Introduction

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I.1 Do International Courts Matter in Rule of Law Countries?

Since the establishment of the first permanent international court in 1922, states have created more than twenty-five international judicial bodies.[1] This cascade of international courts (ICs) and judicial institutions on a global scale – sometimes characterised as 'the international judicialisation of politics' (Tate 1995; Tate and Vallinder 1995; Alter 2014) – has accelerated since the end of the Cold War. The mandates of these ICs often go well beyond peace and arbitration to cover issues as diverse as human rights, market integration, criminal law, trade and investment. Moreover, new courts and tribunals are continuously being called for in issue-areas where they do not yet exist, such as the regulation of climate change or transnational corporate wrongdoing. In some areas, courts have arguably managed to expand their authority well beyond their original mandates, engaging in not only adjudicating, interpreting and monitoring international treaty compliance but also increasingly contributing to the making of international law (IL).

Most studies describing this evolution have either drawn on classical legalistic approaches (see e.g. Clarke, Keller & Stone Sweet 2008; Mackenzie, Romano & Shany 2010; Aust & Nolte 2016)[2] or been developed by constitutionalists – often from political science and sociology – preoccupied with mapping the global development and influence of ICs

[1] See e.g. the 'iCourt Finder' at http://jura.ku.dk/icourts/icourt-finder/. We employ a broad understanding of courts and judicial bodies in this volume encompassing not only courts and tribunals but also human rights treaty bodies.

[2] See in particular the PICT project at www.pict-pcti.org/. The second edition of the manual was published in the Oxford University Press 'International Courts and Tribunals Series' in 2010 (R. Mackenzie, C. Romano & Y. Shany, with P. Sands, 'Manual on International Courts and Tribunals').

(see e.g. Slaughter 2000, 2004; Slaughter & Burke-White 2006; Romano, Alter & Shany 2013; Alter 2014). While the more classical legal scholarship has been dominated by accounts that outline principles and applications of IC case law in national courts, constitutionalists have focused on actual practice, describing the evolution and functioning of ICs more broadly. What has unified both strands of research, however, is the often implicit description of a universal and unidirectional strengthening of legalisation and judicialisation in global affairs. The present volume puts the question in a different way. We do not from the outset normatively assume that ICs are important and powerful actors or that national actors without further ado cite, embrace or enter into a constructive dialogue with these supranational bodies. Rather what this book does is to ask – from a multidisciplinary perspective – how and to what degree do ICs actually influence, impose constraints on and create loyalty from those actors involved? It is our claim that rather little research has been occupied with the actual effects *on the ground* for those national courts, political institutions and citizens who are formally governed by the increased judicialisation.[3] Moreover, the effect-studies that actually have examined the domestic politics dimension of this trend have mainly dealt with the 'backlash' against ICs in developing countries or autocracies (Helfer 2002; Simmons 2009; Martin 2013; Alter, Gathii & Helfer 2015; Graver 2015; but see Shany 2016). Consequently, we have relatively few studies on how *rule of law countries*[4] – which are often the architects behind the establishment of ICs – interact with, and are affected by, this new international judiciary (see, however, Føllesdal 2014, 272–99).[5] In this book, we aim at addressing exactly this gap in the literature.

Undeniably, this book project is to a large extent motivated by what we perceive as some questionable assumptions that seem to exist in substantial parts of the present theoretical and empirical literature. It has for instance often been assumed that rule of law countries – here defined as

[3] A few legalistic studies have addressed the formal reception of doctrines; see for instance the Oxford book series on international courts and tribunals at https://global.oup.com/academic/search?q=Oxford+book+series+on+international+courts+and+tribunals+&cc=dk&lang=en.

[4] The volume refers to a select number of rule of law countries – some long-established such as the Scandinavian countries, Australia, Israel, and Switzerland but also newer democracies including the Czech and Slovak Republics. All countries included rank above the 60th percentile in the World Banks Worldwide Governance Indicators.

[5] See also, for a more theoretical perspective on democracies and international law, Moravscik 2000, 217–52, and 2013.

rather well-established democracies – would embrace 'their own' ICs cooperatively and with few reservations (Helfer & Slaughter 1997; Heyns & Viljoen 2001; Benvenisti & Downs 2009; Simmons 2009; afner-Burton 2013). The more recent developments in the United Kingdom – not only the Brexit referendum – but equally the quite vocal discussion of whether the UK should leave the European Convention of Human Rights, certainly questions the assumption that rule of law countries always embrace their own international institutions. Prime Minister Theresa May advocated strongly (as Home Secretary) for a British withdrawal from the European Convention on Human Rights, and the Conservatives pledged in a manifesto provision to replace the Human Rights Act (incorporating the Convention into domestic law) with a 'British Bill of Rights' to restore the primacy of British law and British judges over the Strasbourg European Court of Human Rights (ECtHR) judges. The same goes for the European Court of Justice, which was also in bad standing during the referendum campaign. At the Conservative Party Conference in October 2016, May in her speech strongly stressed that Brexit for her meant ending the jurisdiction of the European Court of Justice in the UK, arguing that not until that happened would the UK again be 'an independent sovereign nation [. . .] making its own laws.'[6] Also America's President Donald Trump was in his campaign hostile towards international law, casting doubt about whether the new administration would honour US obligations under the Geneva Conventions[7] and international humanitarian law – not to mention NATO and the climate treaties that the Obama administration not only endorsed but fought so hard for. As it turned out, Trump has already followed up on his campaign trail headlines, leaving the rest of the Western world truly worried, as he abandoned the Transatlantic Trade and Investment Partnership and the 2015 Paris climate agreement.[8]

However, domestic politics go beyond political policy change. National courts are also – in this book's perspective – part of what we define as the domestic political field. It has thus often been argued that *national courts* in established democracies would be especially committed to entering into dialogue with other courts but also to upholding and enforcing the international jurisprudence coming out of these ICs (Kumm 2003; Slaughter 2004; Benvenisti & Downs 2009; Noelkaemper

[6] See www.bbc.com/news/uk-politics-37532364.
[7] See www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394.
[8] See www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html.

2011). However, few have in fact examined whether this expectation has any resonance in the real world. By launching some in-depth empirical studies, this volume explores what is at stake on the ground in terms of constraints and opportunities for different types of actors involved in and affected by the judicialisation processes. We analyse phenomena that are almost invisible to purely legalistic accounts by exploring motivations and interests among judges, bureaucrats and politicians. Given the empirical demands of this focus, we cannot cover all rule of law countries or all ICs. Instead, we add value to existing legalistic accounts by integrating factors considered by other disciplines. The unifying element of these multidisciplinary chapters is the question of whether, how and to what extent not only national courts but also governments, parliaments, bureaucracies, financial markets and other substate actors and institutions in rule of law countries *actually* engage with, and are affected by, those ICs and judicial bodies that their states have invented and established. This cannot be reduced to a question of monism-dualism or to a discussion of different legal systems but must go beyond legal doctrine.

To answer our set of questions, we thus embrace a multidisciplinary approach with perspectives from political science, sociology and law. In this regard, the book is unique. Moreover, we explore a variety of different countries through specific case studies, as well as a variety of subject areas ranging from quasi-judicial humans rights bodies to formal courts, international trade and financial markets. The European courts, European Union (EU) and European Convention on Human Rights (hereafter Convention) are given most attention here because these venues are by far the most advanced supranational/international legal regimes in the world, and the rule of law countries we are focusing on in this volume interact most profoundly with exactly these courts and institutions.

Some chapters in the book are of a more general nature, cutting across countries as well as issue-areas (Conant, Pelc and Kucik, Perrymann, Mayoral, and Webb). Others are more in-depth studies of select cases (Wind, Freeland, Rask Madsen, Sipulova et al., Krommendjik, Amman, and Ronen). What unites these chapters, however, is that they all provide empirically substantiated explanations and a comparative perspective. By focusing on selected rule of law countries, we study the experiences of a group of states that must be expected to have the fewest problems adopting international case law and conventions into their own national legal order. Or do they? As noted earlier, little research has in fact been

asking and investigating this intriguing question.[9] The book is organised as follows: Part I presents cases where ICs *have a significant impact on domestic politics* though often in different and unexpected ways. Part II on the other hand presents cases *where domestic politics in different ways override or challenge the influence of ICs*.

Rather than a comprehensive and general outline of the impact of ICs on domestic legal systems, this is a question-driven study that will form part of the 'International Judiciary' Cambridge University Press book series that explicitly values contributions from non-legal disciplines such as political science, international relations theories and political philosophy. Since we deal with diverse rule of law countries and selected ICs and nonjudicial bodies, the contributors address three questions in their chapters. Firstly, what is the *impact* of ICs and quasi-judicial bodies on domestic political and legal systems and societies at large in the cases with which they are dealing? Secondly, to what extent, and how, do domestic actors *interact* with international legal institutions? And finally, how do governments, parliaments, national courts, bureaucracies and other substate actors resist, adapt to or utilise ICs and other legal regimes – even strategically? Naturally, each question is not equally relevant for all chapters, but our authors' analyses of these important issues make the chapters speak to one another in this anthology.

The two main parts of this volume thus serve to illustrate the diverse interplay between ICs and domestic politics. As Conant explains in her chapter, it is important to understand the processes of 'court empowerment' and 'court containment' theoretically, which legalistic approaches do not consider. Yet constitutionalists and realists have very different assumptions about the influence and power of international judicial bodies on the domestic level. Our point is that only by addressing these differences explicitly and in empirical case studies is it possible to grasp the full impact of the transformations that we are currently facing. Constitutionalists expect the power and influence of ICs to increase as the number of ICs grows. Realist approaches on the other hand link the influence of ICs directly to coercion and national interests. However, as Conant contends, the right answer is usually somewhere in between. Often ICs and IL have *contingent effects* on the ground as chapters by Webb, Wind, Ronen, and Ammann demonstrate in this volume.

[9] See, however, Moravcsik 2000. In this article Moravcsik challenges the conventional belief that advanced democracies will be the most active protagonists of international human rights conventions.

Governments and domestic courts – perhaps particularly mature democracies (and common law systems)[10] – may not always feel a need to defer to IC decisions.

I.2 The Structuring Power of Law

While the chapters in Part I of this volume illustrate how ICs matter on the ground, but sometimes a fashion other than what was originally anticipated, we similarly show how legal structures and institutions are *mediated* by factors outside law and legal analysis. In fact, it is here that 'politics' – understood very broadly – comes into the picture. Good examples of this include Pelc and Kucik's chapter where actor incentives and newly developing collective norms help explain why international case law may create precedent and shape the behaviour of the financial markets, an area where they were not expected to have effects. At the same time, there are examples in the book of other types of powerful legal structures that are mediated by domestic political conditions on the ground. For instance, Kosar describes variations in how the ECtHR shapes the internal legal infrastructure in both developing and developed democracies. Meanwhile, Freeland's chapter demonstrates how domestic political concerns about the implications of the complementarity principle dampened the once enthusiastic support of the International Criminal Court statute by the Australian government. By contrast, Perryman wonders how a realist perspective can make sense of the fact that a group of states has empowered a quasi-judicial body (the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights) to adjudicate on economic, social and cultural rights complaints even though these rights remain contested. Only a study of socialisation and change of social norms over time allows us to understand this, he argues. Employing a methodology of historical sociology, Rask Madsen also emphasises the unfolding structural power of a European legal regime. In his chapter, he first explains how domestic political actors in France helped shape the Convention, which later ended up being a catalyst and pioneer for reforms in the legal system of France itself. The full impact of the Convention can only be understood in a historical perspective that attends to the mediating role of domestic political actors.

[10] International human rights treaties are less likely to be ratified in common law legal systems because leaders of these states fear that highly independent and powerful judiciaries will develop and enforce them in unpredictable ways (Simmons 2009).

Similarly, Mayoral explains how a social norm such as trust is a mediating factor with which to explain the structural power of European law at the national level.

I.3 When Domestic Factors Have the Upper Hand

In a reverse manner, ICs and legal structures may not always be decisive. In the second part of this book, we demonstrate how domestic 'politics' sometimes have the upper hand *vis-à-vis* ICs. Once again, it is important to emphasise that we understand 'politics' very broadly: in accordance with political science literature on political actors in general, judges and courts are domestic politics actors, and institutions may have interests and motives that can influence but not necessarily determine their behaviour. To put it differently, when we argue that politics in the case studies of Part II have 'the upper hand', it is not just a question of 'backlash' against ICs, but a much more refined argument about how domestic actors including courts, judges and legislators respond to, resist and sometimes strategically utilise ICs to their own advantage. Again, however, these efforts are often mediated and contingent. To study how they are mediated and how and when interests and politics matter are the purposes of these studies. Sipulova, Janovsky and Smekel demonstrate this very well when they draw heavily on political science theories to explain how domestic factors such as political manifestos influence how two otherwise similar post-communist countries – the Czech Republic and Slovakia – have differed in their acceptance of human rights commitments. Political ideology matters, they argue, and should here be seen as a mediating factor when measuring the impact of human rights treaties on the ground. Webb also shows that domestic political actors sometimes use IL and international court rulings strategically when they react to International Court of Justice (ICJ) rulings on state immunity. Krommendijk similarly sheds light on how domestic politics – in this case parliaments in the Netherlands, New Zealand and Finland – are important to the understanding of how established democracies implement recommendations from UN human rights treaty bodies. Parliaments both influence when they want to limit and when they want to enhance the effect of these human rights remedies. Ammann provides one of this book's single-country studies in her analysis of how national judges mediate the ways in which ECtHR rulings affect domestic politics in sovereignty-loving Switzerland. The chapter illustrates how the semi-direct Swiss democracy often conflicts with the Convention and

how politically sensitive national judges reconcile European legal structures with the national legal system. Ronan also shows in her chapter how domestic political concerns frequently limit the influence of IL and ICs on Israeli national courts. Both hers and Wind's chapter on the Scandinavian supreme courts' citation practice demonstrate that well-established rule of law countries with significant human rights commitments nonetheless shield their societies from the full effect of supranational case law.

I.4 A New Research Agenda

What do we learn from the new research agenda presented in this book? It is first of all important to emphasise that the bulk of chapters in this volume are intended to convince and trigger the scientific curiosity of other scholars and students of law and politics and to go further into the on-the-ground details of judicial policymaking. When, where and under what circumstances do supranational structures matter in rule of law states and when is the effect mediated by the politics of parliaments, national judges, financial markets or other concerns? In fact, existing scholarship demonstrates that we know very little about this. More theoretically, the research presented here questions the constitutionalist (and legalist) claim about an all-encompassing expansion and legitimacy of ICs and IL. There is not necessarily a correlation between the establishment and setting up of new judicial bodies on the one hand and national judges' and politicians' endorsements of these bodies on the other and as recent events in the UK and US show us, not even in old well-established rule of law countries. The analysis and cases presented in this book instead provide a broader discussion and examination of how national courts and other national actors mediate the impact of external legal claims. Domestic judges are central as they are the ones who both resolve most legal disputes that transcend borders and invoke IL – also when they choose not to resort to international conventions and courts. National judges nevertheless still contribute to regional and global governance, as do financial markets, parliaments and non-binding international committees. However, as the chapters in this book also reveal, we are not infrequently faced with both subtle resistance to and sometimes even fundamental criticism of the world's most powerful courts by liberal democracies. Only liberal and pluralist theorising and detailed case-based studies as the ones conducted here can make sense of these variable patterns of interaction between ICs and domestic politics.

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