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978-1-107-00416-0 - Domestic Law Goes Global: Legal Traditions and International Courts

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1 The creation and expansion of international courts

International courts have proliferated significantly in the international system, growing from only a handful of courts a century ago, to over 100 judicial or quasi-judicial bodies today.¹ Prominent international courts include the International Court of Justice (ICJ), the International Criminal Court (ICC), the European Court of Justice (ECJ), and the World Trade Organization's (WTO) Dispute Settlement Understanding. International courts operate at the regional and global levels and cover a wide variety of issues such as territorial disputes, human rights, the law of the sea, trade, investments, and the use of military force.

While the number of international courts has increased significantly over time, there is considerable variation across courts. First, some international courts receive much stronger and broader state support than other courts. The Rome Statute, which recognizes the jurisdiction of the ICC, has currently been ratified by 111 countries, or over 55% of all states in the world.² The World Trade Organization's adjudication mechanism receives a high level of international support as well, with 153 states (75%) belonging to the organization today.³ Other courts receive significantly less international support, such as the ICJ, where only one third of states in the world accept the compulsory jurisdiction of the Court (Alexandrov 1995).

Second, there is considerable variation in the design of international courts. Some courts, such as the ECJ, have a limited regional membership scope, while other courts, like the ICJ and the ICC, are more global and universal in their orientation. Some institutions, like the European Union (EU), require membership in the community's judicial body, while other international courts, such as the Permanent Court of International Justice (PCIJ) and the ICJ, create variation in states' commitments to the

¹ This information is taken from the Project on International Courts and Tribunals at www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf.

² See www.icc-cpi.int/Menus/ASP/states+parties.

³ See www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

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courts by allowing for reservations on states' declarations to the courts. A court's jurisdiction may be qualified by time limits, types of disputes, or application to certain laws or nations, which some have argued hinders an international court's effectiveness (Eyffinger 1996).

Third, there is considerable variation in major power support for international courts. While the creation of new world orders after victory in major wars may include the creation of new international courts (Ikenberry 2001), major power victors may become less willing to support these institutions when they challenge their national interests (Posner 2004). A good example is the United States' tumultuous relationship with international courts. The United States withdrew its ICJ optional clause in 1986 in light of an unfavorable ruling in the *Nicaragua* case, and more recently expressed strong opposition to the creation of the ICC (Bolton 2001). On the other hand, the United States was a fervent supporter of the WTO's adjudication mechanism (Brewster 2006). Even more surprising was President George W. Bush's failed attempt to persuade the US Congress to ratify the Law of the Sea Convention, a move that would have opened up the United States to the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS). Other major powers vary in their support for international courts as well. France withdrew its optional clause declaration to the ICJ in 1974 in opposition to the Court's adjudication of the *Nuclear Tests* cases. And yet, as a founding member of the European Economic Community, France supported the creation of the ECJ, a court with considerable teeth, where judgments rendered at the supranational level have altered the domestic law of EU member states (Burley and Mattli 1993).

How are we to understand this rich variation in state support for international courts? When do states support the creation of new international courts and when do they oppose them? Why do some states agree to recognize the jurisdiction of international courts while other states eschew them? We argue that the key to unpacking this empirical puzzle lies in a better understanding of the two-level legal relationship between domestic law and international law (Koh 1997, 2641). To explain the formation of new courts and the expansion of state support for pre-existing courts, our theoretical argument emphasizes the importance of domestic legal traditions. We argue that characteristics of civil law, common law, and Islamic law influence states' willingness to create new international courts or join pre-existing courts. The initial negotiators of new courts design institutions in ways that are optimal from a legal standpoint. Later joiners to the court are influenced by the court's legal principles and rules as well, viewing some international courts as more capable and fair adjudicators than other courts.

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Our theory distinguishes between the motives of states creating a new court, what we call the “originators”, and the decisions made by states to join existing international courts, a group we call the “joiners.” The originators are able to negotiate the design of an international court’s rules, while the joiners must condition their decision to accept the court’s jurisdiction based on the existing rules and practices of the court. Originators seek to create international courts in their own legal image to reduce uncertainty in future litigation situations. Joiners find international courts attractive if they are able to use the court as a tool for sending signals to other states about their willingness to resolve disputes peacefully and if they view the court as a fair and unbiased adjudicator.⁴

In the next section, we describe several explanations that have been developed to help understand the puzzle of state support for international courts. This is followed by a summary of our theoretical arguments about how domestic legal traditions influence the decisions made by originators and joiners. We then discuss the influence of domestic legal traditions on the rational design of states’ commitments to international courts and the broader significance of our research for the academic and policy communities. The chapter concludes with a road map for the remainder of the book.

Why states create or join international courts

There are a plethora of explanations for the proliferation of international courts, accounts which often mesh well with realist, liberal, rationalist, and constructivist viewpoints on international institutions more broadly. Much like the expansion of international organizations (IOs) and regimes, international courts have grown in number and scope, especially after the end of the Cold War. In this section, we review a variety of answers to our initial puzzle regarding the proliferation of international courts. We also discuss some of the shortcomings of these theories, which we seek to remedy in our theory of international adjudication.

Hegemony/structural change

While a skeptical realist might see international adjudication as an idealist’s waste of time (Morgenthau 1948), other scholars examine the orders

⁴ Other international relations scholars have made similar distinctions. For example, Gruber (2000) argues that the originators of regional trade agreements receive more benefits from cooperation than later joiners. Hawkins and Jacoby (2008) make a distinction between early and late joiners to the European Court of Human Rights (ECHR).

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created by global or regional hegemons, which establish a set of rules, principles, and institutions that can further the hegemon's goals (Organski and Kugler 1980; Gilpin 1981; Keohane 1984; Ikenberry 2001; Lemke 2002). International courts are created through lengthy and detailed negotiations and it is not surprising that major powers, such as the United States and the United Kingdom, play a significant role in these processes. States victorious in global wars may view the establishment of new global courts as an essential part of the post-war order construction process, as illustrated by the creation of the PCIJ following World War I and the formation of the ICJ following World War II. A hegemon could bind itself to a new post-war order more credibly by establishing and supporting an effective international court. Powerful states can use international courts to stabilize relationships with weaker powers, pacify weaker states by giving them a voice in the international order, and stabilize the order by locking in the hegemon's preferences (Krisch 2005). One sees a similar logic in arguments that international courts proliferate in the aftermath of significant structural changes because pre-existing norms shift rapidly, creating space for new institutions. Tiba (2006, 215) argues that the erosion of the Westphalia model of state sovereignty following the end of the Cold War gave non-state actors greater standing in international law and helps to explain the recent proliferation of international courts.

However, unlike other international institutions that often provide direct benefits to major powers, such as regional free trade agreements, international courts are distinctive because they can mitigate power asymmetries in interstate bargaining. Weaker countries have more to gain from a system of effective international courts than major powers because international courts help to level the playing field in world politics (Scott and Carr 1987; Bilder 1998). Empirical evidence supports this conjecture: as states' capabilities increase, they are significantly more likely to renege on optional clause declarations to the World Court (PCIJ/ICJ) (Powell and Mitchell 2007). On the other hand, major powers can sometimes benefit from international law and shape it to their power advantage through colonial conquest (imposition of law), by declaring to whom the law applies (civilized vs. uncivilized peoples), promoting legal principles that advantage them in interstate bargaining, and conditioning aid on international legal practices (Krisch 2005).⁵

While we don't doubt that global and regional powers are important players at the negotiating table when new international courts are

⁵ For example, in the sixteenth century, Spain pushed for a territorial ownership principle based on discovery rather than effective control because their early colonization efforts put them in an advantaged position (Krisch 2005).

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established, we think a power-based explanation can only go so far. As noted earlier, major powers support some courts while eschewing others, often at similar points in time, even though state capabilities remain fairly static in the short run. There is also considerable variation among global and regional powers in their enthusiasm for international adjudication. A power-based explanation has difficulties explaining why two major powers with similar capabilities would adopt distinct levels of support for new international courts.⁶ Furthermore, not all international courts emerge in the aftermath of system-changing wars. Some are created for functional purposes, as global interactions change in both frequency and form over time.

Functional need

Another story about why international courts are created is that they emerge in situations where they are needed. Human rights courts, for example, emerged as global norms for human rights protection became more entrenched, and as publicity about human rights violations became more prevalent. Similarly, the ECJ was created as a judicial arm of the European Community “to ensure that in the interpretation and application of [the treaties] the law is observed” (Article 220 of the Treaty Establishing the European Community). The WTO’s adjudication procedure helped to fill a dispute settlement purpose that was lacking in the prior General Agreement on Tariffs and Trade (GATT) agreement. This theoretical viewpoint sees the creation of new international courts from a functional lens, attributing the proliferation of courts to globalization and increasingly complex and specialized interactions in trade, the environment, human rights, and other issues. One finds a similar story in the literature on IOs, which also links the proliferation of IOs (in part) to expanding functional needs for the institutions (Jacobson *et al.* 1986). This approach might also explain why certain issue areas have seen much more rapid growth in the number of international courts than others, as states would be wary of ceding significant authority to international courts in certain realms, such as security politics (Alter 2003, 67).

The functional story is a useful one, especially in terms of explaining variance in the frequency of international courts across issue areas. Yet,

⁶ For example, the British and American governments were extremely reluctant in their support for the creation of the PCIJ in comparison to their French and German counterparts. Interestingly, however, the British and American negotiators, Lord Phillimore and Elihu Root, were much more in favor of a court with compulsory jurisdiction in comparison to the median preference of their respective governments (Lloyd 1985).

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even within a single issue area, such as trade, there is considerable variation in the design of international courts. Simply knowing the issues to be covered by a court's jurisdiction does not explain why states decided to create a court at a particular point in time. Moreover, this approach does not help us understand why the court's creators select a particular institutional design. Functional need may help us understand the impetus for negotiations to create new international courts, but it is limited for explaining the variety in institutional design across courts in a single issue area.

Delegation

A series of recent studies focus on the delegation of authority to international courts. One approach by Posner and Yoo (2005) utilizes a principal-agent model to explain why states would cede authority to an international adjudicator. The court can play a useful role by providing new information to the disputants, which reduces uncertainty in the interstate bargaining process. States would only want to cede temporary control to the arbitrator in this situation for the dispute at hand, and would avoid creating long-term commitments to international courts. Yet, this theory is hard pressed to explain the increasing prevalence of adjudication relative to arbitration in world politics (Helfer and Slaughter 2005). It does not consider the varied roles that international courts might play, with administrative authority being ceded more naturally to international courts by states than more sovereignty restricting roles, such as dispute settlement (Alter 2008). This approach also fails to explain why so many states vividly support the ICC by signing and ratifying the Rome Statute, a serious and long-term commitment. Why did the international community resort to the creation of a permanent international criminal adjudicative body? Why not alleviate temporary needs for an international criminal tribunal by continuing to create *ad hoc* courts, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia?

A second delegation story focuses on international courts as mechanisms for states seeking to make credible commitments (Moravcsik 2000; Alter 2003, 2008; Helfer and Slaughter 2005; Mitchell and Hensel 2007; Guzman 2008). States create or join international courts in order to enhance the credibility of interstate commitments. Courts can enhance commitment credibility because they increase the reputation costs for reneging, help identify violations of the law, clarify the law, aid in compliance with international law more broadly, and reduce monitoring and evaluation costs. A good example of the logic of this commitment

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explanation is found in Simmons and Danner's (2010) study of state ratification of the Rome Statute. They argue that democratizing states with a recent history of civil war can credibly commit to improvements in human rights practices by ratifying the ICC treaty. Because the court's jurisdiction is mandatory and because the independent prosecutor has adequate authority to initiate proceedings (even against the signatory government), this act of ratification sends a credible signal to the rebels about the state's commitment to peace. Moravcsik (2000) makes a similar argument about European states' willingness to join the ECHR as a credible signal about their commitment to democracy.

Yet, if reputation is the driving force in this process, it is not clear why states would need international courts to resolve interstate disputes: "[I]f reputation were strong enough to compel compliance with adjudication, one wonders why it was not also strong enough to resolve the dispute *without* adjudication. Why is reputation too weak to induce compliance before a third party pronounces a nation's legal obligations, but still strong enough to induce compliance after such a pronouncement?" (Ginsburg and McAdams 2004, 1240). We think reputation plays an important role, but that the presence of an international court serves to enhance the efficiency of bargaining. In other words, there must be something about bargaining in the shadow of the court that gives states incentives to create permanent adjudicators. Otherwise they could rely on other non-judicial mechanisms for commitment credibility, such as democracy, past reliability, and IOs. We believe that states signal information to each other through international courts, but the adjudicator need not be present in every dispute settlement procedure in order to exert an influence. By focusing mostly on the practices of international courts, scholars have failed to examine the broader purposes that courts can play. Commitment credibility gets us part of the way in understanding the proliferation of international courts, but as we show later, states have incentives to lock in particular institutional design features in order to enhance the court's efficacy in future dispute situations.

Kantian peace

Another viewpoint is that the proliferation of international courts is part of the broader movement towards a system characterized by Kantian peace (Teson 1992). Over time, the number of democratic states has increased substantially, which has resulted in the creation of numerous IOs and expansive trade networks (Russett and Oneal 2001). Given democracies' preferences for legalized dispute resolution (Raymond 1994, 2004; Slaughter 1995) and given that most system leaders have

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been democratic, it is only natural that the frequency of international courts would increase in the Kantian system. Democratic states, such as the United States and the United Kingdom, were pioneers in the successful use of arbitration in both the Jay Treaty and the Alabama claims, which spawned further efforts at global arbitration and adjudication at The Hague in 1899 and 1907, culminating in the creation of the Permanent Court of Arbitration and later the PCIJ (Mitchell 2002).

The liberal peace perspective offers important insight into the proliferation of international courts and tribunals. One need only look at the success of legalization and institutionalization efforts in the context of a democratic European region to be convinced of this argument. However, the United States' lack of support for several international courts, such as the ICJ and the ICC, casts some doubt on the liberal story. Whether the United States is merely an outlier among liberal states remains to be seen, yet we think its behavior stems in part from its domestic legal tradition, common law, standing at odds with the civil law nature of the early international court system:

As an initial matter, it is understood for the most part that civil law-trained jurists created modern international law, despite the fact that the term "international law" was coined by a jurist from the common law world, Jeremy Bentham. Of course, theoretically, the jurists responsible for creating the ideas and institutions of international law could have done so in isolation from their domestic legal environments. In fact, however, jurists necessarily borrowed and adopted existing institutions and mechanisms from their existing civil law systems – sometimes subconsciously and perhaps even despite explicit efforts to reject civil law notions. It is only natural that they created international law in the image or shadow of civil law. Thus, from its earliest stage, international law developed among civil law ideas, with the predictable result that it reflected those very ideas. (Picker 2008, 1105)

Early international courts, such as the PCIJ, were created with civil law rules and principles. This led to increased support for this Court among civil law states in comparison to common law and Islamic law states. There is a moderate, positive correlation between common law and democracy, and yet common law countries do not rush to support all international courts equally. Courts created with common law rules in mind, such as the ICC, are much more palatable to the population of common law countries. Democracies may be open to a system of international adjudication, yet they also have many mechanisms in place naturally for successful and credible dispute resolution (Lipson 2003). A fully Kantian system might be one in which courts of last resort exist, but they are rarely utilized (Mitchell *et al.* 2009).

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Another perspective focuses on the proliferation of international courts as a process of contagion. Peace activists in the United States and the United Kingdom pushed for their governments to negotiate the Permanent Court of Arbitration (PCA) (Allain 2000). While the PCA was active mostly in the early years, the negotiations at the Hague in 1899 and 1907 played an important role in the creation of the PCIJ after World War I. Negotiators utilized many design principles crafted in those earlier documents. The PCIJ and its successor, the ICJ, subsequently influenced the creation of new courts in the aftermath of World War II. In short, one sees a process of court contagion as new courts partially emulate existing courts and as the increasing number of cases and “sound” judgments leads to further utilization of existing courts and demands for new ones (Tiba 2006). One sees a similar process at the regional level, especially in Europe, as reflected in both the increasing number of regional courts and the rise in caseloads over time (Helfer and Slaughter 2005, 915–916).⁷

It is hard to distinguish the contagion argument from the Kantian peace argument given that both processes have occurred simultaneously in the past century. We think that part of the story of proliferation also stems from states’ desire to create effective adjudicators. Given the early reliance on civil law procedures and rules in international courts, it is only natural that states with legal traditions distinct from civil law would seek to create new international courts. The ICC statute adopted several common law features, such as rules regarding disclosure obligations, appeal proceedings, and admission of guilt by the accused. The design of several human rights tribunals, such as the International Criminal Tribunal for former Yugoslavia, was also influenced strongly by common law principles. Similarly, the proposed Islamic International Court of Justice (IICJ) would allow Islamic law states to integrate important religious principles into the process of international adjudication. In short, we believe that contagion is certainly a factor, as courts with good prior records are more likely to be utilized. However, we show theoretically that not all adjudicators are capable of being fair and balanced. Courts that adopt similar legal rules and procedures as those found in the disputants’ domestic legal traditions are more capable of helping the parties to strike successful and durable agreements.

⁷ As Alter (2008, 38) notes, much of this activity is heavily concentrated in the last fifteen years: “[S]eventy-five percent of the total IC [International Courts] output of decisions, opinions, and rulings (24,863 out of 33,057) have come since 1990.”

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A rational legal design theory of international adjudication

To explain the puzzle of why states create and join international courts, we focus on the intersection of domestic law and international law. After accepting a basic premise that states can benefit from bargaining with the potential assistance of an adjudicator, we contend that not all adjudicators are created equal. States have incentives to create international courts in their own legal image to reduce uncertainty in future bargaining situations. Similarly, states that join standing international courts look to the court's rules and procedures in order to assess the ability of the court to be fair and unbiased. The design put into place by the originators of a new international court influences the level of state support for the court, the design of states' commitments to the court, as well as the ultimate influence of the court on members' behavior. In short, we can understand the emergence and influence of international courts more clearly by focusing on their rational legal design.

The originators: decisions to create a new international court

States have political and legal preferences that they bring to the bargaining table when creating a new court. States that are strongly committed to the court's creation have incentives to lock in their own country's future commitments to the court (Moravcsik 2000). Negotiators may tie their state's future hands by designing a court with sound design principles and enforcement mechanisms. They may also tie their country's hands by raising the reputational costs for reneging on the court's future judgments. If the originators are supportive of the court, they have incentives to create procedures and rules for the court's operation that will benefit their country in future litigation cases, or at a minimum, ensure that the adjudicator's behavior will be reasonably predictable.

If states can anticipate high degrees of future enforcement, they have incentives to negotiate intensely to secure the best deal possible (Fearon 1998). International courts do have not the same types of enforcement mechanisms as domestic courts, although they are able to raise the reputational costs for noncompliance and they have institutional resources at their disposal for helping parties to carry out judgments (Mitchell and Hensel 2007).⁸

⁸ In this study, we do not problematize the creation of new international courts "all the way down." This might involve a process-tracing of the events leading up to negotiations to form a new court. In the formation of the PCIJ, for example, one might focus on how the