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## CHAPTER 4

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# THE MULTIPLICATION OF INTERNATIONAL COURTS AND TRIBUNALS AFTER THE END OF THE COLD WAR

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1. The Multiplication of International Courts Since the Fall of the Berlin Wall	65
2. External Forces Contributing to the Multiplication of International Courts	73
3. Implications for the Study of Today's International Courts	87

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WHEN the Cold War ended in 1989, there were six permanent international courts plus the non-compulsory dispute settlement system of the General Agreement on Tariffs and Trade (GATT). The European Court of Justice (ECJ) offered the model of an active and effective international court. The other six international legal mechanisms did not inspire much enthusiasm or attention from litigants or observers. Today, however, there are at least two dozen permanent international courts (ICs) that have collectively issued over 37,000 binding legal judgments, more than 90 percent of which were issued since the fall of the Berlin Wall. Contemporary ICs attract much more attention from litigants, journalists, activists, governments, scholars, and critics. Irrelevant institutions are mostly ignored. So, although it might seem counter-intuitive to say, the calls for greater action coupled with the complaints about how ICs are infringing on national political autonomy are actually signs that today's international courts are of growing political importance.

The greater influence of ICs today is not simply a matter of numbers. Today's ICs are fundamentally different from their historical predecessors. Mary Ellen O'Connell and Lenore VanderZee's contribution to this handbook explains how the first ICs were primarily voluntary dispute settlement bodies, institutions litigants could use if they wanted a legal resolution to a disagreement. The big shift was towards ICs with compulsory jurisdiction, a change that started during the Cold War and has since accelerated. Today's ICs, what I call "new-style ICs," have compulsory jurisdiction and they allow non-state actors to initiate litigation. ICs' compulsory jurisdiction makes it harder for defendant governments to block inconvenient cases from proceeding. Access for non-state actors to initiate litigation increases the likelihood that issues people care about can be adjudicated by an international court. Today's ICs have also been delegated a broader range of judicial roles. ICs have been constituted to serve as dispute settlers, administrative review bodies, enforcers, and constitutional review bodies.<sup>1</sup> Today, the lion's share of all international legal rulings are issued in cases initiated by supranational commissions and prosecutors or private litigants with the plaintiff seeking to have state or international organization actions reviewed and international legal rules enforced.

Section 1 of this chapter provides an empirical overview of the multiplication of international courts since the fall of the Berlin Wall, and explains how most ICs today emulate the European model of new-style ICs and embedded law enforcement, raising a question of why regions are embracing European-style ICs. Section 2 summarizes the external and internal forces promoting the multiplication of international courts and examines three case studies that help us see how external and

<sup>1</sup> KJ Alter, "The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review" in J Dunoff and M Pollack (eds), *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship* (Cambridge University Press 2012).

internal forces contribute to the multiplication of ICs and the copying of European design models. Section 3 concludes.

## 1 THE MULTIPLICATION OF INTERNATIONAL COURTS SINCE THE FALL OF THE BERLIN WALL

By the end of 2011, there were nearly two dozen operational permanent international courts—courts with appointed or elected judges that were being invoked by litigants to render binding legal rulings in cases where states or international institutions were the defendants. Four of these legal bodies were global in reach—the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), the Appellate Body of the World Trade Organization (WTO AB), and the International Criminal Court (ICC). The rest were regional bodies located in Africa (9), Europe (6), and Latin America (5). Asia had a proposed dispute settlement system that includes a permanent appellate body. These bodies have jurisdiction to hear cases involving economic disputes (17), human rights issues (4), and war crimes (3 + hybrid courts). A number of these bodies also have a general jurisdiction that allows them to adjudicate any case state litigants choose to bring. Figure 4.1 shows the proliferation of operational courts considered in this analysis, including in parentheses the year the courts were created. The creation of three of the most active and important international courts in the world today and what became an informal dispute settlement system of the General Agreement on Tariffs and Trade are linked to the aftermath of World War II. Three more permanent ICs were created during the Cold War. The remaining ICs were created following the end of the Cold War.

A number of the above-mentioned legal bodies were also reformed in the post-Cold War period. Most of these reforms were intended to increase the reach and effectiveness of international courts by removing the requirement that states consent to litigation, by widening access to initiate adjudication, and by extending subject matter jurisdiction. Both pre-existing and new international legal bodies were also more active in the post-Cold War period.<sup>2</sup> Whereas ICs had collectively

<sup>2</sup> The European Court of Justice, European Court of Human Rights, GATT/WTO system, Inter-American Court of Human Rights, Andean, Mercosur, ECOWAS, EAC, SADC, and ASEAN legal systems all experienced meaningful reforms in the post-Cold War era. See KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), figure 3.3.

Figure 4.1: International courts, by subject matter and year IC became operational

	Economic Bodies	Human Rights Bodies	Mass Atrocities	Other
Post WWII ICs	<i>General Agreement on Tariffs and Trade</i> (1948) European Court of Justice (1952)	European Court of Human Rights (1958)		International Court of Justice (1945)
Cold War ICs	Benelux court (1974) Andean Tribunal of Justice (1984)	Inter-American Court of Human Rights (1979)		
Post Cold War ICs	Economic Court of the Commonwealth of Independent States (1993) European Free Trade Area Court (1992) Central American Court of Justice (1992) World Trade Organization Appellate Body (1994) West African Economic and Monetary Union (1995) Organization for the Harmonization of Corporate Law in Africa (1997) Court of Justice for the Common Market of Eastern and Southern Africa (1998) Common Court of Justice for the Central African Monetary Community (2000)	African Court on Human and Peoples' Rights (2006) Economic Community of West African States Court of Justice* (2005)	International Criminal Tribunal for the Former Yugoslavia (1993) International Criminal Tribunal for Rwanda (1994) International Criminal Court (2002) Special Court for Sierra Leone (2002)	International Tribunal for the Law of the Sea (1996)

Number ICs	17	<p>Court of Justice of the East African Community (2001)</p> <p>Caribbean Court of Justice (2001)</p> <p>Economic Community of West African States Court of Justice* (2001)</p> <p>Southern Common Market (2004)</p> <p>Dispute resolution system of the Association of Southeast Asian Nations (2004)</p> <p>Southern African Development Community Tribunal (2005)</p>	4	<p>Extraordinary Chambers in the Courts of Cambodia (2004)</p> <p>+ Hybrid and special courts for Kosovo, East Timor, Lebanon &amp; Bosnia</p>	2
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\* Section 3 explains that the Economic Community of West African States Court of Justice was created in 2001 and gained a human rights jurisdiction in 2005.

This figure is based on Alter, note 2, figure 3.1.

issued not quite 3,300 binding rulings from their founding through to 1989, the expanding number and greater activity of ICs has led to nearly 34,000 binding international judicial rulings between 1990 and 2011. Quasi-legal bodies—such as investor dispute systems and human rights treaty bodies—and domestic legal bodies have also experienced a rise in adjudication of international law related cases in the post-Cold War period.

## 1.1 Multiplication through emulation

We might consider it plagiarism or a violation of intellectual property if individuals assiduously copied the ideas of others, but in the legal realm the name for the phenomenon is “legal transplants.” As lawyers well know, there are tremendous similarities in national constitutions and bodies of law, and in fact most national legal systems are based on a European model, and then referred to as “legal families.”<sup>3</sup> It should thus come as no surprise that the multiplication of ICs involves copying pre-existing models. Given that Europe’s ICs are known for being activist and sovereignty compromising, the extent to which European models have also influenced international judicial design is, however, surprising.

International economic courts tend to follow one of two basic models. The GATT/WTO model has compulsory jurisdiction and only states can initiate non-compliance suits. This design ensures that only the disputes governments care about are adjudicated. Regional systems that adopt the GATT/WTO model often also adopt its panel system of dispute settlement, which allows governments to first use consultation and then try a more arbitral style of dispute adjudication, before any appeal to a more legalized appellate body. The other basic template is the ECJ model, which has a supranational commission that monitors state compliance and brings non-compliance cases to the supranational court; a preliminary ruling mechanism that allows private litigants to raise cases in national courts, which can then be referred to the supranational court; and systems of administrative and constitutional review that allow states, community institutions, and private litigants to challenge community acts in front of the supranational court.<sup>4</sup> Figure 4.2 classifies ICs by which model they copy. I have also included NAFTA and ICSID, even though these are ad hoc systems that lack permanent appellate bodies. Elsewhere, I explore meaningful variations in these basic designs.<sup>5</sup>

<sup>3</sup> D Berkowitz, K Pistor and J-F Richard, “The Transplant Effect” (2003) 51 Am. J. Comp. L. 163; T Ginsburg, *Comparative Constitutional Design* (Cambridge University Press 2012); A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993).

<sup>4</sup> States can also bring disputes against other states, although they seldom do, preferring to let the commission pursue violations instead.

<sup>5</sup> See KJ Alter, “The Global Spread of European Style International Courts” (2012) 35 West Eur. Pol. 135; KJ Alter et al., *Comparative Dispute Settlement Systems* (manuscript under review).

International criminal tribunals build on the basic design of the Nuremburg trials. Criminal tribunals have compulsory jurisdiction, and an international prosecutor selects which cases to pursue. Modern international criminal tribunals improve on the Nuremburg model in that all parties to the conflict can, in theory, be prosecuted; the international prosecutorial office and tribunals include a broader representation of states and there is an appeals mechanism.

ICs with human rights jurisdictions follow one of two models, both of which are associated with the European Court of Human Rights (ECtHR). The original ECtHR relied on states to consent to the court's compulsory jurisdiction and to allow private actors to bring complaints to the commission. Governments could consent to the court's jurisdiction for short periods of time (e.g., three to five years), and withdraw their consent if they were unhappy with court rulings. The original ECtHR also had a supranational commission that vetted human rights complaints and served as a gatekeeper to the court. This is the model copied by the African Court on Human and Peoples' Rights (ACtHPR), and it has contributed to the dearth of cases reaching that court. It is also the model copied by the Inter-American Court of Human Rights (IACtHR), albeit with certain important differences.<sup>6</sup> The post-Protocol 11 ECtHR has compulsory jurisdiction and direct private access. This revised model has been copied by the Court of Justice of the ECOWAS. Figure 4.3 shows the different design templates used for international human rights and criminal tribunals.

There are of course important differences across human rights, mass atrocities and economic courts: human rights courts adjudicate state violations affecting private individuals; mass atrocities bodies hold individuals accountable for crimes they have committed; and international economic bodies adjudicate state and international institutional violations of international law. Notwithstanding these critical differences, ICs that borrow from European models share essential features. All European-style adjudicative systems have international rules embedded into national systems. These "international" legal rules are more than statutes that ratify treaties, yet can be overridden by subsequent national legislation. Domestically embedded international criminal, human rights, and regulatory law are part of the fabric of the domestic legal order; it is domestic law that, although perhaps formally distinct, is intrinsically connected to international legal obligations. Also, all of these systems include institutional mechanisms (e.g., appellate review, preliminary ruling mechanisms, complementarity principles) that facilitate dialogue between national and supranational legal interpreters, so that interpretation and enforcement of international legal rules becomes an interactive, if not collaborative, enterprise undertaken by domestic and international judges applying what are basically

<sup>6</sup> The Inter-American Court has made it hard for states to withdraw consent once given, and private actors have always been able to raise complaints in front of the Inter-American Human Rights Commission. See C Romano, "The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent" (2007) 39 *N.Y.U. J. Int'l L. & Pol.* 791.



Figure 4.2: Economic ICs following the WTO and ECJ Models (year IC created, organized chronologically)

International Court (N=)	Compulsory jurisdiction	Arbitral process for first stage of trade dispute	Permanent Court (first and or last instance)	States may initiate litigation against other states	Supranational Commission can raise non-compliance suits	Private litigants can initiate litigation	Preliminary ruling system of national court referrals
WTO Model							
World Trade Organization (1994)	X	X	X	X			
International Centre for the Settlement of Disputes (1966)	Set by treaties	X		X		X	
Economic Court of the Commonwealth of Independent States (1993)	X		X	X			
Southern Common Market (2004)	X	X	X	X			X
North American Free Trade Agreement (2004)	X	X		X		Chapter 19 disputes (anti-dumping, countervailing duties)	
Association of Southeast Asian States (2004)	X	X	X	X			
ECJ Model							
European Court of Justice (1952)	X		X	X	X	X	X

Benelux court (BCJ) (1974)	X		X	X																		X
Andean Tribunal of Justice (1984)	X		X	X					X													X
Central American Court of Justice (1992)	X		X	X																		X
European Free Trade Area Court (1994)	X		X	X					X													Advisory opinions Only
West African Economic and Monetary Union (1995)	X		X	X					X													X
Common Market for East African States (COMESA) (1998)	X		X	X					X													X
Central African Monetary Community Court (1999)	X		X	X					X													X
East African Community Court (2001)	X		X	X					X													X
Caribbean Court of Justice (2004)	X		X	X					X													X
Court of Justice of the Economic Community of West African States (2002)	X		X	X					X													X
Southern African Development Community (2007)	X		X	X					X													X
Total ICs with this feature	17 (+ many BITS)	7	16	18	8	13 + NAFTA	12															

This figure is based on Alter, note 1, figure 3-5.

**Figure 4.3: Design templates for international human rights and criminal tribunals (year IC first operational)**

International Court	Compulsory or Optional Jurisdiction	Int'l Actor initiate litigation	Private litigant initiate litigation
Human rights courts templates (ECtHR model)			
European Court of Human Rights (1958)	Optional (1958–1997) Compulsory (1998)	Commission (1958–1997)	X (1998)
Inter-American Court of Human Rights (1979)	Optional	Commission	
Caribbean Court of Justice (2004)	Optional		Appellate review for certain countries
Economic Community of West African States Court of Justice (2005 for human rights jurisdiction)	Compulsory		X (2005)
African Court on Human and Peoples' Rights (2006)	Optional	Commission	
Criminal tribunal templates (building on Nuremburg model)			
International Criminal Tribunal for the Former Yugoslavia (1993)		Prosecutor	
International Criminal Tribunal for Rwanda (1994)		Prosecutor	
International Criminal Court (2002)	Optional (except for Security Council references)	Prosecutor	

Previously published in Alter, note 2, as figure 3.6.

the same set of legal rules. These basic features are present in systems of regional integration that emulate the European Community, in regional human rights systems and in today's war crimes systems, and aspects of this model are present in the Law of the Sea and with respect to contemporary international security law articulated via the United Nations Security Council.<sup>7</sup>

<sup>7</sup> The Law of the Sea allows the Enterprise to regulate deep-sea mining and the Seabed Chamber to adjudicate disagreements with the Enterprise. Law of Sea regulatory rulings are binding on states and firms. Security related decisions of the UN Security Council lead to binding domestic legislation. For more on the links between national and international security regulations, see K Scheppele,

This dominance of the European model is somewhat ironic. European governments did not set out to create the supranational judicial institutions that they have today. By all accounts, legal practice, rather than state intention, led to the European legal model that is so widely copied.<sup>8</sup> Moreover, it is fair to say that European political elites remain ambivalent about the encroachments of European law and supranational legal authority in the domestic realm. Despite Europe's ambivalence about its model, the European model diffuses (and one might note that this continued voiced ambivalence is belied by repeated decisions to improve the functioning of Europe's legal institutions.)

There is little evidence that European leaders pressure others to accept their model. Instead, European legal models have drawn their own adherents. In the 1960s, a number of regions copied Europe's approach to regional economic integration, omitting, however, the Economic Community's legal mechanisms. Most of these regional integration efforts were seen as failures. While observers did not attribute the failure to a lack of a supranational legal structures, participants in these endeavors could not help but notice that the European Economic Community's supranational court—the ECJ—was proving useful in addressing legal issues associated with regional integration. When regional integration returned as a policy objective in the 1980s and 1990s, integration architects paid greater attention to the legal problems presented by regional integration. Legal advocates drew lessons, proposing international legal systems that borrowed from Europe. It took a while to convince governments to embrace international judicial oversight, but eventually the European approach to international law spread.

## 2 EXTERNAL FORCES CONTRIBUTING TO THE MULTIPLICATION OF INTERNATIONAL COURTS

Institutions get built by people—political entrepreneurs who recognize and seize political opportunities for change, individuals who draft statutes, advocacy movements that put pressure on governments, and governmental actors that decide on the possibilities

*The International State of Emergency: Constitutional Exceptions and the Globalization of Security Law after 9/11* (Cambridge, MA: Harvard University Press 2013).

<sup>8</sup> For more information on how the European Community's legal institutions varied from what member states expected, see A Boerger-De Smedt, "La Court de Justice dans les négociations du traité de Paris instituant la CEECA" (2008) 14 J. Eur. Hist. 7; A Boerger-De Smedt, "Negotiating the Foundations of European Law, 1950–1957: The Legal History of the Treaties of Paris and Rome" (2012) 21 Contemp. Eur. Hist. 339; KJ Alter, "Who are the Masters of the Treaty?: European Governments and the European Court of Justice" (1998) 52 Int'l Org. 125.

advocates put in front of them. A full account of the multiplication of international courts would, of course, consider who these actors are and how European ideas diffused. With a few exceptions, however, we lack negotiating histories that can tell us why local actors looked to European models.<sup>9</sup> I focus instead on how external forces generated the opportunities that local advocates seized upon as they pushed for adding international courts. My argument is that these external forces created a permissive environment which proponents could seize upon to advocate the creation of an IC, borrowing European models.

Undoubtedly, a large systemic force indirectly at play was the end of the Cold War. In Europe, the end of the Cold War meant that political bargains designed to keep Communist parties out of power could be reassessed. Political coalitions shifted, and judges and other societal groups felt freer to question the old status quo. The end of the Cold War led to the expansion of the North Atlantic Treaty Organization (NATO), and the enlarging of the European Union and the Council of Europe to include former Soviet bloc states. This pending enlargement, and the creation of a common currency in Europe, became an impetus to reform Europe's existing legal infrastructure before enlargement, when negotiating change would be relatively easier. The conclusion of the Cold War also led to war in the Balkans, which brought the issue of international adjudication of war crimes back to the fore. Outside Europe, the Cold War's close had a different effect. With the conclusion of the Cold War came the discrediting of Marxism and Socialism, the cessation of Soviet economic subsidies and the ascendancy of neoliberal economic thought in international institutions and the American and European foreign policy elite. Henceforth, any state that wanted help from foreign investors, the International Monetary Fund, or the World Bank needed to show that they were undertaking economic and political reform. The 1990s were the high point of what was known as the "Washington Consensus."<sup>10</sup> American and European leaders were convinced that the superior capitalist economic model had defeated communism. Enamored by the compelling social science finding that democracies do not fight wars,<sup>11</sup> international institutions became conveyor belts of liberal economic policies, human rights, and democratization.<sup>12</sup>

The worldwide conjunctural moment of the end of the Cold War created the opportunity for advocates to press for adding ICs. European models became benchmarks that offered potential solutions and lessons. If the problem was that

<sup>9</sup> Exceptions include KJ Alter, L Helfer and O Saldias, "Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice" (2012) 60 Am. J. Comp. L. 709; T Lenz, "Spurred Emulation: The EU and Regional Integration in Mercosur and SADC" (2011) 31 (1) West Eur. Pol. 155.

<sup>10</sup> See J Williamson, "What Washington Means by Policy Reform" in J Williamson (ed.), *Latin American Adjustment: How Much Has Happened* (Peterson Institute for International Economics 1990).

<sup>11</sup> B Russett, *Grasping the Democratic Peace* (Princeton University Press 1993).

<sup>12</sup> Y Dezalay and BG Garth, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002).

people distrusted governments' empty promises of the past, then the solution was to self-bind to independent external institutions that were more likely to be trusted. If the problem was that regional economic rules were not implemented or they were ignored, then advocates suggested a solution of making community regulations directly applicable and supreme to national laws, and empowering private litigants to bring violations of the rules to court. If the problem was that war criminals escaped prosecution and created an environment of local intimidation, then the solution was to create international adjudicative mechanisms that could provide assurance that adjudication might be fair and effective. Advocates might need to adapt European models to address concerns of member governments, but they could then wait for another permissive moment when governments might want the system to work better. When new opportunities arose, advocates could once again borrow from Europe and suggest reforms that would bring the legal system closer to the European model.

The critical juncture of the end of the Cold War, and with it the search for resources and solutions, created a permissive environment and perhaps even an impetus for change. But the reason governments were more open to agreeing to sovereignty-compromising international judicial solutions was that the world had changed, and so had their options. Three systemic changes—all arguably affected by the end of the Cold War—fundamentally changed the choices governments faced. The following overly brief discussions are expanded elsewhere.<sup>13</sup>

The first major change was the expansion of the WTO from just over 100 countries when the Cold War ended to 157 members as of this writing. During the Cold War, governments had to pick sides in the conflict. Members of GATT enjoyed preferential access to American and European markets and a seat at the negotiating table. But to join GATT signaled that a government was picking the Western capitalist side, a decision that brought with it the distrust and displeasure of major communist powers and perhaps even a loss of economic, political, and military support. The collapse of the Soviet Union, followed by the embrace of market reforms by China, basically eliminated the political costs of joining GATT. As it became clear that many states would want to join GATT, the goal of the Uruguay round of negotiations shifted to undertaking major reform in advance of enlargement. American and European governments put together a "single undertaking" that would be the price of admission to the WTO's "most favored nation" market access status. The new WTO would be a member association, with all members agreeing to abide by a package of WTO free trade rules. To be a member meant that neither Europe nor the United States could revoke your "most favored nation" market access privilege.

States joined GATT and the WTO to gain preferential access to major economic markets and to show their commitment to neoliberal economic ideas, and thereby

<sup>13</sup> KJ Alter, *New Terrain of International Law*, note 2, at Chapter 4.

attract investment and foreign aid from Western powers and multilateral institutions. The WTO's legal rules and dispute adjudication system changed state preferences about international courts in a number of ways. First, the WTO system created a free trade floor of rules. There was no point in states within regional organizations having less favorable trade rules among each other than they had under the WTO. Moreover, since the WTO allows for regional economic communities to grant preferential market access to members, regional economic integration became more attractive in its own right. Second, WTO member states were already committed to compulsory adjudication of economic disputes. By 1994, WTO members faced the choice of suing each other in the WTO system or creating regional compulsory enforcement mechanisms as a complement to the WTO system. Regional ICs offered the advantage of judges from the region applying rules adapted by the region's member states.

The second major change involved the expansion of extraterritorial enforcement of human rights and international humanitarian law. With war crimes on the rise in the 1990s and pictures of mass atrocities telecast around the world, national courts in Belgium and the United Kingdom became more willing to invoke universal jurisdiction and to limit claims of foreign sovereignty immunity. The prospect of adjudicating human rights violations in Europe, America, and elsewhere meant that the choice facing governments changed. Governments could create their own review bodies to adjudicate major human rights violations, or they could let foreign bodies adjudicate the cases. According to Kathryn Sikkink, this choice led Latin American courts to reverse grants of amnesty so as to prosecute human rights violations themselves.<sup>14</sup> Foreign trials also shored up the position of those who advocated improving national and regional mechanisms to deal with human rights violations. Creating local remedies at the national and regional level could decrease assertions of extraterritorial jurisdiction by creating a viable alternative to foreign trials.

The third global force for change was the United Nations response to war in Yugoslavia. Evidence of mass atrocities in Yugoslavia had led the UN Security Council to use its Chapter VII powers to create an international tribunal to prosecute war crimes committed in Yugoslavian wars and the crime of genocide and crimes against humanity committed in Rwanda. Inspired by these political advances, human rights activists advocated for a global model. Surely, a global international criminal court made more sense than multiple ad hoc international tribunals. Political mobilization from the General Assembly and a group of "like-minded" states led to the new International Criminal Court (the ICC, which started operating in 2002 after 60 countries had ratified the Rome Statute), and a host of ad hoc hybrid systems to deal with crimes that were committed before and outside the framework of the new ICC (e.g., abuses in Sierra Leone, East Timor, Bosnia & Herzegovina, Kosovo,

<sup>14</sup> See K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton 2011).

Cambodia, and Lebanon).<sup>15</sup> This reality has changed the situation of governments. Leaders who are accused of mass atrocities might hope that pressure by powerful allies will keep the Security Council from referring the case to the ICC, but ratification of the Rome Statute has led many countries to enact domestic legislation that authorizes the prosecution of war crimes. Activists can continually pressure governments to bring leaders to court. Maybe the ICC will end up hearing the case, but perhaps equally as likely is that courts in other countries or in other regional systems will one day end up prosecuting the case—as is currently happening with Chad’s former leader Hissene Habré.<sup>16</sup>

As a result of these systemic changes, governments around the world faced the very real prospect that absent local international adjudicative mechanisms, international and national institutions dominated by Americans and Europeans would fill in. WTO membership changed the default choice of governments, making regional courts attractive because regional courts are closer to home and staffed by representatives of the regional organizations’ member states. Local adjudication is preferable to human rights and mass atrocities trials in national or international institutions dominated by Western powers. This changing reality has made regional adjudicative solutions newly attractive.

## 2.1 External pressures combine with internal forces: three decisions to add international courts

External forces provide a backdrop and contributed to changing the calculation of governments. They do not on their own explain the decision to create an IC. Rather, local actors embrace local ICs to address local problems. There are doubtless many stories one could tell about how the Nuremburg trials shaped today’s ICCs, and how the Council of Europe’s human rights system shaped the Inter-American and African human rights systems. But I am going to focus on economic systems because legal architects had a choice of two models: the WTO model and the European Community model. In what follows, I discuss how the European model shaped decision-making in the Andean, OHADA, and ECOWAS legal systems.<sup>17</sup>

The 1990s led to the reinvigoration of regionalism, which in practice often meant re-launching integration movements around the world.<sup>18</sup> Regional integration

<sup>15</sup> For more on these changes see, in this handbook, Schabas, Ch. 10.

<sup>16</sup> “ICJ Hissène Habré” Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) ICJ Judgment of July 20, 2012 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=144&code=bs&p3=4>> accessed July 25, 2012.

<sup>17</sup> This discussion draws from Alter, Helfer and Saldias, note 9; Alter, “The Global Spread of European Style International Courts,” note 5.

<sup>18</sup> PJ Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca, NY: Cornell University Press 2005); E Mansfield and E Reinhardt, “Multilateral Determinants of



systems adopted new policies and policy-making procedures intended to enhance economic and political cooperative endeavors. The question inevitably arose of how to ensure that these new rules would be implemented and what to do should there be disputes about the rules. The re-launching of regional integration systems became moments to discuss creating or enhancing existing dispute settlement provisions.

### 2.1.1 *Creating the Andean Tribunal of Justice*

From the Andean Pact's inception, governments believed that they possessed the authority to implement the Cartagena Agreement—the Andean Pact's founding charter—and Andean secondary legislation (*Decisiones*) via presidential decrees. This legislative route had the advantage of avoiding national parliaments, in which fractious political parties might attempt to block or revise implementing legislation. But the approach also engendered opposition from business elites who disliked the Andean Pact's import-substitution policies. Opponents raised legal suits in national courts invoking the failure to submit the treaty to national parliaments as they challenged the legal validity of the presidential decrees. National legal challenges to Andean rules in the 1960s and early 1970s ultimately failed. But the manner in which domestic actors responded to these challenges, especially in Colombia, suggested that Andean *Decisiones* would not be given domestic effect. The creation of an Andean Tribunal of Justice, and with it the declaration of the direct effect and supremacy of Andean rules, provided a way to avoid national judicial invalidation of Andean rules.

When Andean officials discussed the creation of a supranational court, several potential models were available for their consideration. The officials could have emulated an early regional tribunal, the Central American Court of Justice, which heard ten cases between 1907 and 1917 before its founding treaty expired. Or they could have embraced the GATT dispute settlement system, although emulating GATT would not have established the direct effect of Andean *Decisions* nor created a mechanism for supranational judicial review of Andean institutions and their decisions. Without such review, national courts might challenge the authority of community law or interpret Andean rules in inconsistent ways. A third alternative—the ECJ model—was the most obvious fit given the preexisting similarities between other Andean and European institutions. The selection of the ECJ model was virtually guaranteed when the *Junta* asked the Institute for the Integration of Latin America and the Caribbean (INTAL) to evaluate the best model for the Andean Pact.<sup>19</sup>

Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements” (2003) 57 Int'l Org. 829.

<sup>19</sup> INTAL is a research center established by the Inter-American Development Bank in 1965 with the mission of promoting and consolidating regional integration. Its network of consultants—many of whom are part-time scholars—provides technical assistance to implement and enforce integration policies.

The INTAL network recommended bundling the creation of an ECJ-style tribunal with foundational ECJ doctrines establishing the direct effect and supremacy of community law in national legal orders. These suggestions came in a meeting in June 1972, leading to draft statute that member states discussed in November, and a formal proposal that went to the legislative body of member states in December of that year. The proposal focused on two key requirements: the doctrines of supremacy and direct effect, and a supranational mechanism to review the legality of community acts. Copying the ECJ's preliminary reference procedure achieved both of these goals. The meeting endorsed the creation of an Andean judicial body to review Andean rules and to ensure their uniform interpretation by national judges, and to "reduce unnecessary and sometimes disproportionate political tensions" with those judges—an implicit reference to Colombian Supreme Court rulings that had raised questions about the legal effect of Andean secondary legislation in Colombia.

This proposal then languished for a number of years. The Andean Pact's difficulties in the 1970s underscored that something fundamental needed to change if the member states were to move the integration process forward. Yet even during this troubled period, the EC continued to serve as a model for Andean integration. Europe, too, faced significant challenges to integration in the 1970s. In response, it adopted several institutional innovations. In 1970, the EC launched the European Political Cooperation initiative to coordinate member states' foreign policies, and, in 1974, it formalized the system of Councils of Heads of States to adopt major decisions related to integration. In 1979, the EC replaced a regional legislative body comprised of national parliamentarians with a system of direct elections to a new European Parliament.

When integration advocates later revived the Andean integration project, they tracked these developments. The re-launch of the Andean integration project provided the impetus for creating the Andean Tribunal of Justice (ATJ). In 1979, the member states agreed to create an Andean Parliament and a Council of Foreign Ministers. And, in the same year, they finally adopted the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement, accepting nearly *in toto* the text drafted by INTAL in 1972, which the *Junta* had incorporated into its 1975 recommendation.<sup>20</sup>

By 1979, member states had adopted the required texts and, by 1984, the ATJ began operation. The ATJ was modeled on the ECJ, but with certain adjustments designed to protect national sovereignty. Private actors could raise cases in national courts, but the Andean Secretariat only considered noncompliance complaints

INTAL served as a conveyor belt for the transmission of European ideas into conversations about integration in Latin America. See O Saldias, "Networks, Courts and Regional Integration: Explaining the Establishment of the Andean Court of Justice" (2010) Working Paper of the KFG The Transformative Power of Europe <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1708040](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708040)> accessed July 1, 2013.

<sup>20</sup> Alter, Helfer and Saldias, note 9, at 725.

raised by member states. Since Andean governments wanted to avoid legal suits, the system sat empty for a number of years. The first case to arise, in 1987, involved a private litigant trying to get his challenge to a Colombian tariff adjudicated by the ATJ. The court refused the case, since private actors lacked standing to raise noncompliance suits; the judges instead instructed the litigant to pursue the issue in the national court. References from national courts trickled in thereafter, but the system remained barely used in its first decade of operation.<sup>21</sup>

The Andean legal system became activated when Andean member states overhauled their existing intellectual property rules in anticipation of member countries joining the WTO. The changes adopted made Andean rules compatible with the agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and these changes in turn unleashed demand for local trademarks and patents. Regional intellectual property law became the governing rules. As applications for patents and trademarks increased, so too did national court references for preliminary ruling decisions.<sup>22</sup> This litigation has made the ATJ the third most active IC, with over 2,000 rulings to date. But as we explain elsewhere, active does not mean activist. The ATJ's law-making style differs from its transplanted parent in important ways.<sup>23</sup>

### 2.1.2 *Creating a legal system for the Organization for the Harmonization of Business Laws in Africa (OHADA)*

The Organization for the Harmonization of Business Law in Africa (OHADA), formed in 1993, creates unified business codes for African countries. Its members are predominately francophone African countries, all of which had anachronistic business rules left over from French colonialism and adapted in a hodgepodge fashion so that few lawyers or judges even knew what governing law applied. The result, everyone seemed to agree, was legal uncertainty that was worrisome to potential investors.<sup>24</sup> The solution that ended up being adopted borrowed heavily from Europe, although the OHADA court is not a direct transplant. Rather, member states borrowed the idea of having directly applicable supranational rules, the interpretation of which would be overseen by a regional court.

The impetus to create OHADA came both internally and externally. Foreign investment in the region fell in the 1980s due to political instability and the reorientation of financial supports in the post-Cold War era. Political leaders wanted more foreign investment, and they became convinced that legal and juridical insecurity

<sup>21</sup> Alter, Helfer and Saldias, note 9, at 725.

<sup>22</sup> See L Helfer, K Alter and MF Guertzovich, "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community" (2009) 103 AJIL 1.

<sup>23</sup> K Alter and L Helfer, "Nature or Nurture: Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice" (2010) 64 Int'l Org. 563.

<sup>24</sup> A Mouloul, *Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.)* (2009), 10–11. Pamphlet on file with the author.

made investing in their markets less desirable. Adopting a common commercial code offered many advantages.<sup>25</sup> By having the same set of rules across countries, foreign investors could save on the legal expertise needed for each national system. OHADA Uniform Acts were also adapted specifically for the needs of developing countries, so that they became more attractive than competing rules—existing French, American, or EU business law.<sup>26</sup> Member states may not amend the Uniform Acts, and the Acts are widely available on the internet and in source books, providing legal stability and certainty. The promulgation of ten detailed multilaterally-crafted Uniform Acts has activated the OHADA system. OHADA's legal system was also one of OHADA's chief attractions. Foreign lawyers have little faith in Africa's national legal systems, where judges are perceived to be ill-informed and often corrupt. International dispute resolution is an alternative, but it is expensive because cases are litigated outside the region. OHADA created its own arbitration system that is managed by the Common Court of Justice and Arbitration (CCJA). This arbitration system is yet to take root, in part because most contract agreements do not yet specify OHADA as the arbitral venue. But the CCJA has become activated as a body that provides an international review of national judicial rulings involving OHADA law.

Externally, the OHADA system was strongly supported by the French government with the encouragement of the *Conseil Français des Investisseurs en Afrique*. The French government was interested in any solution that might help stabilize the Franc zone, because regional instability could generate currency pressures felt in France. A 1991 meeting of African finance ministers from African Franc countries, held in France, led to the commissioning of a study on the feasibility of creating regional business law.<sup>27</sup> The French Foreign Ministry reached out to Kéba Mbaye, a former Senegalese Supreme Court judge and President of the ICJ, who, in the 1960s, had advocated legal harmonization among newly independent states. The French Foreign Ministry underwrote and provided technical support for Mbaye's efforts, which led to the founding of OHADA.<sup>28</sup> France, other EU and non-EU countries, and other international institutions provided financial support to pay for OHADA. While member states now also provide support for the system, it is safe to say that foreign support has been instrumental to the functioning of OHADA. Also the French Foreign Ministry, to this day, has at least one attaché at the OHADA secretariat.

When it appeared that the soon-to-be-implemented OHADA Uniform Acts had been largely forgotten, French patrons, with the support of funding from various

<sup>25</sup> See Mouloul, note 24, at 10–11.

<sup>26</sup> Mouloul, note 24, at 10–11; CM Dickerson, "Harmonizing Business Laws in Africa: OHADA Calls the Tune" (2005) 44 *Colum. J. Transnat'l L.* 18, 25.

<sup>27</sup> P Tiger, *Le droit des affaires en Afrique* (3rd edn, Presses Universitaires de France 2001) 23.

<sup>28</sup> F Katendi and J-B Placca, "Savoir accepter la pauvreté: Interview de Kéba MBAYE" (OHADA.com) <[www.afrology.com/eco/pdf/kebam.pdf](http://www.afrology.com/eco/pdf/kebam.pdf)> accessed November 19, 2012.

international institutions, created a non-governmental organization to promote awareness of OHADA and its laws. The Association for the Unification of African Law plays an analogous role to Eurolaw associations, which in Europe helped to promote European Community law within national systems in the 1960s.<sup>29</sup> The Association helps with training sessions and maintains a website—OHADA.com—that makes available OHADA Uniform Acts and CCJA and national court rulings applying OHADA law. The French journal *Juriscope*, with the support of *Coopération Français*, publish commentary and compendiums of Uniform Acts and community case law, which they help to distribute throughout the region. This is important because in many African countries journals publishing laws and legal rulings are irregularly maintained and hard to access. Members of the Association's network regularly visit national courts to collect rulings that pertain to OHADA. The rulings are transcribed and published online. While the collection of national legal rulings on OHADA.com is surely incomplete, the website supplies what may be the only publicly available searchable source for case law in OHADA member states.<sup>30</sup> I know of no conversation where participants actively discussed borrowing from Europe, although such a conversation may well have occurred. But France was funding and participating in the conversations, and it may well have seemed natural that aspects of Europe's supranational system could help address the challenges OHADA countries faced. There was also probably no conversation about following the jurist advocacy strategy that took place in Europe. Indeed, the European strategy was itself barely a strategy—it was mostly an adaptation of the traditional role of legal advocates coming together to discuss important developing legal issues.<sup>31</sup>

The combination of the Uniform Acts and international review of national court rulings makes the OHADA system a “European style” IC. Why not create, however, a supranational court modeled on the ECJ with commission enforcement and a preliminary ruling mechanism? One reason perhaps is that OHADA is intentionally different from a common market. If OHADA had a larger political objective, like establishing a monetary union or good governance norms, it would be in direct competition with the West and Central African Economic and Monetary Unions, which promote economic integration among former French colonies.<sup>32</sup> Moreover, OHADA aspires to provide a set of business laws that any country can adopt.

<sup>29</sup> KJ Alter, “Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)” in KJ Alter (ed.), *The European Court's Political Power* (Oxford University Press 2009).

<sup>30</sup> Based on interviews with members of Association for the Unification of African Law (Paris, France, March 22, 2007).

<sup>31</sup> A Vauchez, “The Transnational Politics of Judicialization: Van Gend en Loos and the Making of EU Polity” (2010) 16 *Eur. L.J.* 1.

<sup>32</sup> Benin, Burkina Faso, Ivory Coast, Guinea, Mali, Niger, Nigeria, and Senegal are members of OHADA, the West African Economic and Monetary Community and the Economic Community of West African States. Cameroon, the Central African Republic, Chad, the Republic of Congo, Equatorial Guinea, and Gabon are members of both OHADA and the Central African Monetary Community.

OHADA is also primarily designed for business contracts, thus it does not need to replicate the inter-state dispute resolution mechanisms of the WTO or the supranational enforcement mechanism of the EU. The 2008 Québec reforms have brought OHADA institutions closer in form to the EU,<sup>33</sup> but the format for creating Uniform Acts in OHADA remains multilateral more than supranational. There is thus no reason to create administrative and constitutional review roles as checks on supranational authority.

The existence of detailed OHADA law and mobilized litigants who wanted OHADA rules respected explain why the OHADA court has become the fourth most active permanent IC today, with 569 rulings by the end of 2011. But while OHADA law is formally speaking the supreme business law of the land, and CCJA decisions the highest legal authority on the meaning of OHADA law, the OHADA system works quite differently than its transplanted originator. Much of the OHADA state economies remain informal and thus outside the sphere of OHADA law. Within the sphere of business adjudication, litigants may choose arbitration, and sometimes litigants choose to remain in the national system instead of appealing to the CCJA. Also hindering OHADA is that national supreme courts remain wary about working with the CCJA and many national judges are ignorant of the workings of OHADA. In Europe, it is clear that the EU sets the business law tune, in coordination with member states. But for the above-mentioned reasons there is a real question whether Africa's business affairs are truly governed by OHADA rules.<sup>34</sup>

### 2.1.3 *The Economic Community of West African States (ECOWAS)*

The Court of Justice of the ECOWAS (ECOWAS CJ) did not start out as an ECJ-style IC. The original treaty for the ECOWAS, adopted in 1975, expected that the governing authority would adopt—and member states would then implement—a series of legally binding protocols to promote economic integration. The treaty included a provision that contemplated the establishment of a Community Court, but no court was ever created. In the late 1980s, member states began discussing a new charter for ECOWAS, creating an “Eminent Persons Group” to make recommendations. In the meantime, states adopted a Protocol on the Community Court of Justice (the 1991 protocol)<sup>35</sup> that authorized the ECOWAS CJ to hear disputes between member states and suits brought by states on behalf of their citizens. The protocol gave

<sup>33</sup> The reforms created a Council of Ministers, which can adopt and amend Uniform Acts and oversee the operation of the OHADA Secretariat and Court. The Permanent Secretariat manages the legal affairs and accounting, and it works with the Council of Ministers to propose new areas of business law harmonization and to draft new laws.

<sup>34</sup> CM Dickerson, “The Cameroonian Experience under OHADA: Business Organizations in a Developing Economy” (2007) 112 *Bus. & Soc’y Rev.* 191.

<sup>35</sup> Protocol on the Community Court of Justice A/P.1/7/91 adopted in Abuja, Nigeria on July 6, 1991.

the Secretariat no role in monitoring or helping to enforce community rules, and neither national judges nor private actors were authorized to refer cases to the community court. According to Kufuor, the Eminent Persons Group expressed dissatisfaction with the 1991 protocol, recommending that a revised ECOWAS charter should allow private actors to invoke certain ECOWAS legal rights directly before the ECOWAS CJ. These recommendations were not heeded.<sup>36</sup> Implementing this protocol in 2000, member states made what, in retrospect, was a portentous decision; in their expectation of a major re-launching of regional integration, the protocol made the new court a permanent body.<sup>37</sup>

It took until 1996 for the requisite number of states to ratify the court protocol, and until 2001 for the first group of judges to be appointed. Then the fully staffed ECOWAS CJ sat unused because states never brought any cases. The ECOWAS Secretariat grew frustrated that ECOWAS CJ judges consumed significant community expenses without actually contributing to the goals of the community. The problem was the court's extremely limited access rules. Member states had borrowed from Europe, but they had added in adaptations to protect national sovereignty. Private litigants could ask their attorney general to bring a case against another member state on their behalf, but one obvious flaw in the original design was that private actors had no means of filing complaints against their own country. A second limitation was that few national justice ministries or attorney generals knew about the ECOWAS legal system and mobilizing them to raise a case on behalf of private actors was as difficult as it was unlikely.

In 2003, a case finally reached the ECOWAS court. A Nigerian goods trader challenged Nigeria's closing of its border with Benin in clear violation of ECOWAS law. The plaintiff asked the ECOWAS CJ to purposively interpret its jurisdiction and access rules to overcome the "absurdity" that expects a state to be both a plaintiff and a defendant when it violates community rules. The ECOWAS CJ refused the invitation, sticking to the plain wording of its mandate that only allowed "disputes instituted by member states on behalf of its nationals against another Member State." The court recognized that the ECJ had interpreted its mandate expansively "in the interest of justice." But it also expressed concerns that, because some ECJ decisions had attracted criticism, they did not "want to tow on the same line."<sup>38</sup>

The ECOWAS CJ then used the dismissal of the suit to lobby for an expansion of its jurisdiction. Judges asked for changes that included bringing the ECOWAS CJ

<sup>36</sup> KO Kufuor, *The Institutional Transformation of the Economic Community of West African States* (Farnham: Ashgate 2006).

<sup>37</sup> KJ Alter, L Helfer, and J McAllister, "A New International Human Rights Court for West Africa: The Court of Justice for the Economic Community of West African States" (2013) 107 AJIL (4).

<sup>38</sup> *Olajide Afolabi v. Federal Republic of Nigeria* (2004) ECW/CCJ/APP/01/03, para. 56.

closer in design to the ECJ model by adding a preliminary ruling procedure similar to what exists in the West African Economic and Monetary Union (WAEMU). The future role of the court was discussed at a 2004 “Consultative Forum on Protecting the Rights of ECOWAS citizens through the ECOWAS Court of Justice.” A number of human rights groups participated in this forum, which produced a declaration calling on the ECOWAS legal secretariat to draft a supplementary protocol to revise the ECOWAS CJ’s jurisdiction.<sup>39</sup> The reforms brought the ECOWAS court closer to the European model, but differences still remain. The 2005 Supplementary Protocol allows national courts to refer cases involving community law to the ECOWAS CJ, but it does not copy the WAEMU provision that requires national courts of last instance to refer such cases. The protocol also authorizes the Executive Secretariat to initiate noncompliance suits. But by far the most important revision—borrowed from Europe’s human rights system—was the decision to grant the ECOWAS CJ jurisdiction to review complaints from individuals alleging human rights violations.

Why add a human rights jurisdiction, especially if the problem was the under-enforcement of ECOWAS economic rules? We explore this question at length elsewhere.<sup>40</sup> Relevant for this discussion is the desire of political leaders to adopt policies that might give real meaning to the catchphrase of the time—an “ECOWAS of the people.” Human rights activists were frustrated with the highly politicized and slow-moving African Union human rights system. They sought a quicker and more meaningful mechanism to pursue human rights claims. Governments acceded to their request in part to show progress towards addressing some of the concerns and the needs of the people.

I lack space to explain the switch from copying the ECJ to borrowing from the ECtHR.<sup>41</sup> But in many other ways, ECOWAS continues to borrow from Europe. It has transformed its Secretariat into a body more like the European Commission that can propose legislation and hear noncompliance complaints from states and private actors. It has adopted the legislative instruments of Europe including directly applicable community regulations and directives that still require national implementing legislation. But the failure to provide direct private access to challenge violations of economic rules coupled with the decision to allow direct access for violations of human rights rules has made the ECOWAS court more similar in practice to the ECtHR than it is to the ECJ.

My claim is not that governments wanted to import activist and encroaching international judicial models, and I have not really explained the diffusion of the

<sup>39</sup> N Nwogu, “Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS” (2007) 6 *J. Hum. Rts.* 345, 352.

<sup>40</sup> Alter, Helfer and McAllister, note 37. <sup>41</sup> See, however, Alter, Helfer and McAllister, note 37.



European model. Rather, my goal is to explain multiplication of ICs in the post-Cold War Period and to suggest why multiplication involves emulating existing models. My basic argument is that opportunities presented themselves, governments became more open to regionally-based supranational courts and advocates pushed governments to borrow from Europe as they generated regional courts. European supranational institutions served as models because they are associated with success. Pro-integration advocates recommended European models but local governments often preferred to adapt European models for their own specific needs and so as to protect national sovereignty. Two of the three cases involved subsequent reforms during which changes were made that brought the IC even closer to the European model. By embracing and later reforming courts, governments could show their commitment to the integration project and the rule of law. In the Andean context, the European model helped to address a concern that national judges might reject Andean decisions. In OHADA, creating regional business law made investing in the region easier for foreigners, and the fact that governments could not change these rules helped to generate legal certainty and arguably diminish incentives for corruption. Allowing domestic judicial decisions to be appealed to a supranational court increased the credibility of promises that national courts would enforce the common business law. In ECOWAS, the ECJ model served as an inspiration to the Eminent Persons Group charged with making recommendations for a new ECOWAS charter; it shaped the arguments and ECOWAS CJ decision-making in the *Afolabi* case;<sup>42</sup> and it shaped the WAEMU preliminary ruling system that ECOWAS judges wanted to replicate.

These three examples all borrowed from Europe. Meanwhile both Mercosur and ASEAN made a different choice. According to people I spoke with, Brazil became concerned when NAFTA was created that the American-dominated system would spread south. Changing the dysfunctional Mercosur dispute settlement system became a priority, but, despite suggestions by smaller powers, Brazil preferred a WTO system. After all, adopting the European model would allow three countries that comprise less than 30 percent of the population and market to outvote the economically dominant regional hegemon.<sup>43</sup> I am not aware of the history of the ASEAN decision, but given Asian countries' aversion to international courts, their adoption of the WTO model is not very surprising.

<sup>42</sup> *Olajide Afolabi v. Federal Republic of Nigeria*, note 38.

<sup>43</sup> Larry Helfer and I have not yet written up this research, but this argument is based on fieldwork in Argentina in 2011. It cuts against the argument of Lenz, note 9, who is more optimistic that suggestions

### 3 IMPLICATIONS FOR THE STUDY OF TODAY'S INTERNATIONAL COURTS

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For social scientists, the multiplication of international courts generates both a puzzle and an opportunity. The puzzle is why sovereignty-jealous governments suddenly became more willing to submit to compulsory international judicial oversight, and what does this change actually mean in practice? This chapter argued that the end of the Cold War created a conjunctural moment where old international political arrangements were disrupted and governments around the world needed to search for new strategies. Americans and Europeans were looking for evidence of economic, democratic, and human rights reforms, and their preferences shaped the policies and strategies of the World Bank, the International Monetary Fund, and the United Nations. This changing context combined with growing extraterritorial assertions of jurisdiction—by the United States enacting punishments for “unfair trade” and by American and European courts applying global human rights and mass atrocities law—made committing to international judicial oversight for free trade and human rights agreements newly attractive. Local advocates took advantage of governments’ new openness, advocating international judicial models that they associated with success.

The end of the Cold War and the evolution of extraterritorial law enforcement explain both the timing and the fact that most ICs today borrow from European models. While global forces contribute to change, local issues determine how copied models are adapted. Each institution has its own unique history, but one constant is the new reality countries faced in the 1990s. In 1945, governments faced a choice between proposed international courts or no international judicial review of their policies and choices. Today a WTO-violating barrier to trade could well give rise to WTO adjudication regardless of whether there is or is not a functioning regional adjudicative system. The African Union’s human rights system may well be subject to political delays, but any government official who commits human rights violations and then moves abroad may well face prosecution in a foreign court. Omar Al-Bashir may win promises not to be arrested or extradited to The Hague, and Bashar Al-Assad may not as of this writing been indicted by the ICC but both these political leaders need to be very selective when it comes to international travel, and they should make sure that they retain political and financial resources to ensure their protection. In other words, ineffective local

of an ECJ-style court might be embraced. Johannes Rühl of the Graduate Institute of International and Development Studies Geneva is working on diffusion of models and Mercosur.

adjudive mechanisms may well give rise to foreign legal enforcement. The more extraterritorial enforcement exists, the more attractive local adjudicative strategies become. This reality explains why the African Union and the East African Community are today discussing adding a criminal chamber to its regional legal system.

The reality of European-style ICs spreading around the world is a boon for social scientists because there are now laboratories of experimentation. We can now investigate how context intersects with the design of international judicial institutions to shape international legal and judicial politics. We can study how international courts become authoritative political and legal actors, and why some international courts remain perennially irrelevant. We can study when international judges become activist, and when they remain conservative legal formalists. And we can study the factors that generate opposition to international legal enforcement. Of course, we want to know more about how and why international courts have multiplied in number and replicated in form. But ultimately, we want to know what becomes of these many international judicial transplants.

## RESEARCH QUESTIONS

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- 1) How does compulsory jurisdiction affect the law and politics of international courts? How does the ability of private actors and/or supranational prosecutors to initiate litigation change the content of international litigation and the legal outputs of international judges?
- 2) Why do local leaders choose to adapt existing international models, and how are these adaptations important?
- 3) How does the context shape the operation of similarly designed international judicial institutions? Do variations in legal rules and adjudicative mechanisms across regional systems contribute to changing law and outcomes?
- 4) Clearly the dynamics of human rights and mass atrocities litigation will be different from enforcing international economic agreements. But how does the content of the law and the nature of the defendant influence adjudication politics? Do advocates have different litigation strategies for different countries and different issues?

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