

Between Sinking Ships and Collective Wins: Human Mobility Standards from the Inter-American System of Human Rights in Argentinean and Mexican Domestic Adjudication

By *Lila García* *

Abstract: In recent years, Latin America has witnessed two interrelated trends. The Inter-American System of Human Rights has been developing standards relating to the rights of migrants and refugees since its Advisory Opinion (AO) 18/03, and the rights of foreigners since AO 16/99. Meanwhile, domestic legal frameworks within the region have adopted a new approach to human mobility based on human rights. Argentina was the first country to issue a national law (No. 25,871/2004), which, alongside the Refugees Law (No. 25,615/2006), enshrines the right to migrate. Other Latin American countries have followed suit, albeit with different emphases: Uruguay, Ecuador and Bolivia, and Mexico, Brazil and Costa Rica. Against this backdrop, my contribution aims to examine how domestic courts have incorporated Inter-American human rights sources in their rulings, focusing on the decisions of the highest courts in Argentina and Mexico. Both countries have a long-standing relationship with the Inter-American Human Rights system, particularly with regard to the rights of migrants and refugees, and both have constitutional clauses regarding the rights of foreigners (Argentina) and the more recent right to seek and receive asylum (Mexico). Nevertheless, both countries have undergone political changes in recent years that have had a specific impact on regulations governing the movement of people. To this end, this piece systematically reconstructs the universe of cases and outlines four categories based on the granting of protection and the use of standards: “A Collective Win”, “A Singular Victory”, “Planting for the Future?” and “The Sinking Ship”. It then scores the use of Inter-American human rights sources using a point system.

Keywords: Human Mobility; Human Rights; Migration; Courts; Latin America

* Adjunct Professor (tenure-track) at the Department of International Politics, National University of Mar del Plata. Associate Researcher (tenured) at the National Council for Scientific and Technical Research (CONICET) (Argentina). Email: lgarcia@mdp.edu.ar; ORCID <https://orcid.org/0000-0002-4666-9717>.

A. Introduction

This contribution aims to analyze the use of Inter-American sources in human rights in migration and asylum cases decided by the two highest courts within Latin America (Argentina and Mexico) and their relation to the protection granted in the given case. In trying to grasp the connection between human rights and the solution achieved, the underlying idea is that a more robust *use* of (Inter-American, in this case) human rights sources, might guarantee that protection will be granted to the person or persons involved. Thus, after systematizing the universe of legal decisions on migration, asylum and refugees' topics in both courts, this work asks: how many judgments on migrants, refugees and asylum seekers do include inter-American human rights sources? Then, how "intense" is its use? Finally, does the use of Inter-American human rights sources guarantee a protective response for the individuals and/or their rights? Conversely, is there a link between denials and a lack of human rights references? In order to understand the relationship between the protection granted and the use of human rights sources, the study proposes four categories: the "Collective Win", the "Singular Victory", "Planting for the Future?", and "The Sinking Ship". Provided that the "main challenge [in human rights of migrants] remains in its implementation at the domestic level"¹, this contribution also seeks to shed light on how the judiciary decides on migration and asylum cases, particularly within the Latin American context, which has placed a strong emphasis on its commitment to human rights with regard to human mobility.

This article is divided into three main sections. Firstly, it provides an overview of the 'humanistic shift' that occurred in migration legislation in the region around 2004. In particular, it explains the situation in the jurisdictions chosen for this initial exploration: Argentina and Mexico and their respective supreme courts. The next section then goes on to provide a more detailed explanation of the methodology used to understand and score the "intensity" of the use of Inter-American sources, as well as the relationship between the use of human rights and the outcome of the legal case. The final section presents the main results and discusses why the use of regional human rights documents varies so much between courts, and why there is also no clear relationship between that use and the protection provided.

Over the last 20 years, Latin American legal frameworks have turned towards a new understanding of human mobility from a human rights perspective. This shift has taken place at several levels, ranging from the Inter-American System of Human Rights to domestic legislation, and including integration schemes and consultative migration processes.² In this respect, Latin American countries involved in this "humanization" trend can be organised into two main groups: (i) Those that have incorporated the "human right to

1 *Vincent Chetail*, *International Migration Law*, Oxford 2004, p. 254.

2 *Lila García*, *Migraciones, Estado y una política del derecho humano a migrar: ¿hacia una nueva era en América Latina?*, Colombia Internacional 88 (2016).

migrate”, “to migration” or “the right to human mobility”: Argentina in 2004,³ Ecuador in its 2008 National Constitution⁴ and then in its law in 2017,⁵ Uruguay in 2008,⁶ Bolivia in 2013;⁷ and (ii) countries that have incorporated a human rights-based perspective to varying degrees: Costa Rica in 2010,⁸ Mexico in 2011 (“Migration Law”), Brazil in 2017 (Ley 13,445).⁹ The distinction matters to assess the weight of a human rights-based plan for mobile lives: in countries that recognise the “human right to migrate”, the alpha and omega of migration policies would now be the individual, and such mobility would be guaranteed by human rights—the strongest tool for anchoring entitlements in a framework that does not depend exclusively on national laws. In the other countries, the role of human rights would be less defining, with different levels of intensity depending on the particular right involved. Interestingly, Ecuador (group A), Brazil, and Mexico (group B) have included the right to asylum in their national constitutions,¹⁰ and important human rights-based changes to refugee and asylum laws, incorporating both international refugee standards and regional

- 3 “The right to migration is essential and inalienable to the individual, and the Argentine Republic guarantees it on the basis of the principles of equality and universality.” Law 25,871, art. 4.
- 4 “Persons are entitled to the right to migrate. No human being shall be identified or considered illegal on the basis of their immigration status.” Ecuador, National Constitution, art. 40.
- 5 The Organic Law on Human Mobility of Ecuador (passed in 2017, with amendments in 2023 and 2025) relies on several principles. The principle of “universal citizenship”, for instance, implies “recognition of the right of human beings to move freely throughout the planet. It implies the portability of their human rights regardless of their immigration status, nationality, and place of origin, which will lead to the gradual end of foreigner status”.
- 6 “The Uruguayan State recognizes as an inalienable right of migrants and their families, regardless of their immigration status, the right to migration, the right to family reunification, due process and access to justice, as well as equal rights with nationals (...).” Uruguay, Law 18,250, art. 1.
- 7 “The State guarantees foreign migrants the exercise and enjoyment of the following rights: 1. To migration based on the principles of equality, universality, and reciprocity”. Bolivia, Law 370, art. 12.
- 8 “This Law regulates the entry, stay, and departure of foreign nationals in the territory of the Republic, based on the provisions of the Constitution, international treaties and agreements duly signed, ratified, and in force in Costa Rica, with special reference to international instruments on human rights” (Article 1). Likewise, it will seek to promote (...) 2) Respect for the human rights and constitutional guarantees of all foreigners who enter and remain in the country. Costa Rica, Law 8764.
- 9 Brazilian migration policy is governed by the following principles and guidelines: I - universality, indivisibility, and interdependence of human rights; II - rejection and prevention of xenophobia, racism, and all forms of discrimination; III - non-criminalization of migration; IV - non-discrimination based on the criteria or procedures by which a person was admitted into the national territory; V - promotion of regular entry and document regularization; VI - humanitarian reception (...) VIII - guarantee of the right to family reunification; etc. Brazil, Law 13,445, art. 3.
- 10 *Natalia Caicedo Camacho / Luisa Freier*, *Voluntary and Forced Migration in Latin America: Law and Policy Reforms*, Montreal 2022.

humanitarian traditions on asylum, have also taken place in this period (e.g. Argentina by Law 26,165).¹¹

Precisely, the most important feature of this shift, which has been criticised as merely a “human face”,¹² is the role of law. Whether by explicitly recognising “migration” or “mobility” as a “human” rights (group A), by including several rights anchored in a human rights framework (group B), or by referring to “human rights” principles (both groups), law plays a key role. Both groups made these recognitions through national legislation approved by their democratically elected parliaments, one of the most powerful democratic tools for organising social life and structuring human mobility in a Latin American context strongly marked by migration laws mostly inherited from dictatorships¹³. For many of these countries, these “new” laws were crucial in overcoming the long-standing tradition of managing migration through decrees and other rapidly changing norms. It is also worth noting that these laws were achieved through strong advocacy by civil society organisations.

In short, the Latin American experience emphasises migrants’ rights and promotes universal human mobility. Furthermore, it encompasses the no criminalisation of irregular migration, regularisation and equal rights. In summary, “free residence and equal rights form the two pillars of the South American mobility regime”.¹⁴ Some authors have a sort of faith that Latin American countries, which are mostly affected by immigration, can pave the way for better international protection of people on the move.¹⁵

In addition to the legal aspect, this leap of faith could also be driven by the implications of treating migration as a human right. Some authors have particularly emphasised the profound change that would result from recognising migration as a human right. Regarding the Argentinian experience, it has been argued that this is a ‘major step forward for the rights of immigrants’ throughout the world,¹⁶ and that it implies that the sovereignty of the state and its discretionary criteria for admitting, excluding and expelling foreign nationals are no longer the starting point or the pivot.¹⁷ Against this backdrop, one case from each group

- 11 *Leonardo Franco* (ed.), *El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo “asilo-refugio” a la luz del Derecho Internacional de los Derechos Humanos*, Buenos Aires 2004.
- 12 *Eduardo Domenech*, *Las migraciones son como el agua. Hacia la instauración de políticas de « control con rostro humano »: La gobernabilidad migratoria en la Argentina*, *Polis Revista Latinoamericana* 35 (2013).
- 13 *Pablo Ceriani*, *Luces y sobras en la legislación migratoria latinoamericana*, *Nueva Sociedad* 233 (2011).
- 14 *Leiza Brumat / Victoria Finn*, *Mobility and Citizenship during Pandemics: The multilevel political responses in South America*, *Partecipazione e Conflitto* 14 (2021), pp. 321-340.
- 15 *Marie-Bénédicte Dembour*, *When Humans Become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford 2015.
- 16 *Barbara Hines*, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, *Cornell International Law Journal* 43 (2010), p. 472.
- 17 *Pablo Ceriani*, *Nueva ley: un paso hacia una concepción distinta de la migración*, in: *Ruben Giustanini* (ed.), *Migración: un derecho humano*, Buenos Aires 2004. See also *Eduardo Vior /*

will be selected for analysis, exploring how human rights play out in different contexts. Argentina from group A and Mexico from group B. The idea is to analyse a country where a higher level of protection and use of human rights sources may be expected, since human rights play a more defining role (group A), compared to a country where expectations may not be that high, with decisions made on a case-by-case or right-by-right basis (group B). We can assume that Argentina, a country based on the right to migrate, will make better or more intensive use of Inter-American sources than Mexico, a country that relies solely on a human rights perspective. A second assumption that can be made is that there is a correlation between the robust use of human rights sources and the protection granted; the use of these sources may help achieve protection. In both cases, human rights also played a significant role in their respective “shifts”: in Argentina, the law inherited from the last dictatorship changed as part of an amicable settlement within the Inter-American Commission on Human Rights (IACHR), while in Mexico, the 2011 constitutional reform that enshrined human rights in the constitution rapidly led to the adoption of a migration law based on “unrestricted respect for the human rights of migrants” and “consistency on the part of the Mexican state in guaranteeing the rights it claims for its nationals abroad”.¹⁸

Last but not least, both countries have recently experienced significant changes in policies relating to human mobility. Both the Argentinean Migration and Refugee laws were modified in 2025 by presidential decrees No. 366/2025 and 646/2025 under President Javier Milei. These reforms, enacted through decrees of “urgency and necessity”, were deemed unconstitutional, regressive and discriminatory.¹⁹ In addition, the “Migration Commission” within the Public Defence Office was officially dismantled in 2025; all the personnel was transferred to continue working before administrative federal courts in general topics. The real impact on the migrants’ access to justice is still unknown. For its part, Mexico faces direct challenges as a result of the draconian policies implemented by the Trump administration, against the backdrop of a far-reaching and controversial overhaul of its judicial system.

Alicia Bonilla, El derecho humano a la migración y las ciudadanía interculturales emergentes: el caso de la minoría de origen boliviano en la Ciudad de Buenos Aires. Paper presented in the X Congreso de Antropología Social, Posadas 2008.

- 18 *Luisa Gabriela Morales Vega*, Categorías migratorias en México: Análisis a la Ley de Migración. *Anu. Mex. Der. Inter.* Ciudad de México 12 (2012), pp. 929-958. See also *Claudia Perales Galarza*, Ley de Migración: Reforma a Cuentagotas, *Boletín Mexicano de Derecho Comparado* 137 (2013), pp. 749-767.
- 19 *Olivia Bueno / Charlotte Muller*, Trump 2.0? Argentina adopts anti-immigration policies mirroring US models, *Mixed Migration Centre Newsletter*, 13 August 2025, <https://mixedmigration.org/articles/argentina-adopts-anti-immigration-policies-mirroring-us-models/>, (last accessed on 3 April 2026).

B. Argentina and Mexico: Position, Legal Framework and Judicial Organization

Providing a common perspective on both countries, or even a non-comparative one, is not simple; in that sense, this contribution is not intended to make direct comparisons between them. In terms of human mobility, Argentina is primarily a receiving country located in South America, whereas Mexico is a living laboratory situated next to the US. It is a receiving, transit and emigration country and is often referred to as a “vertical border”²⁰ or “buffer zone”²¹ to illustrate one of the largest processes of externalisation in the world. Pressures and unilateral actions from the US have a direct impact on human mobility in and through Mexico. The creation and deployment of a security force (the National Guard) for migration control operations in Mexico was a response to these pressures. This force coexists with unilateral policies that directly impact Mexican territory, such as the implementation of the Migrant Protection Protocols (MPP), also known as the ‘Remain in Mexico’ policy, which has forced thousands of asylum seekers to wait in dangerous Mexican border cities for their US court hearings.²² This relationship with the US might suggest that political pressure would prevent the development of a better application. Argentina in the Southern cone may be considered irrelevant in this respect, so for the purposes of this contribution, more progressive achievements may be expected from the latter country.

Both countries are members of the Organisation of American States, meaning the jurisdiction of the Inter-American Court of Human Rights (IACtHR) extends to them. They are also both parties to the Inter-American Convention on Human Rights (IACHR): although they both became members in the 1980s, the constitutional treatment they provided to the convention took place several years apart. While Argentina incorporated many human rights documents (including the IACHR and the American Declaration on the Rights and Duties of Man) into its constitutional hierarchy during its 1994 constitutional reform, Mexico only prioritised human rights in its 2011 reform.

Despite these differences, both countries have played a significant role in establishing standards for human mobility. There are four advisory opinions from the Inter-American Court of Human Rights on human mobility. Two of these were requested by Mexico: AO-16/99, which concerns consular protection²³ and AO-18/03, which concerns the rights

20 The concept of “vertical border” has not a single author, but for instance: *María Eugenia Anguiano / Alma Trejo Peña*, Políticas de seguridad fronteriza y nuevas rutas de movilidad de migrantes mexicanos y guatemaltecos, *LiminaR* 5 (2007).

21 *María Eugenia Varela*, México. De Frontera Vertical a País Tapón. Migrantes, deportados, retornados, desplazados internos y solicitantes de asilo en México. *Iberoforum. Revista de Ciencias Sociales de la Universidad Iberoamericana* 27 (2019), pp. 49-76.

22 *Elena Sánchez-Montijano / Roberto Zedillo Ortega*, Migration in Mexico: complexities and challenges, UNDP Latin America and the Caribbean, Policy Documents Series, New York 2022.

23 I/A Court H.R., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16.

of undocumented migrants.²⁴ Argentina (alongside Brazil, Uruguay and Paraguay, as MERCOSUR states) requested the AO-21/14 on the rights of children and adolescents on the move.²⁵

Neither Mexico nor Argentina have been subject to any judgements by the Inter-American Court of Human Rights regarding migration or asylum issues; Argentina was brought before the court on a case relating to nationality granted to a foreign person but was found not to be responsible. Therefore, their judiciaries will not be enforcing any supranational rulings that directly involve them. However, it was a case brought before the Inter-American system (the “De La Torre” case) and settled within the IACtHR that triggered Argentina’s 2004 immigration reform. On the other hand, it is hardly surprising that Mexico has received more attention from reports and recommendations. One of the most recent reports issued by the Inter-American Commission on Human Rights (IAComHR) is the “Subregional Report on Human Mobility and the Obligation to Protect”. This report, launched in 2023, deals with mobility from Central America to the US through Mexico.²⁶ Previously, in 2013, the same body had issued “Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico”.²⁷ In 2017, the IAComHR organised a thematic hearing on asylum seekers and refugees from Central America. Soon after, provisional measures were requested to protect those involved in the Migrant Caravan. There have also been thematic hearings requested by civil society about changes to the law by decree in Argentina.

At a more domestic level, the Argentinean Constitution has granted rights to foreigners since its first version in 1853–60. There is also still an anachronistic clause about promoting “European” migration. Following the liberal roots that inspired the 1853/60 Argentinean Constitution, we find that, at the level of this fundamental rule, (i) every “inhabitant”, regardless of their status, enjoys basic rights, including those relating to private property and criminal guarantees; and (ii) specific rights for “foreigners” are provided.²⁸ In 2011, the Mexican National Constitution included clauses relating to the rights of foreigners. They shall enjoy all constitutional rights and guarantees (arts. 1 and 33), and the right to seek

24 I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

25 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21.

26 Inter-American Commission on Human Rights, *Movilidad humana y obligaciones de Protección. Hacia una Perspectiva SubRegional*. Washington DC, 2023. Similar reports on the rights of migrants (families and children) in US and on internal displacement in Center American had been previously issued in 2015 and 2019, respectively.

27 Inter-American Commission on Human Rights, *Derechos humanos de los migrantes y otras personas en el contexto de la movilidad humana en México*, Washington DC 2013.

28 *Lucila Nejmkis / Lila García*, Migration Legislation and Policy in Argentina, in: Natalia Caicedo Camacho / Feline Freier (eds.), *Voluntary and Forced Migration in Latin America: Law and Policy Reforms*, Montreal 2022.

asylum was also incorporated. The constitutional reform of 2016 further strengthened this right by including the right to receive asylum.²⁹

Their respective migration and asylum laws complete the legal framework. Argentina's Law on Migration Policy No. 25,871, passed in 2004, replaced a decree from the last military dictatorship in Argentina (1981), which was openly criminalising. This decree was known as the "Ley Videla". The law underwent major amendments in 2017 through the national decree 70/2017, which was revoked in March 2021. So, the law in its original wording was in force during the period covered by this article. However, the right to migrate has never been modified, either due to a strong commitment or a sense of futility. It is still stated as follows: "The right to migration [derecho a la migración] is essential and inalienable of the person and the Argentina Republic guarantees it on the principles of equality and universality" (article 4, Law 25,871). At the same time, the right is framed by human rights principles settled in the law itself and in constitutional clauses (Article 75.22), which connect the domestic legal framework to international human rights agreements.

Meanwhile, the Mexican "General Law on Population", enacted in 1974 and amended in 1990, 1996 and 2008, was replaced by a Migration Law and a Refugee Law in 2011. Both laws were based on strong human rights principles, but neither recognised the right to migrate. Figures relating to asylum were incorporated in 1996, while a clause regarding non-criminalisation appeared in 2008.³⁰ In short, the 2011 Migration Law starts with its aim: "to regulate matters relating to the entry and exit of Mexican nationals and foreigners into and from the territory of the United States, Mexican States and the transit and stay of foreigners therein, within a framework of respect, protection, and safeguarding of human rights, contribution to national development, and preservation of national sovereignty and security" (art. 1). A similar wording would be enunciated within the principles "international mobility facilitation, safeguarding order and security" (art. 2).

This tension between rights, national sovereignty and security is reflected in the migration policies of all Mexican presidents,³¹ but it is also present, albeit less noticeably, in Argentinian legislation. Law 25,871 of Argentina establishes, among its aims, "to establish

- 29 "Every person has the right to enter the Republic, leave it, travel within its territory, and change residence, without the need for a security letter, passport, safe-conduct, or other similar requirements. The exercise of this right shall be subject to the powers of the judicial authority in cases of criminal or civil liability, and to those of the administrative authority in relation to the limitations imposed by the laws on emigration, immigration, and general health of the Republic, or on harmful foreigners residing in the country. Everyone has the right to seek and receive asylum. The recognition of refugee status and the granting of political asylum shall be carried out in accordance with international treaties. The law shall regulate its origins and exceptions" (Mexico, National Constitution, art. 11).
- 30 *Rodolfo Casillas R.*, *Notas para entender la migración: instituciones gubernamentales y política migratoria mexicanas en los albores del siglo XXI*, Migración y desarrollo Zacatecas 24 (2015), pp. 47-80.
- 31 *Valentina Rabasa Jofre*, *¿De una nación fuerte a una nación segura? Recuento de la legislación y la política migratoria en México*, *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional* 50 (2024), pp. 283-305.

fundamental principles” in order to fulfil international human rights obligations (Article 3.a), “to guarantee the right to family reunification” (Article 3.d), to ensure non-discriminatory admission procedures (Article 3.f), to promote, “bearing in mind the Argentinean humanitarian tradition”, the rights, duties and guarantees of migration pursuant to international commitments (Article 3.g), and to promote integration. However, it does not provide for an open border policy. The recitals also include the aim of “promoting international order and justice by denying entry to and/or residence in Argentine territory to persons involved in acts that are criminally punishable under our legislation”. Similarly, Mexico includes a more detailed list of principles, including an integral approach, shared responsibilities, hospitality and international solidarity, social and cultural integration, “equity” between nationals and foreigners, and family reunification and the best interests of the child.

Many of these principles have counterparts in rights. Relevant provisions in Argentina include the right to family reunification, the right to free legal aid and several others concerning the state's duties, such as taking measures to ensure that everyone has regular status. Regarding migration-based categories, Argentina grants all MERCOSUR nationals the right to reside in the country regardless of whether they have a work, study or family visa. In Mexico, family reunification is guaranteed to all regular migrants (Article 10), while the right to a translator or interpreter and to seek and receive justice is enshrined in law, regardless of migration status.

Then, the Argentinean Refugee Law, enacted in 2006, was amended by National Decrees 942/2024 and 819/2024 in 2024.³² On the other hand, Mexico's 2011 “Law on Refugees, Complementary Protection, and Political Asylum”, similar to Argentina's law, incorporates the definitions of the 1951 Refugee Convention and the 1984 Cartagena Declaration, which expand the scope of protection. These legal frameworks include crucial principles such as non-refoulement. While international asylum and refugee instruments are not the focus of this research, it is worth noting that Mexico ratified the 1951 Refugee Convention in 2000, whereas Argentina has done so in 1961.

Regarding their judicial branches, the Argentinian legal system has stated since 2004 that the Judiciary can review all migration control issues, whereas in Mexico this is still exceptional and is mostly done through an expedited remedy (“amparo”), which requires a violation that gives rise to an amparo action directly before the constitutional courts. Alternatively, another legal remedy requires a nullity action that begins in the federal administrative courts—which are not part of the judiciary.³³ This is a key point for the

32 In spite of these modifications, provided the scope of this research reaches supreme court's rulings is until December 2024, these major amendments have not a direct impact on the judgments; beyond the political atmosphere that these Executive decisions create, we will see how modifications are articulated in the ongoing cases before the Argentinean Supreme Court (and within the Judiciary in general) in the next years.

33 *Mauro Pérez Bravo*, La protección de los derechos de las personas migrantes en el juicio contencioso administrativo, *Revista del Instituto de Ciencias Jurídicas de Puebla* 47 (2021), pp.

scope of this research, which covers the period from 2004 to 2024 —the year in which the “new” Argentine immigration law came into effect—and reviews a period of twenty years up to December 2024. All administrative decisions regarding migration control can be revised by the federal judiciary (part of the judicial branch) in Argentina through a two-tier legal remedy (first instance, then a chamber of appeals, and on an extraordinary basis it can reach the Supreme Court). In addition, asylum denials can also be revised by both instances and an extraordinary appeal can be made to the highest court. In Mexico, most legal actions were “amparos” and thus exceptional. This was also the situation in Argentina before 2004, when the legal framework expressly included the judiciary as a key actor in the cycle of migration policies. This helps to explain the significant difference in the number of appeals reaching the respective highest tribunals.

Another significant difference lies in the availability of free legal assistance, officially available since 2010. These offices provide free legal aid and representation in administrative and judicial proceedings, which is particularly important in a legal system where submitting a legal claim requires representation. In Argentina, almost all appeals brought to the Supreme Court were submitted by public attorneys. In Mexico, legal representation is also mandatory in order to challenge a decision, but until 2019 it relied on the limited human resources offered by NGOs. It was only in 2019, as a result of a Mexican Supreme Court ruling, that a general agreement was signed with the UNCHR to organise a public defence service in Mexico. However, reports by some NGOs indicate that the denial of legal access is widespread: 92% of detained asylum seekers interviewed reported that they were never offered legal representation during their time in migratory detention. The remaining 8% who did access legal counsel did so mainly through the intervention and assistance of CSOs or ACNUR partners.³⁴

C. Towards a Judicial-Based Assessment of the Latin-American “Humanistic Shift” in Human Mobility

In recent years, greater attention has been paid to how human rights standards are incorporated into countries' judicial systems. In 2004, the Inter-American Court of Human Rights began to debate the effect of its judgments on cases and states beyond those directly involved.³⁵ On the one hand, there is an “indisputable” basis pursuant to which “decisions of the IACtHR are binding on the involved state”, and on the other, they imply interpreta-

133-155. *Elisa Ortega Velázquez*, *El asilo como derecho en disputa en México. La raza y la clase como dispositivos de exclusión*, Mexico City 2022.

34 *Asylum Access Mexico*, *Informe Alternativas a la Detención*, Mexico City 2019.

35 *Liliana Galdámez Zelada*, *El valor asignado por la jurisprudencia del Tribunal Constitucional a la jurisprudencia de la Corte Interamericana de Derechos Humanos*, *Estudios Constitucionales* 12 (2014), pp. 329-364.

tive obligations or an “interpretative international *res judicata*” for all other states,³⁶ not to mention their *erga omnes* effects. Thus, key literature has focused on justifying how —and even if— they are binding for these “other” states, particularly the judiciary,³⁷ including a test to determine whether any given authority has breached the Inter-American Convention on Human Rights and consequently incurred international responsibility.³⁸

The methodology and scope of the studies vary. The most common approach is to begin by reconstructing human rights standards or identifying key sources, before assessing their application in the domestic sphere. I adopted this approach in my doctoral thesis on the Argentinian judiciary.³⁹ In her article about 10-year jurisprudence in Chilean courts regarding the expulsion of foreigners, Díaz Tolosa,⁴⁰ also begins by reconstructing the applicable international standards, before legally analysing whether these standards were met by the Chilean rulings. Other authors have conducted similar analyses for Mexico⁴¹ or for a broader regional assessment.⁴² However, this type of analysis has limitations. Firstly, it requires the reconstruction of the relevant standards for the subsequent enforcement “test”. Consequently, only the standards that have been properly reconstructed will eventually be found in the rulings, which speaks more highly of the enforcement of the Inter-American guidelines than of the domestic courts themselves. Furthermore, many reconstructions are incomplete and do not cover all emerging standards.⁴³

36 Víctor Bazán, *Vinculatoriedad de los estándares interpretativos de la Corte Interamericana de Derechos Humanos en los órdenes internos, control de convencionalidad y diálogo jurisprudencial*, Anuario de Derecho Constitucional Latinoamericano, Bogotá / Berlin, 2014.

37 Humberto Nogueira Alcalá, *Diálogo Interjurisdiccional, control de convencionalidad y jurisprudencia del tribunal constitucional en período 2006-2011*, Estudios Constitucionales 10 (2013), pp. 57-140.

38 This work will not focus on the “control of conventionality/conventionality”, since I understand it is only one of the manners of “recepting”, or “use”, incorporating or dealing with inter-American standards.

39 Lila García, *Nueva Política Migratoria Argentina y Derechos de la Movilidad. Implementación y Desafíos de una política en derechos humanos a través de las acciones antes las cortes federales (2004-2010)* [In English: *New Argentinean Migration Policy and mobility rights. Enforcement and challenges of a human rights policy through legal actions before federal courts (2004-2010)*], PhD Thesis, University of Buenos Aires, 2013.

40 Regina Díaz Tolosa, *Aplicación de los estándares interamericanos sobre expulsión de extranjeros en el sistema jurídico chileno*, Estudios Constitucionales 18 (2020), pp. 309-352.

41 Natalia Beltrán Orjuela / Leydi Palacios Segura, *Estándares convencionales en procedimientos de personas migrantes*, Anuario Mexicano de Derecho Internacional, XXI, 2021, pp. 867-894.

42 Elizabeth Salmón / Cécile Blouin, *The Standards of the Inter-American Human Rights System regarding Migration and Its Impact on the Region’s States*, in: Armin Von Bogdandy / Flavia Piovesan / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi (eds.), *The Impact of the Inter- American Human Rights System Transformations on the Ground*, New York 2024.

43 See, for instance, Salmón / Blouin, note 42.

A different approach could begin with the domestic courts. I applied this to the Argentinian Supreme Court,⁴⁴ but the same domesticity then becomes a limiting factor: migration laws are so deeply rooted in the national context—and thus the legal disputes—that it is difficult to overcome the jurisdiction and provide a broader reading that allows a comparative perspective. Many of these studies (including my own) have opted for a case-by-case description, while other models seek to analyse the “dialogue” between courts (e.g. Inter-American and national courts),⁴⁵ the “use”⁴⁶ or “reception”⁴⁷ by domestic courts. From a European perspective, this has recently been referred to as “interaction”.

These later proposals appear to represent an improvement on simply comparing and assessing international standards and on how effectively they are applied. Nogueira Alcalá⁴⁸ refers to the dialogue in terms of “interpretation”. According to his proposal, it may be: (i) *Extensive*: the court/judge provides a broader interpretation of the right than that provided by the Inter-American Court. (ii) *Innovative*: in that there is no ruling from the IACtHR. The Court takes Inter-American standards into consideration and provides an unprecedented solution based on jurisprudence. (iii) *Corrective*: the court modifies its case law based on an IACtHR judgment against its own country. (iv) *Receptive*: the court decides based on the IACtHR’s decisions regarding other countries, without waiting for a ruling addressed to its own country. The court applies “conventional” law. (v) *Neutraliser*: an interpretation aimed at neutralising or avoiding a binding interpretation given by the IACtHR (in this case) by creating a different ‘reading’ of domestic or international laws. (vi) *Discordant*: the domestic court openly disagrees with the ruling, for example by stating that it is an incorrect interpretation of conventional obligations. Other dialogue analysis also refers to judicial postures as resistance, convergence and engagement.⁴⁹

In their research on the “use” of gender-based standards in Argentina, Ronconi et. al,⁵⁰ take a more qualitative approach, starting at the Inter-American level. They first identify the standards, then review the relevant norms, jurisprudence and policies to determine their

44 *Lila García*, Decisiones de la Corte Suprema de Justicia de la Nación (Argentina) sobre control migratorio (2004- 2018), *Periplos Revista de Estudios sobre Migraciones* 3 (2019). See also *Lila García*, Tres por ciento. Debates jurídico-políticos en control migratorio en el máximo tribunal argentino (2019-2022), *Revista Chilena de Derecho y Ciencia Política* 15 (2024).

45 *Nogueira Alcalá*, note 37; *Antonio Moreira Maués / Breno Baía Magalães / Paulo Nassar / Rafaela Sena*, Judicial Dialogue Between National Courts and the Inter-American Court of Human Rights: A comparative Study of Argentina, Brazil, Colombia and Mexico. *Human Rights Law Review* 21 (2021), pp. 108-131.

46 *Liliana Ronconi / Melanie Ghertner / Soledad Guzmán / Nicole Levy / Micaela Ramello*, Uso de estándares del Sistema Interamericano de Derechos Humanos en materia de género en Argentina. *Ius et Praxis* 29 (2023), pp. 207-231.

47 *Sandra Serrano*, La recepción de los criterios interamericanos en las cortes de Colombia y México: de las ideas a los resultados, Mexico City 2021.

48 *Nogueira Alcalá*, note 37.

49 *Moreira Maués et al.*, note 45.

50 *Ronconi*, note 46.

applicability. Based on Vicki Jackson's previous work, they then test the three possible relationships between the domestic sphere and standards: (i) resistance; (ii) convergence (agreement without going beyond the guidelines defined at the inter-American level); and (iii) entanglement. The authors propose a third sub-category within "resistance"—"indifference", a form of implicit resistance consisting of the non-application of human rights standards—and three views on "convergence". Consequently, convergence may be direct, indirect or compatible. "Direct" convergence involves an explicit reference to the standards of the Inter-American system, while "indirect" convergence refers to the use of a norm or act that has itself used standards from the Inter-American human rights system (e.g. a law, a protocol, etc.). Finally, "compatible" convergence implies a "non-use" of inter-American standards since there is no explicit mention, yet the ruling can nevertheless be deemed compatible. In the case of "entanglement" (translated into Spanish as "involucramiento"), domestic laws (and therefore policies and other products) improve due to the Inter-American system: "It seeks to go further, creating better conditions for the recognition of rights at the local level through robust interpretation of international standards". More recently, Clerico and Cardinaux have proposed a device for identifying three levels of "use": nominal (merely as a reference), substantive (as part of the justification for the judgement) and as a control parameter for comparing the given standard with the normative issue to be resolved in the case.⁵¹

Finally, in her book, Serrano provides a systematic analysis of how the Inter-American Court's human rights guidelines have been received by two high courts: the Constitutional Court in Colombia and the Supreme Court in Mexico. The primary virtue of this approach is its comprehensiveness. The "reception" of Inter-American guidelines by high courts is a process by which they take and use these guidelines in their daily activities. This process can be measured in terms of intensity, ranging from "mention" (0 points) to "innovative interpretation" (6 points). The intermediate levels are "reference" (1 point), "legitimacy criteria" (2 points), "interpretative criteria" (3 points), "modify national criteria" (4 points) and "additional right or criteria" (5 points). This also represents an achievement in moving beyond simplified assessments, and the scoring system is easier to grasp. However, Serrano's model contains so many categories that it can make the assessment less clear and more fragmented, at least for smaller samples such as the one in this contribution. Additionally, if both courts—in her example, Colombia and Mexico—have constitutional clauses that make Inter-American standards and, more generally, decisions mandatory, the first scenario of "active resistance" or "discordance" is almost not an option. Finally, her category "modifying national criteria" overlaps with my intention to outline a correlation between the protection granted and the use of Inter-American sources. In Mexico, almost all legal actions are "amparos", which are decisions that "modify" national criteria and tend to involve protection. Protection is granted because it modifies the act or omission

51 Nancy Cardinaux / Laura Clerico, *Los usos del Derecho Internacional de los Derechos Humanos por los Superiores Tribunales de Justicia de Provincia y de la CABA*, Buenos Aires 2025.

that caused the “amparo” in the first place. On the other hand, tracing the effects of each judgment—e.g. whether it causes a modification to the legal framework—is beyond the scope of this research.⁵²

In the next section, I propose four categories based on these developments to capture the relationship between the protection and use of human rights sources and the intensity of such use.

D. Methodology, Universe and Case Selection

This contribution is, firstly, a systematic approach that includes all the appeals that reached the respective supreme courts on migration, asylum and/or refugee matters. By “systematic”, I mean that it is not an analysis of selected or paradigmatic legal cases or decisions, but rather an analysis of all legal cases submitted to the respective supreme courts in Argentina and Mexico. The timeline covers the period from 2004, the year that the Argentinean law came into force, to December 2024, when the most recent decisions were made. Secondly, this is also an attempt to improve our understanding of how international human rights sources are incorporated, rather than merely assessing whether or not they are implemented. To do so, this contribution focuses on the use of Inter-American sources,⁵³ mostly but not exclusively on human mobility issues: the Inter-American Convention of Human Rights, the American Declaration, specific documents on migration, asylum and refugees from the Inter-American Commission of Human Rights jurisprudence.

The total universe was built by conducting searches in the relevant online databases using the keywords: “migration”, “asylum” and “refugee”. For the Mexican Supreme Court, three searches were run by year in the ‘Decisions and File Data’ tool, and these were then cross-checked with the ‘Semanario Judicial de la Federación’. For the Argentinian Supreme Court, I ran the same searches in the ‘All the Rulings’ tool, year by year, until I covered the period from 2004 to 2024. The results (178 appeals in Mexico and 1,057 in Argentina) require thorough and precise curation. Some legal actions appeared in the results of both searches, and many issues were not directly related to the scope of this research. These included topics such as employment (e.g. legal claims against the Migration Directorate in Argentina), extraditions, fines against transportation companies (also in Argentina) and criminal files for human trafficking (Mexico). Finally, debates on competence or jurisdiction were excluded, as were abandoned appeals. After this process, four clear categories of cases relating to migration and asylum (in the strict sense) emerged: firstly, dismissed (on formal grounds) cases⁵⁴ and admitted cases. By focusing on the latest

52 *Serrano*, note 47.

53 In addition to my interest in the use of regional sources, the courts involved rarely refer to other human rights sources, such as the universal or European systems.

54 The results and the cleaning were more complex within the Argentina’s court: beyond the large number of appeals, many of them were rejected on formal grounds so there is not ruling to assess the use of sources. Although it does not represent a problem itself, the question on which appeals

cases, where decisions on the merits can be found, it is possible to differentiate between cases that were decided by reference to another case and cases that serve as a “model”, known as “modelling cases”. This article focuses on these modelling cases, since a high proportion of cases are solved simply by delivery (particularly in the Argentinian case), which would lead to overrepresentation of any category involved in these cases.⁵⁵

Following the aforementioned curation process, the pool of legal decisions on cases to be assessed was significantly reduced to 29 in Argentina and 20 in Mexico. Then, for each case, I identified whether the protection was granted (yes/no) and whether human rights sources were used (yes/no). The results are organised into four categories in this double-entry table: A The. “Collective Win”, for cases where protection was granted and HR sources were used; B. The “Singular Victory”, for cases where protection was granted without HR sources; C. “Planting for the Future?”, comprising a small number of cases where protection was not granted but HR sources were used; D. The “Sinking Ship”, for cases where neither protection nor HR sources were used.

Table 1: Resulting Categories

		Protection Granted	
		Yes	No
Use of HRs Sources	YES	A. Collective Win	C. Planting for the Future?
	NO	B. Singular Victory	D. Sinking Ship

Author’s own elaboration

Then, to determine the intensity of use, I manually identified the Inter-American source and scored each case accordingly, as shown in the next table.

are admitted (are all dismissed appeals on the same topic or situation?) to be debated and then settled by the court remains. The Argentinean court dismissed more than 50% of the appeals on migration matters.

55 For example, the debate about the deadline to submit an asylum application counts on 9 (nine) appeals before the Mexican Supreme Court. It is essentially the same issue and in four of them, the ruling is exactly the same. Before the Argentinean Court, there are thousands of similar appeals but harder to be identified. I did this task in two previous publications regarding the Argentinean Supreme Court for two different periods (2004-2018 and then, 2019-2022) so I just work on the last two years to identify what I call “modeling” or “witness” rulings. See *García*, note 44.

Table 2: Scoring Sources

Scoring	Label	Definition
-1	Reversal	Use of an Inter-American Source in favor of the State.
0	Silence	No Inter-American Source is mentioned in the ruling.
0.50	Footnoting	An Inter-American Source is quoted in footnote.
1	Reference	Specific Clauses (Articles) of Inter-American Convention are refereed, or specific sources are referred in the text and as part of the court’s reasoning .
2	Involve- ment	An Inter-American Source is referred extensively as part of the argument or reasoning of the court, e.g. to support the interpretation of a (legal) right.

Author’s own elaboration based on Serrano’s idea⁵⁶

In the reversal use, the Court uses a human rights source to support the state. This argument is usually in favour of national sovereignty. Each reversal argument in each ruling scores -1. If no human rights source is mentioned, the score is 0. For example, if a ruling includes a human rights source only in a footnote, the score is 0.50, for the source and provided is the only one, for the entire judgment; however, if no mention is made, the decision receives a score of 0 and is not included in Tables 3 or 4. Additionally, there are no cases with purely reversal uses; all reversal uses are embedded in other categories with a score above 0.

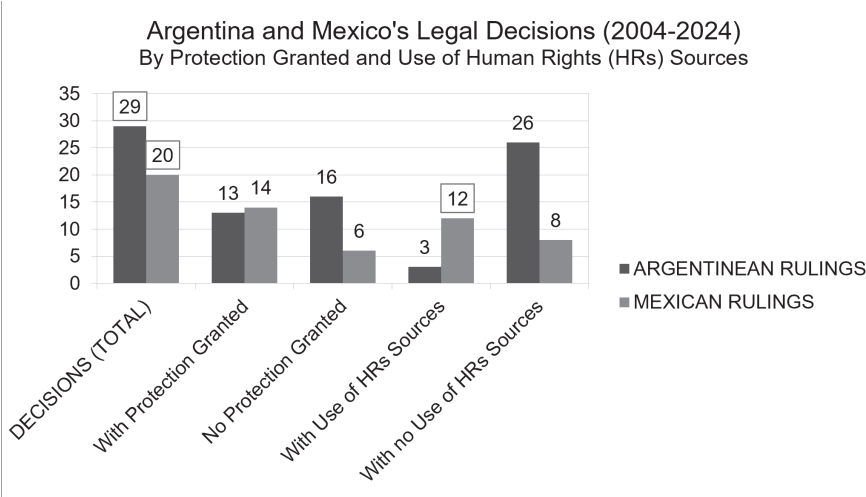
Besides the initial positive use of footnoting, the court may also incorporate human rights sources by referencing or engaging with them. Each reference in the ruling scores 1. If there is more than one reference to a given source (e.g. AO 18/03), it is considered an involvement and scores 2. References form part of the court’s reasoning and are included in the text. When a human rights source is used more extensively (i.e. more than one reference that forms part of the text and the court’s reasoning), it is considered an involvement and scores 2. It does not matter if the source is used two or five times.

E. Results and Debate

The most evident result is the significant disparity in the use of human rights (HR) sources: only three out of 29 Argentinean court decisions refer to Inter-American HR sources, whereas 12 out of 20 Mexican court decisions include HR sources, and in 14 of these cases, the person involved received protection. However, there is no such clear relationship with protection granted in Argentina, since protection was granted in 13 cases without reference to Inter-American human rights sources. The following chart illustrates the outcome of protection and the use of HR sources in both countries for the period under study (2004–2024).

56 Serrano, note 47.

Chart 1 Argentina and Mexico's Legal Decisions (2004-2024)

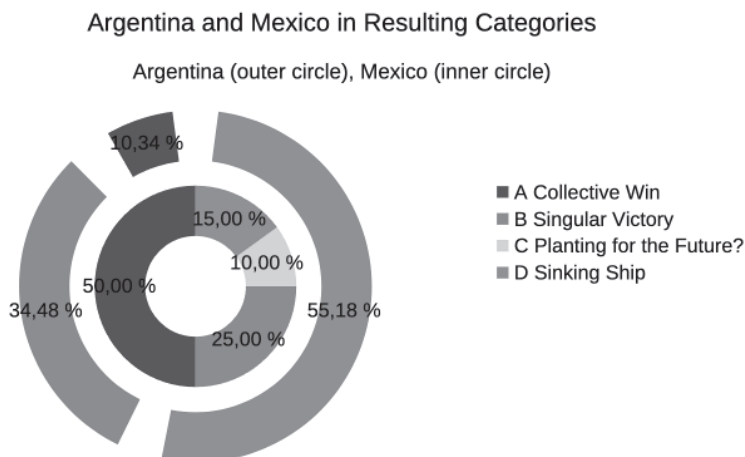


Author's own elaboration

Although the N is too small to calculate in percentages, it can be said that while almost 45% of the cases involving migration, asylum or refugee issues find a protective decision in Argentina, in Mexico this number is 70%. This is where the type of legal action (amparos in Mexico, mostly ordinary actions in Argentina) could help to understand this difference: just to start, a fundamental right violation is required to submit an amparo in Mexico; while in Argentina cases revolves more about the interpretation of the migration law. However, Inter-American human rights sources are extensively quoted in the legal actions and in the appeals (mostly submitted by public defenders) and it is the supreme court's decision to use them or not.

In percentages (to keep the proportion), the next chart organizes the decisions into the four categories mentioned in section C. The outer circle corresponds to Argentina; the inner one to Mexico.

Chart 2 Argentina and Mexico in Resulting Categories



Author's own elaboration

The “Collective Win” (shown in blue) is the most important development for human rights. While it is a win for the plaintiff(s), insofar as the decisions are anchored in Inter-American human rights sources, they are not dependent on the national context and can be used as a reference in other countries within the region. Argentina used a few of these sources (10% of cases), whereas Mexico used them in 50% of cases. Further explanation on the topics of the cases and details of the sources used in each case can be found in chart 3 below.

Similarly, the “Singular Victory” (in orange) is a victory, even when considered alone and without reference to Inter-American human rights sources. A right or favourable interpretation for the plaintiff was achieved, which is significant in a field dominated by state sovereignty. However, this victory is limited in that it is dependent on nationality, so in that sense it sets a precedent and is difficult for foreign jurisdictions to reference. In Argentina, the cases involve topics such as the guarantee of the double check (“Ojeda”), a restrictive interpretation of criminal records (“Apaza”, “Manzaba”) or the prevalence of the principle of non-refoulement in front of expulsion orders (“ML”⁵⁷ and “L.C.”⁵⁸). In Mexico, the following protective decisions were made: a request for regularisation based on family reunification (File 257/2017); a plenary on legal aid in detention facilities (PL 16/2019); the

57 Argentinean Supreme Court, Recurso Queja N° 2 - M. R., L. c/ EN-M Interior y T-DNM s/Recurso Directo DNM. AF 036321/2015/2/RH001.

58 Argentinean Supreme Court, L., C. c/ EN-M Interior Op y V-DNM s/Recurso Directo DNM. File CAF 89674/2017.

validity of the principle of innocence within migration proceedings (File 4421/2020); and the obligation to create a registry for detentions (File 459/2024).

The large green area corresponding to Argentina's cases shows the "Sinking Ship" from the title, "We All Lost": in 55% of the decisions, neither the court granted protection, nor did it use Inter-American human rights sources. Contrary to what the reader might expect, the issues involved in these decisions are not so different; almost all of them focus on the importance of criminal records versus family reunification or the right to education ("Costa Ludueña"). Then, there is a case about the (due notice about the) right to free legal aid ("Zuluaga"⁵⁹), and two more cases about (denial) of regularization without criminal records ("Huang"⁶⁰ and "Qiu"). Finally, some cases involve addressing legal changes that affect grounds of exclusion ("Cai W."), for instance, or the impact of DNU 70/2017. These cases all have one thing in common: they are all migration-residence based, meaning they revolve around the migration law rather than the refugee law. Conversely, Mexican decisions in this category account for just 15% of cases, comprising three decisions in files 346/2019, 385/2020 and 351/2022. The first case, decided on 16 October 2019, involved a debate about the denial of a social security number (the "CURP"), which entitles holders to access work, education and healthcare. At the time, the court found no evidence of discrimination.⁶¹ The second case, decided on 2 December 2020, concerned the refusal of refugees' requests for family reunification with their children, initially abroad and then within Mexico. The court ruled that the refugee law regulations contain constitutional requirements, such as the need for financial resources to bring family members, and that any recognised refugee may choose the option that suits them better: family reunification with financial resources or separate applications.⁶² In the remaining case (351/2022), the court denied the request of a foreign national who, based on the migration law and his status as a victim of crime, had applied for a humanitarian visa.

In conclusion, the "Planting for the Future?" category was found only in Mexico: Files 555/2016 and 198/2024. The former is a case concerning migration-based residence and family reunification, and how a deadline should be considered when the documentation to renew residence has expired. The latter is about the collective expulsion of migrants who had previously been removed from the US. The sources involved can be found in Chart 3. Interestingly, a court still uses Inter-American human rights sources even when protection is denied; however, it is also about how a court takes sides by providing guidelines for the future.

59 Argentinean Supreme Court, Zuluaga Celemin, Claudia Lucía c/ DNM s/ Recurso Directo a Juzgado. FLP 90945/2017/CS1.

60 Argentinean Supreme Court, Huang, Qiuming c/ EN – DNM s/ recurso directo DNM, File CAF 89674/2017.

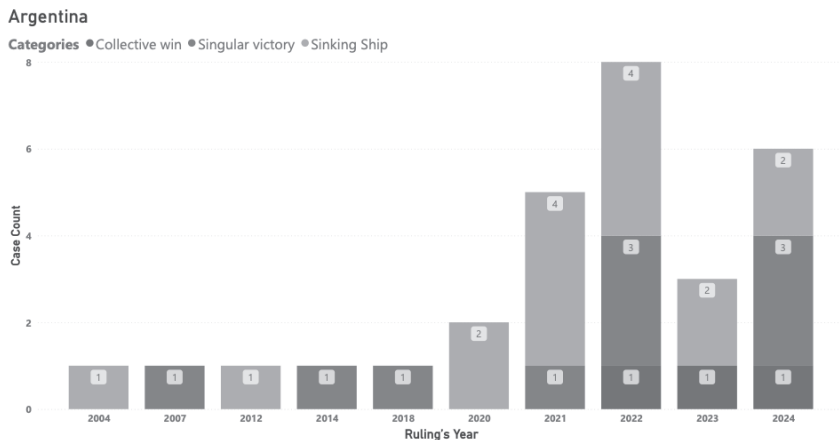
61 Two years later, the Supreme Court will recognize the CURP for all asylum seekers (File 114/2020). Human rights sources will be quoted in this decision.

62 Mexican SCJN, Amparo en Revisión 385/2020, judgment dated of Dec. 2, 2020.

In summary, the categories are spread differently across the twenty years covered by this study. The following chart shows this, broken down by country and year of the ruling. Please note that there are no Mexican court decisions for the period 2004–2015.

Chart 4 firstly exhibits the rulings' delay within the Mexican court: there was no ruling on migration, asylum or refugee issues until 2016, whereas Argentina had issued four rulings by that time (see Chart 3). More significantly, however, the number of decisions clearly increased in both courts after 2019. I had noticed it to the Argentinean court⁶³ and it is insightful to see how the Mexican court has also had an active role in the last years. Of course, one remaining issue is how long it takes for a case to be heard and settled by a supreme court, bearing in mind that Mexico's migration and refugee laws were passed in 2011, while Argentina's were passed in 2004 and 2006. In terms of categories, the Sinking Ship in Argentina is clearly more prevalent in 2021 and 2022, as well as in three cases in Mexico in 2019, 2020, and 2023. It is also important to note that the Argentinean Supreme Court saw a dramatic increase in appeals reaching its jurisdiction around 2020,⁶⁴ but this does not justify the decisions, as the court also increased its dismissal rate and solved thousands of cases by referring to previous decisions.

Chart 3 Argentinean Cases by Category by Year (2004-2024)

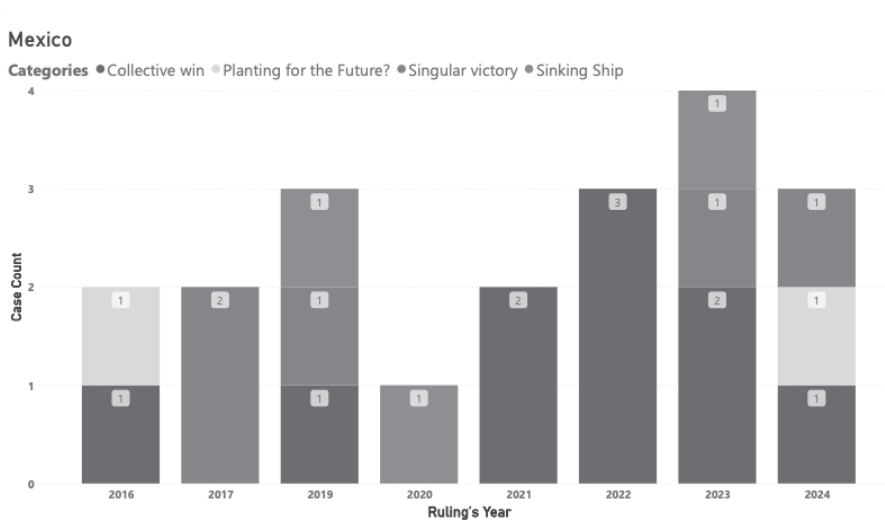


Based on Juan Pablo Cordoba's Elaboration

⁶³ *García*, note 46.

⁶⁴ *Ibid.*

Chart 4 Mexican Cases by Category by Year (2016-2024)



Based on Dr. Juan Pablo Cordoba's Elaboration

Next, the focus will be on the decisions that use Inter-American human rights sources, such as the Collective Win and Planting for the Future. Are human rights sources used with the same intensity? As previously mentioned, the use of HR sources in Argentinian cases is poor. The total score of eight points is made up of quotations from the Inter-American Convention on Human Rights and the Inter-American Court of Human Rights, as shown in the chart below:

Table 3 All Argentinean Cases with Human Rights Sources, Per Year of Ruling

Legal Case (ID)	Rul- ing's Year	Category	IA Conven- tion	Velez Loor (2010)	Cha- parro Al- varez case	Ruano Torres case	Scoring
ARG. CAF 59609/2011 (Condori)	2022	Collective Win	3 (art. 11, 17, 19)				3
ARG. CAF 7320/2015 (Li)	2023	Collective Win	1 (art. 8.2)	1	1	1	4
ARG. CAF 63829/2019 (Al- caraz)	2024	Collective Win	1 (art. 8.1 and 8.2)				1

Author's own elaboration

Two of the three cases from Argentina classified here as a collective win refer to due process guarantees in the context of reforms to migration law 25,871. The remaining case, Condori, is a family reunification that was a real milestone. In a context where other family reunification cases had previously been lost before the same Supreme Court, this case—involving a migrant in an extremely vulnerable situation and the mother of three children—not only secured protection for the individual but also marked the first time that human rights sources were referred to, albeit very tentatively. We all won together with the group of public defenders who literally fought the case. However, the first two cases were not the only ones in which the Argentinean court granted protection in the face of legal changes: Zhang (2007). Z. 138. XL and CCF 7917/2017 (García s/ciudadanía), both of which are covered by “Singular Victories”. These cases debate different topics—the granting of a visa for a family member and of nationality, respectively—but protection is achieved by recognising that the more restrictive applicable law is no longer in force, and that a new sentence must therefore be handed down so as not to undermine the right to defence.

As the next table shows, the situation is more fruitful within the Mexican court.

Table 4: All Mexican Cases with Human Rights Sources, Per Year of Ruling

			A Inter-American Documents	B Inter-American Court Decisions								C Inter-American Human Rights COMMISSION			D Result		
	Ruling's Year	Category	IA Convention	American Declaration	AO 18/2003	Velez Loor (2010)	AO 25/2018	AO 21/2014	Pacheco Tineo (2013)	Nadege Dorzema	Dominican and Haitian Persons (2014)	Chaparro Alvarez	Other Cases	Report 2013 Mexico	Principles on Migrants Human Rights 2019	Other Reports	SCORING
MEX. File 382/2015	2016	Collective Win	2 (art. 8 and 25)	0	0	0	0	0	0	0	0	0	1 (Bamaca) 1 (Villagrán Morales) 1 (Radilla Pacheco) 1 (La Rochela) 1 (Fernández Ortega)	0	0	0	7
MEX. File 555/2016	2016	Planting for the Future?	1 (art. 17)	0	0	0	0	0	0	0	0	0	0	0	0	0	1
MEX. File 665/2019	2021	Collective Win	3 (asylum), (art. 3, 16)	0	3	1	2	2	1	1	0	0	0.50 (list in footnote)	-1 and 1 1 1; so 2	0	0	15.50
MEX. File 275/2019	2022	Collective Win	1 (Art. 2 all; 22.3 in particular)	0	2	2	0	1	0	1	3	1	0.50 (list)	1	0	0	12.50

[illegible]

With a total score of 39 points (Column D), it is quite obvious that the Mexican court makes more intensive use of standards. Both courts used the Inter-American Convention, with the Mexican court's use being more intense at 17.5 points (Column A) compared to Argentina's 5 points. A use of the American Declaration was low (3.5 points, Column A). All the relevant advisory opinions (AO) in this area were then included in the adjudication. AO 18/2003 on the legal status of undocumented migrants scored 12 points, AO 25/2018 on asylum scored 4 points, and AO 21/2014 on children's rights in the context of migration scored 12.5 points. These developments are all important for putting into practice standards derived from non-contentious case law. In terms of case law, the cases "Velez Loor vs. Panama" and "Nadege Dorzema vs. Dominican Republic" achieved 5.5 points each (with two uses in "Velez" in favour of the state, resulting in a score of -1 twice), "Pacheco Tineo vs. Bolivia" scored 6, and "Dominican and Haitian Persons vs. Dominican Republic" scored 4.5 points. Reports and case law from the Inter-American Commission are quoted less frequently, but they include the 2013 report on Mexico, which scores 6.5 points.

Mexican cases that invoke Inter-American human rights law tend to address extremely serious issues and involve more strategic, collective litigation. These cases often concern structural barriers to accessing various social rights for asylum seekers (case 665/2019, "CURP"), racial profiling for migration control outside of international borders (case 275/2019), deadlines for submitting asylum applications (case 353/2019), obligations towards unaccompanied children (case 07/2020), due process guarantees and limitations on detention (case 388/2022), the presumption of innocence in favour of applicants (file 4421/2021), and the right to dual nationality and asylum (case 186/2023). As I mentioned at the beginning, almost all of these cases are "amparos", meaning that a severe infringement of the rights involved is necessary in order to successfully litigate an "amparo", or for it to be selected for strategic litigation. Please note that there was no free public legal representation in Mexico until 2019, so it can be assumed that NGOs and university legal clinics selected their cases quite carefully.

Finally, the use (or non-use) of human rights sources in judgements cannot be explained by their mention (or non-mention) in the appeals filed or in the proceedings in general. Legal representatives in both Argentina and Mexico use extensive citations in their arguments. Ultimately, it is the court that chooses which arguments will be debated and on which sources decisions will be based. The decision to use or not use human rights sources must also be analysed in the context of each court's broader involvement with the Inter-American system of human rights. While Argentina started supporting regional case law strongly in the nineties, in 2017 it decided to limit the effects of inter-American decisions.⁶⁵ The Mexican tribunal ruled that the jurisprudence issued by the Inter-American Court of Human Rights is binding on Mexican judges whenever it is more favourable to the individual,

65 *Moreira Maues et al.*, note 49.

regardless of whether the rulings are against Mexico (P./21/2014). There are also strong signs that it is becoming a rights-based court instead of a relatively independent body.⁶⁶

F. Concluding Remarks

This contribution aimed to illuminate how two high courts used human rights sources from the Inter-American System of Human Rights in all cases involving migration, asylum, or refugee issues over the past two decades. Despite the absence of a comparative approach and the omission of any attempt to establish a correlation between the use of standards and the current migration situation in each country (or even the recent and profound judicial reform in Mexico), the value of the piece lies, first, in the systematic organization of the array of decisions that have been adjudicated by the courts. This systematic organization provides a foundation for reconstruction in other legal jurisdictions, particularly regarding the cleaning of the results.

Then, the proposal further entails the establishment of a measurement tool and categories for the purpose of conceptualizing and refining the relationship between decisions pertaining to the protection of human rights and their subsequent use. The four categories try to capture this relation by naming a protective decision with human rights sources as a collective win: within the current context of backsliding, anchoring judicial decisions in human rights sources and so, obligations for states, is an intelligent strategy to put some limits to regressive politics. Even cases where protection was denied but human rights sources were used (the “Planting for the Future?”) may function as an invitation to litigate in the future. The Mexican court recognised an opportunity to set some standards and seized it. Within the Argentinean cases, one of the collective win cases (“Condori”) could have been dismissed because the situation had been solved, but the court decided to rule it anyway by recognizing that it was an isolated case and it could be repeated in the future.

The “Singular Victory”, even with no Inter-American human rights sources, is still a victory over decisions that prioritize state sovereignty over the rights of migrants, refugees, and asylum seekers. However, their limits are given for the difficult to export the results to foreign jurisdictions, or by the ever-changing migration laws: basing a decision solely on migration or refugee laws is not the best guarantee to challenge restrictive movements.

On the other hand, a plethora of alternative international sources were omitted (e.g. the 1951 Refugee Convention), but at first sight, it was clear at the beginning of this research that a predominant focus on the regional system of human rights was exhibited by Latin American courts. In addition, both the Refugee Convention or the Cartagena Declaration has been incorporated in the domestic refugee laws.

As one of the anonymous reviews of this article pointed out, the contrast between the Argentinian and Mexican Supreme Courts raises interesting questions about whether the formal recognition of a “right to migrate” leads to greater engagement by the courts with

66 Serrano, note 47.

regional human rights standards. It was evident that the use of Inter-American human rights sources was more intense on the part of the Mexican Supreme Court. On the other hand, the Argentinean “right to migrate as a human right” proved to be of little consequence within its Supreme Court. This leads us to consider how much more weight political decisions carry than legal statements. One swallow does not make a summer, nor does a right whose exercise is mainly resisted by the judiciary.

It would be worthwhile to conduct further research, employing the same methodology with enhancements, on the other courts that constitute group A, such as Ecuador, and one other country from group B (Brazil). What factors provoke that a court uses human rights sources, with more or less intensity? Why is one court more silent than others regarding human rights sources? I would need another study and methodology to answer this question, but so far, I dare say that attention should be paid to the amount of claims that are solved before arriving to the judiciary, during proceedings or before achieving the supreme courts, and the type of breaches involved. It is not possible to ignore the context in which the respective human movements are taking place (particularly, the so called “Migrant Caravan” through Mexico) and, therefore, the context in which court rulings are produced and to which they are directed. Nor is it possible to overlook the setbacks in both the migration and the refugee laws that have occurred in Argentina in the last two years, or the challenges that Mexico is facing in relation to the most recent US policies. The urgency of the Mexican situation could help to explain this substantial appeal to human rights that goes beyond the merely domestic. Of course, the real test is in judgment’s enforcement and in the extent to which civil society can take ownership of the results. Otherwise, the “Collective Wins” are made of paper and there is not seed for planting the future.



© Lila García