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**The New Terrain of International Law:
Courts, Politics, Rights Review**

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This is the introductory chapter of my forthcoming book with the same title. The three primary objectives of this book are to reveal the paradigm shift of the contemporary international judiciary, conceptualize how new-style international courts (ICs) contribute to international politics, and normalize our understanding of international courts, seeing them first and foremost as courts, and second as international actors. The introduction defines key concepts and summarizes the main argument of the book. Section I—**Courts**—explains that today's international courts (ICs) are fundamentally different from their predecessors. The vast majority of ICs today have new-style design features and increasingly apply international law that is embedded in domestic legal orders, and they have been delegated a broader range of judicial roles. Section II—**Politics**—explains how new-style ICs are able to alter domestic and international politics. Section III—**Rights**—explains how delegation to ICs contributes to generating and instantiating rights. Part IV provides a roadmap for the book. At the end of the chapter, I have appended an expanded table of context that includes abstracts of the book chapters and a case study index.

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The New Terrain of International Law: Courts, Politics, Rights

International relations have long been considered outside of the domain of law. Most people presumed that law is only meaningful when backed by a central enforcer. By this logic, absent a world state international law cannot meaningfully exist. But since the end of the Cold War, the rulings of international judges have led Latin American governments to secure indigenous peoples' land rights; the United States Congress to eliminate a tax benefit for American corporations; Germany to grant women a wider role in military; Niger to compensate a twenty-one year old former slave for her entrapment in Niger's family law justice system; Congolese warlord Thomas Lubanga Dyilo, Liberian President Charles Taylor, Jean Paul Akayesu and others to be convicted for conscripting child soldiers, abetting insurgents in neighbouring countries and tolerating rape. How have international courts around the world come to be ruling on issues such as these, which once fell under the exclusive domain of sovereign states? There still is no central enforcer for international law, so how do international courts get governments to follow their legal rulings? How is the possibility of an international judicial remedy changing the influence of international law in domestic and international politics? This book is inspired by these questions.

The goal of this book is threefold. First, it reveals a paradigm change in creating and using international courts. The first standing international courts were voluntary inter-state dispute settlement bodies that could be invoked in the rare event that governments wanted a legal resolution of a transborder disagreement. This book documents the new international judicial architecture, which is more far-reaching than most people realize. ICs today review the validity of administrative decisions, assess state compliance with international law, and speak to constitutional issues affecting both international and domestic politics. There are now at least twenty-four permanent international courts. Eighty percent of operational ICs have a broad compulsory jurisdiction and eighty-four percent authorize non-state actors—supranational commissions, prosecutors, and/or private actors—to initiate litigation. These ICs have collectively issued over thirty-seven thousand binding rulings in individual contentious cases, ninety-one percent of which were issued since the fall of the Berlin Wall. Since few of these ICs and cases are about inter-state dispute adjudication, we need to update our understandings about international courts.

Second, this book conceptualizes how new-style international courts affect domestic and international politics across countries, courts, cases and issues. An international court's political influence comes from its authority to say what the law means for the case at hand, its jurisdiction to name violations of international law and its ability to specify remedies that follow from international legal violations. This book explains how speaking the law

translates into meaningful political influence over international and domestic politics. And it theorizes why IC influence varies across countries, issues and cases.

Third, this book aims to create non-utopian expectations for international courts. This study builds on theories developed in the study of domestic courts, and uses the presence of similarly designed international courts, of cross-time design changes, and variations in the influence of the same ICs across countries and issues to inductively elucidate factors that contribute to the ability of international judges to influence state behavior. This approach inherently stresses the courts rather than the international aspects of what I am studying. International judges, like their domestic counterparts, wield neither the sword nor the purse; they only have the power to speak the law. To subordinate powerful actors to the rule of law, international judges must draw on diffuse support for the rule of law and the power and preferences of domestic and international interlocutors. As in the case of the domestic rule of law, critical zones of social interaction occur in contravention of legal rules, with most disagreements settled out of court sometimes without full compliance with the law. But even when law is not one-hundred percent followed, law still serves a regulative role of creating guidelines and setting expectations, and the judicial system helps to clarify the meaning of the law and create some remedy for law violations, as imperfect as they may be.

The implications of these developments for national sovereignty and international relations are profound. ICs are new political actors on the domestic and international stage. Their international nature allows ICs to circumvent domestic legal and political barriers and to create legal change across borders. Their legal nature allows ICs to provoke political change through legal reinterpretation and to tap into diffuse support for the rule of law and pressure governments. Their legal and international nature allows litigants to harness multilateral resources and to knit together broader constituencies of support, linking communities that care about the larger policy domain (e.g. free trade, human rights etc), with supporters of the rule of law, with advocates for the particular legal regime (e.g. regional integration or the World Trade Organization), with self-interested litigants pursuing personal agendas with the legal community of lawyers, judges and scholars. The result is a judicialization of international relations, and diminishing government control over how international legal agreements are understood domestically and internationally.

The rest of this introduction summarizes the main pieces of this argument. Section I describes the courts part of this story. I explain what has actually been delegated to international courts, how the new-style features of international courts changes their political influence, and how the new-style features are an artifact of the desire of states that ICs assume a broader range of judicial roles. This section also defines the four judicial roles states have delegated to IC, which serve as a framing device for exploring where and how ICs are influencing international and domestic politics. Section II explains the politics part of the story. ICs alter politics through alliances with compliance constituencies—ever-changing sets of actors that for a variety of reasons want to see law respected. Law is the

source of the IC's power, and it is what broadens and unites compliance constituencies. Section III explains the rights part of the story, how delegation to ICs helps generate rights by allowing rights holders or defenders to ask judges for a legal remedy. Section IV provides a roadmap for the book.

I. The rise of new-style ICs: the courts part of the story

The courts part of the story begins with a fundamental change in international court design, which transforms the political importance associated with delegating authority to international courts. Old style international courts lack compulsory jurisdiction so that cases can only proceed with the consent of the defendant-state. New-style ICs have compulsory jurisdiction, and they allow non-state actors—international commissions, prosecutors, institutional actors, and private litigants— to initiate litigation. New-style ICs reflect the reality that states have tasked ICs with helping to enforce international law, and with reviewing the application of international law by state and international administrative and legislative actors.

The importance of these design features is sometimes overlooked because scholars focus on whether there is delegation to third-party adjudicators rather than the form delegation takes and because the formal power of courts is the same regardless. But this shift from 'old' to 'new' style combines with the broader range of roles states have delegated to ICs to generate a paradigmatic shift from a contract-based to a rule of law conceptualization of the meaning of international law. The inter-state arbiter approach to international adjudication envisions international law as a contract among signatory states where the role of courts is limited to specifying the terms of the contract. Legal agreements in this view mostly affect signatory parties with law being reciprocally binding, generating no obligation to others besides honoring the terms of the contract with respect to other signatory-states. By contrast, a rule of law perspectives assumes that law brings obligations regardless of what other states do and that governments are not above the law.

The political importance of IC's new-style design features

The old paradigm of international law circumscribes international courts to a voluntary inter-state dispute settlement role. Eric Posner and John Yoo build their theory of international adjudication around the dispute settlement role beginning with an observation about the design of international courts. ICs that lack compulsory jurisdiction, they argue, are more dependent on states wanting to use them. This dependence, they argue, leads ICs to work harder to please governments and especially the governments of powerful states, which according to Posner and Yoo makes the courts more effective.¹

¹ Posner and Yoo's goal is to show that judicial independence is not linked to judicial effectiveness. They argues that judicial "[i]ndependence exists when judges have fixed terms and are not appointed by the parties of a dispute; when the judges are not, or are not necessarily, the nationals of a state party to the dispute; when the judges observe regular, predetermined rules of procedure; and when stare decisis and other legal

While much of Posner and Yoo's analysis is controversial,² most agree that ICs with judges appointed to fixed terms and with compulsory jurisdiction are in fact more independent, for the reasons the authors suggest. When ICs lack compulsory jurisdiction, legal disputes reach a court only where the respondent state also prefers a legal resolution. Also, a lack of compulsory jurisdiction leads international judges to work harder to please governments, so as to encourage the bringing of more cases and to build support among governments for signing on to compulsory jurisdiction protocols. This dependence on states limits the ability and the opportunity for ICs to build law or their relationship with broader compliance constituencies. By contrast, when ICs have compulsory jurisdiction, cases will proceed despite the reluctance of the defendant state and ICs will have more opportunities to shift the meaning of the law in ways that the defendant government may dislike but that individuals, groups and other governments may actually prefer.

Access for non-state actors further enhances an IC's independence from governments and it makes litigation more likely. Governments tend to be reluctant to initiate international litigation against other states, concerned that litigation will antagonize other governments and undermine the achievement of other goals. Governments may also worry that raising a legal suit will provoke actors in other countries to scrutinize their own compliance record and to raise a retaliatory legal suit.

Supranational prosecutors and international commissions tend to be more willing to raise cases compared to state litigants, both because they have a mandate to help enforce the law and because unlike state-plaintiffs, they do not have as many cross-cutting relations and objectives that compete for attention and are perhaps a higher priority.³ Also, whereas states will use ICs to promote national interests, supranational prosecutorial actors will also pursue noncompliance cases of concern to individuals and groups but perhaps not other states. But international prosecutorial actors are also subject to political pressure. There are many cases that prosecutors choose not to pursue, preferring instead to rely on political means to address the issue.

Allowing private litigants to initiate litigation further changes international legal dynamics. Private litigants are more numerous, and they often bear the concentrated costs of state non-compliance and errant administrative decision-making. Private litigants may be less easily dissuaded from pursuing a legal suit compared to international prosecutorial actors, and they may pursue cases that promote their own objectives regardless of the preferences of others. When litigants and advocacy groups use litigation as a political

conventions are observed. In addition, jurisdiction must be compulsory, or states will simply deny jurisdiction of a court when they believe they are likely to lose." (Posner and Yoo, 2005: quote at 12).

² The main controversy surrounds Yoo and Posner's conflation of compliance with effectiveness. Dependent ICs may only be invoked when states intend to comply with a ruling, which will increase compliance with IC rulings. But effectiveness is different than compliance. Effectiveness entails inducing a change from the status quo in the desired direction, even if the result is less than full compliance. For a more far reaching critique of Posner and Yoo's analysis, see: (Helfer and Slaughter, 2005). Central features of this argument get repeated in (Goldsmith and Posner, 2005), which has generated even more critique.

³ For more see (Mccall Smith and Tallberg, 2012).

strategy to promote their objectives, ICs are likely to have ready-made compliance constituencies who will work to see the IC ruling implemented.⁴ Thus private access may enhance the likelihood that ICs find domestic interlocutors, leading to a stream of cases that enable IC law-making and generating constituencies that pressure for compliance with international law.⁵

I focus on these design features in part because they allow us to readily see the difference in ICs today. Before the Cold War ended, it perhaps made sense to see ICs as voluntary dispute settlement bodies, and Europe's Court of Justice as a sui generis case of one. But today, new-style ICs are more typical and cases raised by non-state actors generate the lion's share of all international legal rulings.

The power of international judges

The design of ICs has changed, but their formal power has not. My perspective regarding the power of international judges differs from a traditional conception wherein law and adjudication are politically meaningful because they enjoy the backing of the state's coercive power. This Austinian view stands behind the presumption that absent a world state, international law is wholly dependent on state consent and therefore quite limited in its ability to influence state behavior or international relations.⁶ International judges clearly do face political limitations, but the biggest constraint is neither the lack of a world state, nor the lack of strong coercive tools. Indeed it really is not clear that adding either of these features would change the reality that international judges, like all judges, are legally and politically constrained.

International law is different than municipal law. Later I will argue that the key difference is that international law must compete with domestic rule of law conceptions. For now, what interests me is the power of international judges that comes by virtue of their legal mandate. ICs have the power to issue binding rulings in the cases that are raised. Like their domestic counterparts, international judges issue rulings pertaining the authority and legality of government actions even though they have no way to force governments comply with their rulings.⁷ So how do international judges influence governments to respect to the rule of law?

Delegating interpretive authority to ICs is politically significant because it introduces an independent outside actor with the legal authority to say what international law means. ICs become the trustees of the legal agreement and their legal interpretations

⁴ (Harlow and Rawlings, 1992: especially chapter 4).

⁵ (Helfer and Slaughter, 1997; Keohane, et al., 2000: 482; Stone Sweet, 1999: 314-18).

⁶ John Austin argued that law reflects the commands of a sovereign and has influence because it is backed by that sovereign's coercive power (Austin, 1832). The Austinian perspective still holds sway in international relations, although it has been much critiqued by jurists and philosophers. For an excellent discussion of Austin's approach alongside other perspectives, see: (O'Connell, 2008: 19-55).

⁷ Goldsmith and Levinson consider the similarities between ICs and domestic courts in their public law roles. See: (Goldsmith and Levinson, 2009).

are presumed to be more independent and disinterested compared to self-serving arguments put forward by litigating states. To understand this claim, we must think about what exists when there is no delegation to ICs. Where there are no authoritative international adjudicators, each party can proffer their own interpretation to support their cause. Although domestic judges may be called upon to interpret international rules, national judges often defer to governments because the executive branch enjoys foreign affairs power, because governments have more insight into what an international agreement was supposed to mean, and because diplomats often have a better sense how different legal interpretations might impact foreign relations. But delegation to ICs creates a legal actor that resides outside of the control of litigating states with the authority to say what international law means, to apply the law to concrete cases and thus to indicate what compliance with international law entails. Delegating interpretive authority to ICs does not supplant the role of domestic actors, and in most cases ICs will be working with domestic supporters of the rule of law. But it does remove from governments and domestic judges the monopoly power to define what international law requires at home.

Being a trustee does not mean that international judges are entirely neutral or fully independent actors. The term comes from the common law concept of a trust where the trust's creators specify the terms of the agreement and transfer oversight to a third party 'trustee,' who implements the agreement on behalf of the trust's beneficiaries.⁸ The creator of the trust writes the trust agreement and selects the trustee to supervise the agreement, and in this respect, trustees are the agents of those who created the trust. The key conceptual point is that judges exercise their power on behalf of the trust's beneficiaries. A single state cannot change the trust agreement (international law) nor can they remove an international judge from office. This is why simply creating an IC involves a sovereignty risk. Governments can appoint a political ally to an IC, and they can choose to disregard an IC ruling. But there will remain a concrete risk that international judicial rulings will shift the meaning of law in ways that are unexpected and politically irreversible, putting governments on the defensive. This risk is not just hypothetical. Constitutional review involves nullifying laws passed by legislative bodies, while administrative review involves rejecting decisions made by public actors. Thus, if judicial actors play their intended roles, judges will at times disagree with, rule against, or render interpretations that run counter to what the makers and the enforcers of the law might have wanted.

In chapter four I take up the question of why states became increasingly willing to submit to international judicial oversight, and chapter on each role further considers why states might delegate a specific jurisdictional role to specific international courts. These arguments help make sense of the trends this book documents, but for me the reasons are secondary. What matters is that states *have* consented to IC authority, binding ever-

⁸ I have developed this idea further in: (Alter, 2008). Chapter two qualifies this earlier work, arguing that the interests of states and ICs align when ICs are binding others to follow the law, and that ICs are most like trustees in self-binding judicial roles.

changing governments to international judicial oversight of their adherence to international legal agreements and also empowering ICs to review the creation and application of law by international and national legislative and administrative actors. Once ICs exist, they become opportunity structures that litigants can activate to promote greater respect for international law. International judges may not be able to call upon centralized tools of coercion to enforce their rulings, but they can often call upon legal and political actors around the world to pressure governments to respect international law as defined by IC rulings.

Four judicial roles: dispute settlement, administrative review, enforcement and constitutional review

I assess the influence of ICs in action by looking at four different roles international courts play in the international political system: dispute settlement, administrative review, enforcement, and constitutional review. Old-style ICs were primarily inter-state dispute settlement bodies with jurisdiction to adjudicate disputes and access rules that allowed only states to initiate binding litigation. New-style ICs have more extensive mandates that can include jurisdiction to rule on state compliance with international law and jurisdiction to review the legal validity of state and international legislation and administrative acts. Chapter two explains how dispute settlement and administrative review tend to be other-binding judicial roles that extend the central state's power, while enforcement and constitutional review tend to be self-binding judicial roles that check the state's exercise of power. Although each role can have both self and other-binding dimensions, quite often delegation to ICs remains other binding, which is to say a tool powerful state actors use to bind others to follow the law. This reality helps us understand why states so readily extended compulsory jurisdiction and access to non-state actors and why most dispute settlement and administrative review IC rulings are not politically controversial. In short, states and ICs share the objectives of seeing the legal agreements implemented and the law respected.

The book has four chapters that correspond to these different roles. My coding of IC legal instruments reveals that governments made decisions to delegate certain roles to certain courts. These decisions are reflected in the initial grant of jurisdiction, and in variation in access rules and remedies that states associate with different IC roles. I begin each empirical chapter by charting the universe of permanent ICs delegated a specific role, and in doing so I document a baseline of state consent while implicitly arguing that it makes the most sense to compare ICs within a given role, rather than to mix, match and compare ICs playing fundamentally different roles. I document design variation within the role and include a number of case studies, using the case studies to identify how ICs are influencing international relations and state behavior in the particular role. The case studies also allow me to relax the categories somewhat, to consider international adjudication by non-permanent courts, the influence of ICs in assumed rather than explicitly delegated

roles, and to explore cases that combine roles. The rest of this section summarizes the four roles and reports broad trends revealed by the coding of IC legal instruments.

Before proceeding, it is worth mentioning that these role categories are somewhat controversial. The idea that judicial roles can be separated by function—dispute settlement, administrative review, enforcement and constitutional review—tends to be more recognizable and accepted by lawyers educated in the civil law tradition where branches of the judiciary are often divided by role. Lawyers most familiar with common law legal systems, by contrast, tend to see the judicial roles as overlapping, and they are more likely to expect that judges will fluidly migrate across roles. ICs are a melding of civil and common law traditions.⁹ Since ICs are expensive to create and maintain, states often follow the common law tradition of giving multiple roles to single international legal institution. Also, ICs tend to use the common law practice of citing precedent. But the legal instruments specifying IC jurisdiction intentionally vary IC design for different types of legal jurisdiction, extending access for certain roles *so that* ICs can perform additional legal functions. And, my sense is that consistent with the civil law tradition, ICs are likely to stay within a given role. This is especially so because the authority of ICs is often contested by national judges who expect ICs to stick to their designated jurisdictional mandate.

What matters for me is that delegating specific roles to ICs tends to create a self-fulfilling prophecy. I do not expect that delegating an IC a given role means that the court actually plays this role in practice. ICs influence law and politics when potential litigants invoke them. But the jurisdictional mandates define where ICs are more likely to be invoked, where ICs are more likely to rule against state defendants, and where international judges are more likely to be defended and politically protected because they are doing exactly what they were tasked to do. In any event, I am less concerned with creating hermetic distinctions than I am in understanding how and when ICs make contributions in the four roles.

Dispute settlement

In their dispute settlement role ICs adjudicate legal disagreements between contracting parties, helping the two sides resolve disagreements that turn on definitions of law. Most international treaties include provisions requiring the peaceful settlement of disputes, and many agreements designate ICs as the final legal venue for the settlement of disputes related to the treaty. Perhaps for this reason dispute settlement remains the role

⁹ Civil law systems (especially those that copy the French and German models) have separate private law dispute settlement, criminal enforcement, and public law administrative courts. When civil law systems added constitutional courts, they created separate institutions so as to underscore that ordinary courts still lacked judicial review authority. Common law countries, by contrast, tend to have unified legal systems where a single court may hear cases across categories, where lawyers might raise constitutional questions in the context of any type of dispute, and where judges regularly conduct judicial review and engage in lawmaking. The two traditions are increasingly merging (see Merryman and Pérez-Perdomo, 2007: 86-90).

scholars most commonly associate with international courts, even though it is not the role most often delegated to ICs, nor the function ICs most often perform. The majority of ICs (17 of 24) have dispute settlement jurisdiction. States do not have to use ICs to resolve disputes; the only legal obligation is that the dispute be resolved peacefully. Litigating parties can settle out of court or mutually agree to any venue for dispute resolution, including legalized and non-legalized dispute settlement (e.g. arbitration, mediation, good offices). The upshot is that IC's dispute settlement jurisdiction is usually general, abstract, neither exclusive nor mandatory, and often never invoked.

It is nonetheless helpful to consider ICs involved in dispute settlement, since sometimes ICs *do* help contracting parties resolve disagreements. Chapter five identifies the seventeen ICs with the formal jurisdiction to adjudicate disputes pertaining to a broad range of issues. Fourteen of these ICs have jurisdiction to adjudicate disputes between state parties; thirteen have jurisdiction regarding disputes involving nonstate actors (international institutional actors or private litigants). Quite often the dispute settlement role primarily binds others to follow the terms of the legal agreement, and quite often the IC has also been delegated other roles. Indeed all but three of the ICs with a formal dispute settlement jurisdiction also have been delegated either enforcement, administrative or constitutional review roles. These facts may help explain why more often than not IC's have compulsory jurisdiction for their dispute settlement role. After all, if ICs are primarily binding others to follow the terms of legal agreements, and if ICs also have compulsory jurisdiction for their enforcement role, why not extend compulsory jurisdiction to the dispute settlement role?

The goal of judging in this judicial role is to apply the law, but also to facilitate the settlement of disputes in the shadow of the law. IC's key compliance partners in this role are the litigants themselves. ICs specify what the law requires, issuing a ruling that more often than not is a legal compromise designed to facilitate voluntary compliance. The legal solution is embraced because the parties brought the issue to the IC so that they could have a legal solution, the parties prefer legal certainty and want to move on, and perhaps because it is convenient for governments to blame the IC for disappointing domestic actors.

Case studies in chapter 5 examine how the ICJ helped resolve a territorial disagreement between Qatar and Bahrain; how the International Tribunal of the Law of the Seas could help resolve disputes involving Russian authorities seizing Japanese vessels despite the fact that the two countries still contest the underlying boundaries where the vessels were fishing; and how the US-Iran Claims Tribunal and the Organization for the Harmonization of Business Law in Africa are able to resolve complex legal disagreements involving public and private litigants.

Administrative review

In their administrative review role, ICs review the legal validity of contested administrative decisions creating a legal remedy for the subjects of those decisions. Depending on the standard of review, the judge will be checking to make sure that the administrator was faithful to the law, followed prescribed procedures, had legally defensible reasons for the decision, and that the decision was not discriminatory. Chapter six identifies thirteen ICs with administrative review jurisdiction, and explains how delegation of administrative review authority is associated with systems where international and/or domestic administrative actors apply international regulatory rules. Whereas international dispute settlement involves a broad range of issues, administrative review tends to be concerned with economic aspects of international agreements. Eleven ICs have jurisdiction to review administrative acts of supranational administrators; eight have jurisdiction to review national implementation of international administrative rules.

All ICs with designated administrative review roles have compulsory jurisdiction associated with this role, and allow private actors to initiate litigation so that the subjects of administrative decision-making can pursue a legal remedy. Twelve ICs also allow national judges to refer to the IC cases where community rules are at issue. IC's key compliance partners in this role are administrators themselves who seek help in interpreting legal lacunae and in coordinating interpretation across actors and borders, and who deflect criticism and benefit from judicial validation of their rulings via administrative review.

Governments delegate administrative review to ICs because such review primarily binds others, providing a fire-alarm system of oversight for administrative actors who themselves rely on delegated authority.¹⁰ Governments learn about errant administrative decisions, which they can then repudiate, and judges can help administrators to resolve thorny interpretive questions. Where governments do not like how their regulatory rules are being interpreted, they can issue a clarifying declaration (as occurred in the Belmont and Metalclad cases discussed in Chapter 6), or change the regulation. When ICs review international administrative decisions, they provide a legal redress that would otherwise not be available through domestic legal systems. When ICs review state administrative acts, they serve as a back up to domestic procedures, helping to generate a uniform interpretation of supranational administrative rules and providing an international redress that can be assuring to foreign litigants. Compared to domestic administrative review, international administrative review is more likely to leave fact finding to administrators so that in practice international administrative review provides a legal redress that fails as often if not more than it succeeds, thereby helping domestic and international administrators defend their actions against firm claims of illegalities. Where international

¹⁰ On administrative review as oversight for administrative actors see: (McCubbins, et al., 1989). The general idea is that fire departments wait for a private actor to trigger a fire alarm before deploying fire trucks. By contrast, policemen are out of the streets monitoring citizens so as to discourage crime. Fire alarm oversight systems are especially attractive for international institutions with limited central resources, and where there is an effort to respect the autonomy of national regulators (see Kelemen, 2011; Raustiala, 2004).

adjudicatory bodies do scrutinize fact finding, administrative review is more likely to be contested by local administrators and to turn into a de facto enforcement role.

Case studies in chapter six include the European Commission's regulation of Microsoft and GE/Honeywell's decision to merge; the Andean Belmont litigation, which involved multiple countries disagreeing about which firm owned rights to the Belmont trademark; the 'Softwood Lumber case study' involving bi-national panels under the North American Free Trade Area (NAFTA) and the WTO's dispute settlement system; the International Centre for the Settlement of Investment Disputes (ICSID) dealing with Mexican decisions affecting the American firm Metalclad. Other chapters also include cases that involve administrative issues. The second-use patent case in chapter seven involves a supranational commission challenging an illegal national regulation of an administrative nature. The Kadi case in chapter eight involves a private litigant raising a constitutional challenge to a supranational regulation.

Enforcement

ICs in their enforcement role assess state compliance with an international agreement, naming violations of the law and thereby increasing the costs of noncompliance. Nineteen ICs have enforcement jurisdiction, meaning jurisdiction to adjudicate state compliance with international legal rules. IC enforcement cases nearly always involve state defendants (or individuals acting in a public/leadership capacity), and nearly all ICs with explicitly delegated enforcement roles (17/19) have compulsory jurisdiction associated with this role. Fourteen of these systems allow states to initiate non-compliance suits; thirteen allow supranational commissions and eleven private litigants to initiate a review of state compliance with international law. Today one finds international courts with compulsory enforcement jurisdiction in the substantive areas where ICs operate; economic agreements, human rights treaties, and international criminal law. ICs primarily name a state practice as legal or illegal, and secondarily authorize remedies designed to compensate victims and create costs associated with illegal behavior. The types of remedies ICs are able to specify varies by court, and IC's compliance partners vary by issue area and case depending on what compliance with the law actually entails, which in turn determines which actors have the power to choose compliance.

Chapter seven presents four case studies covering all of the substantive domains international courts operate. The case studies shows WTO litigation pressuring the United States Congress to change a tax policy that promotes US exports; the Andean Tribunal facilitating a retreat on the issuing of 'second use patents,'; the Community Court of the Economic Community for West African States (ECOWAS) court leading Niger to compensate Hadijatou Mani for enslavement in the customary family law system and the indictment and arrest of Charles Taylor, a sitting head of state, for crimes committed in a neighboring country. Chapter eight includes four additional case studies of IC reviewing state practices (previewed in my discussion of the constitutional review role). In all of

these case studies, the ability of ICs to offer a remedy mobilized litigants, and IC's rulings constructed focal remedies that compliance supporters could demand. IC rulings also provided legal, symbolic and political resources that those actors who preferred law compliance could use as levers for their cause. Political mobilization, and the legal, symbolic and political resources supplied to compliance partners generated costs for violating international law.

Constitutional review

In their constitutional review role, ICs hold international and state actors accountable to constitutional procedural and rule of law expectations, invalidating legislative acts that conflict with higher order legal requirements. Constitutional review is perhaps the most controversial IC role in that it involves ICs confronting highly legitimated actors and rejecting policies that may have been legally enacted.¹¹ Ten ICs have this self-binding jurisdiction to assess the legal validity of public acts, with the remedy being the nullification of illegal acts. Nine of these ICs have jurisdiction to review the validity of supranational laws and acts; four have jurisdiction to review the validity of national acts.

Whereas ICs' enforcement role creates costs associated with state noncompliance, ICs constitutional review in theory nullifies and vacates illegal acts.¹² The discussion of constitutional review authority in action explores how local cultures of constitutional obedience condition whether IC constitutional rulings are seen as rendering unconstitutional acts null and void. If governments or judges see IC rulings as authoritative, and the applicable international law as legally supreme, then ICs may be able to foster a culture of constitutional obedience to international law where acts condemned by ICs are seen as *ipso facto* invalid. Like their domestic counterparts, ICs cannot really force governments to comply with their ruling. Where national cultures of international law adherence emerge, however, national legislators and judges will usually voluntarily vacate policies that run afoul of higher order international laws.

I suggest that building a culture of constitutional obedience to international law may be easier with respect to the review of international acts, because the political legitimacy of international legislative acts is already considered suspect. Chapter eight includes two case studies of ICs invalidating contested supranational legislation.

The chapter then examines four cases where ICs are arguably engaged in constitutional review of domestic acts. These cases are even more difficult in that domestic actors need to see international law as supreme to national law. In the 'women in combat support roles' and 'indigenous land rights' cases, IC rulings were widely seen as requiring governments to create a positive remedy for the constitutional breach and this

¹¹ For more on the debate about constitutional review by international courts, see (Dunoff and Tractman, 2009).

¹² (Stone Sweet, 2000: 21).

remedy was not required by domestic law. These cases studies are contrasted with the ‘alcohol related practices’ case study where the ATJ condemned Colombia’s alcohol policies but the Colombian Supreme Court hindered the supreme application of Andean community rules. I also contrast the positive obligation to make land rights meaningful the ‘indigenous land rights case’ to the politically easier requirement of a compensatory award in the ‘modern day slavery’ case study discussed in Chapter 4. Finally, the chapter discusses the ‘rape as a war crime’ case study where the International Criminal Tribunal for Rwanda (ICTR) constructed a new definition of criminal responsibility with constitutional import.

The four judicial roles together

I am interested in the multiple roles ICs play because they allows us to appreciate the many different contributions ICs make to international politics. ICs engage in inter-state dispute settlement, and they adjudicate state compliance with international agreements. But this is not all they do. Wherever there are common regulatory rules that are to be applied transnationally, policy-makers worry about rules being interpreted and applied differentially across borders. Wherever there are supranational administrators making binding decisions, lawyers and policy-makers worry about how to monitor the international actors to ensure basic competence and as a check against institutional capture. International systems of administrative review are designed to address these concerns. National legislatures and states in federal systems worry that their sovereign rights may be usurped when the executive operates through international institutions. Human rights advocates and national judges worry about unchecked international authority. International constitutional review helps to address these concerns. Even the dispute settlement role is broader than inter-state dispute settlement, and it does more than resolve legal ambiguities; it transfers private litigant complaints about broken promises to a venue where disinterested actors can investigate the charges and hopefully create some legal finality that helps stakeholders move on.

My larger argument is that state-IC politics varies by judicial role. Some judicial roles- in particular the dispute settlement and administrative review roles- are primarily other-binding roles, where the power of central governments is more likely to be reinforced than it is to be undermined. Other judicial roles-particularly the enforcement and constitutional review role-self-bind governmental and legislative actors and by design they check the exercise of sovereign power. Also, the ICs key interlocutors-those who help give IC rulings a political effect- vary by role. In the dispute settlement role, IC’s key interlocutors tend to be the litigants who chose to embrace the IC ruling and end their disagreement. In the administrative review role, IC’s key interlocutors tend to be administrators who assent to interpret and apply regulatory rules in the ways defined by the IC. In the constitutional review role, IC’s key interlocutors are national supreme court judges whose support for the notion that international law imposes higher order legal

obligations makes it harder for governments to simultaneously violate international rules and maintain their claim to be rule-of-law actors. For the enforcement role, ICs compliance partners will vary because what compliance with the law entails will vary, and ICs may need to draw on the support of broader compliance constituencies who leverage IC rulings to pressure for political change.

New style ICs and the new terrain of international law

In certain respects, basic elements of ICs have not changed. ICs are still created by states; governments still appoint international judges; ICs still have the same formal power to render binding rulings in the cases that are adjudicated. But expectations have changed. Under the contract-based approach, when one side breaks a contract, the other side is released from their legal obligations under the contract. This contractual approach still operates to some extent in the ICJ and for some economic systems, but the shift to new-style ICs reflects a changed notion of legal obligation.¹³ For human rights, mass atrocities law, and much international economic law, we don't expect one country's violation to dissolve the obligation of other states. We will see in the book's many case studies that the practice of many ICs today reflects this shift towards rule of law expectations of compliance with the rules regardless of what other states might be doing.

Politically speaking the new style design of ICs is important because compulsory jurisdiction and access for non-state actors makes it harder for governments to block inconvenient cases. Because the content of international law has expanded and the opportunities to legally challenge state practices increased, international courts are adjudicating legal issues that used to fall within the exclusive prerogative of states.

This change in IC design combines with the embedding of international law into domestic legal orders to bring with it a loss in government control over both the litigation process and of legal understandings. But it is also true that the reach and scope of international law into the domestic realm varies. The starting point for ICs remains state consent. Governments must craft international agreements, incorporate international law into national systems, and create international legal mechanisms that are actually useful for those actors that want to see law respected. Litigants must be able to invoke ICs, and ICs must be able to connect with compliance supporters in order for delegation to ICs to increase the shadow of international law in domestic and international politics. Chapter three identifies significant variation in where states have consented to compulsory international judicial oversight. The reach of ICs and international law varies, but where there is international law that litigants can invoke in court, the circle of actors involved in defining what international law means, and what it means for governments to be rule of

¹³ Article 36 (3) of the ICJ's statute recognizes that some legal obligations depend on reciprocity, but it also allows that countries can create agreements that do not depend on reciprocity. Chapter 7 identifies which economic enforcement systems use tit-for-tat retaliation as a remedy for noncompliance.

law actors expands. This expansion brings with it a shift in international relations, away from state control in both the domestic and international realms.

II. Altering politics: the politics part of the story

The larger question of this book is when and how does delegation to ICs influence international and domestic politics. Although an IC's influence varies by judicial role, I have one general argument about how ICs influence political outcomes. The existence of an international legal remedy empowers those actors who have international law on their side, increasing their out-of-court political leverage. ICs then directly influence political outcomes by giving symbolic, legal and political resources to compliance constituencies, ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law. The general dynamic is present across roles and cases, but variations in the law, what compliance entails and the mobilization, political power and leverage of compliance supporters creates important variation in when delegation to ICs ends up altering domestic and international outcomes.

This argument is challenging for those who expect ICs to be beholden to the interests and preferences of governments. International relations scholarship generally conceives of international courts as a cipher of state interests. This is partly true, although not in the way that many international relations scholars posit. Scholars who expect ICs to be guided by the preferences of litigating governments generally build their theories from the insight that ICs have no way to compel compliance with their rulings. They then make the following corollary. If ICs can neither compel compliance nor themselves enact strong sanctions for violating the law, the only choice left to an international judge who wants to be useful and relevant is to make rulings that appeal to a litigating state's national interest. Thus all ICs can really do is serve as coordination devices for states.¹⁴

No one disputes that ICs can be inter-state arbiters, helping governments identify areas of common interests. The real question is whether ICs are only able to serve as coordination devices. Conservative and law and economics scholars make this leap.¹⁵ But the corollary—a lack of coercive power limits ICs to the role of ascertaining median preferences of the litigating governments—has within it a flawed logic.

All courts lack coercive power; it is states not judges that have the monopoly on the legitimate use of force. Nor is the main constraint of ICs their lack of overt sanctioning tools. Indeed ICs are no different than domestic constitutional courts in facing these constraints. Rather ICs, like their domestic constitutional counterparts, must create indirect costs for political actors inclined to ignore them.

¹⁴ (Garrett and Weingast, 1993; Goldsmith and Posner, 2005; Posner and Yoo, 2005). For more, see the discussion of the inter-state arbiter model in chapter two.

¹⁵ For more, see the discussion of the inter-state arbiter model in chapter two.

The problem for ICs is that governments can choose not to comply, defending noncompliance as consistent with the domestic rule of law.¹⁶ Moreover, domestic populations may actually prefer noncompliance with international agreements. But where domestic actors are unhappy about government violations of international agreements, and even where populations are mostly indifferent, ICs can work with domestic and transnational interlocutors to either orchestrate compliance or construct counter pressures that tip the political balance in favor of policies that better cohere with international legal obligations.

ICs help change state policy by using their institutional position to aid actors inside and outside of states that share the objectives inscribed into the law. Chapter two distinguishes between compliance partners and compliance constituencies. *Compliance partners* are actors that have the power to on their own generate compliance with an IC ruling. In other words, compliance partners can embrace an IC ruling and thereby create compliance without any decision, mobilization or action by governments or legislatures. For the dispute settlement role, the litigating parties are the IC's compliance partners. In the administrative review role, administrators are IC's compliance partners. In the constitutional review role national supreme court judges are compliance partners. *Compliance constituencies* are broader coalitions of actors whose tacit or mobilized support is needed to protect compliance partners from political retaliation or to induce reluctant governmental actors to embrace an IC ruling.

The path to mobilize these compliance partners and constituencies can take a few different routes. The existence of these alternative routes means that ICs do not need to pander to the interests of governments in power. Perhaps the easiest route politically is for ICs to co-opt the support of compliance partners, since they already have the power to choose compliance. ICs can co-opt governments, providing legal rulings that governments can use to deflect blame and overrule the arguments of domestic opponents. ICs can also circumvent governments. If ICs induce administrative agencies and national judges to reinterpret existing domestic laws, ICs can produce policy changes regardless or even despite the preferences of ruling governments. Using reinterpretation as a mode of political change is relatively easier because it does not require mobilizing governments or legislatures to act. Domestic compliance partners can be fairly easily co-opted where they believe that ambiguity in the rules themselves, unintended errors, incompetence, indifference, or corruption has generated noncompliance, or where they think that the government is pursuing an agenda that itself runs counter to domestic legal and constitutional requirements.

Where compliance partners are either unwilling or unable to deliver full compliance with an IC ruling, ICs must instead rely on others to exert political pressure on those actors

¹⁶ Not all constitutions grant supremacy to international law, so that conflicts between international and domestic laws are not necessarily resolved in favor of international law. Even where international law is seen as formally supreme, domestic courts adjudicate the internal effects of international law.

who do have the power to choose compliance. ICs can appeal to actors in other states, invoking multilateral politics as a tool to influence a recalcitrant government. For example, the World Trade Organization (WTO) allows other states to retaliate for violations of WTO rules by raising tariffs against politically sensitive industries and regions. The “Foreign Sales Corporation case” discussed in chapter seven shows how the legally authorized retaliation of the European Union shifted US firm preferences, so that firms now wanted the US Congress to eliminate a special tax break for exporters. The “Charles Taylor” case shows governments and advocates invoking the Special Court of Sierra Leone’s indictment of Charles Taylor to justify creating sanctions and repealing Taylor’s grant of asylum in Nigeria. The key point is that sanctions occur as a consequence of IC involvement. In other words, in the new terrain of international law non-state actors can initiate international litigation, provoke an IC condemnation and then harness multilateral and inter-state politics to support their objectives.

ICs can also try to inspire the “spiral strategy” where national and transnational activists use an international legal ruling as evidence that political leaders are deviating from their promises of respecting the rule of law, or from adhering to the goals and standards inscribed into national and international law.¹⁷ In this transnational politics strategy, ICs work with grassroots organizations to influence government policy. For example, the “indigenous land rights case,” discussed in chapter eight shows how supporters of indigenous rights used the Inter-American judicial system to pressure Nicaragua’s government to adopt new policies demarcating the land ownership of indigenous peoples.

IC’s institutional position allows them to contribute meaningful leverage to compliance supporters, which is why raising cases in front of an IC can be attractive. IC rulings provide legal justifications for actors within states –the police, governments, national administrators, and national judges—who might otherwise be reluctant to push back against the preferences of a powerful domestic actor. The presumed authority of IC rulings also provides compliance advocates with a tool to delegitimize the interpretations of the law that opponents are using to defend the validity of their actions. IC rulings can mobilize lawyers, law professors, and public interest law groups to find similar cases and to use domestic legal channels to increase the political pressure. IC rulings can also mobilize actors who benefit from the international legal system overall. For example, business groups might support certain interpretations of WTO law because they see compliance as furthering their international economic interests. Even if these groups do not mobilize, their tacit support provides cover for actors who are facing counter-pressures. The public nature of IC rebukes also creates potential costs. Flaunting an IC ruling can make it harder for a government to pressure other states to follow rules of the international regime. For example, if the US violates the consular affair rights of foreigners within its prison system, American citizens arrested abroad may find that their legal pleas carry less

¹⁷ (Risse, et al., 1999; Thomas, 2001).

weight. And for this reason the State Department may become an advocate of following international law. In these ways ICs are able to knit together broader coalitions of political support to push in the direction of law compliance. IC involvement can also lead to changes that span borders. The indigenous land rights ruling led to legal claims in other Latin American countries. Erik Voeten and Laurence Helfer further show how European Court of Human Rights jurisprudence regarding the rights of gay, lesbian and transsexual individuals and their partners contributed to broader change in practices across members of the Council of Europe.¹⁸

The ability of ICs to alter internal and external politics means that simply creating an international court is a politically significant act. What delegation to ICs does most often is entrench politics across time. States delegate authority to an IC so as to ensure that subsequent governments do not walk away from the set of policies inscribed in the law. Thus quite often ICs help tip the balance in the direction that the law's authors inscribed into the DNA of the law. ICs enforcing international economic rules will tend to promote market openness. ICs enforcing human rights rules will tend to promote a human rights agenda. International war crimes tribunals will tend to condemn state practices that harm noncombatants. This means that to the extent that international agreements codify the goals and objectives associated with economic liberalism, or liberal democracy, ICs will more likely than not be contributing forces for these goals. The role of ICs in reinforcing the current order may not be visible because states may avoid violations that are likely to be challenged, or governments may settle out of court, granting concessions but perhaps not complying in full. But delegating authority to ICs will nonetheless have the effect of increasing the negotiating leverage of the party that favors what the law requires.

The argument itself implies no specific trajectory for how law gets interpreted. The argument does, however, mean that ICs actually contribute to constituting understandings of international law, and thereby the preferences of actors that care about the legality of their behavior. The role of ICs in constructing interests is easier to observe when ICs are seized and when their rulings lead to changes in domestic policy, but ICs' very presence can discourage actions that would expose legal vulnerabilities and thereby hinder change that may otherwise have occurred. In either case, in order to reconstitute politics ICs must have domestic and international level interlocutors that support their interpretations of the law.

This argument takes legal obligation and the autonomy of law seriously and suggests that international judges are equal parts legal and political actors. The legal part of the analysis is the claim that international judging is deeply shaped by the jurisdiction delegated to ICs, which defines the judicial roles ICs may be asked to play and are likely to embrace, and by the 'legal facts' by which I mean what a plain reading of what the law requires. The political part—captured by the altered politics framework—focuses on how variation in what compliance entails and variation in the mobilization and political power

¹⁸ (Helfer and Voeten, 2012).

of judge's compliance constituents influences litigant strategies, IC decision-making, and whether state behavior changes.

The altered politics argument suggests that the greatest limitation on ICs is not the lack of a world government but rather the reality that where ICs lack domestic support constituencies, governments can defend noncompliance with international rules as consistent with the domestic rule of law. But where there are governmental and nongovernmental actors who *do* prefer to follow international law, ICs can help construct coalitions of counter pressures that tip the political balance in favour of policies that better cohere with international legal obligations.

This analysis suggests that ICs become politically weak not because government oppose them—indeed opposition to existing government policies is probably the reason why ICs are invoked in the first place. Rather, ICs become politically weak when legal and policy defenders will not organize to demand that governments adhere to the particular legal covenants or to the particular interpretations of the law the IC is promoting.

Explaining variation in IC influence: a brief theory and methods discussion

Overall this book is a theory generating exercise with the goal of theorizing ICs varied influence in domestic and international politics. My claim is not that IC design necessarily translates to IC effectiveness. On the contrary, I argue that by comparing like institutions operating in different contexts, we can gain insight into when and how ICs become politically effective, meaning able to engender greater respect for the law.

My method of investigation is inductive. I start by understanding the world as it exists, with twenty-four ICs that states have been differentially empowered to adjudicate a variety of types of legal cases. A key question for me is how the existence of the IC affects political strategies both inside and outside of court, and whether invoking international law contributes to changing government behavior in the direction of greater respect for the law. Since this is my question, I need to explore the political dynamics that lead cases to get to court, ICs to be willing to challenge powerful political actors, and governments to change their behavior. Case studies are the best way to do this. The chapter case studies combine to elucidate variation within a given judicial role. I looked for cases that represent a variety of legal and structural situations, varying the actors that initiate litigation, what compliance entails, and the pathways towards compliance. I generally pick hard cases, situations where important interests are at stake, where the policies leading to law violations are politically entrenched, and where law operates in places and ways that are counter to the expectations of international relations scholars and domestically focused lawyers. Since we would expect IC influence to be less in these cases, a focus on hard cases is a good qualitative tool to 'test' how meaningful IC influence actually is. The case study method allows me to compare single institutions across time, and I explore political dead ends alongside success stories so as to elucidate how invoking ICs does and does not influence state behavior across cases.

If I were testing as opposed to inductively building theory, I would carefully select case studies to fit theoretical arguments. Instead, I put side-by-side a variety of ICs and other international legal bodies as they adjudicate disputes that occur in diverse contexts and that involve economic issues, human rights, mass atrocities and other issues so as to underscore the similar altered-politics dynamics at play. My selection bias is that I focus on cases that are litigated and where the defendant government lost because it is easier to see the influence of ICs in such cases. The qualitative method of investigation also allows me to examine how change occurs over time, to move beyond binary views of law compliance, to evaluate varying causal factors influencing state behavior, and to better see the broader (e.g. non case specific) influence of ICs on international and domestic politics.

The case studies relax the focus on permanent international courts and state consent that dominate in Part I of the book, so as to show how these are not essential criteria for domestic and international politics to become judicialized. Although there are *many* European cases one could examine, only three of the eighteen case-studies in this book focus on European legal institutions because I want to show that the new terrain of international law exists beyond Europe. Because I prefer less likely cases, I focus on human rights courts from Latin America and Africa, and cases where ICs with economic subject matter jurisdiction end up speaking to human rights issues, rather than a case-study involving the European Court of Human Rights.

Throughout the book I generate hypotheses that one could systematically test. Chapter two develops a process-based approach to studying the influence of ICs across issues and cases where I break down the stages of the litigation process. Each time frame is a threshold where different actors play a decisive role. In Time 1—bargaining in the shadow of the court— the key decision-makers are potential litigants, legal factors shape the credibility of the legal threat, and the political reality of what compliance with the law requires shapes bargaining politics. In Time 2—litigation politics— the key decision-makers are international prosecutorial actors and judges, legal factors and compliance concerns shape IC decision-making, and rhetorical politics dominate. In Time 3—leverage politics— the willingness of compliance constituencies to remain mobilized, and to leverage rulings into costs for noncompliant governments shapes politics and outcomes. I explain how variation in each of these steps of the litigation process and interactive effects across steps can lead to variation in the influence of ICs. Role based chapters further hypothesize about sources for IC's varied activation and influence in a given role.

Rather than constructing stylized cases to fit theories, my case studies are brief compelling accounts that acknowledge the complexity of the issues at stake. By revealing the contemporary international judiciary, and comparing disparate cases with their inherent complexity, I implicitly suggest the way to understand the growing and varied influence of ICs today and to test theories is through comparative analysis—comparing ICs, comparing issues, comparing pathways towards greater respect for the law. I hope that presenting a broader array of courts and cases will push others to move beyond the 'usual suspects,' as

there are important issues we can explore by looking at how international law works in varied contexts.

III. Making legal rights meaningful: the rights part of the story

This book explains how legal norms and politics are imposing rule of law expectations on international deal making and bringing international law into domestic politics. Rule of law politics are often closely related to rights politics. A key legal notion is that rights can only meaningfully exist when there are remedies. International law has long lacked remedies, and in truth there may be no remedy for certain international law violations. War that is illegally instigated, human rights violations that affect hundreds and thousands of individuals, and even the death or rape of a single person can never be rectified. It is also questionable whether restorative remedies should be a goal for international politics. Focusing on restitution tends to keep people focused on the past, and it may be less practicable and useful than stopping new violations from occurring or simply helping parties move on.

Delegation to ICs is part of a forward looking project of building respect for international law. To create an IC is to introduce the possibility of a legal remedy. Not only does the existence of this remedy instantiate the legal right, making it meaningful, the prospect of the remedy also mobilizes stakeholders to claim their rights. Formally speaking, the IC's contribution is to offer a legal interpretation that validates the existence of the legal right, to put a scarlet letter on a violation, and perhaps to specify what compliance with the law and respect for the right requires. The modern day slavery, softwood lumber, and Metalclad case studies lead to compensation for harms generated by illegal acts. The indigenous land rights, women in combat support roles, Belmont, seizing private assets (*Kadi*) and rape as a war crime case studies lead to the creation of obligations and rights that extend into the future.

Politically speaking, the IC's contribution is to become a catalyst for rights-holders to assert their rights and governments to recognize these rights. Litigants claim their rights, and this claiming instigates bargaining in the shadow of the law. Rights holders may well settle for far less than the full realization of their right, and the settlement may reflect power more than law. But in offering to settle, or in letting the case proceed to litigation, the existence of the right gets recognized. Rights claimers of the future can draw inspiration, future litigants can invoke legal precedent, expectations can shift, and in the next iteration litigants, advocates and judges can ask for more.

My approach to rights creation is dynamic, showing how the common international relations baseline—that governments pursue their own and the nation's interests—shifts over time. International treaties and secondary legislation get created at one point, for specific reasons. Governments might ratify an international treaty without considering what compliance involves, or political leaders might think that they will control how international law is applied by writing protections for cherished national policies into

international treaties and secondary legislation. Delegation to ICs may come at the same time the law is made, or much later. And states may begin by significantly limiting access to the IC, by making the IC ruling purely declaratory, and by filling ICs with their allies. Over time, however, governments and politics change. New leaders emerge, and they may want to signal their new politics by strengthening the existing international legal systems or by complying with a ruling a previous government flaunted. A new government's embrace of democratic values or the growing power of judges in general may itself spur litigants, and ICs may find they have new constituencies of support to draw on. ICs may then interpret existing laws in unexpected ways. Delegation to ICs in this way becomes a slow time-release mechanism that promotes political change in the direction indicated by the law. International judicial review can itself be a mode of institutional change, of changing understandings of law, of circumventing national legal and political barriers, and of incrementally shifting expectations about what compliance with the law entails.

The book's case studies allow us to see ICs varied contribution to generating rights. In terms of the legal finding, international judge's room for interpretive maneuver may be limited by the law and by shared legal understandings of compliance partners. Variation may mostly come in the form of the remedies demanded. The cases present a sliding scale of legal remedies and show how ICs and litigants vary remedies to make it easier for compliance partners—administrators, judges or government officials— to circumvent political opposition. When the political moment is right— when new coalitions of support arise and mobilize, when opponents of policy change are no longer upset, mobilized or powerful, when support for certain norms becomes broader or captures the attention of political leaders, or when political leaders change—international judges can ask for a fuller remedy. In the meantime, the ability to offer a scaling and adjustable remedy provides an incentive for advocates to invoke courts, judges to declare rights, and a starting point for ideas and understandings to shift.

This long-term view is admittedly optimistic. Legal strategies can of course lead to new impediments for rights-claimers, which may then inhibit future litigation. It is also possible that IC involvement can provoke a political backlash, even where ICs are doing exactly what they have been asked to do. In the short run, the inadequacies of international legal remedies raise serious normative questions. Opponents will ask: who consented to let ICs adjudicate compliance with international law? On whose behalf do ICs monitor compliance and help enforce the law? What if governments and citizens do not like how ICs apply the law? What if state and substate actors want to change their mind about consenting to an international law or to IC adjudication? Even sympathetic supporters will wonder: How can huge atrocities generate such short and relatively cushy prison terms? Why are my country's fairly minor violations pursued while major violations in country x escape adjudication? These normative questions are important, and vigorously debating them may well end up shaping what international legal rights become. The fact that we

bother to raise these questions is itself testament to the growing power and influence of ICs, and our rising expectations for international law.

Overall, this book shows that ICs are increasingly part of legal contestation about the meaning of international law and what government respect for the rule of law entails. IC's contribution to these politics is to increase the credibility of legal threats, and then to state what the law means in the cases that are adjudicated, sometimes naming violations of the law, sometimes specifying remedies. ICs effectuate change by working with compliance supporters to facilitate greater respect for international law. Because governments can no longer block litigation or control which cases get adjudicated, because ICs are legal actors that traffic in the currency of rule of law expectations, because international law is increasingly embedded into domestic legal orders, the prospect of an IC remedy and IC legal edicts themselves are politically meaningful. But international judicial dependence on state and sub-state interlocutors is both empowering and constraining. Ultimately, rights are intersubjective; they exist when both the rights holder and those actors who have legal duties recognize the right. Delegation to ICs ratchets up the pressure to recognize rights, and this in itself contributes to generating such rights.

IV. Conclusion: a roadmap for this book

In the new terrain of international law, international law governs issues and policy arenas that were once the exclusive domain of national governments. Litigation can be a tool to reinforce the regulative role of international law, and a way to help the individuals charged with applying international rules better understand *how* they are supposed to implement international laws. This regulative role of international law and IC adjudication is important to recognize, and it is the main focus when I examine the other-binding dispute settlement and administrative review roles of ICs. But I am especially interested in when ICs serve as change-agents, reinterpreting law on the books, applying existing rules to new domains, and helping to generate rights that have value and meaning. Because ICs can be change agents, delegation to ICs introduces a dynamic element into international politics. ICs are rival authorities, able to contest interpretations of the law used by powerful domestic and international actors to defend the legality of their actions. ICs are also able to introduce a finality to disagreements about what the law means, clarifying the meaning of the law for the case at hand in a way that creates a new status quo that all political actors must respond to.

Part I of this book considers the international judiciary as a whole. Chapter two develops the altered politics framework in theoretical terms. Chapter three maps the international judicial landscape today by presenting a bird's-eye overview of the contemporary international judiciary, revealing temporal, substantive and regional trends in delegating authority to ICs. The birds'-eye perspective helps us grasp what delegation to international courts looks like today. But the perspective is largely static, a snapshot in time that obscures how legal practice, international law and international legal institutions evolve. Chapter four explains why governments have become increasingly willing to

consent to compulsory international judicial oversight, highlighting how legal practice has changed and how international law is increasingly become embedded into domestic law and institutions.

Part II of the book examines the politics of ICs in action. Chapters five through eight consider the four judicial roles—dispute settlement, administrative review, enforcement and constitutional review— independently. I document which ICs have explicitly been the given role, provide more fine-grained distinctions about design variations across ICs with respect to the given role, and speculate about why the identified set of courts (and not others) were delegated the role in question. Appendixes to each chapter provide more detail regarding access rules and jurisdiction for a given role. Illustrative case studies then examine the politics of ICs within each role, suggesting both similarity and divergence in the how different ICs play a given role. This book presents a total of eighteen case studies of ICs in action. The cases get increasingly contested as the chapters proceed because the discussions move from ICs in other-binding roles, where international judges are extending the power of the central state, to ICs self-binding governments and invoking higher order legal norms as they challenge state prerogatives and entrenched behaviors.

The conclusion recaps and starts to build on the main findings in the book through a focus on the normative question of how to reconcile international law with democratic politics. The most obvious way to build on this book is to engage in deeper comparative theorizing about how and when delegation to ICs alters international and domestic politics. By identifying how different factors matter at each stage of the litigation process, and how litigation efforts can succeed or fail at each step of the process, the altered politics framework provides a natural starting point for developing scope conditions and testable hypotheses. The role-based chapters identifying similarity and difference in IC's formal mandate and access provisions, the varying data, and the juxtaposition of case studies highlight the many different pathways towards compliance as well as challenges ICs face, providing detail from which scholars can develop their own hypotheses to test. A second way to build is to begin a policy discussion about how we want to use international legal mechanisms as a tool to enhance the influence of international law in domestic and international politics.

The fuller picture of how a broad range of ICs are influencing politics requires us to throw away our stereo-types about courts, which are usually utopian ideals that do not even exist in the best national rule of law system. The fuller picture also requires us to recognize international law not as a luxury good, but as a basic necessity for countries and individuals where the domestic rule of law and the best efforts of their supporters nonetheless fall short. Elites may chafe when international judges rule against countries on issues that used to fall within the prerogative of domestic governments, but this is a new reality that states created for themselves when they combined a commitment to international laws with international judicial oversight. More importantly, this is an evolution in legal practice that is unlikely to change.

Going back in time to the world after World War II, where governments could choose whether or not to submit to judicial oversight is not a realistic or viable political option. Rather than lament the new reality, we should learn to harness delegation to legal bodies as a means to promote shared political objectives. Most ICs do exactly what governments asked them to do. ICs adjudicate disputes, fill in legal lacunae, review administrative decision-making and assess state compliance with international law. Most IC rulings are not controversial, and those that raise objections are controversial mostly for those whose argument lost in court. The involvement of courts and judges in adjudicating state compliance with international law is an interesting and important evolution in contemporary politics, one that is growing and unlikely to be reversed any time soon.

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The New Terrain of International Law: Courts, Politics, Rights

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International relations have long been considered outside of the domain of law. Most people presume that law is only meaningful when backed by a central enforcer. By this logic, absent a world state international law cannot meaningfully exist. International law is rising in political relevance because since the end of the Cold War, international politics has become increasingly judicialized. Domestic actors increasingly see the rule of law as requiring respect for international law; domestic and international actors are increasingly invoking international law as they advocate for and justify policy prescriptions; and international courts, ad hoc international legal mechanisms, and domestic judges are increasingly adjudicating state respect for international law. *The New Terrain of International Law* charts the changes and trends in judicializing international relations by focusing on the creation and use of international courts (ICs). Today there are more than two-dozen international courts that have collectively issued over 37,000 binding legal rulings in individual contentious cases. The contribution of the courts, international or otherwise, is to say what the law requires, and to perhaps specify remedies for law violations. *The New Terrain of International Law* explains how this very limited power—the power to speak the law—translates into political influence, and it explains when and how delegating authority to international courts influences international and domestic politics.

After mapping the development of the international judiciary since the turn of the twentieth century, the book examines international courts in action focusing on eighteen case studies of international courts as dispute settlers, enforcers, and administrative and constitutional review bodies. The case studies span human rights, economic and territorial disputes, and mass atrocities law. They involve regions around the world, and countries that are not known for respecting international law or welcoming IC intervention. Collectively the case studies elucidate the political factors that often intervene to limit whether or not international courts are invoked and whether international judges dare to demand significant changes in state practices. The book concludes by considering the normative question of how to reconcile international judicial review and democratic politics.

Part I: Delegating Authority to International Courts: A Global View

Chapter 1: The New Terrain of International Law

The three primary objectives of this book are to reveal the paradigm shift of the contemporary international judiciary, conceptualize how new-style international courts (ICs) contribute to international politics, and normalize our understanding of international courts, seeing them first and foremost as courts, and second as international actors. The introduction defines key concepts and summarizes the main argument of the book. Section I—**Courts**—explains that today's international courts (ICs) are fundamentally different from

their predecessors. The vast majority of ICs today have new-style design features and increasingly apply international law that is embedded in domestic legal orders, and they have been delegated a broader range of judicial roles. Section II–**Politics**– explains how new-style ICs are able to alter domestic and international politics. Section III–**Rights**– explains how delegation to ICs contributes to generating and instantiating rights. Part IV provides a roadmap for the book.

Chapter 2: International Courts Altering Politics

ICs pretty much only have the power to say what the law means. How then can ICs influence state behavior and political outcomes? This chapter first considers when state and IC interests are aligned, and thus when international judges do not need to worry about eliciting state compliance with their rulings. I then provide three alternative understandings of how ICs influence state behavior in self-binding contexts. 1) ICs can be interstate arbiters, helping two states resolve a dispute by identifying from a set of acceptable outcomes the “legal” solution. 2) ICs can increase the multilateral costs of noncompliance. 3) Litigants can also seize ICs to influence domestic and transnational politics, convincing or coopting support from domestic actors with the power to choose compliance. The real question is when do ICs end up influencing international politics in each of these ways? The chapter unifies the three models into the altered politics framework, and then theorizes about the factors that generate variation in IC activation and influence. The altered politics framework allows international law to be a tool to circumvent domestic governments, with the result that delegation to ICs breaks the monopoly of governments and national judges to say what international law requires at home.

Chapter 3: The New International Courts

This chapter documents the proliferation and increased usage of ICs in recent times, presenting a birds’-eye overview of the international judiciary today. It identifies a shift from ‘old-style’ ICs, voluntary inter-state dispute resolution bodies. Starting in Europe, and spreading since the end of the Cold War, is a proliferation of more independent and active “new-style” international courts, ICs with compulsory jurisdiction and access for non-state actors to initiate litigation. These ICs have jurisdiction over international economic, human rights and mass atrocities criminal law, and delegation to ICs is more common in Europe, Latin America and Africa. The chapter shows how the creation, release of design-hobbles, and growing usage of international courts accelerated greatly at the end of the Cold War. Chapter four will explain how two critical junctures– World War II and the end of the Cold War—contributed to building the international judiciary of today.

Chapter 4: World History and the Evolving International Judiciary

This chapter explains how the end of WWII, the Cold War and the end of the Cold War have shaped the international judiciary, generating an ‘embedded’ approach to international law enforcement. I continue the focus on the international judiciary as a whole, highlighting how developments in one region and domain affect developments in similar and distant regimes. Proponents of international courts draw lessons across time, waiting for the permissive conditions to arise after which they suggest new ICs or improvements in existing ICs. The path-dependent nature of institutional change means

that the form and nature of international judicial institutions evolves across iterations. Judicial authority also evolves through legal practice, which in combination with disappointment with national solutions and developments in the international political context (including nationally based actors asserting extraterritorial jurisdiction), generate permissive conditions for creating or reforming ICs.

Part II: International Courts in Action

Chapter 5: International Dispute Settlement

This chapter is focused on how ICs contribute to international dispute settlement. The chapter resides in the old inter-state arbiter terrain of international law, where ICs are dependent on states and where disputes end because the litigants embrace a court ruling. Even in this old terrain, ICs make important contributions to dispute resolution. After documenting the eighteen ICs with explicitly delegated dispute settlement jurisdiction, case studies demonstrate the limited ability of ICs to resolve transborder disputes, focusing on four ‘least likely’ cases where ICs make meaningful contributions to enforcing transborder contracts. The limitations of IC influence revealed in this chapter sets the stage for the next three chapters, which reside more clearly in the new terrain of international law.

Chapter 6: International Administrative Review

This chapter considers ICs in their administrative review role, where ICs hear private litigant challenges to the decisions of administrative actors. Section I documents the thirteen ICs with explicitly delegated administrative review roles. Section II considers ICs playing their administrative review role vis-à-vis the decisions of supranational and national administrative actors. Two cases focus on fairly uncontested international administrative review, which involve a review of the application of international administrative rules. The second set of case studies show administrative review as treaty enforcement. These rulings are more contested in part because the adjudicatory procedures tend to favor foreign actors but also because governments clearly prefer national over international administrative rules. The key interlocutors for ICs in their administrative review role are the administrators themselves; a lack of support by administrators serves as a key hindrance to state respect of IC administrative rulings.

Chapter 7: International Law Enforcement

International courts with enforcement jurisdiction are explicitly empowered to adjudicate state compliance with international law. Section I discusses IC’s contribution to law enforcement, and identifies the nineteen permanent international courts with explicitly delegated enforcement roles. The overview identifies significant design variation in which actors can initiate litigation and in the remedies available. Despite these variations, the role of the IC is the same. ICs name legal violations and sometimes specify remedies, providing resources for compliance constituents advocating respect for international law. Section II focuses on ICs enforcing international law and influencing state behavior and politics more broadly. Four case studies span economics, human rights and war crimes with different factors leading states to comply with IC rulings. The cases show the different effects of IC design as they shape whether cases are litigated, how the nature of

what compliance entails shapes political outcomes, and how sanctioning power is sometimes but not always important in influencing outcomes.

Chapter 8: International Constitutional Review

Many people question whether the metaphor of a constitutional court is appropriately transferred to international courts (ICs). This debate misses, however, that at least ten ICs have been explicitly delegated constitutional review jurisdiction, meaning jurisdiction to invalidate statutes and executive acts on the basis of a conflict with a higher order law. Section I identifies ten ICs explicitly delegated constitutional review roles. Whether ICs in fact play a constitutional review role depends on the existence of a culture of constitutional obedience wherein violations of higher order legal norms are seen as illegitimate and thus politically unsustainable. Developing cultures of constitutional obedience is easier with respect to the IC review of international acts, and harder with respect to IC review of state acts where IC's constitutional authority must compete with the authority of domestic judges and institutions. This argument is developed empirically through two case studies that focus on ICs reviewing international acts (Section II) and four case studies that focus on IC review of state acts (section III). The case studies suggest that ICs exercise their constitutional review powers with caution, and the reaction of domestic judges is key in shaping whether or not IC's constitutional edicts affect national political outcomes.

Part III: Courts, Politics, Rights

Chapter 9: Conclusion: International Courts and Democratic Politics

This concluding chapter draws out the implications of this book's analysis for international relations theory while identifying the next step for theory building. I then turn to the normative and policy questions that delegation to international courts inevitably raises. The external and legal nature of international courts is their attraction, providing international courts with authority, power and independence from governments. This external and legal nature also is not subject to democratic control. The conclusion returns to the three models of how international courts influence politics, showing that each offers a different flawed way to reconcile respect for international law with democratic politics. I then add the book's altered politics reconciliation to the debate. Individually, each attempt at reconciliation falls short. But together, the different reconciliations are better than relying on domestic legal processes alone. Presuming that we can find a satisfactory way to make international law democratically accountable, there is another debate we need to have: When will making international law enforceable contribute to the effectiveness of international law? The book ends by laying the foundations for a deeper policy debate about where and when delegation to international courts is a normatively and politically desirable policy approach.

Case Study Index

The book has eighteen qualitative case studies of international adjudication in action. Case studies allow me to identify the causal pathways through which international adjudication influences state behavior and to move beyond a binary focus on state-compliance. The

brief case study discussions explain how the issue came to be adjudicated, identifying the influence of the IC before and after the ruling and extending beyond individual cases to examine the larger influence of the court for the issue at hand. The case studies relax my focus on ICs in Part I of the book; they span the globe in their geographic reach; and they also allow me to compare side by side political dynamics in economic, human rights, and mass atrocities adjudication.

Dispute Settlement

- 5.1 ICJ– “Bahrain v. Qatar territorial dispute”– International Court of Justice resolves a territorial dispute, which facilitates the regional economic development
- 5.2 ITLOS– “Japan v. Russia– seizing of vessels”– International Tribunal of the Law of the Seas assures fair treatment of Japanese vessels seized for illegal actions in Russian waters (Tomimaru & Hoshinmaru cases)
- 5.3 “Iran–US mass claims tribunal” adjudicating public and private disputes arising from the Iranian revolution
- 5.4 “OHADA business law” The Organization for the Harmonization of Business Law in Africa as an appellate body for public and private cases involving OHADA “Uniform Acts”

Administrative Review

- 6.1 ECJ–“Microsoft” and “GE/Honeywell merger” cases – Oversight of administrative decisions by the European Commission
- 6.2 ATJ– “Belmont case”– The Andean Tribunal fills in legal lacunae and coordinates transnational administrative decision–making regarding the trademark “Belmont”
- 6.3 NAFTA and WTO “Softwood lumber”–NAFTA bi–national review and WTO review of national determinations of dumping and countervailing duties
- 6.4 ICSID: “Metalclad” ICSID Investor dispute settlement system to compensate for an indirect Mexican administrative taking of the property of a foreign investment

Administrative cases in other chapters:

ITLOS– Japan v. Russia– Seizing of vessels (5.2); “Second use patent case” ATJ annulment of Peruvian second use patent decree (7.2) ; “Seizing private assets– (*Kadi*) case (8.2).

Law Enforcement

- 7.1 WTO– “Foreign Sales Corporation”– WTO review of the United States special tax treatment for goods exported abroad
- 7.2 ATJ– “Second use patent case” Andean tribunal’s review of Peru’s policy granting patents for new medical uses
- 7.3 ECOWAS– “Modern day slavery case” ECOWAS court finds that Niger’s government has not done enough to remedy enslavement via family law
- 7.4 Special Court of Sierra Leone– “Charles Taylor case”– Indictment, arrest and conviction of Charles Taylor, President of Liberia, for crimes committed in a neighboring country

Enforcement cases in other chapters:

Metalclad ICSID Investor dispute settlement (6.4); NAFTA and WTO– Softwood Lumber (6.3); ATJ– Colombian alcohol–related practices case (8.4); ICTR– “Rape as a war crime case” (8.6) (Prosecutor v. Akeyesu); ECJ– “Women in combat support roles case” (8.3); IACtHR–“Indigenous land rights case” (8.5).

Constitutional Review

- 8.1 ATJ– “Peru exemptions case” – ATJ invalidates a collective Andean executive decision exempting Peru from Andean Free Trade Area requirements
- 8.2 ECJ– “Seizing private assets (Kadi) case”– ECJ invalidates a Council regulation implementing an act of the UN Security Council and a Commission action implementing a UN Sanctions Committee decision
- 8.3 ECJ– “Women in combat support roles case”– ECJ rejects a German constitutional provision disallowing women in combat support roles
- 8.4 ATJ– “Colombian alcohol–related practices case” – ATJ finds Colombian alcohol policies to violate Andean free trade rules, with noncompliance persisting
- 8.5 IACtHR–“Indigenous land rights case” IACtHR creates a positive obligation for Nicaragua to demarcate land rights for the Awas Tigni
- 8.6 ICTR– “Rape as a war crime case” – ICTR creates command responsibility to stop sexual violence

Case Studies by Subject Matter & Country:

Economic law

- 5.4 OHADA Business Law– various business codes in Francophone Africa
- 6.1 ECJ–“Microsoft case, GE/Honeywell merger cases”– antitrust in Europe
- 6.2 ATJ– “Belmont case”– intellectual property (trademarks) in Colombia and Ecuador
- 6.3 NAFTA and WTO–“Softwood lumber dispute”– antidumping in the United States
- 6.4 ICSID and NAFTA–Metalclad– investor dispute in Mexico
- 7.1 WTO– “Foreign Sales Corporation”–subsidies in the United States
- 7.2 ATJ– Second Use Patent case– intellectual property (patents) in Peru
- 8.1 ATJ– Peru exemptions case – derogations from free trade provisions in Peru
- 8.4 ATJ– Colombian alcohol–related practices case– Non–tariff barriers to trade in Colombia and tariff barriers in Ecuador

Human rights law

- 7.3 ECOWAS– Modern Day Slavery case – forced labor, family law practices in Niger
- 8.2 ECJ– Seizing private assets (*Kadi*) case– due process rights in the European Union
- 8.3 ECJ– Women in combat support roles case– gender equity in Germany
- 8.5 IACtHR– Indigenous land rights case– land rights of indigenous peoples in Nicaragua

War crimes

7.4 Special Court of Sierra Leone– Charles Taylor’s indictment and arrest for crimes in Sierra Leone

8.6 International Criminal Tribunal for Rwanda– “Rape as a war crime” in Rwanda

Other

5.1 ICJ– Bahrain v. Qatar Territorial dispute

5.2 ITLOS– Japan v. Russia– seizing of vessels

5.3 Iran–US Mass Claims Tribunal–seizing of assets