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# Borrowing and Nonborrowing among International Courts

Erik Voeten

## ABSTRACT

Why do some international courts and judges extensively cite decisions from other courts, whereas others do not? I examine what light theories of transjudicial communication shed on this question. I then confront these theoretical expectations with an in-depth analysis of citations by the European Court of Human Rights (ECtHR) and a global analysis of broader cross-citation patterns. First, contrary to its transnationalist reputation, the ECtHR rarely cites other courts in judgments, although ECtHR judges do so regularly in separate opinions. Second, ideology matters: judges who are inclined toward an expansive interpretation of the European Convention are more likely to use external citations. Third, there are large asymmetries in the extent to which international courts rely on each other's jurisprudence, contradicting the argument that transjudicial communication is driven by reciprocity principles. Fourth, the evidence is consistent with the notion that judges sometimes refrain from citing external sources for strategic reasons.

## 1. INTRODUCTION

A growing literature asserts that national and international judges increasingly communicate with each other and influence each other's interpretations of legal issues (for example, Glendon 1991; Lester 1988;

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Slaughter 1994, 2003, 2004). According to Anne-Marie Slaughter, such “transjudicial communication” has become an integral part of a “new world order” (2004), leading to an emerging “global jurisprudence” created by a “global community of courts” (2003). While these ideas have attracted a great deal of interest,<sup>1</sup> there is little comparative evidence of just how common reliance on external decisions is and what may explain variations in this practice (Black and Epstein 2007).

I address these issues in the context of international courts. International courts develop legal norms that influence domestic courts (see, for example, Koh 1996). They also borrow from each other and from domestic constitutional courts. These practices are controversial. Most international tribunals are delegated the task of interpreting a specific treaty or convention. However, the decentralized and nonhierarchical nature of international law may lead to inconsistent international legal norms without transjudicial communication (see, for example, Koskenniemi and Leino 2002).

There are complaints aplenty that international courts rely either too much or too little on each other’s decisions. For example, a former president of the International Court of Justice (ICJ) stated in a speech before the United Nations General Assembly that interjudicial dialogue is insufficient to resolve inconsistencies because every institution “has a tendency to go its own separate way” (Guillaume 2000).<sup>2</sup> Similarly, some argue that the World Trade Organization’s (WTO’s) Dispute Settlement Body (DSB) and Appellate Body (AB) should be more willing to rely on public international law and engage sources other than its founding treaties (for example, Pauwelijn 2001). In contrast, the Inter-American Court of Human Rights (IACHR) has been accused of being too creative in its use of external judicial decisions (Neuman 2008), and the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been criticized for relying heavily on external court decisions and international customary law to motivate an expansive reading of its mandate (Danner 2006).

Drawing on the literatures on transjudicial communication and judicial behavior, I develop alternative theoretical accounts that purport

1. An indicator of the importance of this concept in the legal academy is that the term “transjudicial communication” or “transjudicialism” has now appeared in 128 U.S. law review articles (author’s LexisNexis search, January 23, 2009).

2. The fragmentation of international law was featured in three consecutive annual speeches by International Court of Justice (ICJ) presidents to the United Nations General Assembly (Koskenniemi and Leino 2002).

to explain variations in the propensity of international judges and courts to cite other courts. I then confront these propositions with evidence from an in-depth analysis of citations to and from the European Court of Human Rights (ECtHR) and a more global analysis of citation patterns between other international courts. The ECtHR has issued more judgments than other standing international tribunals have. It also draws the most obvious comparisons with courts in the United States, on which most of the debates about transnational legal process have centered. Zaring (2006, p. 326) concluded in an empirical survey that those worried about the influence of foreign courts “shouldn’t be worried about foreign citation as much as citation to the European Court of Human Rights.” Moreover, the ECtHR is often heralded as the court that has overtaken the U.S. Supreme Court in terms of international influence, partially because of the Supreme Court’s reluctance to cite foreign sources (Liptak 2008).

The empirical analysis yields four conclusions. First, contrary to its transnationalist reputation, the ECtHR rarely cites other courts in majority judgments, although ECtHR judges do so regularly in separate opinions. This finding suggests that ECtHR judges are aware of external jurisprudence but are cautious in their explicit reliance on it. Second, as for the U.S. Supreme Court, ideology matters. The ECtHR judges who are more inclined toward an expansive interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms (usually called the European Convention on Human Rights, or ECHR) are more likely to use external citations than are judges on the self-restraint side of this spectrum. Third, there are large asymmetries in the extent to which international courts rely on each other’s jurisprudence. This finding is contrary to the hypothesis that transjudicial communication is driven by reciprocity principles. Fourth, judges may sometimes refrain from citing external sources for strategic reasons. Most notably, judges may feel constrained by potential state responses if judicial reasoning sets precedent and if compliance pressures are high.

## 2. WHY DO INTERNATIONAL JUDGES AND COURTS CITE EXTERNAL SOURCES?

The willingness of courts to cite each other’s decisions is the phenomenon that best exemplifies transjudicial communication (see, for example, Slaughter 1994). External citations are the predominant form of anecdotal evidence used by scholars of transjudicial communication. Yet

transnational citations should not be equated with transnational influence. Citations are not necessarily decisive in judgments. Thus, a study of external citations may exaggerate external influence. A study of citations may also underestimate transnational influence if courts have reasons to conceal such influences. For example, Slaughter (1994, p. 106) suggests that the United Nations Human Rights Committee has adopted styles of reasoning similar to that of the ECtHR without acknowledging this. As these examples demonstrate, we need theoretical explanations about the conditions under which international judges and courts are more or less likely to cite external sources. External citations can be understood in at least four ways: as acknowledgments of learning from other courts, as attempts to influence other courts, as reflections of judicial ideology, and as signaling devices.

### 2.1. Learning

Scholars of transjudicial communication suggest that judges cite external opinions in order to improve the quality of their decisions. As Slaughter (2003, p. 201) puts it, "For these judges, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. . . . It provides a broader range of ideas and experience that makes for better, more reflective opinions. This is the most frequent rationale advanced by judges regarding the virtues of looking abroad." Consequentially, much of the transjudicial communication literature has focused on clarifying the role of external sources in judicial opinions. For example, Koh (2004) identifies three functions: they help inform the interpretation of parallel rules, they shed empirical light on legal issues, and they may be used to illustrate how common standards should be applied. Others have questioned the circumstances under which external sources are informative. For example, Posner and Sunstein (2006) argue that the informative value of external decisions depends on the extent to which decisions were reached independently, based on private information, and under sufficiently similar circumstances.

The learning motivation yields some observable implications about variation in citing other courts. First, courts that deal with similar legal issues should cite each other more frequently. Second, courts with reputations for reaching high-quality independent decisions should attract the most cross citations. Yet learning does not provide an explanation

for variation among judges on the same court.<sup>3</sup> Moreover, if learning were the sole motivation, there would be no reason to exercise caution in using external citations. To the contrary, judges should reinforce that their decisions are rooted in external case law in order to demonstrate the quality of their reasoning. While learning is surely an important reason for why we see external citations in the first place, it is unlikely to by itself explain variation in external citation practices.

## 2.2. Influencing Other Courts

A second perspective is that judges want to influence other courts. Slaughter (2004) argues that the key difference between old modes of legal transplantation and new transjudicial communication is that there is now a true dialogue between judges. The current system should be thought of not as a centralized hierarchy in which a few courts exert disproportionate influence but as a community of courts that exchange ideas. Influence within this system is determined by a willingness to engage others. For example, Slaughter (2004, pp. 74–75) suggests that judges who are unwilling to participate in the transjudicial dialogue will undermine their ability to influence other courts: “appellate judges around the world are engaging in self-conscious conversation. This *awareness* of constitutional cross-fertilization on a global scale—an awareness of who is citing whom among judges themselves and a concomitant pride in a cosmopolitan judicial outlook—creates an incentive to be both lender and borrower.”

Such reciprocity is also suggested by judges who argue that the U.S. Supreme Court is losing its international influence because of its unwillingness to engage foreign decisions (for example, Barak 2002; L’Heureux-Dubé 2002). Similarly, Schauer (2000) claims that Canadian Supreme Court judgments have gained influence internationally because of the Canadian court’s willingness to embrace international jurisprudence.

There is some empirical evidence in support of the general idea that reciprocity motivates judicial citations. Choi and Gulati (2008) find that federal appellate judges cite other judges who cite them frequently. Reciprocity implies that there should be no large asymmetries in citation patterns between pairs of courts. Moreover, at the system level, we

3. This is the case unless we wish to subscribe to the thesis that intelligent judges use foreign opinions and less intelligent ones do not. Aside from the merit of this thesis, “stupidity is not a very interesting analytic category” (Krasner 2009, p. 130).

should not find a hierarchy in which a few courts are the source of external citations but are themselves unwilling to rely on the decisions of others.

Others suggest that relations between international courts are more competitive. Koskeniemi and Leino (2002, p. 562) claim that international tribunals are “involved in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest.” For example, international human rights courts occasionally disregard ICJ precedent in order to reinforce their jurisdictions. Presidents of the ICJ subsequently express concern about the fragmentation of international law in an effort to defend their position at the top of international law’s institutional hierarchy. Consequently, Koskeniemi and Leino (2002, p. 561) argue that “proliferating tribunals, overlapping jurisdictions, and ‘fragmenting’ normative orders . . . arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic.” Engagement with other courts may thus be motivated by parochial rather than cosmopolitan motives.<sup>4</sup>

### 2.3. Judicial Ideology

The role of ideology as a motivating force for the use of external sources is frequently suggested in the U.S. context. As Bork (2003, p. 22) puts it, “Perhaps it is significant that the justices who [borrow] are from the liberal wing of the Court. This trend is not surprising, given liberalism’s tendency to search for the universal and to denigrate the particular” (see also Black and Epstein 2007). On the current U.S. Supreme Court, the most vocal proponents of using foreign decisions indeed come from the liberal camp, whereas the openly skeptical justices are generally thought to be more conservative.<sup>5</sup> There is evidence that the ideology of judges matters for their citation practices: federal judges appointed by Democrats tend to cite other judges appointed by Democrats (Choi and Gulati 2008).

Recent research on the ECtHR shows that the main source of variation among judges is the desired degree of deference that should be

4. Although this paper cannot provide a definitive test that discriminates between these perspectives, I examine this issue where possible.

5. There are examples of conservative justices, including Chief Justice William Rehnquist and Justice Felix Frankfurter, relying on foreign jurisprudence (Black and Epstein 2007). It is not inconceivable that conservative justices may find it useful to appeal to foreign law in cases in which the domestic status quo is more liberal than the international one (for example, the exclusionary rule).

granted to states in how they implement their international obligations (Voeten 2007). The judges who believe that this margin should be small (activists) tend to interpret the ECHR in an expansive manner. Judges on the self-restraint side of this spectrum show more deference to the *raison d'état*. These judges are more likely than other judges to be diplomats and to be appointed by governments skeptical of supranational integration (Voeten 2007, 2008). External sources may be more useful to a judge who wishes to justify a broad interpretation of a treaty provision than to a judge who prefers a narrower interpretation. Thus, I hypothesize that more activist ECtHR judges are more likely to cite external sources. A limitation of this hypothesis is that it does not offer a compelling explanation for variation across courts (as opposed to judges).

#### 2.4. Strategic Communication

Finally, there may be a strategic logic underlying judicial borrowing (see, for example, Benvenisti 2008; Black and Epstein 2007; Epstein and Knight 2003; Schauer 2000). The strategic model of judicial decision making starts from the premise that judges have goals, such as to see the law reflect their policy preferences, to advance their careers, or to enhance the institutional authority of the court on which they serve. Judges operate in an environment in which their ability to achieve these goals depends on others. They therefore behave in ways that take the anticipated actions of others into account.

Citations are one way in which judges communicate. As Merryman (1977, p. 381) puts it, "Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to the reader." The most influential readers of international court decisions are state parties. Citing external sources has potential downsides and upsides when communicating with state parties. On the upside, it signals that legal reasoning is shared by others and thus is not arbitrary. On the downside, it opens judges up to charges that they are exceeding their delegated authority. This perspective is consistent with the notion that international courts enjoy "constrained independence" (Helfer 2006) and operate in a "strategic space" (Steinberg 2004). The key to explaining variation is in detailing how those constraints vary across courts and/or cases. I discuss three ways in which the environment of courts provides varying incentives: the extent to which legal reasoning affects multiple state parties, signals by state parties that external cita-



tions are allowed, and variation in the expected persuasiveness of external citations to state parties.

**2.4.1. Anticipated State Responses.** State parties have various tools to sanction judges that include attacking their legitimacy, not complying, affecting the careers of judges, and influencing the institutional support for a court. The use of these tools is costly. Governments will not spend the resources to monitor and challenge legal reasoning unless they believe that said reasoning affects their interests. Moreover, the actions of one government are unlikely to credibly threaten a court. Multiple governments may care about legal reasoning when judgments set precedents and compliance pressures are strong. These conditions create incentives for governments that are not party to a dispute to take an interest in the legal reasoning of courts.

The issue of precedent is a controversial one in international law. Most international tribunals are asked to limit their focus to the dispute at hand. For example, article 59 of the Statute of the International Court of Justice proclaims that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” Yet the ICJ motivates its resolution of disputes with extensive references to its past opinions and considers these precedents (Shahabuddeen 2007). De facto norms of *stare decisis* are also operative at the WTO (Bhala 1999a, 1999b, 2001; Busch 2007).<sup>6</sup> Similarly, the European Court of Justice (ECJ) and the ECtHR rely heavily on their past decisions, and their judges have no trepidation about referring to these decisions as “precedents” (see, for example, Wildhaber 2000).

That governments are aware of this situation is evidenced by regular third-party participation in court cases. For example, Busch (2007) argues that states strategically file trade disputes in the forum where they believe the precedent will serve them. Carrubba, Gabel, and Hankla (2008) find that third-party government observations influence ECJ be-

6. For example, the World Trade Organization’s Appellate Body slapped a panel that had ignored precedent by stating, “It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB” (Panel Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para. 158 [April 30, 2008]).

havior. Important ECtHR cases also attract active interventions from third-party governments concerned with similar issues.<sup>7</sup>

By contrast, few governments monitored the International Criminal Tribunal for Rwanda (ICTR) and the ICTY, as is evidenced by the rarity of amicus briefs and permanent observers. Governments were primarily interested that suspected war criminals were prosecuted fairly and efficiently (Danner and Voeten 2010). They did not anticipate that the legal norms these tribunals developed would affect them. This disinterest left these tribunals relatively free to interpret and develop international criminal law (Danner 2006) and to cite external law.

A similar story applies to the IACHR. Compared with the ECtHR, it has less direct access for individuals, fewer compliance mechanisms, and less embeddedness in domestic legal systems (Pasqualucci 2003). Thus, while governments care about winning their own cases, they rarely take an interest in other cases and seldom (if ever) submit briefs as third parties. Consequently, IACHR judges have little reason to believe that their legal justifications have much of an impact on their legitimacy with states. This freedom allows them to pursue other goals in justifications, such as establishing an internationalist reputation (see Neuman 2008).

None of these findings imply that ECJ, WTO, or ECtHR judges always do what state parties want and instead indicate that they have more incentives to be cautious in justifying decisions with reference to the treaties that they are delegated to interpret.

**2.4.2. Chains of Delegation.** Overlapping jurisdictions may send signals to judges that they are allowed to use certain external sources. For example, all European Union (EU) member states have accepted the compulsory jurisdiction of the ECtHR. The preamble to the 2000 Charter of Fundamental Rights of the European Union (Nice Charter) explicitly reaffirms the rights of EU citizens that result from ECtHR case law, thus making it relevant to the ECJ.<sup>8</sup> If judges are sensitive to chains

7. Recent examples are cases on the extradition of suspected terrorists to countries where they might be tortured (for example, *Chahal v. United Kingdom* [23 Eur. H.R. Rep. 413 (1996)] and *Saadi v. Italy* [App. No. 37201/06, 2008 Eur. Ct. H.R.]).

8. The precise text is, "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights" (Nice Charter, preamble). Wetzel (2003, p. 2862) argues that "[t]he [Nice] Charter

of delegation, then the ECJ should have increased its reliance on the ECtHR after the adoption of the Nice Charter. The reverse is not necessarily so given that 20 countries that are subject to the ECtHR's jurisdiction are not EU members. As such, the ECtHR should be more cautious in citing the ECJ than vice versa.

Several regional dispute settlement mechanisms in the area of trade interpret treaty provisions that are similar to those of the WTO, and this likeness raises opportunities for forum shopping (Busch 2007). The delegation argument suggests that the WTO should not cite regional dispute resolution forums, but North American Free Trade Agreement (NAFTA) panel reviews and other tribunals may refer to WTO case law. This argument is also relevant to the ICJ. Given that ICJ decisions may set precedent that is relevant for all members of the international system, it should be cautious in citing case law developed by courts with less inclusive membership. These observable implications directly contrast with the reciprocity theory: there should be asymmetries in who cites whom based on implicit chains of delegation.

**2.4.3. The Persuasive Value of External Precedent.** Finally, the expected benefits of external citations may increase with the extent to which state parties are sensitive to claims that they are not in compliance with broader international standards. The literature suggests that democratizing states, especially when they aspire to benefits such as EU membership, are most sensitive to such claims. Both authoritarian states and advanced liberal democracies have reasons to resist expansive international court rulings as overly intrusive. To democratizing states, accepting such rulings may be a useful way to signal that they are becoming part of a liberal international community. For example, Voeten (2007) demonstrates that governments who aspire to EU membership appoint judges with more activist inclinations. Moravcsik (2000) and Mansfield and Pevehouse (2006, 2008) show that democratizing states are more likely than others to make new international legal commitments.

I thus hypothesize that external citations are of greater use to judges who communicate with democratizing state parties than they are to others. This theory contrasts with the reciprocity hypothesis in that it suggests asymmetric citation patterns. Courts whose state parties are predominantly advanced liberal democracies should be the sources of external decisions but not their recipients. In addition, courts like the

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obligates the ECJ to honor the case law precedent of the European Court of Human Rights without making the Luxembourg Court subordinate to the Strasbourg Court."

ECtHR may use external citations to communicate with developing democracies on issues that are of little concern to advanced democracies.

### 3. EXTERNAL CITATIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS

#### 3.1. Overview

The ECtHR is the most active international court, having issued more than 10,000 judgments over a 50-year period. Aside from a handful of interstate cases, the court resolves disputes between an individual<sup>9</sup> and a government about alleged violations of the ECHR. Individuals have to exhaust domestic remedies before they can appeal to the ECtHR. The ECtHR's judgments regularly deal with controversial issues such as torture, the rights of gays and transsexuals, voting rights for prisoners, privacy rights, disappearance cases, and the behavior of governments in conflict zones. The court's judgments are binding in all 47 Council of Europe member states, including Russia, Turkey, and all EU member states.<sup>10</sup> The court has 47 judges, one from each member state, who issue judgments in chambers of seven judges.<sup>11</sup> Appeals are decided by the Grand Chamber of 17 judges.

The similarity between the ECHR and the U.S. Bill of Rights has been recognized by citations to ECtHR judgments in four different U.S. Supreme Court opinions and at least 29 federal court of appeals judgments (Zaring 2006). In this section, I examine whether the ECtHR also recognizes U.S. jurisprudence. For comparative purposes, I also searched for references to two other domestic constitutional courts that are allegedly influential internationally: the Supreme Court of Canada and the South African Constitutional Court (Slaughter 2004, p. 74).<sup>12</sup> In addition, I included the most prominent international bodies that have interpreted international human rights and criminal law: the IACHR, the

9. A more precise term is "legal person," given that nongovernmental organizations and businesses also have standing.

10. This number includes the 27 European Union (EU) members and Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine.

11. Decisions to declare an application inadmissible are made in panels of three judges.

12. The search is based on the notices published for each case in the online case law system Hudoc. These notices explicitly identify what are termed "external sources." I also searched the full text of opinions to find instances that may not have been recognized as external sources. I used multiple search terms to account for irregularities in citation styles.

United Nations Human Rights Committee (UNHRC),<sup>13</sup> the Committee against Torture (CAT), the ICTY, and the ICTR. I also checked for references to the WTO, given the ECtHR's growing jurisprudence on intellectual property rights (Helfer 2008). The ECtHR regularly interprets general rules of international law, so I included citations to the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ). Finally, I looked for citations to the ECJ.

I evaluated all 7,319 judgments made before October 30, 2006. In all, I found only 29 majority judgments (.4 percent) that cited one or more decisions of the aforementioned foreign constitutional courts or international courts. However, in 46 (3.7 percent) judgments with a separate opinion, one or more of the separate opinions referenced an external decision. Many ECtHR judgments are straightforward applications of case law for which external citations may be superfluous for legal and other reasons. All but two of the external citations are in one of the 1,163 judgments that are assigned the high level of importance by the court.<sup>14</sup> In all, 2.3 percent of important judgments referred to an external decision.

Figure 1 plots the total number of judgments that cite an external decision, either as a majority opinion or as a separate opinion. There has been an increase in the number of external citations over time, but this increase has not kept pace with the overall increase in judgments. Figure 2 plots the total number of judgments assigned the highest importance level. Even for this subgroup, the number of external citations remains small in comparison to the overall number of judgments.

The remainder of this section evaluates the use and nonuse of external citations in greater detail, focusing on citations to domestic constitutional courts, international courts, and the use and nonuse of external citations in separate opinions.

### 3.2. The European Court of Human Rights and Domestic Constitutional Courts

Lester (1988, p. 541) claimed that "[w]hen life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving

13. The United Nations Human Rights Committee evaluates compliance with the International Covenant on Civil and Political Rights.

14. In Hudoc, importance level 1 is defined as "[j]udgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State" (European Court of Human Rights, Hudoc Faq [<http://www.echr.coe.int.echr/en/hudoc/faq>]).

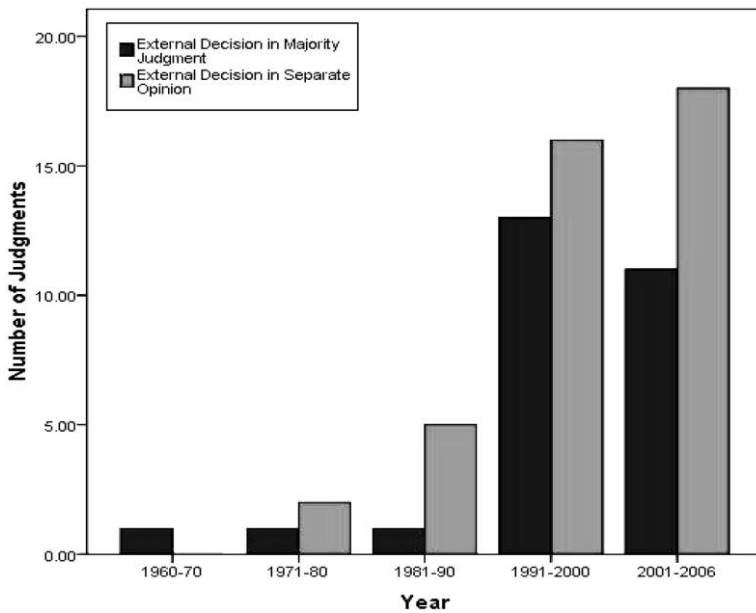
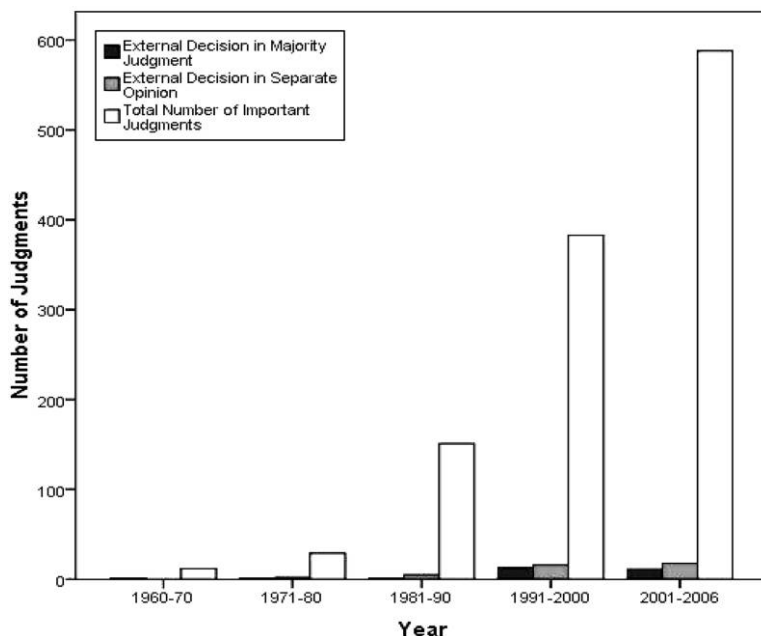


Figure 1. External citations in majority and separate opinions

fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington D.C.”<sup>15</sup> In all, 38 ECtHR judgments made references to U.S. Supreme Court case law. More than half of these (21) occurred in separate concurring or dissenting opinions rather than in the majority judgments of the court. Most of the others were interpretations of U.S. law or cases in which the parties (or a third party, usually a nongovernmental organization [NGO]) introduced U.S. case law, but the judges did not explicitly discuss the relevance of these decisions. Only twice is a judgment of the U.S. Supreme Court explicitly listed in the ECtHR’s case law system as one of the external sources on which an ECtHR judgment relied.<sup>16</sup> In both (unanimous) judgments, the U.S. Supreme Court cita-

15. Strasbourg is the seat of the European Court of Human Rights (ECtHR).

16. The cases are *Welch v. United Kingdom* (20 Eur. H.R. Rep. 247 [1995]), which cited *Austin and Alexander v. United States* (125 L. Ed. 2d 441, 488 [June 28, 1993]), and *James and Others v. United Kingdom* (8 Eur. H.R. Rep. 123 [1986]), which cited *Hawaii Housing Authority v. Midkiff* (104 S. Ct. 2321 [1984]). A third case in which U.S. Supreme Court precedent plausibly influenced the ECtHR is *Appleby v. United Kingdom* (37 Eur.



**Figure 2.** External citations and important judgments over time

tions served a minor role by supporting the finding of similar developing legal norms within the ECtHR's contracting states.<sup>17</sup> Moreover, in both cases the U.S. precedent was already featured in the U.K. courts from which the decisions emerged.

This relatively sparse use of U.S. Supreme Court precedent is not

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H.R. Rep. 38 [2003]), although the U.S. cases were advanced by the applicants to advance the exact opposite conclusion that the court reached, and the court explicitly rejected the applicants' interpretations of U.S. Supreme Court case law.

17. In *Welch v. United Kingdom*, the ECtHR highlighted "that confiscation orders had been recognised as having a punitive character in various domestic court decisions and in several decisions of the Supreme Court of the United States concerning similar legislation" (20 Eur. H.R. Rep., para. 23). In *James and Others* (8 Eur. H.R. Rep., para. 40), the court argued that "no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership."

reflective of a dislike of the United States. For example, there are only 18 mentions of Canadian jurisprudence, only two of which appear in the majority judgments of the court. Perhaps the clearest case in which any domestic constitutional court decision influenced an ECtHR judgment is *Hirst (2) v. United Kingdom* (42 Eur. H.R. Rep. 41 [2005]), an important ruling that invalidated Britain's blanket prohibition on the right of prisoners to vote. In the judgment, the court acknowledged that there was no consensus among contracting states that prisoners have the right to vote. The judgment relied heavily on a Canadian and to a lesser extent on a South African decision, although it should be noted that these decisions were also cited in the original British judgment that was effectively overruled (*Sauvé v. Canada (no. 1)*, 2 S.C.R. 438 [1992]). The British government criticized the use of this case law, arguing that the Canadian decision was decided by a narrow majority (5–4) within a different institutional context and that the South African decision concerned different obstacles to voting. As of April 2009, 5 years after the ECtHR ruling, the United Kingdom had still not altered its laws to become compliant with the *Hirst* judgment.

The *Hirst* judgment invited a pointed dissent from five of the Grand Chamber's 17 judges, including both the court's then-president Judge Luzius Wildhaber and the judge who later replaced him in that role, Judge Jean-Paul Costa. Unlike in some U.S. Supreme Court dissents,<sup>18</sup> the judges did not denounce the use of external citations per se, but they did argue that such references are a poor substitute for ECtHR precedent and evidence of an emerging regional consensus:

[I]t is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An “evolutive” or “dynamic” interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. . . . The judgment of the Grand Chamber—which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa—unfortunately contains only summary in-

18. Consider Justice Antonin Scalia's dissent in *Roper v. Simmons* (543 U.S. 551, 608 [2005]): “The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”



formation concerning the legislation on prisoners' right to vote in the Contracting States. . . . Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. . . . We are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.

In sum, the ECtHR rarely relies explicitly on the judgments of foreign constitutional courts. When it does, it does so only in cases involving the United Kingdom and uses decisions only from other common-law jurisdictions that were already cited by the U.K. courts. This still matters because such usage could set a precedent for other European jurisdictions, which it arguably did in the *Hirst* case. However, as far as I am aware, *Hirst* is the only ECtHR judgment for which decisions of external constitutional courts played a role similar to that in *Roper v. Simmons* (543 U.S. 551) and *Lawrence v. Texas* (539 U.S. 558 [2003]). Moreover, this usage elicited dissent from prominent court members who warned that the court was overstepping its delegated authority.<sup>19</sup>

### 3.3. The European Court of Human Rights and Other International Courts

The ECtHR referred to the case law of the IACHR in five majority judgments, all concerning Turkey (*Ergin* [no. 6], 47533/99 [2006]; *Akdivar and Others*, 99/1995/605/693 [1996]; *Kurt* [27 Eur. H.R. Rep. 371 (1998)]; *Akkum and Others* [App. No. 21894/93, 2005-II Eur. Ct. H.R. 211]; *Öcalan* [App. No. 46221/99, 2003 Eur. Ct. H.R.]). Three of these dealt with the issue of disappearances,<sup>20</sup> all citing the IACHR's landmark *Velásquez Rodríguez* decision (Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, O.A.S. Doc. OEA/Ser.L/V/III.19, doc. 13 [1998]). In

19. It may be that the more likely source of human rights innovations are the high courts in their member jurisdictions. I do not analyze these because it is less clear that they are external citations. The ECtHR routinely looks at developing practices in the member states, so many of these citations should be uncontroversial. It may, however, be that there are some cases in which such citations play a role similar to that of external citations. This should be a subject for future study.

20. In the two cases not involving disappearances, the role of the Inter-American Court of Human Rights (IACHR) references in the judgments was minor.

only the *Kurt* judgment did this usage elicit dissents.<sup>21</sup> The use of this decision is consistent with the learning hypothesis, as *Velásquez Rodríguez* is a landmark opinion within international jurisprudence on disappearances (see, for example, Lantrip 1998–99). Yet it is also plausible that ECtHR judges felt at liberty to use IACHR judgments in cases against Turkey because the country is a developing democracy eager to join the EU and because precedent set in disappearance cases is unlikely to worry the advanced democracies.<sup>22</sup> It is noteworthy, for instance, that none of the Russian disappearance judgments refer to IACHR case law. The Turkish disappearance cases are also the only ones that use decisions, comments, or communications by the UNHRC. The two ECtHR references to the CAT are also in cases against Turkey.<sup>23</sup>

By contrast, the IACHR has referred to ECtHR judgments in 60 percent of its 126 judgments since 2000.<sup>24</sup> It is not unusual for IACHR judgments to cite a dozen or more ECtHR judgments and discuss their meaning extensively. The case law that it cites is very diverse in terms of alleged violations and respondent governments. The cited judgments are often recent, which suggests that IACHR judges follow ECtHR jurisprudence closely. While one would expect the IACHR to rely more on the senior court than vice versa, the observed relationship is unusually asymmetric.

A striking difference between the ECtHR and the IACHR also occurs in their respective treatments of *jus cogens*, peremptory rules of law from which no derogation is possible. While the focus of this paper is on external citations, broad interpretations of *jus cogens* should be sub-

21. Judge Louis-Edmond Pettiti argued that “[t]he majority of the Court speculates on the basis of a hypothesis of continued detention relying on their personal conviction. That, to my mind, is ‘heresy’ in the international sphere, since the instant case could have been decided on the basis of the case-law under Article 5 requiring objective evidence and documents that convince the judges beyond all reasonable doubt; but both documents and witnesses were lacking in the present case. In addition, the *Kurt* case occurred in a different context to the one that led to the decisions of the Inter-American Court” (27 Eur. H.R. Rep. 373 [1998]).

22. Note that this argument also holds for the IACHR reference in the *Öcalan* case, which concerns the death penalty.

23. Neither reference involved an application of Committee against Torture (CAT) judicial reasoning. *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 and 46951/99, 2005-I Eur. Ct. H.R.) includes a reference to the rules of procedure, and *Aksoy v. Turkey* (23 Eur. H.R. Rep. 553 [1996]) has a reference to a summary account of CAT proceedings as evidence that torture continued to be widespread and prevalent.

24. This finding is based on a search of the full text of the judgments since 2000. This percentage is probably an undercount given the highly irregular citation standards maintained by the IACHR.

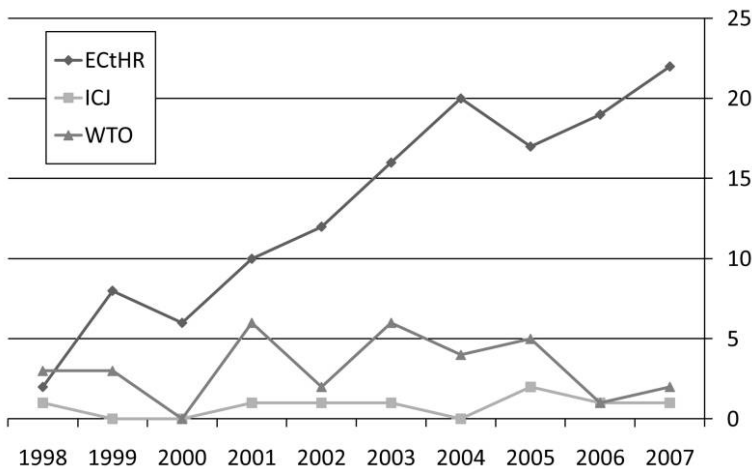
ject to similar potential charges to delegated authority. The ECtHR has not been nearly as creative as the IACHR in identifying *jus cogens* norms such as equality before the law (Neuman 2008). Moreover, even when recognizing *jus cogens* norms, such as a prohibition on torture, it has been cautious in drawing conclusions from such an analysis. For example, in *Al-Adsani v. United Kingdom* (App. No. 35763/97, 2001-I Eur. Ct. H.R.) the court ruled with the narrowest possible majority (9–8) that the United Kingdom had not denied a British citizen, who was tortured in Kuwait, the right to a fair trial when U.K. courts ruled that Kuwait enjoyed sovereign immunity from civil suit. The minority argued that since a prohibition on torture is recognized as *jus cogens* whereas state immunity is not, the hierarchically higher norm should win out. The majority rejected this reasoning. The concurring opinion of Judge Matti Pellonpää (joined by Judge Nicolas Bratza) notes that “[w]hen having to touch upon central questions of general international law, this Court should be very cautious before taking upon itself the role of a forerunner.”

This type of caution is uncommon on the IACHR, where judges are openly proud of their status as innovators in international law (Neuman 2008). There are several other cases in which the ECtHR has chosen not to be a frontrunner. For example, the ECtHR could have followed the example of several other courts (see Carozza 2003) that the “imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the Convention” (*Öcalan v. Turkey*, Grand Chamber ruling [Judge Lech Garlicki, separate opinion]), but it has chosen not to do so.

The ECtHR is similarly sparse in citing other international courts. International Court of Justice case law is cited just five times in the main part of majority judgments, two of which came in interstate cases (*Cyprus v. Turkey* [App. No. 25781/94, 2001-IV Eur. Ct. H.R.]; *Ireland v. United Kingdom* [2 Eur. H.R. Rep. 25 (1978)]). In the period under analysis, ICTY case law is cited in one judgment (*Al-Adsani v. United Kingdom*) in support of a finding of no violation.

European Court of Justice case law was used only eight times as an aid to interpret the ECHR.<sup>25</sup> Most of these uses were relatively innocuous. For example, in *Cantoni v. France* (App. No. 17862/91, 1996-V Eur. Ct. H.R.), the ECtHR relied on ECJ case law to determine whether

25. There were 51 judgments that mentioned the ECJ. Most of these considered the involvement of the ECJ in some step of the proceedings in a case.



**Figure 3.** Citations from the European Court of Justice to other international courts

certain goods fit the description “pharmaceuticals.” All judgments that cited ECJ case law involved EU member states. In only four of these cases was the ECJ citation made in support of a finding of a violation. The use of ECJ case law that elicited the most controversy among the judges came in *Pellegrin v. France* (App. No. 28541/95, 1999-VIII Eur. Ct. H.R.), in which four judges wrote a dissenting opinion arguing that applying ECJ standards would inappropriately limit the applicability of the ECHR.<sup>26</sup>

As hypothesized, the ECJ cites ECtHR case law much more regularly than it cites other jurisdictions (despite its lower overall number of judgments), as can be seen in Figure 3, and these citations have increased dramatically since the adoption of the 2000 Nice Charter.<sup>27</sup> The increase in ECtHR citations is not a result of an overall more internationalist attitude of ECJ judges, as citations to other international courts remained relatively scarce. Moreover, it is not in an obvious way connected to a

26. The dissenting judges were Françoise Tulkens, Marc Fischbach, Josep Casadevall, and Wilhelmina Thomassen. The issue concerns the applicability of article 6-1 to civil servants.

27. This finding is based on a search of the Court of Justice of the European Union Web site ([http://curia.europa.eu/jcms/jcms/Jo1\\_6308/curia](http://curia.europa.eu/jcms/jcms/Jo1_6308/curia)). The search included Court of First Instance and ECJ judgments.

greater number of human rights cases appearing in front of the ECJ.<sup>28</sup> Finally, the ECtHR references were generally used to help interpret EU law and were sometimes significant, including in the *Kadi* judgment (Case C-402/05P, 2008 E.C.R. I-6351), widely hailed as one of the most pathbreaking decisions the ECJ has made in years.<sup>29</sup> Taken together, this evidence suggests that the change in delegated authority after the adoption of the Nice Charter led to the increased reliance on ECtHR judgments.

One should exercise caution in interpreting these cross-citation figures as saying much about the relative influence of other courts. For example, the U.S. Supreme Court and the ECJ have issued more opinions than the ICJ and the IACHR have, so on a per-opinion basis the latter two courts may be more influential. The most striking finding here is simply how small the numbers are for any of the courts, which renders a potential comparative analysis of influence unreliable.

### 3.4. The Use of External Decisions in Separate Opinions

The observation that citations to external decisions appear more frequently in separate opinions than in the majority part of a judgment warrants further attention, as it can shed light on the motivations that judges have for or against including external citations. First, the usage of external citations in separate opinions illustrates that some judges find such citations objectionable for the reasons implied by the delegated authority perspective. There are eight judgments in which the separate opinion argues that the majority has overstepped the bounds of its delegated authority by citing an external decision.<sup>30</sup> For example, Judges Lucius Caflisch, Riza Türmen, and Anatoly Kovler argued in a dissenting opinion to *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 and 46951/99, 2005-I Eur. Ct. H.R.) that the court's reliance on the

28. In the period under analysis, there were only 16 judgments in the area of freedom, security, and justice, three of which referred to ECtHR case law. Most references to ECtHR case law came in traditional EU law areas, such as competition.

29. The *Kadi* judgment held that the EU regulation implementing a Security Council resolution that had placed Kadi on the list whose funds were to be frozen on suspicion of financing terrorism did not sufficiently respect the fundamental rights of the appellant. For examples of statements on the significance of this ruling, see New York University School of Law, Institute for International Law and Justice, The NYU Kadi Panel Discussion in Full (<http://globaladminlaw.blogspot.com/2008/10/nyu-kadi-panel-discussion-in-full.html>).

30. Interesting instances are the *Hirst* opinion (App. No. 74025/01, 42 Eur. H.R. Rep. 41) and *Ireland v. United Kingdom* (2 Eur. H.R. Rep. 25), in which the British judge Sir Gerald Fitzmaurice refers to his own dissenting opinion in the ICJ case cited by the majority (the *Northern Cameroons* case [1963 I.C.J. 97]).

ICJ's *LaGrand* decision (2001 I.C.J. 466) was "misguided." (At stake is the binding effect of interim measures initiated by the court.) They stated, "In *LaGrand* the ICJ was called upon to interpret a provision of its own constitutive treaty, that is, Article 41 of its Statute. . . . By contrast, *no such provision* can be found in the European Convention on Human Rights. . . . What the Court's Grand Chamber has done, and the Chamber before it, in *Mamatkulov and Askarov* is to exercise a *legislative function*, for the Convention as it stands nowhere prescribes that the States Parties to it must recognise the binding force of interim measures indicated by this Court."

Second, the data suggest that the usage of external citations is correlated with judicial ideology. Instances in which the separate opinion brings up external case law *de novo* almost always argue in favor of a more expansive ruling.<sup>31</sup> External case law often plays a large and sometimes even exclusive role in these arguments. For example, Judge Jan De Meyer's dissenting opinion in *Imbrioscia v. Switzerland* (App. No. 13972/88, 17 Eur. H.R. Rep. 441 [1994]) consists of a brief summary of the U.S. Supreme Court's *Miranda v. Arizona* (384 U.S. 436 [1966]) judgment, followed by the statement that "[t]hese principles, then clearly defined, belong to the very essence of fair trial. Therefore I cannot agree with the present judgment, in which our Court fails to recognise and apply them." Thus, without any reference to ECtHR jurisprudence, ECHR provisions, or developing practices within Council of Europe member states, Judge De Meyer referred to the standards developed in *Miranda* as a global precedent that the court ought to apply.<sup>32</sup>

Similarly, the Maltese judge Giovanni Bonello stated in a dissenting opinion in *Anguelova v. Bulgaria* (App. No. 38361/97, 2002-IV Eur. Ct. H.R. 355): "It is cheerless for me to discern that, in the cornerstone protection against racial discrimination, the Court has been left lagging

31. There are only two exceptions to this claim: the dissenting opinion of Judge Franz Matscher in *König v. Germany* (App. No. 6232/73, 2 Eur. H.R. Rep. 170 [1978]) and, more interestingly, the dissenting opinion of Judge Brian Walsh in *Dudgeon v. United Kingdom* (App. No. 7525/76, 4 Eur. H.R. Rep. 149 [1981]), in which he argued that the U.S. Supreme Court had "refused to extend the constitutional guarantee of privacy which is available to married couples to homosexual activities or to heterosexual sodomy outside marriage."

32. *Miranda* appears in four dissenting opinions written by different judges, which indicates that whether its standards should be applied in the ECtHR context is a source of controversy among judges. These cases are *O'Halloran and Francis v. United Kingdom* (App. No. 15809/02, 46 Eur. H.R. Rep. 397 [2007]), *John Murray v. United Kingdom* (App. No. 18731/91, 22 Eur. H.R. Rep. 29 [1996]), and *Galstyan v. Armenia* (2007 Eur. Ct. H.R. 936).

behind other leading human rights tribunals.” He continued to quote the IACHR’s *Velásquez Rodríguez* decision at length. In another set of instances, judges wrote concurring opinions that pointed out that the reasoning of the court should or could have referred to international jurisprudence. For example, in a concurring opinion in *Çicek v. Turkey* (App. No. 25704/94, 934 Eur. Ct. H.R. 56 [2001]), Judge Rait Maruste pointed out that the court should have based its justification on the IACHR’s *Velásquez Rodríguez* ruling: “I do not see serious obstacles to the application of that doctrine in this particular case.” Such opinions suggest that at least some of the judges wished that the ECtHR more explicitly embedded its judgments in public international law and that this desire is almost always accompanied by a desire for more activist judgments.

### 3.5. Judicial Ideology

The previous section suggests that the usage of external citations is motivated by judicial ideology. This section tests this hypothesis quantitatively by employing a measure of judicial ideology that is based on a methodology identical to that used by U.S. Supreme Court scholars to estimate variation in levels of liberalism or conservatism among Supreme Court justices (Voeten 2007). The ECtHR judges vary according to their levels of judicial activism, which in this context refers to the degree of deference that judges grant states in how they implement their ECHR obligations (Voeten 2007). The hypothesis is that this more universalist approach to human rights also leads judges to be more expansive in their use of external sources. Judges who are more deferential to states (those who show “restraint”) may also be more sensitive to issues of delegated authority.

The analysis confirms that judges who refer to external decisions *de novo* in their separate opinions are more activist than are the judges who refrain from doing so on the same cases. The difference in means is large (.63 SDs) and significant ( $F = 18.561, p = .000$ ). The effect also holds in a probit analysis with fixed effects for cases.<sup>33</sup> The effect is robust to including other characteristics of judges, including their past careers (whether they were diplomats, academics, or former judges; for details on the data, see Voeten 2007). It is also robust to including characteristics of the home states of judges, such as legal origin, civil

33. The coefficient is  $-.41$ , the  $z$ -value is  $-4.12$ , and the  $p$ -value is  $.000$ . The marginal effect of activism is  $-.06$  ( $n = 406$ ).

liberties, and gross domestic product per capita. None of the coefficients on the other variables approach conventional levels of statistical significance in any of the specifications, while the effect of activism on using external decisions remains robust and significant. Thus, as in the United States, judicial ideology affects the desire of judges to cite external sources.

#### 4. A GLOBAL OVERVIEW OF EXTERNAL CITATION PATTERNS

Space and data preclude a similarly detailed analysis of external citation patterns among other courts, but this section offers a first look at the data from the most prominent international courts: the ECJ, ECtHR, IACHR, ICJ, ICTY, WTO (AB and panels), NAFTA panel reviews, and the IACHR. The findings are based on secondary sources and searches in the case law databases of each court. Table 1 provides an overview of the findings. As observed earlier, when evaluating these findings one should keep in mind the varying numbers of judgments among these courts. Obviously, some of the cells are empty because courts have few opportunities to cite each other. Yet there are some interesting conclusions that can be drawn from these patterns.

In a previous study, Miller (2002) found that until 2000, the ICJ had made only three references to any other international tribunal, none of which were to the courts under investigation here.<sup>34</sup> Such citations remain exceptionally rare.<sup>35</sup> Two separate opinions cite the ECtHR, the IACHR, and the ICTY in the admissibility judgment of the *Democratic Republic of the Congo v. Rwanda* (2006 I.C.J. 1).<sup>36</sup> There is a brief reference in *Democratic Republic of the Congo v. Belgium* (2002 I.C.J. 3) to decisions by the ICTY and the ICTR that Belgium cited in support of its case. In all, though, the concerns expressed by consecutive ICJ presidents regarding the unwillingness of other international tribunals to follow ICJ precedent has not led the ICJ to refer more frequently to those other tribunals. This suggests that the ICJ judges have little faith in the reciprocity theory.

By contrast, both the ICTY and the ICTR referred very frequently

34. Two references were to a 1917 judgment by the Central American Court of Justice and one was to the 1977 Anglo-French Arbitral Award (Miller 2002, p. 500).

35. What follows is based on a search of ICJ judgments in LexisNexis (April 6, 2009).

36. The separate opinions are of ad hoc judge John Dugard and the separate opinion of Judges Rosalyn Higgins, Pieter Kooijmans, Nabil Elaraby, and Bruno Simma.



**Table 1.** Global Matrix of International Court Citation Patterns, by Court Cited

Originating Court	ICJ	ECtHR	IACHR	ECJ	WTO	NAFTA	ICTY/ICTR
ICJ							
ECtHR	Sometimes but rarely to interpret ECHR	Rarely	Rarely Sometimes to interpret ECHR, only in cases with Turkey	Never Sometimes to interpret ECHR, only in cases with EU member states	Never Never	Never Never	Rarely Sometimes to interpret ECHR
IACHR	Very frequently	Very frequently		Never	Never	Never	Sometimes
ECJ	Rarely	Frequently	Never	Never	Sometimes	Never	Never
WTO	Frequently but not to interpret WTO law	Never	Never	Never to interpret WTO law	Never to interpret WTO law	Never	Never
NAFTA	Sometimes	Never	Never	Never	Frequently	Never	Never
ICTY/ICTR	Very frequently	Very frequently	Sometimes	Never	Never	Never	

**Note.** ICJ = International Court of Justice; ECtHR = European Court of Human Rights; IACHR = Inter-American Court of Human Rights; ECJ = European Court of Justice; WTO = World Trade Organization; NAFTA = North American Free Trade Association panel reviews; ICTY/ICTR = International Criminal Tribunal for the Former Yugoslavia/International Criminal Tribunal for Rwanda; ECHR = European Convention on Human Rights; EU = European Union.

to other international courts. For example, the ICTY made reference to the ECtHR in 161 and to the ICJ in 65 of its decisions and judgments.<sup>37</sup> Five of its decisions made reference to IACHR case law. There are also 36 decisions that reference U.S. Supreme Court case law. The International Criminal Court appears to have continued this trend. For example, the indictment of Sudanese president Omar al-Bashir (Case No. ICC-02/05-01/09) makes reference to more than a dozen ECtHR cases (as well as several IACHR cases) and uses ECtHR jurisprudence to interpret a key evidentiary standard for rejecting the prosecutor's request that Bashir be indicted for genocide.<sup>38</sup> This is another rejection of the reciprocity theory, given that the ECtHR rarely uses jurisprudence from any of the international criminal tribunals. Moreover, together with the earlier observation that the IACHR refers to external case law with great regularity, this finding confirms the thesis that courts that play relatively more to an NGO or scholarly audience than to a state audience are more likely to cite external sources.

World Trade Organization panels and the AB regularly cite ICJ rulings but never to interpret WTO treaties. Most citations relate to issues of treaty interpretation and involve ICJ interpretations of the Vienna Convention on the Law of Treaties. World Trade Organization panels do not cite other international courts and have never cited any of the regional trade dispute mechanisms, even though these other tribunals interpret similar (and partially identical) treaties (Busch 2007). By contrast, NAFTA panel review decisions refer to WTO interpretations of legal issues with some regularity. About 25 percent of NAFTA panel review decisions make at least a passing reference to WTO decisions.<sup>39</sup> Moreover, they frequently use this case law as a guide to interpret WTO law. Given that all NAFTA members are part of the WTO but not vice versa, this finding is consistent with the delegated authority perspective but not the reciprocity theory.

## 5. CONCLUSIONS

In all, the evidence paints a complex picture of the role of transjudicial communication on international courts. First, while international judges

37. This finding is based on a search in the International Criminal Tribunal for the Former Yugoslavia's online database, ICTY Court Records (<http://icr.icty.org/default.aspx>), which contains approximately 5,000 decisions.

38. In her partly dissenting opinion, Judge Anita Ušacka explicitly rejects the majority's interpretation of ECtHR jurisprudence (Case No. ICC-02/05-01/09, para. 9).

39. This finding is based on a LexisNexis search (April 6, 2008).

appear aware of international jurisprudence, they also exercise restraint in using or acknowledging these external sources. This restraint is evident from the large variation in the number of external citations between courts that deal with similar legal issues but operate under different constraints (for example, WTO and NAFTA, ECtHR and IACHR). The limited use of external citations in the majority part of ECtHR decisions compared to their more common use in separate opinions is also suggestive. Several of the separate opinions quoted in this paper suggest that at least some of this dynamic is driven by concerns that reliance on external sources would lead to challenges that the court is exceeding its delegated authority.

Second, there is no evidence for the reciprocity hypothesis. The most developed courts are the sources of external citations but themselves rarely use them. They also do not cite each other, so the evidence cannot be easily explained away with reference to the quality of legal judgments. The community of international courts does not reflect the horizontal network ideal posited by Slaughter (2003, 2004). While scholars and judges attribute the new reluctance of foreign courts to cite U.S. precedent to the unwillingness of the U.S. Supreme Court to cite international sources, such critiques are not aimed at the ECtHR, the body that is supposedly overtaking the U.S. Supreme Court's international influence (see Liptak 2008). It may be that the debate in the United States has been more public or that the ECtHR gets a pass as an international court. Yet the general pattern in the data suggests that reciprocity is simply not a strong motivation for cross citations.

Third, the ECtHR evidence supports the hypothesis that the use of external decisions is driven in part by the individual ideologies of judges. Given that judges have considerable discretion in what external decisions to ignore, follow, or reject, this finding should not be a surprise. Yet, together with the finding on delegation, it does suggest that transjudicial communication is not a simple technocratic process that is driven by professionals who want to improve the manner in which they exercise their trade. The potential ideological bias of transnational judicial networks could be a topic for future research. For example, judges who participate in international conferences may have systematically different judicial philosophies than those who do not.

Fourth, there is at least some suggestive evidence that judges are sensitive to the strategic implications of using external citations. Courts whose legal reasoning directly affects the interests of multiple state parties are least likely to use external citations. If reasoning is cheap talk

in the eyes of states, judges have more room to play to audiences that are more sympathetic to the use of external sources, such as NGOs and scholars. States may also send messages to judges about the appropriateness of external citations. The most persuasive evidence in this regard is the spike in citations from the ECJ to the ECtHR after the adoption of the Nice Charter. This trend was not followed with more citations from the ECtHR to the ECJ or from the ECJ to other international courts.

Finally, there is some evidence that external citations are used more frequently when communicating with democratizing states than with stable democracies. This choice is consistent with the idea that the persuasive value contained in an external citation is greater in the former communication.

This paper is very much a first cut at this issue. This analysis has been limited to a subset of international courts and ignores other international tribunals (such as investment tribunals) and domestic constitutional courts. In particular, the interaction between domestic constitutional courts and international courts should be a fruitful topic of future research. If our understanding of transjudicial communication is to advance, future studies should seek to account for both the presence and the absence of explicit connections between courts rather than to simply document cross citations where they occur.

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