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Introduction

A The Problem with International Courts

The beginning of the twenty-first century has seen an unprecedented growth in the power and influence of international courts. These courts have increased in number, they have expanded their scope, and the amount of cases they decide is rapidly multiplying. Many commentators criticize this development.

These commentators present a series of arguments against the increased intervention of international courts in domestic affairs:

- Some argue that international courts lack democratic legitimacy: These courts are unelected, unrepresentative bodies and should therefore keep out of the business of democracies that usually represent the interests of their citizens.
- Another common criticism is that international courts are unlikely to make better decisions than national governments. In fact, some argue that these courts have poorer institutional capacities than national bodies and should therefore not intervene in their affairs.
- One can also argue that taking important issues out of the hands of representative bodies weakens public deliberation, which is essential for a healthy democracy.
- Other commentators call attention to the danger that international courts are captured by powerful transnational interest groups – some of which may be organized as Non-Governmental Organizations (NGOs) – and serve the interests of these elites instead of those of the general public.
- Finally, there are those who argue that the ultimate outcome of international courts' intervention, after all relevant actors in the global arena have reacted to their judgments and decisions, may be far worse than if the international court didn't intervene at all.

These arguments are often used by politicians to attack international courts and to threaten them with ignoring their judgments or even leaving their jurisdiction. The incredibly prolific European Court of Human Rights (ECHR), which disposed of more than 85,000 cases in 2017 alone, is often in the line of fire. So is the far less productive International Criminal Court (ICC), which managed to convict only eight people in more than sixteen years. Other courts that drew significant criticism are the Court of Justice of the European Union (CJEU) and the World Trade Organization Appellate body (WTO AB).

This book is a rejoinder to the critics of intervention by international courts. It highlights the conditions under which the judgments of international courts are both legitimate and likely to trigger the formation of good policies. It argues that international courts can enhance, instead of stifle, public deliberation. It suggests how international courts can cooperate with other actors in the global arena in ways that minimize the risk of capture and are likely to lead to good outcomes. The arguments against international courts are not dismissed. Rather, the book studies the boundaries and limitations of these arguments and explains when international courts should and should not intervene.

B Overview of the Book

Chapter 2 addresses the legitimacy of judicial law-making by international courts. International courts are constructed by states or international organizations to interpret and apply certain legal provisions. As far as courts only apply existing law, one may argue that they do nothing but execute the mandate that was duly given to them. Yet when international courts apply the law, they often develop it in ways that were unsanctioned, and often unforeseen, by their creators. Add to that the fact that even international courts that are not legally bound by their previous judgments often rely on their own judgments as if they were binding precedents and it is impossible to escape the conclusion that international courts make law all the time.

As judicial bodies, international courts are bound by the treaties that created them. These treaties are the formal basis for the courts' authority. Courts cannot contradict them in their judgments. However, international courts can use methods of expansive interpretation to manipulate the meaning of their founding documents. Expansive interpretation does not constitute a breach of the limits of the courts' authority, but it still raises the problem of democratic legitimacy of these courts. The

problem emerges because international courts are not constructed to represent the public in the states under their jurisdiction. They must therefore justify any use of their interpretative powers to intervene in the decisions of elected bodies in democratic states.

International courts ought to interpret their founding treaties restrictively only as long as these treaties adequately represent the interests of all the people affected by them. This may not be the case if the provisions for amending the treaty make it very difficult to change it in light of either new conditions or shifting preferences of the majority of the treaty's member states. Such provisions often give unmerited extortive power to a minority of states that resist any amendment to the treaty. Additionally, even if states can easily change the treaty, states may not always properly represent individuals. All democracies may be subject to democratic failures such as lack of political power for national minorities, disenfranchisement of vulnerable groups such as foreigners and in some countries prisoners, and immense power concentrated by interest groups. When treaties do not represent the will of states or when states do not represent the will of individuals, expansive interpretation doesn't necessarily contradict the will of all affected people and is therefore legitimate.

Chapter 3 addresses the second major challenge to intervention by international courts: the argument that there is no reason to believe their decisions would be better than those of national bodies. The book makes no claim about the legal proficiency of international judges. Instead, it addresses the problem indirectly by arguing that the unique institutional position of international courts helps guide the international community in the right direction. Therefore, even if the decision-making abilities of international judges aren't any better than those of national judges or politicians, allowing international courts to intervene would lead to better laws and policies than blocking their intervention.

The argument in Chapter 3 relies on the intuition that if many states adopt a certain policy, this policy is probably a good one. Eric Posner and Cass Sunstein used this intuition to construct a justification for the use of comparative law by national courts.[1] They apply the Condorcet Jury Theorem – a simple mathematical model according to which a majority's decision in a group is more likely to be correct than the decision of any individual decision-maker, at least under certain conditions. Unfortunately for Posner and Sunstein's argument, one of the conditions for the

[1] Eric Posner & Cass Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131 (2006).

applicability of the Jury Theorem is that decision-makers in the group decide independently. This conflicts with their own recommendation to states because they call on states to learn from the laws adopted by each other, violating the condition of independence. Due to this problem, the use of comparative law by national courts may prove self-defeating. It would result in states following each other's decisions without making any independent judgment, what Posner and Sunstein call "information cascades."

These cascades can be solved by international courts – not because they are better decision-makers but simply because their institutional position can preempt the problem. For example, the ECHR applies a doctrine called "emerging consensus." According to this doctrine, the court finds states that violate human rights that are protected by the majority of states in Europe in violation of the European Convention on Human Rights – the text it is tasked with applying. The ECHR follows the majority of the states and therefore, in line with the Jury Theorem logic, aggregates their collective wisdom. At the same time, states can decide independently, knowing that they can be guided by the ECHR. Some empirical research suggests states actually act this way, and wait for the ECHR's decision before they change their laws to conform to the European majority's view.[2]

The intervention of the ECHR breaks the vicious circle that states were locked into. It allows states, on the one hand, to decide independently and fulfill the critical condition for the applicability of the Jury Theorem and, on the other hand, to enjoy the benefits of comparative law by following the ECHR's judgments. However, this solution will work well only to the extent that the states do not have conflicting interests that would motivate them not to decide independently. If states want to adopt good policies quickly, before the ECHR has a chance to intervene, they may attempt to use comparative law themselves and start an information cascade. To the extent that the ECHR may delay or manipulate its decisions to avoid a political backlash, this problem may prove severe.

As a possible solution, the ECHR may use its margin of appreciation doctrine, which allows it to issue guidelines for the states' behavior while still deferring to state policies and not finding a violation. The court can thus escape the risk of a hostile response and be able to rapidly and

[2] *See* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 Int'l Org. 77, 106 (2014).

honestly apply emerging consensus, motivating states to act independently and wait for the court's final decision. The margin of appreciation doctrine also allows the ECHR to provide states with a warning that their practices contradict the European majority without accusing them of violating the convention. This may increase the willingness of states to decide independently instead of trying to guess the court's future judgments and conform to them in advance. The ECHR may also be justified in using the margin of appreciation doctrine if there is good reason to believe that the examined state could make better policy by itself, or if this state is too different from the rest of Europe to make learning from other European states useful. This set of considerations can determine the boundaries for the intervention of the ECHR in state policies and the court's optimal level of deference to certain policies of the states.

There is yet another potential problem with the use of emerging consensus. On certain issues, European states may be divided between several fundamentally different conceptions of what constitutes good policy. In these cases, the states' ranking of potential legal solutions may include second-best and third-best options that cannot be aggregated in a way that fulfills the elementary condition of transitivity. This problem was named the Condorcet Paradox, and it may prove real in complex questions such as the right of prisoners to vote. When faced with such problems, the ECHR may need to abandon the use of emerging consensus – which doesn't enjoy the same informational value it does in simpler issues involving a more binary set of options – and use other doctrines instead.

It seems intuitive to assume that a binding judgment of an international court is the final word on any policy matter. If this judgment obviates the need for a public debate and limits the engagement of people in politics, a serious problem arises. But often the judgment of an international court is not the final word on the matter. A better metaphor for the intervention of international courts is that of a dialogue with the public and its officials. International courts may cast an effect on the public debate, but they do not silence it. In fact, they often improve public deliberation, as Chapter 4 argues.

International courts provide arguments for an informed debate, based on rights instead of on naked power. They create a powerful myth that severe problems can be solved according to principles of justice and the rule of law, which gives people an incentive to get involved in politics. Many international courts also act as social hubs that give international

lawyers training and ideas and let them meet each other – invigorating the legal debate.

Furthermore, the resistance of political bodies to international courts involves the public and requires action by a host of administrative bodies. This process may rejuvenate national bodies and national constituencies instead of enfeebling them. Scholars have already noted that hostile responses of states to international courts' judgments may constrain these courts' discretion ex ante.[3] This chapter will call attention to the potential benefits of such responses ex post.

Unlike previous chapters, Chapter 5 doesn't focus on the decisions of international courts or their ultimate outcomes. Instead, it addresses the process of decision making by international courts and the danger that this process will be captured by interest groups.

International courts do not work on their own initiative. They depend on applicants to bring cases for their decision. These applicants can sometimes be powerful and well-informed NGOs. At other times, NGOs may submit amicus curiae briefs as an attempt to influence the court's decision, or operate in the shadows by funding and providing legal advice to applicants. NGOs can help the court's interest by supplying it with information and with opportunities to decide cases. They can also assist international courts by shaping public opinion in their favor or by supporting them in international fora. Finally, they can help monitor compliance with the court's judgments. All these are advantages arising from the intervention of NGOs, but they also raise the concern of undue influence that these NGOs will exert on the court in return for the benefits they confer on it.

The concerns raised by the participation of NGOs in international courts' proceedings are real. They need to be addressed while taking into account the specific character of the court and the challenges it faces. The chapter suggests different procedures for different international courts based on their unique characteristics.

After an international court issues a judgment, the influence of NGOs doesn't end. NGOs may shame states into compliance by exposing their violations and creating potent reputational sanctions. The

[3] *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 658 (2005); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411 (2008); SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS, Cambridge University Press (2015).

question that remains is whether NGOs are likely to use these reputational sanctions in a biased way or in a way that is merited, considering the severity of state violations. Empirical research that I conducted regarding the submission of NGO reports to a new, publicly available, website operated by the Committee of Ministers – the body charged with enforcing judgments of the ECHR – suggests that international courts can create arenas where NGOs use accurate and beneficial reputational sanctions. By coding all the NGO reports filed on the website in the first four years of its existence, this research shows a focus of NGOs on the most severe violations and on the most important legal issues. The chapter explains this phenomenon using the tools of Social Network Analysis, an influential social science methodology. The research also shows that NGOs focus their shaming efforts on states that are usually well-behaving and spend less effort on states that regularly violate human rights. A series of quantitative tests and qualitative interviews with NGO lawyers and activists suggests that NGOs focus on well-behaving states because these NGOs believe well-behaving states are likely to improve their practices when facing criticism by the human rights community.

Chapter 6 moves on to the final challenge for the intervention of international courts in domestic affairs: the claim that this intervention eventually leads to worse outcomes all things considered. Domestic bodies and officers of the state operate under the shadow of potential judgments by international courts. This threat may give them the wrong incentives and make them act in ways that cause more harm than good. Partly to avert such a danger, many international courts voice a commitment to the principle of subsidiarity, a principle which relegates as many decisions as possible to the domestic level instead of the international level.

Subsidiarity is served by different doctrines in different courts. The ICC for example applies a rule of admissibility called complementarity, according to which it may not prosecute crimes that were prosecuted or investigated by national authorities. The existence of this rule gives states an incentive to investigate crimes committed by their soldiers in order to preempt ICC intervention. But the downside of complementarity is that it allows states to shield their soldiers from ICC prosecution by sham investigations that would not lead to a reasonable penalty.

It seems intuitive that the main justification to abandon the rule of complementarity in favor of a more interventionist rule – such as the rule of primacy adopted by the ad hoc criminal tribunals in Yugoslavia

(ICTY) and Rwanda (ICTR) – should be the existence of many states that are willing to conduct sham investigations. But the picture is a bit more complex. When the incentives of individual soldiers as well as those of state authorities are taken into account, a strategic analysis makes it clear that complementarity deters more soldiers than primacy as long as the probability of ICC prosecution is low. Only as the probability of prosecution increases over a certain threshold would a shift to primacy – either by treaty amendment or by judicial interpretation – improve deterrence.

It is possible to move the analysis one step backwards and assess what doctrines would make states more willing to subject themselves to the jurisdiction of international courts to begin with. The willingness of states to subject themselves to the ICC's jurisdiction depends on the rule of admissibility it applies and on the states' long-term goals. Similarly, other international courts may affect the willingness of states to join their jurisdiction or to increase their scope by the doctrines they develop. When the ECHR uses expansive interpretation, for example, it risks motivating states not to take on more obligations by approving any additional protocols. If states know that every obligation they agree to may be expanded by the court in ways they can't foresee, their natural response may be not to assume further obligations.

Chapter 7 concludes the book by providing a wider theoretical perspective on the intervention of international courts in domestic affairs. The chapter examines theories of domestic judicial review and shows the similarity between their insights and the analysis of international judicial review throughout the book. Naturally, the scholarship about judicial review by national courts is much more developed than the literature on international courts and can serve as a useful source of inspiration. Nevertheless, international courts have to face different circumstances than national courts, and the parallels between the ideas described in this book and theories of domestic judicial review are often quite complicated.

To account for the special conditions in which international courts operate, the chapter outlines the characteristics of the global arena today. The chapter describes a world with many centers of power connected to each other through numerous cross-cutting networks. These networks do not start at the top of each state's administrative hierarchy. Rather, they link mid-level government officials as well as private bodies and individuals in different states. International courts that operate in today's world cannot content themselves with assuring

compliance to their judgments by states. They must address multiple audiences at the same time.

C Policy Implications

There is a fundamental difference between a book of this kind and a policy paper. A policy paper that wishes to direct action by administrators has to apply a cost-benefit analysis to specific factual situations. It has to balance numerous conflicting considerations that arise with regard to every set of facts and to quantify the effect of every one of these considerations. The book doesn't attempt this form of analysis.

Instead, the purpose of the book is to flesh out potential implications of the intervention of international courts in domestic affairs. It relies mainly on theoretical analysis but also on empirical investigations. The book engages in basic science – it tries to improve the scientific understanding of the world – not in applied science. It doesn't spell out direct policy recommendations for particular circumstances.

Nevertheless, the book certainly has normative implications and it attempts to make them as clear as possible in the chapters that follow. These implications are only arguments: arguments for or against judicial intervention in certain issues, or arguments in favor of giving states a certain degree of deference. In order to distill a policy recommendation from these arguments, the magnitude of harm or the potential advantage of judicial action would need to be assessed in light of specific facts. Other utilitarian considerations would inevitably have to be addressed at this point.

Chapter 2 doesn't attempt to assess the consequences of international judicial review, but rather tries to establish when it is normatively legitimate. Chapters 3 and 6 explain when doctrines of deference such as margin of appreciation or complementarity are likely to lead to the best outcomes. The analysis there is in a very high level of abstraction. It cannot direct judges exactly how to decide a concrete case, but it can guide them by exposing the hidden implications of the options at their disposal. Chapter 4 draws on a set of empirical findings to highlight some advantages of international judicial review. These advantages clearly have to be weighed against other potential disadvantages. Only Chapter 5 attempts to balance conflicting considerations regarding NGO intervention and to offer more concrete policy recommendations. But even these recommendations are quite general and would need to be adapted to the concrete needs of a certain court at a certain time.

The book attempts to demonstrate how actual judgments could be justified or explained as a method to achieve certain societal advantages. Some readers may find this practice to be Panglossian – as if I were arguing that international judges always live in the best of all possible worlds. But this isn't my intention. I do not argue that international courts always get it right. Rather, there are two reasons behind addressing specific judgments: to show what abstract principles would look like when materialized in the work of judges and to suggest that judges track these principles, consciously or unconsciously, at least some of the time.

Nowhere is it argued that judges always behave in ways that could be justified by the theory. On the contrary, by presenting an accurate picture of what good judicial practices look like, it is possible to criticize other judgments as digressing from these principles. The book therefore gives the reader tools to assess the quality of judicial decision making at international courts against a certain normative ideal.

Sometimes, judges may be aware of this ideal and deliberately try to reach it. But usually they would have only a basic intuition, an intuition which could be sharpened and significantly improved by the analysis in the book. For example, many judges probably share the intuition that by learning from the practices of the majority of countries in Europe according to the emerging consensus doctrine, they can discover good policies. But most judges – and most of the lawyers who read their judgments – probably didn't synthesize the conditions for optimizing the benefits of emerging consensus according to the Condorcet Jury Theorem. They didn't realize that by giving states a prior warning before a finding of violation, states can be encouraged to decide independently – fulfilling a pre-condition for the Jury Theorem to work. They may have never heard about the Condorcet Paradox, even if they had the intuition that some issues are too complicated for aggregating the views of different states.

By abstracting principles from judgments and carrying them to their ultimate logical ends, even the healthy instincts of experienced judges can be improved. Yet, as explained in this chapter, this book carries the reader only half of the way toward better judicial decisions. It presents the principles, but their application is always contingent on specific circumstances.

Furthermore, applying the ideas in this book to reality requires considering simultaneously the arguments made in several chapters. Every