

# THE NEW TERRAIN OF INTERNATIONAL LAW

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Courts, Politics, Rights

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## CHAPTER 1

# The New Terrain of International Law

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### *Courts, Politics, Rights*

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. 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 the military; Niger to compensate a former slave for her entrapment in Niger's family law justice system; and Congolese warlord Thomas Lubanga Dyilo, Liberian president Charles Taylor, Jean Paul Akayesu, and others to be convicted for conscripting child soldiers, abetting insurgents in neighboring 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 interstate 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 84 percent authorize nonstate actors—supranational commissions, prosecutors, and/or private actors—to initiate litigation. These ICs have collectively issued over 37,000 binding rulings in individual contentious cases, 91 percent of which were issued since the fall of the Berlin Wall. Since few of these ICs and cases are about interstate 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 nonutopian and thus more realistic expectations for international courts. This inquiry 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 100 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 (for example, free trade, human rights, and such), with supporters of the rule of law, with advocates for the particular legal regime (for example, regional integration or the World Trade Organization), with self-interested litigants pursuing personal agendas and 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 change 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 ICs, 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 ICs' 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 nonstate 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 inter-

national 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 interstate arbitrator 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 perspective assumes that law brings obligations regardless of what other states do and that governments are not above the law.

#### THE POLITICAL IMPORTANCE OF ICs’ NEW-STYLE DESIGN FEATURES

The old paradigm of international law circumscribes international courts to a voluntary interstate 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.<sup>1</sup> While much of Posner and Yoo’s analysis is controversial,<sup>2</sup> most agree that ICs with judges appointed to fixed

1 Posner and Yoo’s goal is to show that judicial independence is not linked to judicial effectiveness. They argue that judicial “independence 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 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.

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 the defendant government may dislike but that individuals, groups, and other governments may actually prefer.

Access for nonstate 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, compared to state litigants, tend to be more willing to raise cases, 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.<sup>3</sup> 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 noncompliance 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 strategy to promote their objectives, ICs are likely to have ready-made compliance constituencies who will work to see the IC

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

ruling implemented.<sup>4</sup> 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.<sup>5</sup>

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 nonstate 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.<sup>6</sup> 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 from 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 to the authority and legality of government actions even though they have no way to force governments to comply with their rulings.<sup>7</sup> So how do

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

5 (Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 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).



international judges promote greater government respect for 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 are presumed to be more independent and disinterested compared to self-serving arguments litigating states put forward. 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 of 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.<sup>8</sup> 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

8 I have developed this idea further in Alter (2008). Chapter 2 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.

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 4 I take up the question of why states became increasingly willing to submit to international judicial oversight, and chapters 5, 6, 7, and 8 further consider 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-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 interstate 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 legislative and administrative acts. Chapter 2 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 nonstate actors and why most dispute settlement and administrative review IC rulings are not po-

litically 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 associated 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 nonpermanent 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 the coding of IC legal instruments reveals.

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.<sup>9</sup> Since ICs are expensive to create and maintain, states often follow the common law tradition of giving multiple roles to single international legal institutions. 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

<sup>9</sup> 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 law-making. The two traditions are increasingly merging. See Merryman and Pérez-Perdomo (2007, 86–90).

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 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 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 (seventeen of twenty-four) 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 nonlegalized dispute settlement (for example, arbitration, mediation, good offices). The upshot is that ICs' 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 5 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 ICs 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. ICs' 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 International Court of Justice (ICJ) helped resolve a territorial disagreement between Qatar and Bahrain; how the International Tribunal for the Law of the Sea 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 6 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. ICs' key compliance partners in this role are administrators 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 rely on delegated authority.<sup>10</sup> 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 backup 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 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 6 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 binational panels under the North American Free Trade Agreement (NAFTA) and the WTO's dispute settlement system; the International Centre for the Settlement of Investment Disputes (ICSID)

<sup>10</sup> On administrative review as oversight for administrative actors see McCubbins, Noll, and Weingast (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 on 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).

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 7 involves a supranational commission challenging an illegal national regulation of an administrative nature. The Kadi case in chapter 8 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 (seventeen of the nineteen) have compulsory jurisdiction associated with this role. Fourteen of these systems allow states to initiate noncompliance 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 vary by court, and ICs' 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 7 presents four case studies covering all of the substantive domains in which international courts operate. The case studies show WTO litigation pressuring the US Congress to change a tax policy that promoted US exports; the Andean Tribunal facilitating a retreat on the issuing of "second use patents"; and the Community Court of the Economic Community of West African States (ECOWAS) 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 8 includes four additional case studies of ICs 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 ICs' 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 constituencies 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.<sup>11</sup> 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 explicit jurisdiction to review the validity of national acts.

Whereas ICs' enforcement role creates costs associated with state non-compliance, ICs' constitutional review in theory nullifies and vacates illegal acts. 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 8 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 remedy was not required by domestic law. These case studies are contrasted with the

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



alcohol-related practices case study where the Andean Tribunal of Justice (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 in 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 allow us to appreciate the many different contributions ICs make to international politics. ICs engage in interstate 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 interstate dispute settlement. 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 vary 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 by independent judicial review than it is to be undermined. Other judicial roles—particularly the enforcement and constitutional review roles—self-bind governmental and legislative actors and by design 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, ICs' key interlocutors tend to be the litigants who choose to embrace the IC ruling and end

their disagreement. In the administrative review role, ICs' 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, ICs' 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. States still create ICs; 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.<sup>12</sup> 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 case studies that the practice of many ICs today reflects this shift toward 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 nonstate 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 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.

<sup>12</sup> 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.

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 3 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 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 delegation to ICs influences 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 alter 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 constituencies 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 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.<sup>13</sup>

No one disputes that ICs can be interstate 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.<sup>14</sup> 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 from 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.

The problem for ICs is that governments can choose not to comply, defending noncompliance as consistent with the domestic rule of law.<sup>15</sup> 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 counterpressures that alter the political balance in favor of policies that better cohere with international legal obligations.

ICs help alter state policy by using their institutional position to aid actors inside and outside of states that share the objectives inscribed into the law. Chapter 2 distinguishes between compliance partners and compliance supporters. *Compliance partners* are actors that have the power to generate compliance with an IC ruling on their own. 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 the IC's compliance partners. In the constitutional review role national supreme court judges are compliance partners. *Compliance supporters* are broader coalitions of actors whose tacit or mobilized support is needed to protect compliance partners

13 (Garrett and Weingast 1993; Goldsmith and Posner 2005; Posner and Yoo 2005).

14 For more, see the discussion of the interstate arbiter model in chapter 2.

15 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.

from political retaliation or to induce reluctant governmental actors to embrace an IC ruling. The two together—partners and supporters—are the IC's compliance constituency.

The path to mobilize these compliance 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 of or even despite of 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 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 that 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 7 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 for 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 nonstate actors can initiate international litigation, provoke an IC condemnation, and then harness multilateral and interstate 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.<sup>16</sup> In this transnational politics strategy, ICs work with grassroots organizations to influence government policy. For example, the indigenous land rights case discussed in chapter 8 shows how supporters of indigenous rights used the Inter-American Court of Human Rights (IACtHR) judicial system to pressure Nicaragua's government to adopt new policies demarcating the land ownership of indigenous peoples.

ICs' 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 counterpressures. 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 United States violates the consular affair rights of foreigners within its prison system, American citizens arrested abroad may find that their legal pleas carry less 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 constituencies 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.<sup>17</sup>

The ability of ICs to alter internal and external politics means that simply creating an international court is a politically significant act. What

16 (Risse, Ropp, and Sikkink 1999; Thomas 2001).

17 (Helfer and Voeten 2013).

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 alter the balance in the direction 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 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 of judges' 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 non-compliance 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 counterpressures that alter the political balance in favor of policies that better cohere with international legal obligations.

This analysis suggests that ICs become politically weak not because governments 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 helpful for engendering 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 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 toward 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 (for example, non-case-specific) influence of ICs on international and domestic politics.

Case studies allow me to 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. I also use case studies to make the theory less abstract. Through the case studies we see how international legal politics works in the real world, warts and all. We can also identify how the introduction of compulsory international adjudication and access for nonstate actors has affected domestic and international politics.

Throughout the book I generate hypotheses that one could systematically test. Chapter 2 develops the altered politics framework, 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 ICs' varied activation and influence in a given role.

Rather than constructing stylized cases to fit theories, my case studies are brief narratives, compelling stories 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 toward 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 remedies in the form of restitution should be a goal for international politics. Seeking restitution keeps 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 led to compensation for harms illegal acts generated. The indigenous land rights, women in combat support roles, Belmont, seizing private assets

(Kadi), and rape as a war crime case studies led 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 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 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 judges' 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. ICs' 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 constituencies 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 are politically meaningful. But international judicial dependence on state and substate 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.

## 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 powerful domestic and international actors use 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 2 develops the altered politics framework in theoretical terms. Chapter 3 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 bird's-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 4 explains why governments have become increasingly willing to consent to compulsory international judicial oversight, highlighting how legal practice has changed and how international law has increasingly become embedded into domestic law and institutions.

Part II of the book examines the politics of ICs in action. Chapters 5 through 8 consider the four judicial roles—dispute settlement, administrative review, enforcement, and constitutional review—independently. I document which ICs have explicitly been delegated the role, provide more fine-grained distinctions about design variations across ICs with respect to the 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. Case studies then examine the politics of ICs within each role,

suggesting both similarity and divergence in 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 reinforcing and 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 ICs' formal mandate and access provisions, the varying data, and the juxtaposition of case studies highlight the many different pathways toward 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 stereotypes 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.