

Preface

This book is motivated by the changing world around us. The growing role of judges, both domestic and international, is self-evident. In the United States and Europe courts review most major policy initiatives, and judicial rulings are front-page news. In many other parts of the world judges are also becoming increasingly emboldened, willing to challenge powerful individuals and governments. International courts are part of this global trend and a powerful symbol that law and legalism have become part of foreign affairs and international politics. What draws the attention of international relations scholars is the fact that international courts increasingly speak to issues that used to fall exclusively within the national domain. There are literally thousands of international judicial rulings reviewing the human rights and economic practices of governments. International adjudication has even entered the might-equals-right world of security relations. These developments are further evidence of evolving norms of state sovereignty.

Despite clear changes in the world around us, much of the academy remains trapped in old ways of thinking. The new international courts are quite different from the archetype in most scholars' heads—the International Court of Justice—and the substance of international law has also changed, becoming more detailed and far reaching in its scope. International relations and international law scholarship is yet to catch up. Most international relations scholars still assume that international courts exist primarily to resolve disputes between states, that the desires governments express unquestionably reflect “the national interest,” and that the wishes of powerful governments invariably do or should prevail. Of course governments remain key actors in international politics. World leaders dominate the global bully pulpit, and usually governments are the only voting participants within international institutions. Moreover, it is increasingly clear that the only thing worse than a state with a predatory leader is the chaos of a country lacking a government. Governments are and will remain essential actors in domestic and international politics.

But government's defended perch on the mountaintop of power politics is increasingly questioned and challenged from below. Governments may still prefer the polite rules of diplomacy, including respect for national sovereignty. And lawyers, whose background and work makes them closely attached to state power, may still regularly question the notion that international agreements are or should be domestically binding. But this view from inside of office buildings and ivory towers overlooks something vital: that most people accept at face value that governments should play by the legal rules of the game. International courts traffic in the currency of rule of law expectations, and most people believe in international law's good faith ideal of *pacta sunt servanda*. These developments reflect a changed social understanding that international law generates rights.

Some governments are used to ruling by executive fiat or decree, and some governments respond to binding adverse legal rulings by taking out their pens to write a new legal decree. But most people expect signing and ratifying a treaty to give rise to a binding obligation. There is also a largely unquestioned presumption that legal obligations should be meaningful, that they should give rise to rights, that the legal bodies tasked with interpreting and applying applicable laws should be prioritizing the law over the wishes of governments, and that legitimate governments should display a fundamental respect for the rule of law, including international law. Perhaps these presumptions should be questioned, but in any event most people make the domestic analogy. Why should an international agreement, negotiated and duly ratified, be any different from a national law? Why should rulings by international courts be any less binding than rulings by domestic courts? Lawyers can explain the complicated reasons why international law is somehow different—international law is not self-executing, international law operates in a separate legal order, international legal rulings do not generate domestic effects—but for most people these reasons seem convoluted.

There may be a cynicism about how the rule of law operates in practice, and the gap between expectations and the international legal situation remains profound. But this does not change the reality that people want, hope, and expect that in a well-functioning polity legality matters. This expectation transfers into the political realm, carried forward by advocates of international law and the tacit backing of commonsense assumptions of most people. The reality that legitimate governance is increasingly equated with rule of law governance is why governments bend over backward not to be seen as violating the law. One must only look at the tortured "torture memos" to recognize the lengths governments will go to be seen as rule of law actors. Pinochet's Chile and even

Communist China have been equally committed to keeping up a rule of law appearance.

I have just used a lot “shoulds” in noting that people think governments should follow the law. My invocation of norms and values perhaps suggests that this book is a normative enterprise. It is not. This book is a positive political science enterprise that sees law and the preferences of people as important political forces. *The New Terrain of International Law* represents an international relations and comparative politics analysis of the politics of law, taking very seriously that the law and the legal rules of the game matter to lawyers, judges, and people.

Litigation is a tool of the weak. Chapter 2 explains how governments use law to regulate the behavior of citizens. Powerful actors that are able to influence government policy making can rule by law, using the legislative process and government support to promote their priorities. For individuals and groups who do not find government doors wide open, litigation can be a political means to overturn the decisions of governments. Individuals living in authoritarian countries and in countries with weak rule of law institutions generally invoke international law to circumvent blockages created by domestic institutions that are captured by governments. International law is also a resource vis-à-vis powerful states because the United States and Europe are rule of law countries, where legitimate action must also be legal action. International law is an attractive political resource because governments do not control it. No one government can change international law. And while international courts are surely political actors, they are legal institutions comprised of judges from multiple countries with a formal mandate to apply the law. Governments can personally threaten judges, but really the best way to influence legal bodies is to use legal and public policy arguments. And even then, judges get to decide.

This book is about how litigant pressures interact with domestic and international forces to propel change in the direction the law indicates. The power of courts will always be limited. To take on power with law is perhaps akin to the battle between David and Goliath. Goliaths also sometimes use law. American and European actors understand law’s power, and they are often participants in foreign litigation as consultants, lawyers for hire, or pro bono nongovernmental advocates showing others how to play the litigation game to influence policy.

Since we live in a world with expensive international judicial institutions that have the ability to be effective, ineffective, or to act in ways that are counterproductive, I think it is important to investigate how international courts affect political outcomes. Rather than studying the hundreds of ways that institutions can fail, I prefer to study what helps public

bodies succeed in some cases yet then fail in others. If it seems like I find much success in international legal institutions, it is probably because my expectations are so low. In the Bible, David always wins. In the real world, the odds remain in Goliath's favor. But increasingly international law—words on paper imbued with legal authority—provides a legal and political resource that makes a political difference. The ability of international courts to speak law to power and thereby influence governments to alter their behavior is in my mind somewhat akin to David's miracle victory over Goliath.

This book has four main audiences. For international relations scholars, *The New Terrain of International Law* explains why today's international courts are more politically prominent than international courts of the past. I document a new style of international courts and explain how this new style combines with the growing practice of embedding international law into domestic legal orders and empowering national judges to apply this law. I also focus on how law is a different sort of political resource, operating by its own rules of the game, able to mobilize a transnational constituency of lawyers and judges and to tap into diffuse support for the rule of law. Legal politics *are* different from electoral politics and diplomacy, and this is precisely law's attraction.

For specialists of law and courts, this book conceptualizes and studies international courts using categories and tools that have been developed for studying comparative courts. I examine international courts as tools of social control that powerful state actors use to lock in their policy preferences. By delegating legal interpretation to courts, the authors of the law gain a slow time-release mechanism that litigants can activate to push in the direction the law indicates. International courts are designed to promote the objectives of economic and political liberalism written into the DNA of international law, enforcing the legal rules that governments agreed to perhaps expecting that they would never truly be held to these legal commitments.

For specialists of international law and institutions, this book helps to move beyond the "usual suspects" scholars tend to focus on. The book considers twenty-four international courts based around the world. I include courts and legalized dispute adjudication systems that Americans and Europeans care about. Still, United States actors are litigants in only six and European actors are litigants in four of my eighteen case studies. I compare ICs constraining very powerful countries to contexts where governments are not known to be supporters of international law, international legal institutions, or even the rule of law. My goal is to broaden the focus of scholars, to show that international law can constrain the powerful but it is also an important resource to promote rule of law ob-

jectives outside of Organisation for Economic Co-Operation and Development (OECD) countries.

Finally, this book is a theory-generating enterprise that brings comparative politics tools and the best of what qualitative methods uniquely provide—a careful attention to the causal pathways of political change, taking seriously the importance of local context and priorities, world history, and the complexities of the real world. By identifying like cases, institutions, and categories that others might compare in their own work—quantitative or qualitative—I hope this book makes the study of comparative international judicial systems less daunting. The case studies are designed to bring theories and institutions into the nitty-gritty of actual cases, revealing the complexity that is often lost when political scientists engage in deductive theorizing and macro analysis. Scholars can mine the case studies and the role-based chapters to identify factors to explore more systematically. I also hope the case studies make this book more teachable, and the new terrain of international law less abstract.

When I first began presenting this research a number of years ago, especially older members of the audience would sometimes become very upset. I understood the source of their consternation, although I thought that venting on me was fundamentally misdirected. I did not create the ICs I study. Nor did I have any say over how international courts were invoked or how legal rulings affected political outcomes. Quite honestly, if I had been asked, I might have recommended that some of the ICs in this study not be created and some of the cases not litigated. I try to adopt a value-neutral approach when it comes to studying international courts. Still, this work is upsetting to some because it upends taken-for-granted assumptions.

If you are over forty-five years old, chances are you studied international law during the Cold War when power politics mattered more than law, and when most international legal institutions were virtual entities that barely met and rarely said anything of political or legal consequence. For lawyers who have not updated their knowledge and for litigators who have little direct contact with international law and international courts, this book's conversation may seem esoteric and even fantastical. Numerically speaking, most lawyers probably fit into this category, which means by definition that this book presents what is probably a minority view of how international law operates in the real world. Mine may be a minority view, but it is also a far more informed view than that of most practicing lawyers. Today's judges and lawyers have specialized, so that their job likely does not bring them into contact with a broad range of international law and international courts. Also, just as most of the na-

tional economy remains domestic in nature—for example, most of a family's income is spent on locally produced goods and services and most citizens never venture beyond their borders—most of the daily life and practice of lawyers remains untouched by international law. Add in our preference to focus on what is close to home and familiar, and to avert our gaze from any international or external origins of decisions we make, and it is not hard to see why the changes in the international judicial world remain peripheral for most law faculties and lawyers. But just because international law feels distant and everything we call law seems homegrown does not mean that politics, law, and legal practice today is not colored by international legal precepts. Nor do traditional views mean that the international legal world is unchanging.

Clearly and undeniably international courts are growing in political importance. Newspaper coverage reflects this reality, and scholarship follows the front pages. International law is a burgeoning area of academic writing. This book is motivated by the changing world around us. What *The New Terrain of International Law* identifies, names, and explains is but the tip of the iceberg of how legalization already is and will continue changing our world.

This book has been incredibly challenging to write, and I have had much help along the way. With twenty-four courts, very diverse legal subject matters, four judicial roles, eighteen case studies involving institutions and countries from around the world, it has been hard to keep the many pieces organized and accurate while staying focused on the larger argument. I have worked hard to get beyond an alphabet soup of institutions, so as to make the international judicial architecture more tractable. Yet collecting and managing information about international courts is at times bewildering. Something as straightforward as when a court was established can actually be quite hard to pin down, and the design, legal jurisdiction, the way rulings get reported, and the membership that falls under a court's jurisdiction are constantly moving targets. To give but one example, the European Court of Justice was created in 1952, but only became the Court of today starting with the launching of the European Economic Community. This Court has been redesigned at least four times, because the European project has grown, the number of judges sitting on the court has increased from six to twenty-seven, and member states added a Tribunal of First Instance. The European Court's jurisdiction continues to grow every time European states decide to regulate a new area of the economy, and both the European Court of Justice and the Tribunal of First Instance have changed their names so it is hard to know what to call the European Court of the 1980s. I have intentionally eschewed the details that lawyers often hold dear, trying instead to create heuristics that allow readers to follow the analysis without needing to

stay on top of moving targets. I imagine and expect specialists on each of these cases, institutions, and legal topics will object to or find small errors in what I have written. As I say in the book's conclusion, this book is a "lumping" exercise, which means that it glances over important details and nuances that are of meaningful legal importance for the purpose of comparison. I have done my best to accurately discuss diverse laws and institutions, and to get the dates, actors, and details right. I apologize in advance for the errors that surely exist.

If this book is relatively clearheaded, comprehensible, accurate in its details, and readable, it is because of the feedback I have had along the way. Larry Helfer has been a partner in studying and writing about Latin American and African courts. Not only is he willing to travel to remote places, he has also with amazing cheer read many drafts, encouraged me, and provided incisive comments at many stages during the writing of this book. It is a rare gift to find a fellow traveler who is also curious and open to wherever the data takes us. As a bonus, David Boyd comes as part of the Larry package, making travel delicious and enjoyable, and ensuring that we also talk about something other than international law. Cesare Romano has been a resource from the time I barely knew anything about courts outside of Europe. He has read many drafts of this book and articles, and has always been encouraging, helpful, and a supportive friend despite my very many blunders. Erik Voeten and Jonas Tallberg have also read multiple drafts multiple times, giving me extremely helpful feedback, even on the fifth version they read! Thanks for all of your patience and help.

Many others have looked at pieces of this project, come to workshops, or created opportunities to get feedback. Thanks to Samantha Besson, Tanja Börzel, Damian Chalmers, Tom Ginsburg, Larry Helfer, Ian Hurd, Mattias Kumm, Peter Lindseth, Franz Mayer, Steve Nelson, Jide Nzelibe, Joost Pauwleyn, Henrik Palmer Olsen, Chris Reus-Smit, Thomas Risse, Cesare Romano, Hendrik Spruyt, Jonas Tallberg, Stephen Toope, Leslie Vinjamuri, Erik Voeten, and Michael Zürn for coming to workshops where we could talk about the book in depth. Thanks to Francesca Big-nami, Rachel Cichowski, John Crook, Paul Diehl, Jeff Dunnoff, Andreas Follesdahl, Michael Geyer, Brian Hanson, Nick Hatzis, Darren Hawkins, Alexandra Huneus, Beth Hurd, Ian Hurd, Vicki Jackson, Wade Jacoby, Peter Katzenstein, Judith Kelley, Bob Keohane, Michael Rask Madsen, Sally Merry, Alexander Panayotov, Mark Pollack, Tonya Putnam, Morton Rasmussen, Duncan Snidal, Richard Stewart, Bernhardt Zangl, and others who read and commented on pieces of this book and its arguments. Thanks to Ji Li, Stephen Bychowski, Alexander Panayotov, and Aleksandr Sverdlik for invaluable research assistance (the diagrams of regional regime complexes were Aleksandr's creation). Thanks to Sophie

Meunier, Wade Jacoby, and Judith Kelly, colleagues who have also become important friends. I feel like I have been working on this book for years, and I know I have forgotten to mention some people—so a blanket thanks to the many people who have answered my e-mails and offered their feedback along the way.

I have developed the pieces of this argument over the years, mostly through articles presented at various workshops and published in various forums. These articles probed ideas, for example, the category of new-style courts, the idea that delegation to courts is both self- and other-binding, that ICs are trustees, that ICs play multiple judicial roles, and that international regime complexity matters, have all appeared in articles published from 2006 on. This book updates all of these ideas, qualifying my earlier claims while creating a simplified snapshot of the international judiciary as of 2011.

I would not have started this book without Joseph Weiler inviting me to spend a year at Harvard Law School where he guided me to audit courses on property law, constitutional law, and administrative law. I would not have pursued my intuition about the four judicial roles without Mike Tierney, Darren Hawkins, and Dan Neilson pushing me to write memos that explained my ideas. And I would not have finally finished this book were it not for the John Simon Guggenheim Foundation and the American Academy of Berlin, which provided a wonderful respite for me to push through the bulk of the writing and revisions. This project has also had support from Northwestern University, the Howard Foundation, and research support from Northwestern and Vanderbilt University has been critical for field research in Latin America, Europe, and Africa and for research assistance. Residential stays at the American Bar Foundation and Northwestern Law School also pushed my thinking on this project. Mostly, this book is reflective of the rich intellectual and interdisciplinary pluralism that flourishes at Northwestern University. The Department of Political Science's commitment to multiple methods and strength in all social science and theoretical perspectives, and the Buffett Center for International and Comparative Studies' relentless efforts to get scholars from different disciplines to work together have had a formidable influence on my thinking.

The only people who have given as much to this book as I have are my family who endured me through what has been a very consuming project. Brian is my better half who makes everything I do both possible and meaningful. My father, mother, sisters, and in-laws are always great cheerleaders and listeners. My daughter wanted me to include our dog in the book's dedication. I call Quinn "happiness" for his unabated enthusiasm whenever I walk through the door, and his company as he follows me from room to room. But I dedicate this book to Abigail and Elliot,

who shared their mother even when they really did not want to. In some ways, I have been working on this book your whole lives. You came with me to Berlin and joined in life's adventure of living abroad. Especially in the last year and a half there has been more work than play because of this book. I hope you are proud of this book, as it reflects our collective achievement. That said, please do hold me to my promise not to work as much or be as distracted now that this book is out the door.