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Wayne Sandholtz

*Gould School of Law University of Southern California*

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## A NEW AGE OF INTERNATIONAL COURTS?

Wayne Sandholtz\*

KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (PRINCETON UNIVERSITY PRESS 2014). PP. 480. PAPERBACK \$ 35.00.

In *The New Terrain of International Law*, Karen Alter argues that the international courts of today perform more roles and do so with greater effect on world politics than their predecessors did.<sup>1</sup> In theorizing the roles of modern international courts and illustrating their effects on national and international law and policy, Alter has established a new plateau in scholarship on international courts, one upon which many others will surely build.

Alter's agenda is ambitious: she aims to show that "new-style" international courts (ICs) are producing a "judicialization of international relations" that is "diminishing government control over how international legal agreements are understood domestically and internationally."<sup>2</sup> To accomplish that goal, the book offers a theory of the functioning of modern international courts, traces their emergence, maps their empirical terrain, and offers case-study explorations of the effects—both domestic and international—of specific IC decisions. *New Terrain* is a capstone to the major contributions that Alter has made to theorizing international courts and evaluating them empirically for more than twenty years, in research that has extended from the European Court of Justice to international courts in Latin America and Africa.

In the review that follows, I first explore the book's theoretical framework, highlighting connections to major strands of research on international law and courts and emphasizing the decisive stance *New Terrain* takes toward them. I then turn, in the second section, to three central themes in the book, each of which signals directions for complementary lines of inquiry. The first theme addresses the nature and importance of rule of law cultures, which play a crucial role in international courts "altering politics."<sup>3</sup> A second theme concerns judicial decision-making in international courts, in particular, how international judges might (and probably must) take into account domestic political and legal contexts. The third theme emphasizes the dynamism of normative systems where new-style international courts are at work. The final section offers concluding thoughts.

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\* John A. McCone Chair in International Relations, School of International Relations and Gould School of Law, University of Southern California.

1. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014).
2. *Id.* at 5.
3. *Id.* at 32-67.

## I. THEORY

Alter sets out her theory in chapter 2, “International Courts Altering Politics.” The chapter is the single best theoretical piece on international courts that I have encountered. Alter stakes out a position as far from that of the international law skeptics as she can make it. The international law skeptics are scholars who, importing simplified versions of “realism” from International Relations, argue that international law has no independent effect on the behavior of states.<sup>4</sup> They contend that states comply with international legal obligations not because they are legal but because compliance either serves state interests or is imposed by superior power. The realist view of international courts is that, because international law has no autonomous effect, ICs can only be agents of states, molding their decisions to conform to the preferences of the most powerful states.<sup>5</sup> The contrary view, advanced vigorously by Alter and others, is that under certain conditions, international courts can be trustees of a normative system rather than servants of states.<sup>6</sup> In previous work Alter has contributed to theorizing about trustee courts.<sup>7</sup> In *New Terrain* she qualifies slightly the earlier work, arguing that ICs are most like trustees when they are empowered to enforce legal norms against states themselves.<sup>8</sup>

The debate on whether international courts can be anything more than faithful agents of states has tended to focus on the European Court of Justice (ECJ); the ECJ is also the international court that has been most intensively subjected to empirical analysis for the purpose of determining whether its rulings are systematically shaped by member state preferences.<sup>9</sup> The ECJ is a natural focal point for such research because it is widely seen as having exercised a broadly independent role in shaping EU law and policy and, in fact, as having “constitutionalized” the EU regime.<sup>10</sup> A substantial body of empirical work has shown that the ECJ routinely rules in ways that the member states oppose and would not have approved through normal legislative mechanisms.<sup>11</sup>

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4. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). Goldsmith and Posner are probably the most cited exponents of this view, which has, of course, been vigorously contested by other scholars. The literature on both sides of the debate is too extensive to be cited or adequately discussed in this review.

5. Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173 (Judith Goldstein & Robert O. Keohane eds., 1993).

6. Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & CTS. 61 (2013).

7. Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33 (2008).

8. ALTER, *supra* note 1, at 9 n.8. Alter describes ICs that can apply international rules to states as acting in “self-binding judicial roles.” “Self-binding” refers to situations in which ICs apply rules that are meant to constrain states themselves. “Other-binding” refers to situations in which ICs extend state power by enforcing legal norms against other states, international organizations, or non-state actors.

9. Stone Sweet & Brunell, *supra* note 6, at 72 (“To date, the EU is the only international regime on which scholars have designed systematic research to assess whether judicial outcomes are constrained by the threats of noncompliance and override.”).

10. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); J. H. H. WEILER, *THE CONSTITUTION OF EUROPE* (1999); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004).

11. See generally Karen J. Alter, *Who Are the “Masters of the Treaty”? European Governments and the*

In the most recent round of this debate, Carrubba, Gabel, and Hankla claim to offer quantitative evidence supporting the proposition that the EU member-state governments constrain the ECJ's decision-making by: (1) collectively threatening to override its judgments, and (2) individually threatening non-compliance with those decisions.<sup>12</sup> Both claims have been comprehensively refuted.<sup>13</sup> Carrubba, Gabel, and Hankla mistakenly assumed that the ECJ decisions in their dataset of 3,176 legal issues were all subject to override by a qualified majority vote of the member states, which would make it easier for states to reverse them. In fact, more than ninety percent of the legal issues they include in the analysis could only be overridden by unanimity, which makes the threat of override non-credible.<sup>14</sup> Carrubba, Gabel, and Hankla provided no data on member-state threats of non-compliance and offered no test of their second proposition.<sup>15</sup>

In fact, the European Commission's position, which will virtually always support the expansion and application of EU law, is more likely to predict the ECJ's decisions than are the weighted member-state government positions, in cases where the defendant is a member state.<sup>16</sup> Stone Sweet and Brunell show that in non-compliance cases (Article 258 enforcement proceedings), though the member states rarely (3.2 percent of cases) register a net weighted position supporting the Commission, the ECJ rules against the defendant state more than 90 percent of the time.<sup>17</sup> Non-compliance, in other words, triggers ECJ action; it does not constrain it. In preliminary reference cases (under Article 267, in which national courts refer a question to the ECJ for the interpretation of EU law), when the Commission and the member states (collectively) take opposite sides, the ECJ favors the Commission position more than two-thirds of the time.<sup>18</sup>

Alter has been a protagonist in the debates on the ECJ and takes the question of the Court's independence as settled.<sup>19</sup> On the broader question of whether international courts

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*European Court of Justice*, 52 INT'L ORG. 121 (1998); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); RACHEL CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION, AND GOVERNANCE (2007); Margaret McCown, *The European Parliament before the bench: ECJ precedent and EP litigation strategies*, 10 J. EUR. PUB. POL'Y 974 (2003); Stacy A. Nyikos, *The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistance*, 4 EUR. UNION POL. 397 (2003); MARK A. POLLACK, THE ENGINES OF INTEGRATION: DELEGATION, AGENCY, AND AGENCY SETTING IN THE EUROPEAN UNION (2003); STONE SWEET, *supra* note 6; Jonas Tallberg, *Delegation to Supranational Institutions: Why, How, and with What Consequences?*, 25 W. EUR. POL. 23 (2002).

12. Clifford J. Carrubba et al., *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 439 (2008).

13. Alec Stone Sweet & Thomas Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AM. POL. SCI. REV. 204 (2012); Stone Sweet & Brunell, *supra* note 6.

14. Stone Sweet & Brunell, *supra* note 13, at 206-08.

15. Instead of testing their hypothesis that the threat of non-compliance constrains ECJ decisions, Carrubba, Gabel, and Hankla test a very different proposition, namely, that "[t]he more opposition a litigant government has from other MSGs [member-state governments], the more likely the court is to rule against that litigant government;" Carrubba et al., *supra* note 12. This allows them to count as evidence in their favor any case in which the balance of weighted member-state observations favors a ruling against the defendant state, even if only one state submits an observation and even if that state is a small one like Luxembourg. Their analysis therefore does not test the claim that the threat of non-compliance by a state that is subject to an unfavorable ECJ decision constrains the Court.

16. Stone Sweet & Brunell, *supra* note 13.

17. Stone Sweet & Brunell, *supra* note 6, at 73.

18. *Id.* at 75.

19. Alter, *supra* note 11; KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE

in general are simple agents of states or whether they can have an autonomous impact on politics and policies, she takes the latter view as her point of departure: “[I]t is more plausible that we accept the possibility that ICs can rule against the preferences of governments and then ask how ICs get governments to then change their behavior.”<sup>20</sup> Alter does not claim that ICs are wholly independent of state preferences, nor that state compliance with IC judgments is non-problematic. Rather, she presents a theory of the conditions under which international courts can bring about shifts in state behavior, “in the direction of greater respect for international law,”<sup>21</sup> that is, how ICs can alter international politics.

The problem with existing accounts of the relationship between international courts and national governments is not that they are all wrong, but that they are all right—some of the time. *New Terrain* identifies three existing categories of models. ICs help states to resolve disputes by identifying focal points that are consistent with the preferences of both states (the interstate arbiter model). By judging that certain acts fall outside the bounds of legality, ICs can also generate behavior that is consistent with international law through decisions that motivate other states to impose sanctions-based or reputational costs on the offending state (the multilateral adjudication model). Finally, IC decisions can mobilize and empower both domestic and transnational actors who can bring pressure to bear on governments to comply with the IC ruling (the transnational politics model). Alter’s goal is to bring the three existing classes of models together into one unifying framework (she, correctly in my view, does not label it a theory). The unifying framework is a set of interlocking propositions about how legality, and actors that value legality, can move states toward compliance with IC decisions.<sup>22</sup>

At the center of Alter’s argument are “compliance constituencies.” Compliance constituencies include actors—primarily state officials—who have the authority to “choose compliance” with international law and with specific IC decisions, as well as broader groups of non-state actors who “support adherence to a specific international law” and provide political backing to officials who pursue it.<sup>23</sup> International courts influence governments through alliances with domestic and international compliance constituencies. Through their decisions, ICs can empower “those actors who have international law on their side, increasing their out of court political leverage. ICs then alter political outcomes by giving symbolic, legal, and political resources to compliance constituencies.”<sup>24</sup> The move to see international courts’ primary channel of influence as operating through a variety of transnational and domestic allies parallels important lines of research on international norms and law. A durable insight in research on the effects of international human rights norms, for example, is that norm entrepreneurs and activists can bring political pressure on rights-abusing governments by mobilizing both transnational and domestic actors.<sup>25</sup> Human rights treaties exert their most powerful effects through domestic channels,

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MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001).

20. ALTER, *supra* note 1, at 43.

21. *Id.* at 52.

22. *Id.* at 42-52.

23. *Id.* at 53.

24. *Id.* at 19.

25. Alison Brysk, *From Above and Below: Social Movements, the International System and Human Rights*

giving domestic actors a source of political leverage (pressure politics) as well as the potential for legal recourse in domestic courts (judicial politics).<sup>26</sup>

By focusing on alliances between ICs and various domestic and transnational actors, Alter shifts the compliance focus away from governments, who are the key actors in realist-inspired accounts. International courts, then, are not constrained to be simple agents of states because governments are not the only effective players when it comes to compliance with IC decisions. Domestic judges, administrators, military officers, and legislators can all, in some circumstances, take action to comply with IC judgments. One implication, of course, is that as international judges craft their rulings they must think about a variety of potential compliance constituencies beyond just national executives. I return later to two issues raised by compliance constituencies: the motivations of compliance constituencies, and the links between international courts and domestic politico-legal contexts.

A second key theoretical anchor for *New Terrain* is Alter's temporal framework for the international litigation process. Once a state violates an international rule or obligation, international courts exercise their influence in three partially overlapping periods or stages. The stages are not meant to represent a strict linear chronology but are analytical constructs that illuminate important mechanisms and processes. Time 1 is the pre-litigation stage, in which most of the action takes place domestically. Both domestic actors (courts, legislatures, prosecutors) and international legal actors bring pressure to bear on national political actors who have the authority to choose compliance with international law. The key is that this takes place "in the shadow of an IC," as litigation looms should the state not rectify its violation of an international obligation.<sup>27</sup> In Time 2, the various actors try to persuade an international court to rule in their favor. If the IC rules against the state, compliance constituencies use "leverage strategies" in Time 3 to pressure the state to comply with the IC's decision. The mechanisms highlighted in the three existing models of compliance with international courts can all operate within Alter's three-stage framework.

Alter makes the bold claim that "new-style" ICs can shift international relations "away from state control in both domestic and international realms."<sup>28</sup> It is the "new-style" qualifier that requires emphasis. "Old-style" international courts were designed simply to help states resolve disputes. Old-style ICs, like the International Court of Justice, continue to function in this mode, and international law skeptics<sup>29</sup> assume that international courts in general are limited to that role. New-style ICs can take on additional roles (administrative review, enforcement, and constitutional review in Alter's typology). These modern ICs are producing a "judicialization of international relations and diminishing government control over how international legal agreements are understood domestically and internationally."<sup>30</sup>

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*in Argentina*, 26 COMP. POL. STUD. 259 (1993); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

26. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

27. ALTER, *supra* note 1, at 55.

28. *Id.* at 19.

29. GOLDSMITH & POSNER, *supra* note 4; Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 3 (2005).

30. ALTER, *supra* note 1, at 5.

What is new about the “new-style ICs”? Two main features distinguish them: (1) they tend to have compulsory jurisdiction, and (2) they allow non-state actors (international commissions or prosecutors, or private individuals) to trigger litigation.<sup>31</sup> Old-style courts see international law essentially as contracts between states.<sup>32</sup> New-style courts imply a “rule of law conceptualization of the meaning of international law” in which “governments are not above the law” and law creates “obligations regardless of what other states do.”<sup>33</sup> The book focuses on twenty-four international courts, selected because they are both permanent and operational.<sup>34</sup> Excluded are quasi-judicial bodies, like the International Centre for the Settlement of Investment Disputes (ICSID), whose panels are *ad hoc* and therefore not permanent, and courts that exist on paper but are non-functioning (like the dispute settlement body of the Organization of Arab Oil Exporting States). Of the twenty-four ICs, twenty-three have at least some new-style features; the sole exception is the International Court of Justice (ICJ).<sup>35</sup> Only six of the twenty-four courts existed before 1989, and of the 37,236 binding judgments issued by the twenty-four courts in contentious cases, ninety-one percent came after the fall of the Berlin Wall.<sup>36</sup>

Europe (in the form of the ECJ and the European Court of Human Rights (ECtHR)) is, as Alter notes, exceptional. The ECJ and the ECtHR have accounted for 33,451, or 90%, of all judgments produced by the twenty-four ICs.<sup>37</sup> But Alter also notes that the European courts started out slowly and that, if compared from the year of their first judgment, the more recent new-style ICs have been about as active as the two European courts in a similar phase of their development.<sup>38</sup> Still, it seems unlikely that other ICs will experience the same conditions that generated the rapid expansion of judicial activity in the ECJ and the ECtHR: the simultaneous and mutually reinforcing growth in legislation, in cases filed, and in expansive judicial decisions, all in the context of strong rule-of-law cultures.

## II. EXPLORING THE NEW TERRAIN

International lawyers and social scientists who follow one or a few international courts may not need to be persuaded that ICs created in recent decades have generated important jurisprudence through decisions that have substantive effects. But *New Terrain* will be useful even for that audience, as Alter presents the broader picture of ICs taken as a whole. The book offers a tour of the empirical territory of modern ICs and an analytical framework for assessing their effects on international and domestic law and politics. *New*

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31. *Id.*; see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

32. ALTER, *supra* note 1, at 6.

33. *Id.*

34. *Id.* at 70. These courts meet additional criteria included in the definition of international courts employed by the Project on International Courts and Tribunals (PICT). For more information on PICT, please visit <http://www.pict-pecti.org/matrix/Matrix-main.html>.

35. *Id.* at 84 fig.3.2.

36. *Id.* at 4, 73-75 fig.3.1.

37. ALTER, *supra* note 1, at 72-73 fig.3.1.

38. *Id.* at 106-07 figs.3.14 & 3.15.

*Terrain* opens multiple questions and provides points of departure for finding ways to answer them. This section explores some of those questions and raises further ones, focusing on cultures of obedience to international law, judicial decision-making, and the dynamism of judicialized systems.

A. *The Commitment to Law and Cultures of Obedience*

Underlying Alter's framework is an assumption, or perhaps a commitment to the idea, that at least some actors value legality in itself. It is a crucial assumption, and one that appears almost every time Alter discusses compliance constituencies. It is also an assumption that starkly separates Alter from the international law skeptics, who assume that states decide whether to comply with international law and IC judgments purely on the basis of instrumental calculations of material payoffs. To take a prominent example, Goldsmith and Posner explicitly assume that (1) rules and institutions do not shape interests and (2) rule-following cannot be a state interest.<sup>39</sup>

In contrast, much of the distinctiveness of Alter's account stems from the idea that at least some actors value legality and adherence to law for their own sakes. Alter recognizes that actors are driven by both instrumental and normative motivations.<sup>40</sup> "Some [compliance] supporters will be self-interested, seeking rulings that benefit themselves and their clients."<sup>41</sup> Others support compliance with IC rulings because they "benefit from the international legal system overall."<sup>42</sup> Still other compliance constituencies favor conformance with IC judgments even when they "do not have a dog in the fight," because they "see themselves as rule of law actors."<sup>43</sup> As Alter argues, "[s]upport for the rule of law . . . bring[s] civil society groups and countries that are substantively self-interested together with individuals, groups, and foreign governments that care about correct legal interpretation and the rule of law more generally."<sup>44</sup>

*New Terrain* does not explore the basis for or the logic of the second category of motivation—the benefits of the international system of rules—and, in fact, it remains largely undeveloped in scholarship on international law compliance. The idea is that specific "games" of international relations are embedded in higher-order or "meta" games, which are about the system of rules itself. Violating the rules in the lower-level game (to gain a temporary trade advantage, for example) could have an economic or political payoff in the short-term, but potentially at some cost in the meta-game if violations undermine the system of rules and the predictability that they bring. Actors may therefore be in a situation of optimizing: How much selfish breaking of the rules in the lower-level game is possible without destabilizing the framework of rules itself? And do actors think about their interests at both levels? Theoretical development could help explore answers to such questions.

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39. GOLDSMITH & POSNER, *supra* note 4, at ch. 1.

40. ALTER, *supra* note 1, at 64.

41. *Id.* at 53.

42. *Id.* at 22.

43. *Id.* at 53.

44. *Id.*



The third motivation—that some actors value legality and the rule of law itself—seems plausible. Many readers will want to accept it. But the book does not attempt to justify the assumption that such a motivation is real nor examine its foundations. Research has addressed the underlying psychology of compliance with law,<sup>45</sup> and the late Thomas Franck argued that international law created through fair and accepted processes exerts a compliance pull.<sup>46</sup> But little work that I am aware of has focused directly on the extent to which people (in governments, courts, NGOs, or publics) in fact view international legality as a sufficient motive or justification for action. Yet the assumption is crucial to Alter's arguments. Alter posits that "some compliance supporters are primarily motivated by their normative commitment to the rule of law and a belief that the IC ruling correctly applies the law."<sup>47</sup> International courts can empower these actors, providing them with legal justifications for choosing policies that conform to IC decisions. IC judgments carry a "presumed authority" that can help compliance advocates "delegitimize" positions that are contrary to the IC's interpretation.<sup>48</sup>

The commitment to legality and the rule of law is especially vital when international courts exercise constitutional review, which consists of "the judicial authority to invalidate laws and government acts on the basis of a conflict with higher order legal obligations."<sup>49</sup> In the new terrain of international law, those higher order legal obligations are to be found in, for example, the EU treaties with respect to the ECJ, the American Convention on Human Rights for the Inter-American Court of Human Rights (IACtHR), and the General Agreement on Tariffs and Trade (GATT) within the World Trade Organization (WTO) Dispute Settlement System. Effective constitutional review by international courts requires the existence of "[a] culture of constitutional obedience," which means "a political culture in which any legislative text or government action found to violate higher order law becomes inherently illegitimate."<sup>50</sup> Scholars have studied the development of domestic constitutional courts, constitutional review, and cultures of constitutional obedience.<sup>51</sup> However, cultures of constitutional obedience to international law may be, as Alter notes, something quite different.<sup>52</sup> Scholars have made progress in analyzing when and how domestic courts make use of international law and IC decisions,<sup>53</sup> but Alter makes a different argument: that broader judicial cultures of adherence to international law can empower

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45. See, e.g., Jonathan Jackson et al., *Why Do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051 (2012); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

46. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

47. ALTER, *supra* note 1, at 53.

48. *Id.* at 22.

49. *Id.* at 282 (citing ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 21 (2000)).

50. *Id.* at 290.

51. *Id.* at 291-92. See also *id.* at 291 nn.14-17, 292 n.18 (citing some of the relevant research).

52. ALTER, *supra* note 1, at 292.

53. See, e.g., André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760 (2007); ANDRÉ NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* (2011); DAVID SLOSS, *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (2009); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

international courts. The book does not explain how to identify cultures of adherence to international law or assess their strength. It does, however, provide some initial signposts for possible directions of such work, noting that national judges are probably crucial to whether domestic cultures of obedience to international law develop.<sup>54</sup> The idea of domestic cultures of adherence to international law is a richly intriguing one that begs for research to identify their preconditions, to assess their variation across countries, and to document their effects on law and policy.<sup>55</sup>

#### B. *Judicial Decision-Making in International Courts*

*New Terrain* depicts international courts affecting domestic law and policy and shifting international relations. The judges who sit on new-style international courts, then, play a pivotal and increasingly important role. Yet how international judges perform that role and how they reach decisions, when they are both partially independent but also legally and politically constrained, remain largely unknown. Though theories of judicial decision-making are quite developed in the U.S. context (especially for the Supreme Court) and are beginning to emerge in other national and comparative settings,<sup>56</sup> we know little about judicial decision-making in international courts.<sup>57</sup>

Alter does not offer a theory of international judicial decision-making, but her arguments reveal a set of important assumptions. Elsewhere she has argued that the multilateral nature of the appointment process for judges on international courts means that international judges are probably more insulated from appointment or confirmation politics than are domestic judges.<sup>58</sup> The assumption that international judges are at least partially independent of national governments underlies the entire argument of *New Terrain*. Delegation to an IC creates “an independent outside actor with the legal authority to say what inter-

54. ALTER, *supra* note 1, at 292-94.

55. Analyzing cultures of adherence raises tricky empirical challenges. For instance, it is crucial to devise indicators of the existence of a culture of adherence that are independent of the IC's decision-making. Alter argues that an IC will exercise restraint if it perceives that a domestic culture of international law obedience is lacking, but then IC restraint cannot serve as evidence of the absence of such a culture. For a useful exploration of the multiple ways in which international law and international courts interact with national law and institutions, see Gregory Shaffer, *How the WTO Shapes Regulatory Governance*, 9 REGUL. GOV. 1 (2015).

56. See, e.g., Ezequiel González Ocantos, *Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina*, 46 COMP. POL. 479 (2014); Ezequiel González Ocantos, *The Collapse of Impunity Regimes in Latin America: Legal Cultures, Strategic Litigation and Judicial Behavior* (July 2012) (unpublished Ph.D. dissertation, University of Notre Dame); GRETCHEN HELMKE & JULIO RÍOS-FIGUEROA, *COURTS IN LATIN AMERICA* (2011); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007); Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY (2010); DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* (2012); Georg Vanberg, *Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers*, 32 COMP. POL. 333 (2000).

57. Empirical research on judicial behavior in international courts is sparse. In one of the few existing studies, Voeten shows that judges on the European Court of Human Rights tend to favor their home countries, but that the proportion of cases in which a home-country bias might affect the outcome is extremely small. See Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

58. Karen J. Alter, *Delegation to International Courts and the Limits of Recontracting Power*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 312 (Darren G. Hawkins et al. eds., 2006).

national law means” and whose “legal interpretations are presumed to be more independent and disinterested compared to self-serving arguments litigating states put forward.”<sup>59</sup> ICs are legal actors that reside “outside of the control of litigating states.”<sup>60</sup>

A second key assumption is that, in general, judges on international courts will act as trustees of a legal regime and seek to apply its norms. This means that “international judging” is guided in part by “legal facts,” namely, “what the law requires.”<sup>61</sup> Thus “ICs enforcing international economic rules will tend to promote market openness. ICs enforcing human rights rules will tend to promote a human rights agenda. International war crimes tribunals will tend to condemn state practices that harm noncombatants.”<sup>62</sup> Alter assumes that judges on international courts possess both the degree of independence and the underlying judicial preference to uphold international legal rules and apply them even, at times, when doing so contradicts the preferences of important states.<sup>63</sup> These are crucial assumptions that call for empirical exploration.

At the same time, Alter recognizes that “[b]eing a trustee [of international legal norms] does not mean that international judges are entirely neutral or fully independent actors.”<sup>64</sup> They are both “legally and politically constrained.”<sup>65</sup> Where Alter diverges from the international law skeptics and the IR realists is that she does not see the source of political constraints on ICs as emanating solely from states.<sup>66</sup> Rather, ICs are constrained (or enabled) by the absence (or presence) of domestic compliance constituencies (see the discussion above).<sup>67</sup> Governments, or more narrowly, national executives, are not the only potentially important constituency.<sup>68</sup> The upshot is that, though ICs (like all courts) lack overt means to compel states to comply with their rulings, they are not “beholden to the interests and preferences of governments.”<sup>69</sup> The range of IC interlocutors is much broader. ICs can use “their institutional position to aid actors inside and outside of states that share the objectives inscribed into the law.”<sup>70</sup> International courts can therefore “work with domestic and transnational interlocutors to either orchestrate compliance or construct counter-pressures that alter the political balance in favor of policies that better cohere with international legal obligations.”<sup>71</sup> In other words, the primary constraints on ICs are the availability of compliance constituencies and the ability of the court to engage or empower those actors.<sup>72</sup>

International courts must consequently take into account the degree to which their interpretations of the law are likely to resonate with and lend political or legal support to

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59. ALTER, *supra* note 1, at 9.

60. *Id.*

61. *Id.* at 23.

62. *Id.*

63. *Id.*

64. ALTER, *supra* note 1, at 9.

65. *Id.* at 8.

66. *Id.*

67. *Id.* at 19.

68. *Id.* at 18.

69. ALTER, *supra* note 1, at 19.

70. *Id.* at 20.

71. *Id.*

72. *Id.* at 18-20.

(primarily) domestic pro-compliance actors.<sup>73</sup> As Alter puts it, “international judges should, and probably do, consider whether or not there is legal and political support for the interpretations they advocate.”<sup>74</sup> The point is such a crucial one that it calls for further theoretical and empirical development—work that social science and law scholars should be eager to take up. Alter offers the intriguing speculation, for instance, that the adjustment by international judges “to the realities of their environments” may be most visible in the remedies they order, where judges might enjoy greater flexibility.<sup>75</sup> The case studies in the second half of the book offer examples of remedies that vary in the difficulty of domestic implementation. At one end, the Andean Tribunal of Justice ordered no remedies in the *Peru Exemptions Case*, finding that the violation had already been corrected.<sup>76</sup> In the *Modern-Day Slavery Case, Hadijatou Mani v. Niger*, the Economic Community of West African States (ECOWAS) Court of Justice ordered compensation for the victim but did not rule on whether Niger’s laws violated international rules, making compliance more likely.<sup>77</sup> At the other extreme, the IACtHR ordered Nicaragua to adopt substantial legal and institutional changes regarding indigenous communal land rights in *Mayagno (Sumo) Awas Tingni Community v. Nicaragua*.<sup>78</sup>

Alter’s insight on ICs’ potential flexibility with remedies flags the need for much greater understanding of judicial decision-making in international courts.<sup>79</sup> How do international judges weigh the multiple legal and political considerations that arise in the disputes that come before them? In particular, how do IC judges balance two objectives that are often in fundamental tension: one, advancing the international rule of law, and two, garnering support for and compliance with their judgments?

Research has begun to explore that key question. For instance, Stone Sweet and Brunell analyze how international courts expand the reach of international legal norms while navigating the heterogeneous preferences of member states.<sup>80</sup> They argue that international trustee courts employ a strategy of “majoritarian activism.”<sup>81</sup> The heart of the strategy is that the court assesses the practice of the states involved in the regime, to gauge the degree of state consensus on the rule in dispute, or even on a more expansive interpretation of it.<sup>82</sup> The practice of a majority of states is a fact relevant to the resolution of the case.<sup>83</sup> The court’s decisions will then approximate outcomes that the states might adopt “under majoritarian, but not unanimity, decision rules.”<sup>84</sup> When a majority of states has enacted a

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73. *Id.* at 66.

74. ALTER, *supra* note 1, at 66

75. *Id.* at 60.

76. *Id.* at 295-98.

77. *Id.* at 260-67; *Mme Hadijatou Mani Koraou v. The Republic of Niger*, (2008) AHRLR 182 (ECOWAS 2008), available at <http://www.chr.up.ac.za/index.php/browse-by-subject/379-niger-koraou-v-niger-2008-ahrlr-ecowas-2008.html>.

78. ALTER, *supra* note 1, at 315-19; *The Mayagna (Sumo) Awas Tingni Cmty, v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

79. ALTER, *supra* note 1, at 346, 348.

80. Stone Sweet & Brunell, *supra* note 6, at 61.

81. *Id.*

82. *Id.* at 63-64.

83. *Id.*

84. *Id.* at 64.

more expansive interpretation of a norm in their domestic policies and practices, the court can adopt that interpretation in its decision, thereby applying it to all states within their jurisdiction, even the “laggard[s].”<sup>85</sup> For instance, the ECtHR has expanded rights protections for homosexuals through a strategy of majoritarian activism.<sup>86</sup> The strategy allows the court to expand the reach of international legal norms while at the same time ensuring a majority compliance coalition of states.<sup>87</sup> Sandholtz and Rangel Padilla offer evidence that the Inter-American Human Rights System (comprised of a commission and a court) has modulated both the timing and the scope of its fourteen decisions on national amnesty laws in light of domestic politico-legal conditions.<sup>88</sup> The IACtHR has thereby been able to construct an interpretation of the American Convention on Human Rights that prohibits amnesties, but it has done so in a way that increased the likelihood that its rulings would find (in Alter’s terms) domestic compliance constituencies.

On judicial decision-making in international courts, *New Terrain* thus raises crucial questions and indicates important avenues to be pursued.

### C. *The Dynamics of Law in International Courts*

*New Terrain* forcefully makes the case that international law is inherently dynamic,<sup>89</sup> and that international courts are engines of legal norm change, with consequences for state behavior and world politics.<sup>90</sup> The contrast here is with (mainly) political science approaches to international law and international legal institutions, in which a sense of the dynamism of law and judicialized politics is almost entirely missing.<sup>91</sup> For example, in the “legalization” approach in International Relations, the focus is on the choices and tradeoffs states make in creating international legal rules and institutions.<sup>92</sup> There is no systematic attention to how legal norms evolve through disputes and dispute resolution.<sup>93</sup> The “rational design of international institutions” approach suffers from the same limitation.<sup>94</sup> It offers sophisticated propositions about the tradeoffs states make in setting up institutions to enforce international agreements<sup>95</sup> but has almost nothing to say about what happens

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85. Stone Sweet & Brunell, *supra* note 6, at 81.

86. *Id.* at 79-80.

87. *Id.* at 86.

88. ALTER, *supra* note 1, at 19; *see also* Wayne Sandholtz & Mariana Rangel Padilla, Law and Politics in a Trustee Court: Amnesty Laws and the Inter-American System (2015) (Workshop paper) (on file with the UCLA Department of Political Science).

89. On the dynamics of international law, see Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. (1999); WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE (2007); WAYNE SANDHOLTZ & KENDALL W. STILES, INTERNATIONAL NORMS AND CYCLES OF CHANGE (2009); Terence C. Halliday, *Recursivity of Global Normmaking: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. (2009); Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

90. ALTER, *supra* note 1, at 44.

91. *See generally* JUDITH L. GOLDSTEIN ET AL., LEGALIZATION AND WORLD POLITICS (2001).

92. *Id.* at 386.

93. *See generally* Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 762 (2001).

94. *Id.* at 761.

95. *Id.* at 771.

once such bodies are adjudicating claims and interpreting rules. The inattention to the dynamics of legal and judicial institutions is traceable to the baseline position for many International Relations scholars that international courts have no independent effect on conduct or outcomes.<sup>96</sup> Indeed, the field of International Relations has, for the most part, ignored international jurisprudence. Alter offers an important corrective: “[T]he decisions of governments to create ICs . . . are important, but legal practice shapes what institutions become.”<sup>97</sup>

Alter contends that “[d]elegation to ICs . . . promotes political change in the direction indicated by the law”—provided that the necessary compliance constituencies exist.<sup>98</sup> The process is dynamic because ICs can “interpret existing laws in unexpected ways,” and those interpretations can empower various domestic and transnational actors who will pressure governments to comply with IC decisions.<sup>99</sup> Alter’s argument powerfully complements the work that Stone Sweet and others have done over many years to integrate jurisprudential and political analyses and to show empirically how judicial decisions shift the calculations, and hence the choices, of social and political actors.<sup>100</sup> The more judicialization proceeds, the more motivated actors will be to act in ways that are defensible in light of the legal interpretations announced by the court, and the more their decisions will be influenced by the shadow of the court.<sup>101</sup> The more courts are seen as authoritative interpreters of norms, the more violations of the rules will trigger litigation, and the more courts will shape (or reshape) the rules.<sup>102</sup>

In *New Terrain*, Alter makes a compelling argument that these dynamics are emerging around more international courts than most readers will have imagined.<sup>103</sup> She illustrates her claims in the second half of the book with a series of case studies.<sup>104</sup> The case studies analyze the jurisprudence of diverse international courts resolving diverse kinds of claims, and examine their effects on political and policy outcomes.<sup>105</sup> The point of these chapters is not to test a theory but to establish the plausibility of the broader argument that

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96. Most International Law (IL) scholarship, with the exception of IL “realists” and skeptics, assumes the opposite. Constructivist approaches in IR tend to take international courts seriously.

97. ALTER, *supra* note 1, at 111.

98. *Id.* at 27; see Part II.A *supra*. The crucial role played by compliance constituencies in Alter’s framework underscores the necessity, discussed above, of identifying the factors that produce or foster cultures of international law obedience.

99. ALTER, *supra* note 1, at 27.

100. Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 137 (1999); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004); Alec Stone Sweet, *Path Dependence, Precedent, and Judicial Power*, in ON LAW, POLITICS, AND JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002); Burley & Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993); Wayne Sandholtz, *The Emergence of a Supranational Telecommunications Regime*, in EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE ch. 5 (Wayne Sandholtz & Alec Stone Sweet eds., 1998); Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance*, in THE POLITICS OF INTERNATIONAL LAW 238-71 (Christian Reus-Smit ed., 2004); Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INT’L ORG. 609 (2002).

101. ALTER, *supra* note 1, at 5.

102. *Id.* at 7.

103. *Id.* at 3-4.

104. *Id.* at 260-67.

105. *Id.*

international courts are altering domestic and international politics.<sup>106</sup> Readers' prior beliefs about international courts will probably shape how they judge the cumulative effect of the case studies.

Readers may be less convinced that the framing of the case studies in terms of four judicial roles (dispute resolution, administrative review, enforcement, and constitutional review), or indeed the role typology itself, is crucial to the argument. Of the twenty-four courts included in the book, only six perform just one of the four roles. Of those six, three are international criminal tribunals (the ICTY, the ICTR, and the ICC), which necessarily have narrowly specified jurisdiction. Eight courts (one-third of the total) perform all four judicial roles. Alter notes frequently that the roles often "morph" into one another.<sup>107</sup> The real work seems to be done by the distinction between "other-binding" and "self-binding" functions, which do not map directly onto the four judicial roles.

### III. CONCLUSION

In *The New Terrain of International Law*, Alter presents a panoramic view of modern international courts and argues convincingly that they influence domestic and international politics as never before.<sup>108</sup> She suggests that international law, and international courts in particular, have entered a new era.<sup>109</sup> Turning back the clock to a time when states could choose, case by case, whether or not to be subject to international adjudication "is not a realistic or viable option."<sup>110</sup> The new terrain represents a major shift in world politics, one that is "unlikely to be reversed any time soon."<sup>111</sup>

But does the current state of international courts represent a new era or instead a time that will be remembered as a high point in the judicialization of world politics? Skeptics might suspect the latter. The two temporary criminal tribunals, the ICTY and the ICTR, are winding down. The International Criminal Court has been unable to secure the arrest of Omar al-Bashir, even though he has traveled to ICC member states that are supposed to be committed to cooperating with the Court. The ICC had to shut down its case against President Uhuru Kenyatta of Kenya and faces widespread resistance, if not hostility, across much of Africa. International criminal courts, in other words, may not be poised to expand their role in world affairs. Among the human rights courts, the ECtHR is coping with an overwhelming caseload while the IACtHR continues to be under-resourced and modestly utilized. The African Court on Human and Peoples' Rights has not really begun to function, and there appears to be no prospect of human rights courts emerging in the Middle East or Asia. Among international courts with jurisdiction over trade and economic issues (the largest single category of ICs), the ECJ has by far the largest caseload (18,511 binding rulings), followed distantly by the Andean Tribunal of Justice (2,197 rulings) and the Common Court of Justice and Arbitration of l'Organisation pour l'Harmonisation en

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106. ALTER, *supra* note 1, at 4.

107. *Id.* at 38, for example. See also the index entry for "morphing judicial roles."

108. *Id.* at 3-4.

109. *Id.* at 5-6.

110. *Id.* at 30.

111. ALTER, *supra* note 1, at 31.

Afrique du Droit des Affaires (OHADA) (569 rulings).<sup>112</sup>

The European courts—the ECJ and the ECtHR—are, by any measure, the most effective and influential international courts.<sup>113</sup> Alter argues that the ECJ and ECtHR design templates have been adopted by most other ICs around the world.<sup>114</sup> The question is, can the non-European courts follow not just the design templates but the trajectory of usage and effectiveness of the two European models? Alter provides evidence that many of the non-European courts show activity levels that compare favorably with those of the European courts, *at similar operational ages*.<sup>115</sup>

Whether the current development of international courts represents a new era or is a temporary golden age will depend on the degree to which the courts serve the needs and interests (both material and normative) of those who live under the legal rules those courts curate. Whether that happens will depend on three conditions: first, actors—states, firms, NGOs, activists, and individual persons—see third-party dispute resolution as an effective means to resolve disputes, vindicate rights, and hold authorities accountable; second, international courts effectively meet litigants’ needs; and third, compliance constituencies embedded in cultures of adherence to international law keep the pressure on governments to comply with IC rulings.<sup>116</sup> The three conditions are mutually reinforcing. If they develop together, judicialization will proceed.<sup>117</sup> Alter makes the bet that they will.

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112. *Id.* at 104.

113. *Id.*

114. *Id.* at 90.

115. *Id.* at 106-07.

116. *See generally* ALTER, *supra* note 1, at 20.

117. *Id.* at 4-5.