



---

NORTHWESTERN UNIVERSITY SCHOOL OF LAW

PUBLIC LAW AND LEGAL THEORY SERIES • NO. 11-50

LAW AND ECONOMICS SERIES • NO. 11-16

---

## **The Evolving International Judiciary**

Buffett Center for International and  
Comparative Studies Working Paper Series 11/002

Annual Review of Law & Social Science, forthcoming

**Karen J. Alter**  
**Northwestern University School of Law**

**Buffett Center for International and Comparative Studies  
Working Paper Series**

**The Evolving International Judiciary**

**Karen J. Alter**

**Department of Political Science, Northwestern University**

Working Paper No. 11-002

June 2011



**BUFFETT  
CENTER**

The Roberta Buffett Center for  
International and Comparative Studies  
Northwestern University

## The Evolving International Judiciary\*

By Karen J. Alter, Professor of Political Science, Northwestern University<sup>‡</sup>

Annu. Rev. Law Soc. Sci. 7:XX. Forthcoming.

<http://www.annualreviews.org/journal/lawsocsci>

**Abstract:** This article explains the rapid proliferation in international courts first in the post WWII and then the post Cold War era. It examines the larger international judicial complex, showing how developments in one region and domain affect developments in similar and distant regimes. Situating individual developments into their larger context, and showing how change occurs incrementally and slowly over time, allows one to see developments in economic, human rights and war crimes systems as part of a longer term evolutionary process of the creation of international judicial authority. Evolution is not the same as teleology; we see that some international courts develop and change while others stay at in their same role and with the same low level of activity for long periods of time. The evolutionary approach of this article suggests that building judicial authority evolves through practice and takes time, and that the overall international judicial context and developments in parallel institutions shape the development of individual ICs.

The international judiciary has grown extensively in the post-Cold war era. In 1985 there were six permanent international courts. Today, there are at least 26 permanent international courts, and well over a hundred quasi-legal and ad hoc systems that interpret international rules and assess compliance with international law (Romano, 2011). The changes occurring in international adjudication are easily observable in the rising newspaper coverage of transnational legal bodies, in the language of states and transnational advocates that increasingly use law-based arguments to make their case, and in complaints that international actors are speaking to issues that are or should be purely matters for domestic decision. Yet we have very little understanding of the forces contributing to these changes.

This article investigates larger dynamics driving the development of the international judiciary. I reconstruct the establishment and amendment of twenty-five permanent international courts, weaving together legal and institutional histories to embed changes in the international

---

\* Thanks to John Hagan, Gregory Shaffer, and participants at the Midwest Regional Regional Colloquium on Globalization of Law, International Organizations and International Law for comments on an earlier draft of this paper. Thanks to Aleksandr Sverdlik for research support.

<sup>‡</sup> Karen J. Alter is Professor of Political Science at Northwestern University, specializing in the international politics of international organizations and international law. Alter is author of *The European Court's Political Power: Essays on the Influence of the European Court of Justice on European Politics* (Oxford University Press, 2009) and *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001) and over thirty articles and book chapters on the politics of international courts and international law. Fluent in Italian, French and German, Alter's research has been supported by the John Simon Guggenheim Foundation, the American Academy of Berlin, the Howard Foundation, the German Marshall Fund, the DAAD, and the Bourse Chateaubriand Scientifique.

judicial order into the evolving global context. The study builds on the insights of complexity studies, which argues that systems can exist even without a central organizing institution. Within complex systems, individual developments may be best understood in relationship to the larger whole.<sup>1</sup> In this case, the larger whole is the larger international legal complex, where there are a variety of governing legal instruments and courts. New judicial institutions are created to address problems or lacunae in existing rules and institutions, which is why one can best understand individual developments by seeing their relationship to what already exists or has come before.

International courts sit as authoritative actors in this international legal complex [cite to Karpik & Halliday in this volume], ready to be called upon to resolve disputes about the meaning of international agreements. Insiders and unaffiliated actors invoke international courts to promote compliance with existing laws, to encourage judicial law-making that furthers the goals of the advocates and the organization, or to challenge political steps that arguably over-expand or illegally retrench the institution from its larger goals. Where appeals to courts are possible, bargaining occurs in the shadow of a court with each side knowing that a failure to settle the case may lead to a precedent setting binding legal ruling.

By connecting discrete events and forces shaping the creation and change of international judicial institutions, I hope to help scholars to see general dynamics across international judicial developments, and thereby identify new questions to investigate. The article proceeds as follows. First I provide basic descriptors of the international judiciary today, identifying the realm of transnational courts and the pieces of institutional development that need explaining. Then I identify three critical events that shape the larger context of international legal regimes—the end of World War II, the Cold War and the fall of the Berlin Wall. I locate the creation of twenty-five existing permanent international courts in three important issue areas—economic disputes, human rights and war crimes-- within the dynamics of these events. Next, I offer some explanations of the evolution of the international judicial order by showing how Europe has been a force for the global spread of transnational courts, and how the end of the Cold War accelerated the expansion of existing and new transnational legal systems. The analysis reveals that even

---

<sup>1</sup> Many different disciplines have considered how complexity matters. In the sciences, complexity is understood as a system characterized by organization without a central organizing principle, where studying the parts may not give any insight into how the whole operates. For example, studying neurons may not tell one much about how the brain works, yet both are affecting each other. For more on how complex systems operate, see: [http://www.northwestern.edu/nico/about\\_cs.html](http://www.northwestern.edu/nico/about_cs.html). For more on the politics of international regime complexity, see: (Alter and Meunier, 2009, Keohane and Victor, 2011)

when the US has been ambivalent about international courts, it has been largely unable to stop the trend of international judicialization.

Building on the historical evolution of the post-WWII ICs, I advocate for an evolutionary perspective on international courts. Many of today's international courts are in their early stages of development. We do not yet know what will become of them, but the long-term view of this article helps us see the difficulty of drawing firm conclusions based on the early years of operation. While I advocate for an evolutionary perspective, I do not claim that there is an inevitable trajectory of development. Many international courts today are barely used, despite having institutional designs associated with active and effective ICs and despite having the formal authority to enforce rules that one could imagine would be of use to litigants. While there is no inevitable trajectory, international courts that do transform, becoming both active and effective, serve as models for all international courts. For the scholar, these models allow us to investigate why some international courts become central to developing the law and influencing politics. For the legal advocate, the models suggest possible trajectories to emulate or avoid. I conclude by identifying new research questions that emerge from the analysis.

### ***The Twenty-First Century Transnational Judicial Order***

By the end of 2008 there were twenty-five operational permanent international courts—courts with appointed judges that were being invoked by litigants to render binding legal rulings in cases where states or international institutions were the defendants. Four of these legal bodies were global in reach—the International Court of Justice, International Tribunal of the Law of the Seas, the appellate body of the World Trade Organization, and the International Criminal Court. The rest were regional bodies located in Africa (9), Europe (6), Latin America (5) and Asia (1). These bodies have jurisdiction to hear cases involving economic disputes (17), human rights issues (6), and war crimes (3) and/or the courts have a general jurisdiction that allows them to adjudicate any case state litigants choose to bring (9). Table 1 below identifies the twenty-five operational courts considered in this analysis, including in parentheses the year the courts were created. Of these twenty-five operating legal bodies, three of the most active and important international courts in the world today were created in the aftermath of World War II. Three more ICs were created during the Cold War. A number of these existing institutions were changed in the 1990s, and remaining nineteen ICs were created following the end of the Cold War. Some ICs have multiple jurisdictions. On the table below, I give the IC's full name the first

time I introduce it, and use the acronym each subsequent reference thereby allowing one to identify, which ICs are listed more than once.

**Table 1: Operational Permanent ICs by Region and Subject Matter (by year created)<sup>2</sup>**

Subject Matter	Europe	Latin America	Africa	Asia	Pan-Regional
<b>Economic Courts</b> N= 17	European Court of Justice (ECJ)(1952) Benelux Court of Justice (BCJ)(1974) Economic Court of the Commonwealth of Independent States (ECCIS) (1993) European Free Trade Area Court (EFTAC) (1992)	Andean Tribunal of Justice (ATJ) (1984) Central American Court of Justice (CACJ) (1994) Caribbean Court of Justice (CCJ) (2001) Southern Common Market (MERCUSOR) (2004)	West African Economic and Monetary Union (WAEMU) (1994) Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1994) Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997) Central African Monetary Community (CEMAC)(2000) Court of Justice of the East African Community (EACJ) (2001) Economic Community of West African States (ECOWAS) Court of Justice (2001) Southern African Development Community (SADC) (2005)	Dispute resolution system of the Association of Southeast Asian Nations (ASEAN) (2004)	World Trade Organization (WTO) Appellate Body (1994)
<b>Human Rights Courts</b> N=5	European Court of Human Rights (ECtHR) (1959)	Inter-American Court of Human Rights (IACtHR) (1979)	African Court of Peoples and Human Rights (ACtPHR) (2004) ECOWAS Court Human Rights jurisdiction (2005) SADC & EACJ can hear cases involving good governance procedures.		
<b>Criminal Courts</b> N=3 But	International Criminal Tribunal for		International Criminal Tribunal for Rwanda (ICTR) (1994)		International Criminal Court

<sup>2</sup> Starting dates can be hard to ascertain because it may take years for judges to be appointed and rules of procedure crafted. I try to use the common date of origin; where there is no established consensus I use the date the court first became operational rather than the year states drafted the treaty to establish a court. The table does not include the at least seven other formally constituted courts that are either dormant or barely active such as the European Nuclear Energy Tribunal (1957-present), the European Tribunal on State Immunity (1972-present), the judicial board of the Organization of Arab Petroleum Exporting Countries (1980 to present), the Courts of Justice for the Economic Community of Central African States (1983-present), African Magreb Union (1989-present), and African Economic Community (1991-present). Also missing are a number hybrid criminal tribunals (Including the Serious Crimes Panels in the District Court of Dili, East Timor (2000-2005), special panels in the Courts of Kosovo (2001 -), War Crimes Chamber of the Court of Bosnia-Herzegovina (2005 -), Special Court for Sierra Leone (2002 -), Extraordinary Chambers in the Courts of Cambodia (2006 -) and the Special Tribunal for Lebanon (2009- )). For a complete list of formally constituted international courts and tribunals, see: (Romano, 2011)

there are also hybrid systems that aren't listed	Former Yugoslavia (ICTY) (1993)				(ICC) (2002)
<b>20 General Jurisdiction</b> N= 9 because many ICs have general jurisdiction too	BCJ	CACJ CCJ	WAEMU (1995) CEMAC (2000) EACJ (2001) SADC (2007)		International Court of Justice (ICJ) (1946) International Law of the Sea Tribunal (ITLOS) (1996)*
<b>Total courts</b> N=25	6	5	9	1	4

Not only are there more international courts than at any point in history, newer ICs are qualitatively different entities compared to their historical precursors, such as the International Court of Justice. Newer ICs tend to have compulsory jurisdiction and access for non-state actors—private litigants, international prosecutors, and supranational commissions—to initiate litigation so that new-style ICs are far more likely to be activated, and to be ruling in cases in which states are reluctant participants. These design trends mean that most international courts today are closer to the transnational court ideal-type than they are to the inter-state dispute resolution model of an international court (Keohane, Moravcsik and Slaughter, 2000). Given these trends, it is not surprising that the types of cases ICs are adjudicating, and remedies ICs authorize, increasingly impact the internal operation of states. Old-style ICs mainly resolved disputes between states. Today international courts assess whether states are violating individual's basic rights, whether economic policies and government regulations create illegal barriers to trade, and whether actions undertaken in war constitute war crimes and crimes against humanity (Alter, 2010).

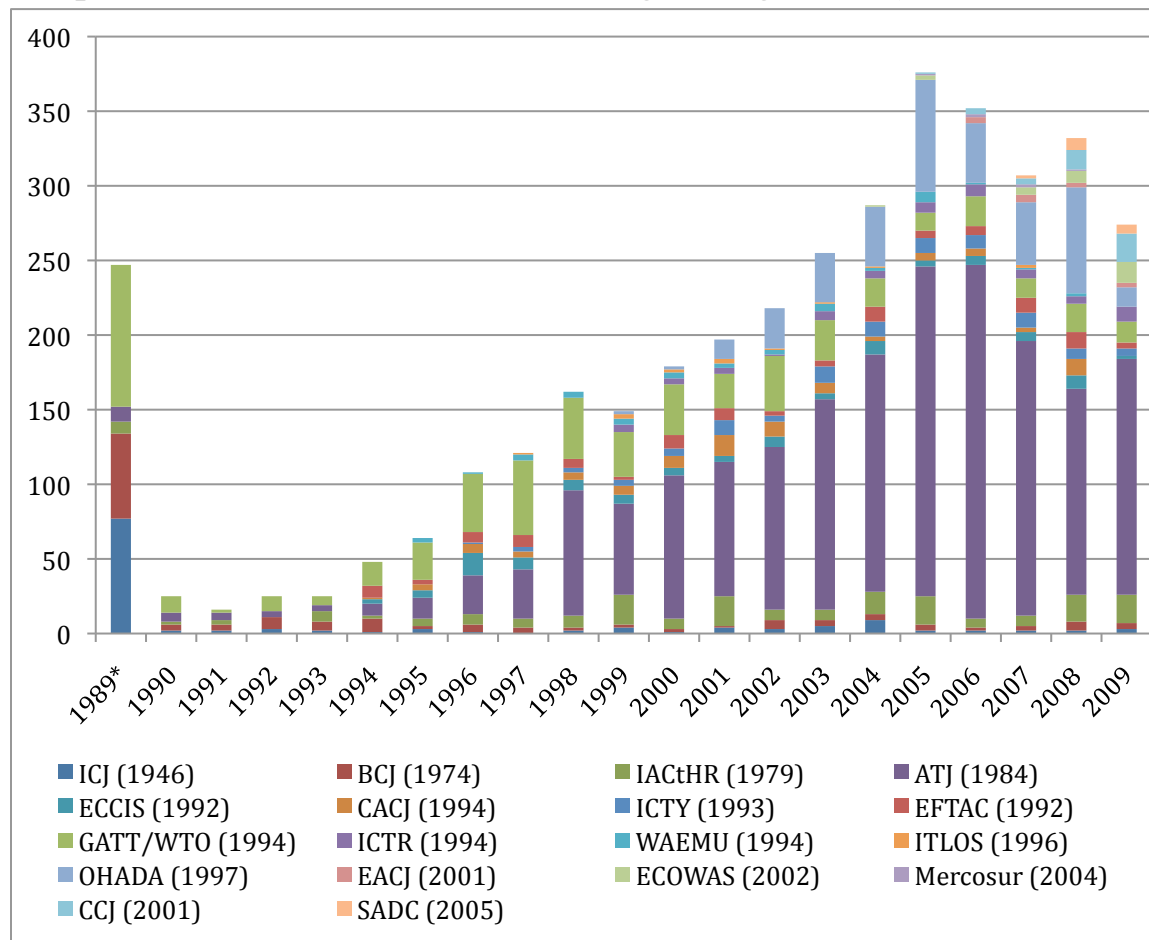
ICs are increasingly invoked. By the end of 2008, international courts had issued over twenty-four thousand binding legal rulings where an IO or state actor was the defendant. Nearly ninety-percent of these rulings were issued since the end of the Cold War (1989). Graph 2 below shows increased usage of eighteen ICs over time. For now I exclude the ECJ and ECtHR so as to better see the growth in litigation by all ICs. The first bar includes the sum of international judicial rulings in the four existing ICs before 1989 (ICJ, Benelux, IACtHR, ATJ) and the GATT

---

\* The ITLOS Tribunal is admittedly an awkward fit in this category; countries opting into the authority of the ITLOS court can bring any case but the court's subject matter is confined to issues pertaining to the Law of the Seas.

rulings that were adopted. The rest of the table includes litigation for each post-Cold war year including the active ICs where I could find data. Some of these ICs are very active, and some are fairly inactive despite sharing the design of the more active ICs. Graph 2 shows that after the ECJ and the ECtHR, the next most active courts are the Andean Tribunal of Justice (ATJ) (1492 rulings), the WTO legal system (370 panel and appellate decisions), the OHADA court (274 rulings) and IACtHR (152 rulings).

**Graph 2: Growth in IC Decision-making through 2008 (ECJ & ECtHR excluded)**



Source: (Alter, 2010). \*= rulings since the court's founding-1989. Data excludes employee disputes and interim rulings.<sup>3</sup>

<sup>3</sup> The statistics reporting rulings can change over time as courts change how they count and report cases. I count rulings based on the year of the ruling rather than the year the case began, and try to undercount cases by not counting staff disputes or interim judgments. The result is a low-ball estimate, not reflecting the total number of IC opinions, let alone the total number of cases that are initiated but settled before a binding judgment is delivered.



How does one get their hands around so many varied institutions and legal decisions? Scholars have tried to create hypotheses that categorize legal bodies according to different characteristics. For example, one set of scholars distinguishes between *inter-state legal bodies* where only states can initiate litigation and where compliance with international legal rulings is in practice voluntary and *transnational legal bodies* where private actors can initiate litigation and legal rulings are implemented by domestic actors (Keohane, Moravcsik and Slaughter, 2000, Posner and Yoo, 2005). Other scholars expect international legal institutions to work differently depending on whether member states are liberal democracies (Moravcsik, 1995, Slaughter, 1995). A second approach is to classify international legal bodies. Cesare Romano maps out how different courts fit into different classifications -- regional versus global bodies, economic versus human rights bodies, judicial versus quasi-judicial bodies-- yet he recognizes that doing so is somewhat artificial since individual institutions can span classifications (Romano, 2011).<sup>4</sup>

But law and legal process do not confine themselves to these categories. States are members of multiple international legal institutions, and reputations for compliance can be diffuse. The Organization for the Harmonization of Business Law in Africa is clearly quite different from the Economic Community of West African States, the African Union and the United Nations (which oversees international criminal law). But African governments can end up as defendants in the legal bodies of all of these institutions, and a growing 'rule of law' culture will affect the politics within all four institutions. Although India can certainly ascertain that US violations of international human rights law does not mean that it will break its economic agreements (Guzman, 2008), it may be harder to figure out what will happen with respect to a large number of economic agreements that may have ambiguous and contradictory clauses, especially over time as leaderships and contexts change. The lens of international regime complexity allows us to think about how membership in one institution may affect membership in another, and how dynamics can cross from one regime to another (Alter and Meunier, 2009).

By embedding individual judicial developments into their larger context, we are also better able to see how international judicial developments occur in relation to each other. Lawyers worry that if courts with different jurisdictions make contradictory rulings about similar legal texts, legal certainty will be undermined and litigants will be able to game the legal process and pit judges against each other. The designers of international legal regimes actively avoid

---

<sup>4</sup> For a slightly different taxonomy, see: (Kingsbury, 2011)

legal fragmentation, which means that they take into account the other legal regimes that may be ruling on similar if not identical legal texts. Also, since countries are members of multiple legal institutions, legal diplomats, judges and lawyers themselves will find that they are working with multiple international legal regimes. While scholars may chose to specialize in a single institution, the legal actors who design, work in and use international legal institutions inhabit the larger international legal complex. For this reason alone, the larger legal complex shapes the design and development of individual international systems. It is also true that political and legal developments inevitably spill across institutions. Lessons from one institution get drawn and applied to other institutions, with respect or disrespect of international law and the rule of law becoming a tide that can raise and lower all boats.

This paper starts from the question of how we understand the forces leading to the clustered creation of these legal bodies? A related question is how do we understand the change in the design of international courts over time? Most scholars expect that international courts with compulsory jurisdiction and access for nonstate actors to initiate litigation will be more independent, active, and sovereignty compromising (Helfer and Slaughter, 2005, Posner and Yoo, 2005). In 1985, four of the seven existing international legal systems had optional jurisdictions (ICJ, ECtHR, IACtHR and General Agreement of Tariffs and Trade (GATT)). Today, twenty-one of the twenty-five permanent international courts have compulsory authority.<sup>5</sup> And twenty ICs allow non-state actors to initiate litigation against states, further increasing the chance that states will be brought to court.<sup>6</sup> By looking at the complete category of permanent and functioning international courts, I can capture all domains in which international legalization is occurring today, and identify variation that does not clearly map on to categories of interstate versus transnational courts, and that includes variation within various classificatory systems.

### ***Critical Junctures in the Creation of Permanent International Courts: WWII, The Cold War, and the Fall of the Berlin Wall***

Robert Kagan has famously suggested that European governments turn to international law because they are unable or unwilling to use coercion to pressure other states (Kagan, 2002).

---

<sup>5</sup> The ECtHR and WTO now have compulsory authority. The ICs with optional authority include: ICJ, ITLOS, ACtPHR, IACtHR. For the ECCIS, it is not entirely clear whether or not its authority is compulsory. Twenty-five Latin American states have accepted the IACtHR's compulsory authority, and the IACtHR now assumes its authority is compulsory for signatories.

<sup>6</sup> State only courts include: ICJ, WTO, ASEAN, MERCUSOR and ITLOS (with the exception of the Seabed Authority cases).

Delegation to ICs does emanate from Europe, but a more convincing explanation of this fact is that World War II provided a shock that changed attitudes in Europe. Having seen the violations of human rights orchestrated through formal legal means, and suspicious of everyone who had exercised power during the authoritarian era, European leaders and citizens distrusted themselves and their legal institutions. Although Europeans were and remain more willing than governments and peoples in other countries to submit to international judicial oversight, European leaders were also wary of international legal oversight in the immediate post-WWII period. Indeed if I were writing this article in 1975, I would have concluded that European governments were no more likely to submit to robust international judicial oversight than governments elsewhere in the world. I would have made such a declaration, missing that Europe was in the midst of the greatest international judicial revolution in world history.

This section explains how through practice rather than design, Europe created for the world a model of an effective embedded international legal system. WWII shaped the founding of the ICJ, ECJ and ECtHR. The Cold War provided the permissive environment facilitating the bottom up construction of strong international legal mechanisms in Europe, despite the concerns of Europe's political leaders. The end of the Cold War then facilitated the strengthening and spread of existing international courts, most of which adopted Europe's model of embedded international legal systems. Table 3 forecasts key features of this narrative by locating developments regarding economic, war crimes and human rights legal systems into their historical evolutionary context. I then explain the gradual development of international judicial enforcement via experimentation and the unintended consequences of earlier decisions. I argue that following the end of the Cold War, states embraced international courts because the context and options had shifted radically. Embracing international legal oversight in the post-Cold war era now seemed like the best alternative, a lesser evil to submitting to American and European dominated global and national legal institutions.

**Table 3: Historical Evolution of International Courts Across Issue Areas** (Permanent ICs in bold; ad hoc international courts in italics)

World History	International Economic System	War Crimes & Prosecutions	International Human Rights System
<p><b>1940s</b>                      WWII ends. United Nations and <b>International Court of Justice (ICJ)</b> created (1945).                      India gains independence (1947); decolonization begins.</p>	<p>General Agreement on Tariffs and Trade adopted as a precursor to International Trade Organization (1947)                      International Trade Organization charter rejected by US (1950)</p>	<p><i>Nuremburg Trials (1945-6)</i>  <i>Tokyo Trials (1946-8)</i>                      Genocide Convention (1948)                      International Law Commission proposes International Criminal Court (1948)</p>	<p>UN Human Rights Commission created by the UN Economic and Social Council with a focus on standards setting (1947)                      American &amp; UN Declarations on Human Rights (1948)                      European Convention on Human Rights (1950)</p>
<b>Cold War Sets In</b>			
<p><b>1950s</b>                      Cold War sets in                      Decolonization gains political momentum, fueled in part by Cold War rivalries</p> <p><b>1960s</b>                      Civil rights movements                      Wars of Independence among former colonies</p> <p><b>1970s</b>                      East-West Détente; Brandt's <i>Ostpolitik</i> (1970), Nixon goes to China (1972)                      New International Economic Order launched (1973-4)</p> <p><b>1980s</b>                      Gorbachev era reforms in Soviet Bloc (Perestroika &amp; Glasnost)                      Law of Sea III signed (1982); US refuses to sign convention delaying its implementation                      Berlin Wall falls (1989), Cold War ends</p>	<p><b>European Court of Justice (ECJ)</b> founded as part of Coal and Steel Community (1952)                      Treaties for European Political and Defense Communities are rejected (1954)                      Treaty of Rome creates European Economic Community, expanding the ECJ's jurisdiction (1958)</p> <p>ECJ's legal revolution begins with the ECJ's <i>Van Gend en Loos</i> ruling (1963)                      GATT's noncompulsory dispute settlement system has its first codification/reform (1966)</p> <p><b>Benelux court</b> created (1974)                      United States Trade Act creates Section 301 mechanism providing for unilateral sanctions for 'unfair' trade practices (1974)</p> <p><b>Andean Tribunal of Justice (ATJ)</b> created (1984)                      Uruguay Round negotiations in GATT system begin (1986)</p>	<p>Eichmann trial in Jerusalem (1961-2)                      German trials of Treblinka and Auschwitz Guards (1960s and 1970s)                      My Lai Massacre in Vietnam (1968)                      William Calley is only US soldier convicted for his role in May Lei Massacre (US military court, 1971).                      Cambodian Killing fields (1975-1979)</p>	<p>European Commission on Human Rights begins operations (1954)  <b>European Court of Human Rights (ECtHR)</b> created (1958)                      Inter-American Commission on Human Rights established (1959)                      Creation of many UN Human Rights conventions in 1960s.                      UN Human Rights Commission starts investigating and reporting on human rights violations (1967)                      American Convention on Human Rights (1969), which includes protocol to establish Inter-American Court                      Italy, Switzerland, France accept ECtHR authority (1973-5)                      Chile's human rights abuses, Argentina's dirty war, (1974-1978)                      Carter administration (US) makes human rights central to American foreign policy, advocates ratification of American Convention (1977-81)  <b>Inter-American Court of Human Rights (IACHR)</b> created (1979)  <i>Filartiga v. Pena Irala</i>: US Federal Appellate court resurrects the Alien Tort Claims Act, part of the 1789 Judiciary Act, to find a US federal jurisdiction for human rights violations committed outside of US territory (1980).                      African Charter on Human Rights signed (1981)</p>

**Cold War Ends**

<p><b>1990s</b> Washington Consensus (US, IMF, World Bank) regarding economic policy (1990s) Failed UN intervention in Somalia (1992)</p> <p>EU and Council of Europe first post-Cold War enlargement (1995) <b>International Tribunal for the Law of the Sea</b> finally created (1996)</p> <p><b>2000s</b> Era of Globalization Attack on United States World Trade Towers (2001) Merger of African Court of Justice and ACtHPR proposed. EU and Council of Europe enlargements bring in former Soviet states (2004, 2007)</p>	<p>Maastricht Treaty and reforms of European Union and its legal system (1992) EU enlargement. <b>Economic Court of the Commonwealth of Independent States (ECCIS)</b> created (1993) <b>European Free Trade Area</b> gets court as part of agreement with the EU (EFTAC) (1992) <b>Central American Court of Justice</b> resurrected (1994) <b>World Trade Organization's (WTO)</b> new system of compulsory dispute resolution (1994) <b>Court of West African Economic and Monetary Union (WAEMU)</b> created (1994) <b>Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)</b> (1994) Andean legal system reformed (1996 Cochabamba Protocol) <b>Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)</b> (1997)</p> <p><b>Central African Economic and Monetary Union Court</b> created (2000) <b>Community Court of Justice of the East African Community (EACJ)</b> (2001) <b>Caribbean Court of Justice (CCJ)</b> (2001) <b>Economic Community of West African States (ECOWAS) Court of Justice</b> (2001) <b>Southern Common Market (MERCOSUR)</b> (2002) <b>Association of Southeast Asian Nations (ASEAN) dispute settlement system</b> agreed to (2004) <b>Southern African Development Community Court (SADC)</b> created (2005)</p>	<p>War breaks out in Yugoslavia (1991).</p> <p><b>International Criminal Tribunal for the Former Yugoslavia (ICTY)</b> (1993) Rwandan genocide (1994) <b>International Criminal Tribunal for Rwanda (ICTR)</b> (1994) Rome Statutes of International Criminal Court signed (1998)</p> <p><i>Hybrid international criminal tribunals for East Timor, Kosovo and Sierra Leone</i> (1999-2001)</p> <p><b>International Criminal Court (ICC)</b> created with jurisdiction covering crimes committed after 1 July 2002 (2002)</p>	<p>Belgium Parliament passes "law of universal jurisdiction" (1993)</p> <p>ECtHR reformed (Protocol 11 signed 1994).</p> <p>Spanish extradition request for Augusto Pinochet to prosecute human rights violations (1998) European Commission abolished and ECtHR's reformed system comes into force (1998) Organization of African Unity agrees to create an African Court on Human and Peoples rights (1998)</p> <p>Inter-American Human Rights Commission decides that it will refer all unresolved cases to the IACtHR (2001) <b>ECOWAS Court</b> gains jurisdiction over human rights issues, including private access to initiate litigation (2005) <b>African Court of Human and Peoples Rights (ACtPHRs)</b> created (2005). ECOWAS court issues a series of human rights rulings on arrest and torture of journalists, modern slavery in Africa, and the right to free public education (2008-9) ACtPHR delivers first judgment, denying the admissibility of its jurisdiction (2009)</p>
--	---	---	---

## **Critical Juncture 1: WWII and the Onset of the Cold War**

Pre-WWII had some international courts, including the Central American Court of Justice (1907-1917) and the Permanent Court of Justice (1922-1946). These early precursors mainly suggested that most disputes between states would not be resolved effectively in court. The Central American Court of Justice heard ten cases before its founding treaty expired. The Permanent Court issued 32 binding rulings from the 66 contentious and advisory cases raised. When political tensions grew, however, it became increasingly clear that states were unwilling to bring significant disputes to the Permanent Court of Justice for resolution. At its peak, forty-three states accepted the optional jurisdiction of the Permanent Court of Justice but by the end only 29 states were willing to submit to the Court's authority. When Germany and Japan withdrew from the League in 1935, continued efforts to use League institutions looked increasingly fanciful (Allain, 2000). One can find in the United Nations system remnants of the legal and political conceptions that had animated the League of Nations, and the International Court of Justice (ICJ) in many respects resurrected the Permanent Court of Justice. But expectations were lower this time around. The discrediting of old international legal beliefs combined with the Cold War, however, to make a more limited international legal approach newly attractive.

The atrocities of WWII created in Europe willingness, if not a desire, to experiment with international courts. The Ally victors of WWII did not want to repeat the mistake of WWI by pursuing collective retribution against all Germans, thereby generating anew the sorts of grievances Hitler exploited in his rise to power. The Allies also sought to create a clear difference between the summary execution/political trial approaches of Soviet President Josef Stalin. The Nuremburg Tribunals used law and legal processes to hold specific Germans accountable for specific crimes. The Tokyo trials repeated this strategy, although concerns about inflaming Japanese nationalists led to the decision not to prosecute Japan's wartime Emperor.<sup>7</sup> Among Western lawyers and politicians, the Nuremburg trials were seen as a very important success in that they opened German eyes to the atrocities of World War II, convinced Germans that actual war criminals were prosecuted and dealt with relatively fairly (Shklar, 1964: Part II), and helped to construct a historical memory of World War II (Savelsberg and King, 2007). But the trials were far from what idealistic international lawyers might aspire. Legally problematic was the notion that the defendants

---

<sup>7</sup> There were also antecedents to the Nuremburg Tribunals, but the Nuremburg trials represent the first full fledged international effort to prosecute war crimes. For more on antecedents and on the Nuremburg and Tokyo trials, see: (Bass, 2000).

could be held to account for crimes that did not exist as a matter of law. Only after Nuremburg were laws established so that future trials would not violate the fundamental due process notion of “no punishment without law.” Politically problematic was that only the war crimes of Germany (and at the Tokyo Trials the crimes of Japanese) were prosecuted. Moreover, prosecution was highly selective in terms of which actors and crimes were pursued, suggesting to many that the Nuremburg and Tokyo Trials were yet another example of victor’s justice (Bass, 2000: Chapter 5).

Despite such critiques, the perceived success of the Nuremburg trials in dealing with war crimes contributed to the decision to give the new International Court of Justice jurisdiction to help enforce the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>8</sup> This decision proved controversial as a number of countries ratified the genocide convention with reservations and declarations associated with their signatures. The clause generating the most reservations was the agreement to submit disputes to the International Court of Justice.<sup>9</sup> The United Nations (UN) Declaration on Human Rights was similarly controversial. Many governments refused to agree to anything too concrete or legally binding, so the Declaration became a soft law aspirational statement adopted by the General Assembly. Even this non-binding declaration was too much for some states; the UN Declaration on Human Rights was adopted with 48 votes in favor, 0 votes opposed, and eight abstentions that mostly came from Soviet bloc states.<sup>10</sup> The UN Commission on Human Rights, from its establishment in 1947 until its reconstitution and renaming in 1967, concentrated on promoting human rights and helping states elaborate treaties, but not on investigating or condemning violators.

Dismayed by the limited international efforts to promote human rights, and wanting to demarcate the West European approach to protecting human rights from the Soviet practices in the East, the Council of Europe decided to create its own human rights system (Madsen, 2009). Most

---

<sup>8</sup> Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Article IX states “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

<sup>9</sup> There were 27 reservations involving article IX: Albania, Algeria, Argentina, Bahrain, Bangladesh, Belarus, Bulgaria, China, Czech Republic, Hungary, India, Malaysia, Mongolia, Morocco, Philippines, Poland, Romania, Russian Federation, Rwanda, Singapore, Slovakia, Spain, Ukraine, US, Venezuela, Vietnam and Yemen. Between 1989 and 1999 eleven of these countries removed their reservations regarding the ICJ’s authority to resolve disputes involving the treaty. The next largest number of reservations (13) were related to the applicability of the treaty vis-à-vis non-self governing territories. See: <http://www.preventgenocide.org/law/convention/reservations/> accessed 20 May 2011.

<sup>10</sup> Countries abstaining included: Byelorussia, Czechoslovakia, Poland, Ukraine, USSR, Yugoslavia, South Africa and Saudi Arabia. See: <http://www.un.org/rights/HRToday/declar.htm> accessed 20 May 2011.

of the architects of the European Convention on Human Rights were members of the *European Movement*, a group that included many former anti-fascist resistance fighters and government officials overseeing national purges of Nazi collaborators. The *European Movement* envisioned a robust system of international oversight that could sound the alarm should European governments start down the path towards authoritarian fascism (Bates, 2011: 44-76).

The dreams of the ECtHR's legal architects were immediately tempered by state sovereignty concerns. A number of countries did not want a highly independent international oversight mechanism, thus the Commission's formal mandate prioritized friendly reconciliation over enforcement actions (Robertson and Merrills, 1994: 5-12, 295-296). Also, states made optional the consent for the right of individuals to petition the Commission and for the Commission to be able to bring cases to the ECtHR. Henry Schermers stated the dilemma:

proper human rights protection requires international supervisory organs. This, however, would be a further infringement of national sovereignty. The supremacy of national courts would be degraded if an international organ would be permitted to criticize their judicial decisions. For many states, this went too far. An inter-European commitment to protect human rights was acceptable, but a European court supervising the Convention would undermine the sovereignty of the state and could not be generally accepted (Schermers, 1999: 822).

Originally only Sweden, Ireland, Denmark, Iceland, Germany and Belgium accepted ECtHR's compulsory jurisdiction and only Sweden, Ireland, and Denmark accepted the right of individual petition. Moreover, a number of these acceptances were provisional, made for only a few years at a time. The refusal of France and Britain to consent to the right of individual petition or to the ECtHR's authority diminished the sense that Europe as a whole was seriously committed to a robust regional human rights regime (Robertson and Merrills, 1994: 13-14). The politically fragile nature of Europe's human rights system led the European Human Rights Commission to proceed with great caution. In the early years, the European Human Rights Commission acted primarily as a political body limiting the types of cases heard by the ECtHR. Between 1954 and 1961, less than one half of one percent of the 1307 applications filed with the Commission were declared admissible (Schermers, 1999: 825)—with the result being that in its first ten years of operation, the ECtHR ruled on only 7 cases.<sup>11</sup>

The Commission's timid approach to human rights oversight was a disappointment to legal idealists, and arguably a sign that post-war international law approaches would not achieve much

---

<sup>11</sup> On the factors shaping Commission decisions to refer cases, see: (Greer, 2006: 33-98, Robertson and Merrills, 1994: 264-74, 300-1)



more than inter-war international law had achieved. While the Commission's prudence was designed to reassure member governments that international oversight would not be deeply sovereignty compromising (Schermers, 1999), in 1974 the European Human Rights system teetered on the brink of failure. To signal its displeasure with the European Commission and Court actions, the United Kingdom shortened its acceptance of the Court's authority to two years and suggested that it would withdraw from the right of individual petition. But at around the same time domestic political efforts culminated in Italy, Switzerland, Greece and France accepting the ECtHR's jurisdiction, and the ECtHR issued a number of important rulings that reinforced the object and purpose of human rights law in Europe. Edward Bates argues that what looked like a near collapse ended up being an awakening of Europe's human rights system, a turning point where Europe transitioned from ambivalent concern about the ECtHR to an onus to accept the ECtHR's authority to demonstrate commitment to liberal democratic ideals (Bates, 2011: 277-318).

Europe's other approach to international law enforcement in the post-World War II era was its Coal and Steel Community. The main impetus for founding the European Coal and Steel Community (ECSC) was a concern that the United States intended to return to Germany full sovereignty over its coal and steel industry. France, Italy, Belgium, the Netherlands and Luxembourg feared that Germany would exploit its dominance in coal and steel, putting its neighbors at a competitive disadvantage at a time that they needed to rebuild their industries and economies (Gillingham, 1991). The ECSC included the European Court of Justice (ECJ), added in part to create a check should the High Authority be dominated by the more powerful member states (Boerger-De Smedt, 2008). The ECJ of the ECSC had compulsory jurisdiction and private access so that the individuals could challenge arguably illegal High Authority actions.

The *European Movement* also supported European integration efforts. Members of the movement hoped that the ECSC would be the launching point for further integration endeavors. European federalists imagined that European human rights system would become part of a larger federal Europe united under the supreme authority of a European Constitution and a European Constitutional Court (Friedrich, 1954: introduction). The first steps towards both groups' visions were the drafting of charters for the European Political Community and European Defense Community. Sovereignty concerns interceded again when the French parliament rejected the European Defense Community in 1954. In this sense, the 1958 Treaty of Rome, which created the European Economic Community (EEC), was a big disappointment (Milward, 1992: 186-223). The

Treaty of Rome rechristened the ECSC High Authority as the Commission (not to be confused with the completely separate European Commission on Human Rights). The EEC Commission could not rule itself on state or firm compliance with European rules, rather it was authorized to bring state violations to the European Court of Justice, which could declare that a member state had “failed to fulfill its obligations” under the Treaty of Rome. Such a declaration was largely toothless in that no remedies were associated with an ECJ finding of a violation of European law.

For the activists of the *European Movement*, both the Treaty of Rome and the legal system of the European Convention on Human Rights were disappointments. Concerns about state sovereignty had watered down the agreements leaving only a minimalist commitment to integration and supranationalism. Integration enthusiasts then watched in further dismay as French President De Gaulle assumed office in 1959 and led a successful full-on assault on the supranational elements of the EEC, culminating in the arguably illegal “Luxembourg compromise” where the treaty mandated switch to qualified majority voting was derailed by political agreement (Hoffmann, 1966). De Gaulle’s efforts to dismantle the already quite limited European supranational structures led activists to turn to a legal strategy to promote European integration (Cohen, 2007). With so few countries accepting the authority of the ECtHR, the ECJ became the focus of their legal activities.

Scholars use the term “revolution” to characterize what then happened. Basically, in the 1960s the ECJ made a number of legal rulings that repudiated existing international legal doctrine and boldly asserted the supreme authority of European law within national legal orders (Stein, 1981, Weiler, 1991). We now know that members of the European Movement, who had helped found associations of lawyers, judges and scholars committed to or merely interested in the laws of European integration, spurred these revolutionary rulings on. Euro-law jurist advocacy movements located test cases, and used their positions of legal power to advance the cause of European legal integration (Alter, 2009: Chapter 4, Rasmussen, 2010, Vauchez, 2010). In the 1960s, the ECJ’s revolutionary rulings were mostly dicta, but they became authoritative in the 1970s as lawyers and national courts adjusted national legal doctrine to incorporate the ECJ’s radical legal doctrines (Alter, 2001).

Much more could be said about this revolution, but the key point is that it changed the way the European Community’s enforcement system operated. For both the EEC and the European Convention on Human Rights, the main enforcers were supposed to be the more politically controllable supranational commissions—the EEC Commission and the Council of Europe’s

Human Rights Commission. In the 1960s, both of these Commissions were understandably deferential to the concerns of national governments. But the ECJ's legal revolution harnessed private litigants as monitors of state compliance with European law, and national courts as key enforcers of community legal obligations. Allowing private litigants to challenge arguably illegal national policies in cases raised in national courts affected the number and types of cases raised. Private litigants pursued cases that the Commission had dropped out of political concerns, and private litigants framed their challenges boldly. National court enforcement has ended up providing a number of benefits. There were few international costs to ignoring ECJ rulings, but ignoring national court rulings was politically more difficult (Burley and Mattli, 1993, Weiler, 1992). National courts could also apply the same remedies for violations of European law as existed for violations of domestic law. Elsewhere I explain exactly how the ECJ's transformation of the preliminary ruling process forced a change on European governments, despite their clear aversion to robust international judicial oversight (Alter, 1998).

At around the time that the ECJ was flexing its new legal muscle (1980s), the European Commission on Human Rights began to let more cases proceed to the ECtHR. Schermers explains that "over the years the Commission became more critical of the behavior of Governments. In 1993 there was no longer a reasonable risk that member states would not renew the right of individual petition or that they would withdraw from the Convention. Public opinion in the member states and the Council of Europe would not easily accept such a step" (Schermers 1999: 825).

The transformation of the Europe's supranational legal systems introduced to the world a new form of international court, a European model where IC authority is embedded in domestic legal orders and where international courts are able to induce greater compliance with international agreements (Helfer and Slaughter, 1997). There are, of course, significant sovereignty costs associated with Europe's international judicial model. Because the European Economic Community's laws and legal system are embedded into domestic legal orders, litigants can turn to the ECJ to pursue social, economic, and political objectives only distantly related to facilitating trade (Harlow and Rawlings, 1992). Litigants can turn to the ECtHR as a sort of constitutional court for Europe.

The nationally embedded European legal systems took three decades to construct from the bottom up. In the 1960s the ECJ's legal revolution was primarily a matter of legal doctrine. Only in

the 1970s did the ECJ begin to issue rulings with political resonance and consequence.<sup>12</sup> By the 1980s, politicians were complaining about ECJ activism and lost sovereignty. But by then European leaders were also becoming concerned that economic competition from the United States and Japan would threaten the European ‘embedded liberal’ economic system (Ruggie, 1983). Curbing the European legal system’s perceived excesses would be a blow to European integration at the very moment that national governments were embracing European integration as the central tool to ensure that European economies became internationally competitive (Hanson, 1998).

Around this time and a continent away, Latin America began embracing international courts. In the 1970s Latin America’s military dictatorships engaged in serious human rights violations including abductions, torture and disappearances (Sikkink, 2004). In response to these violations, the Organization of American States decided to finally augment their existing human rights system by adding a court. The architects of the Inter-American court copied the model of the European Court of Human Rights, including the optional nature of the Court’s authority (Cavallaro and Brewer, 2008: 778-781). It took until 1979, and pressure by human rights advocates in Jimmy Carter’s administration, for enough states to ratify the agreement accepting the Inter-American Court’s authority. Meanwhile, in the late 1970s the Andean Pact countries (Colombia, Ecuador, Bolivia, Venezuela and Peru) also decided to recommit themselves to economic integration, adding a court to their flailing integration system. The Andean Community copied the model of the ECJ hoping to emulate its success in encouraging greater compliance with collective rules (Alter, Helfer and Saldias, 2011).

The western trading system also had a dispute settlement mechanism, created in the post-WWII period. This mechanism began informal, since states had expected the General Agreement on Tariffs and Trade (GATT) to be replaced by a more formal International Trade Organization. The draft charter of the International Trade Organization had a defined mechanism to resolve disputes, and it envisioned that ultimately the ICJ could resolve disputes. But after the United States defeated the Havana convention, states were left with the GATT which did not have a formal dispute resolution system (Dunoff, 2009: 327-333). Diplomats constructed an informal system to resolve disputes in the 1950s and 1960s, which became increasingly formalized over time. The early GATT dispute resolution system allowed states to initiate mediation and then ask for a panel

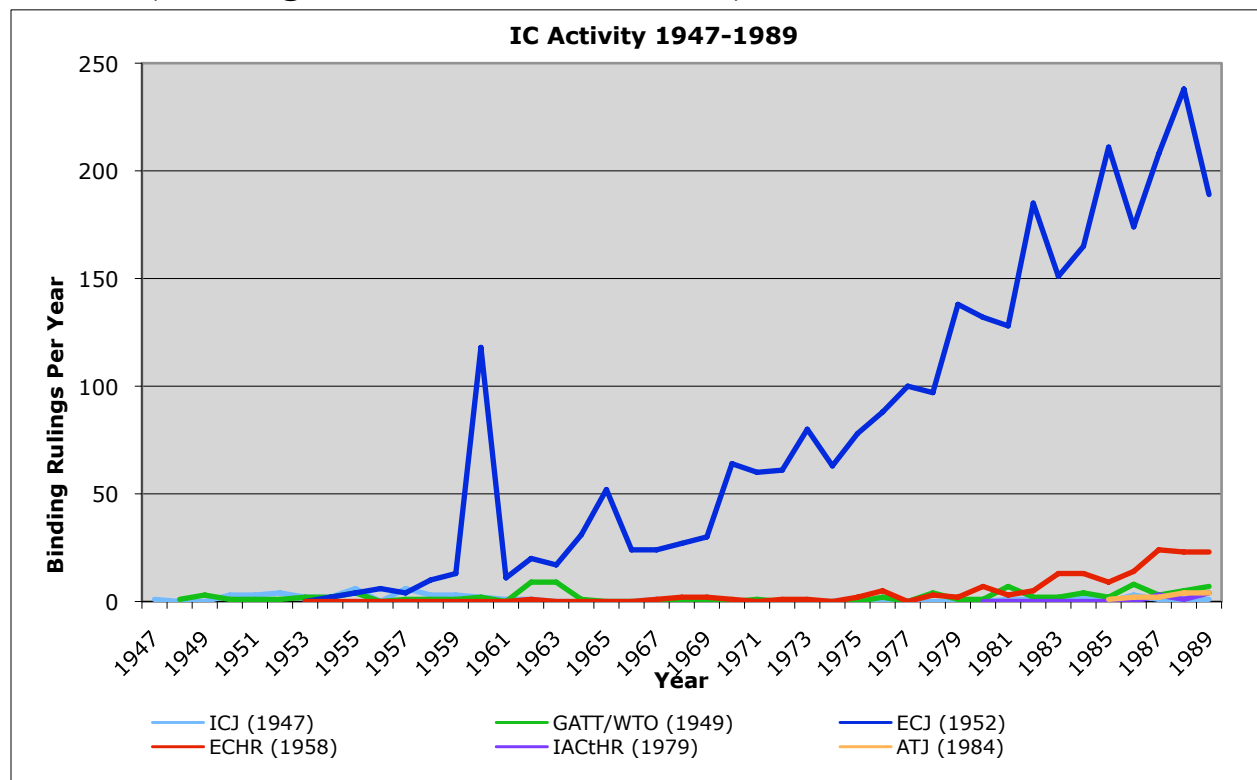
---

<sup>12</sup> Also at this time the Benelux countries created a court to answer questions about Benelux regulations that fell outside of the authority of the ECJ.

of experts to render a ruling. But defendant states had to consent for a panel to be formed and for the panel's ruling to be accepted. When developing countries sought to make the system more useful for themselves, by creating financial remedies and by allowing for remedies even if a country had not participated in the original case, Europe and the United States stopped using the GATT system. From 1965 to 1980, only nine disputes reached the stage of a panel's formal decision being accepted (Hudec, 1993: 31-34). Frustration with the GATT dispute resolution system combined with growing American trade deficits in the 1970s to provoke the passage of the United States Trade Act of 1974. Under Section 301 of this act, the United States Trade Representative (USTR) was to pursue the unfair trade practices of other states. The Section 301 system (relaunched in the 1990s under the name Super 301) was better at engendering resentment than it was at resolving intractable trade disagreements (Noland, 1997). The US complained, however, that the GATT system had no other effective means to address 'unfair trade' by its trading partners. The US Section 301 innovation spurred the creation of private-public partnerships where firms worked with governments to identify and challenge national barriers to trade. The perceived success of this US model led other countries to create their own systems for private-public partnerships aimed at liberalizing national economies (Shaffer, 2003).

By the mid 1980s there were thus permanent international courts in Europe and Latin America. The ECJ was becoming increasingly active as an enforcer of European law in cases raised by the European Commission and in rulings based on national court references. The experience of the ECJ suggested that international courts could perhaps find a broader base of political support. By contrast, the rest of the existing international legal systems were still quite limited. US use of Section 301 spurred renewed interest in working with the GATT dispute resolutions system, if only to stave off and redirect US unilateralism. Neither the European nor Latin American human rights systems were used very often. The Andean Tribunal of Justice opened its doors for operation in 1984, but it was also mostly inactive in the 1980s (Helfer and Alter, 2009). Graph 4 below shows the relatively low level of litigation in existing legal systems before the end of the Cold War. The ECJ, with its compulsory jurisdiction and legal revolution, is a clear outlier in terms of level of activity. Litigation rates in systems lacking compulsory jurisdiction—the ICJ, GATT, ECtHR and IACtHR--were much lower. But one can already begin to see changes in the 1980s when the EEC Commission and the European Commission on Human Rights decided to exercise their right to refer more cases to their courts.

**Graph 4: Binding Rulings Issued by ICJ, GATT/WTO, ECJ, ECtHR, ATJ, and IACHR (founding to the end of the Cold War)**



At this point, the end of the Cold War provided a second critical juncture in the evolution of international courts. Existing enforcement systems were strengthened, and international courts proliferated.

### **Critical Juncture 2: The End of the Cold War and the Global Spread of International Courts**

The end of the Cold War contributed to the strengthening and spread of international courts. The dismantling of the Soviet empire unfroze the political dynamic whereby the Soviet Union and its satellites blocked global multilateral efforts and membership in Western institutions. Countries escaping from the Soviet orbit rushed to bind themselves to the international institutions of the West. In anticipation of expanding membership and legal rules, states moved quickly to address longstanding problems in existing international judicial systems. Three key changes contributed to the spread of permanent international courts. First, reforms to the GATT dispute resolution system negotiated as part of the transition to the World Trade Organization (WTO) made legalized dispute resolution compulsory, so that all WTO members now faced the prospect of litigation in the WTO

forum. This reality, along with the perceived failure of state-led economies, promoted the diffusion of regional trade agreements that now included international legal mechanisms. Second, the increased willingness of American and European judges to hear human rights and war crimes violations under revived universal jurisdiction provisions introduced the prospect of foreign trials for human rights abuses. This prospect spurred the creation of regional human rights systems so that local judges would deal with abuses. Third, the post-Cold War conflict in Yugoslavia provoked the creation of a United Nations War Crimes Tribunal. These three events spurred legal mobilization and fueled the larger changes in the international judicial system. This section first describes the post-Cold War strengthening of existing systems, and then the spread of international courts around the globe.

### **Strengthening Existing Enforcement Systems in the Post-Cold War Era**

While the ICJ and the Benelux system remained the same, the rest of the existing international legal systems were reformed in the Post-Cold war era. Table 5 below summarizes key institutional changes in existing systems, all of which were designed to increase the capacity of the international courts to deal with state noncompliance. The timing of the changes flows from the end of the Cold War. For the ECJ, ECtHR and WTO systems, existing member states changed their systems in anticipation of enlargement to include former Soviet satellite states. Changes in the ATJ, IACtHR, MERCOSUR and ECOWAS systems, stemmed from changes brought by WTO membership, from the increased willingness of European and American courts to adjudicate legal violations that took place in other countries, and from increased government tolerance for transnational judicial oversight.

**Table 5: ICs with Significant Design Changes Over Time**

Court	Year of Reform	Significant Design Changes
European Court of Justice (ECJ)	1988, 1993, 2009	Tribunal of First Instance (TFI), created in 1988 to relieve pressure on the ECJ, hears labor disputes and direct action cases against the European Commission. Its rulings can be appealed to the ECJ, thus the ECJ gained appellate jurisdiction in 1989. TFI jurisdiction extended in 1993, 1994, and 2004, allowing it to make references to the ECJ for certain questions. The Maastricht Treaty (1993) created a system for financial sanctions for non-compliance with ECJ rulings. The Lisbon Treaty (2009) gives the ECJ jurisdiction over some asylum and criminal cases.
World Trade Organization (WTO)	1994	The WTO system makes panel formation automatic and requires a unanimous vote to keep panel reports from being accepted. In other words, the WTO system has compulsory jurisdiction where the GATT system did not.
Andean Tribunal of Justice (ATJ)	1996	The Cochabamba reforms allowed private actors to bring non-compliance suits to the attention of the Andean General Secretariat, and to raise the suit directly in

		front of the ATJ. With this change, the General Secretariat could overcome state reluctance to raise a suit, since secretariat officials could tell the state that one way or another, the case would end up in front of the ATJ.
European Court of Human Rights (ECtHR)	1998	Protocol 11 made the Court's jurisdiction compulsory for all Council of Europe members, and it eliminated the role of the Commission in bringing cases to the ECtHR. Now private actors are able to make direct appeals to the ECtHR, after they have exhausted domestic remedies.
Inter-American Court of Human Rights	2000 & 2001	In 2000, the Court changed its rules of procedure to allow representation by non-governmental organizations. Before 2001 the Inter-American commissions decided on majority vote whether or not to refer a case to the IACHR, and there was a bias against referring cases. As of 2001 the Inter-American Commission submits to the court cases where it has found a violation. These changes lead to more cases being referred to the IACtHR.
Southern Common Market (Mercosur) (2002)	2002	The interim system of the Treaty of Asunción created the model of inter-state dispute resolution where unresolved disputes were sent to the political Common Market Council. The Olivas Protocol allows for unhappy parties to appeal the dispute to a Permanent Review Court. There is discussion about replacing this system with an ECJ style court.
Court of Justice of the Economic Community of West African States (ECOWAS)	2005	The ECOWAS court, established by treaty in 1995 but only constituted in 2001, gained jurisdiction over human rights violations in 2005. Private actors were given direct access to the ECOWAS court to pursue human rights violations, with no requirement that private actors first exhaust domestic remedies.

For the European Community, the impetus to reform its system was a sense that compliance with EC law and ECJ decisions was uneven.<sup>13</sup> To improve respect for European law, in the late 1980s and early 1990s member states streamlined the Commission initiated noncompliance procedure for enforcing European law, created a Tribunal of First instance to relieve the growing caseload pressure on the ECJ, and added to the European legal system financial sanctions for those states that persistently ignore ECJ decisions (Tallberg, 2003: 54-91). This new system, as well as the common law *acquis communautaire*, applied to all new member states.

For the European human rights system, the impetus to reform was a growing backlog of unresolved cases. In the 1960s and 1970s, few European governments had accepted the ECtHR's authority and the Commission dealt with most cases on its own. The part-time ECtHR judges could handle the caseload during their regular meetings. But when more states accepted the ECtHR's jurisdiction, and when the European Commission on Human Rights began to refer more cases in the 1980s, the existing apparatus became overburdened and slow. After years of studying problems in the system, a majority of existing member states finally agreed to accept Protocol 11, which abolished the European Commission on Human Rights, required that all member states accept the

<sup>13</sup> According to Tanja Borzel, the perceived 'compliance crisis' was a result of Commission action and it was rather overstated, designed to build support for a more resourced and muscular European legal system (Börzel, 2001, Tallberg, 2003: 48-53).



ECtHR's compulsory jurisdiction and the right to individual petition, and converted the ECtHR into a full time body (Bates, 2011: Chapter 11). New Council of Europe members thus joined a fundamentally different system than that of the original member states.<sup>14</sup> Formally speaking, the ECtHR's power is much the same. But with private actors able to pursue cases on their own, the ECtHR became a de facto review body for national court decisions involving human rights violations. According to Laurence Helfer, these changes in design are best understood as an acknowledgement that Europe's human rights obligations and the ECtHR's authority have become deeply embedded into Europe's national legal orders (Helfer, 2008). This evolution—private direct appeals and a full time international human rights court- was clearly not what European governments expected when they first created the European human rights systems.

For the GATT system, the impetus for change was the growing dissatisfaction with the US unilateral enforcement strategies combined with a desire to simplify and universalize the GATT system before membership expanded. The USTR became particularly aggressive in its pursuit of Section 301 violations whenever the President sought trade negotiation authority from the Congress, appeasing Congress but creating much disgruntlement among trading partners. The lead up and beginning of the Uruguay Round led to enhanced US monitoring of 'unfair trade' of trade partners, making the 1980s an especially contentious period (Dunoff, 2009: 342-5). The USTR sought a more effective trade remedy, and other states sought a reprieve from US unilateralism. In this context, revising the long-problematic GATT dispute settlement system became a least bad alternative for all involved. The Uruguay Round trade talks became the moment to make this change. With the dismantling of the Soviet trading system, many countries that had stayed outside of the GATT system now wanted access to the West's preferential trading system. These new countries could be forced to accept the entire package as the price of admission. Meanwhile, given how long negotiations had already taken, existing GATT members realized that change would only be harder going forward, precisely because GATT membership was likely to expand. States used the Uruguay Round to consolidate the many changes that had been agreed to during previous GATT trade negotiation rounds, and to create a single undertaking that would apply to old and new members alike (Barton, Goldstein, Josling and Steinberg, 2006: 67-73, 160-178).

---

<sup>14</sup> Moravcsik argues that formerly Communist systems embraced these changes to demonstrate their deep commitments to democracy and the rule of law (Moravcsik, 2000).

The changes in the GATT dispute resolution system looked small, but they were significant. The dispute settlement system of the rechristened World Trade Organization (WTO) still has panels composed by the litigating parties rendering decisions that must be accepted by the Dispute Settlement Body before they become binding. But now it takes a unanimous vote to reject a panel report, so that adopting panel reports is pretty much automatic. Also, a permanent Appellate Body was created so that 'faulty' panel rulings can be appealed. GATT law always allowed plaintiff states to claim compensation if their rights had been nullified and impaired by defendant states, but the ability of states to block the adoption of panel rulings had rendered this provision ineffective. Now the legal authority of WTO panels is compulsory, and panel decision-making takes place in the shadow of an appellate body appeal, which has made the panel stage less diplomatic and, perhaps ironically, both more legal and more contentious in nature (Alter, 2003, Weiler, 2000). These changes combined with 'learning' by the United States trade partners about the benefit of harnessing firms to identify and build the legal case to support trade litigation. In 2004, the EU passed the Trade Barrier Regulation which allows private firms to petition the Commission to investigate trade matters and bring claims on their behalf to the WTO (Shaffer, 2003: 85). As governments became more willing to use the WTO system, more resourced governments built up legal expertise in WTO litigation and legal firms started offering their services to facilitate the preparation of legal cases, that could then be brought in the WTO (Shaffer, Sanchez Badin and Rosenberg, 2008).

The Inter-American Human Rights, Andean, Mercosur and ECOWAS systems' changes are more recent, and thus better understood as a spillover in the changes in the WTO and Europe.

### **The Global Expansion of International Economic, Human Rights and War Crimes Courts**

The end of the Cold War, and with it the discrediting of Marxism and Socialism, led to the end of Soviet economic subsidies and the ascendance of neo-liberal economic thought in international institutions and the American and European foreign policy elite (Dezalay and Garth, 2002). Hence forth, any state that wanted help from foreign investors, the International Monetary Fund and the World Bank needed to show that they were undertaking economic reform. Entering the WTO system, and reinvigorating regional trading agreements were ways governments could show their commitment to neo-liberal economic ideas. Changes in US and European foreign

policy, and the changes brought by WTO membership, ended up indirectly affecting state choices about regional trade systems. The WTO system allows regional economic communities to grant preferential market access to members, making regional agreements attractive in their own right (Mansfield and Reinhardt, 2003). By adding compulsory enforcement mechanisms to these regimes, countries within the regional regime can create a complement to using the WTO system. This regional alternative can replicate the WTO system (as is the case in MERCOSUR and ASEAN), but common market regional trade agreements tended to adopt the ECJ model instead since it also included administrative and constitutional review procedures and mechanisms for national courts to dialogue with ICs about the application of community secondary legislation (Alter, 2011). The treaties for most of the regional economic courts were created in the 1990s, but not implemented until enough member states had ratified the agreement.

We lack good histories of the establishment of permanent economic and human rights courts in the 1990s. Where such histories exist, they seldom consider the larger international legal complex, thus they often fail to consider how developments in parallel and overlapping institutions contributed to the decisions being made. But it is clear that the end of the Cold War and developments in other international legal systems often directly contributed to the establishment of new ICs. The Economic Court of the Commonwealth of Independent States was created to facilitate the resolution of disagreements among what were now independent yet deeply dependent post-Soviet states (Danilenko, 1999). The desire to create more foreign investment led directly to the founding of the Organization for the Harmonization of Business Law in Africa, which included a supranational judicial enforcement and arbitration system (Mouloul, 2009). The OHADA system did not directly copy the ECJ model because its members want to avoid conflicts with the economic and monetary unions to which they also belonged. Within the Andean system, impending WTO membership led the Andean Pact to adopt new intellectual property rules beginning in the early 1990s. These new rules activated what was until then a barely used Andean legal system (Helfer, Alter and Guertzovich, 2009: 6-18).

The second global force for change was the outbreak of war in Yugoslavia. Yugoslavia was arguably a Cold War state. The multi-ethnic polity was held together by the Soviet support of Serbia and the tacit willingness of the West to accept that Yugoslavia was part of the Soviet sphere of influence. When the Cold War ended, a number of Yugoslavian territories sought independence. European governments fumbled in their early efforts to deal with the situation, contributing to the

outbreak of war by recognizing the legitimacy of the Slovenian, Croatian and Bosnian independence claims. The United States and the UN nonetheless hoped that the European Community, with its new foreign policy apparatus, might deal with the regional crisis. The UN's failed intervention in Somalia (1992) had sapped enthusiasm for UN intervention. Meanwhile the US hoped that Europe could become a regional leader so that it could capture a peace dividend from the end of the costly Cold War. While Western political leaders tried to avoid involvement in any humanitarian intervention, human rights groups published accounts of concentration camps bringing images to America and Europe that greatly resembled the concentration camps of WWII. Political inaction became increasingly embarrassing for American and European leaders.

Eventually the West responded through the UN, establishing a "commission of experts" to gather evidence of war crimes. According to Gary Bass, this commission was set up to go slow. UN officials obstructed its efforts, and the Commission's paltry budget starved the commission of the resources needed to carry forth its task. But commission member Cherif Bassiouni raised funds from private foundations, and relied on students and non-governmental organizations, amassing strong evidence of war crimes. Embarrassed by UN inaction, especially in light of the mounting evidence of mass atrocities, yet still unwilling to use military force to counter Serbian atrocities, the United Nations Security Council agreed in 1993 to create an international tribunal to prosecute war crimes committed in Yugoslavian wars (Bass, 2000: 210-214).

The International Criminal Tribunal for the Former Yugoslavia (ICTY) broke the mold of past war crimes systems, leading to a new form of international war crimes court. Already different was that the Nuremburg trials had created legal precedents so that the ICTY did not face the legitimacy problem of enforcing legal rules that did not exist. More significant were the ICTY's political and institutional innovations. The Yugoslavian Tribunal was a United Nations body, and as such it was filled with lawyers from a wide variety of countries (though still primarily Western). The ICTY had an independent prosecutor empowered to decide which cases to pursue, and it investigated crimes by multiple parties so that war crimes prosecution would not be victor's justice. Also, the Tribunal was created while the war (and thus war crimes) was still ongoing. The ICTY's charismatic prosecutors, Richard Goldstone, Louise Arbour and Carla Del Ponte, used their prosecutorial prerogatives to shape what the ICTY, and subsequent international war crimes tribunals, would become (Hagan, 2003, Hagan, Levi and Feralles, 2006).

These innovations were important, but it is also important to recognize how this turn to international criminal courts was limited. Western countries created the ICTY so as to claim credit for doing something to address the human rights violations appearing every day in national newspapers. Western governments refused, however, to intervene to stop atrocities and they did not require local actors to turn over indicted war criminals as a condition for Western political aid. The commitment was also very circumscribed. The jurisdiction of the ICTY was limited to crimes committed in the Yugoslavian crisis between the onset of war in 1991 through war's cessation. There was an unstated understanding that the focus was the crimes of the local warring parties, not actions associated with NATO intervention. In this way, the ICTY reflected an other-binding delegation of enforcement authority (Alter, 2008). Moreover by creating the ICTY through an act of the UN Security Council, permanent members of the Security Council could ensure that the ICTY precedent would not extend to them.

The very limited nature of the ICTY's authority in itself raised questions. On what logic could one prosecute crimes in Yugoslavia, but not crimes elsewhere? And on what logic could 'crimes' of NATO forces be exempted from investigation?<sup>15</sup> The 1994 Rwandan genocide provided an early test of international resolve. Especially after the debacle in the UN's Somalian intervention, Western powers did not want to commit troops to stop the genocide, nor did they want to suggest that African lives were of less value than European lives. The international community responded by creating another international criminal tribunal for Rwanda. Calls for special international tribunals for other regions and violations proliferated.

Inspired by these political advances, human rights activists advocated for a global model. Surely a global war crimes court made more sense than multiple ad hoc war crimes tribunals. The political impetus for a permanent criminal court came from the United Nations General Assembly. Working groups gave way to an ad hoc committee, which became a preparatory committee for multilateral negotiations. By the time formal negotiations for the International Criminal Court began, more than sixty states had united into a "like minded caucus" committed to a number of key propositions that were at odds with the preferences of permanent members of the Security Council. This group pushed for inclusion of core crimes (genocide, crimes against humanity, war crimes and perhaps aggression); for the elimination of any Security Council veto on prosecution; for an

---

<sup>15</sup> Slobadon Milosevic tried to create a focus on the crimes of NATO, and prosecutor did investigate complaints that NATO had bombed a prison. See (Hagan, 2003: 217-9) (Hagan, 2003: 217-9).

independent prosecutor with the power to initiate proceedings; and for a rule that would prohibit reservations to the statute (Schabas, 2001: 14-16). These provisions ultimately prevailed, leading the United States to oppose the Rome Statute. The result was the new International Criminal Court (created in 2002), and a host of ad hoc hybrid systems to deal with crimes that were committed before and outside of the framework of the new International Criminal Court (ICC)(e.g. abuses in Sierra Leone, East Timor, Kosovo and Cambodia). The new ICC represents the first ever self-binding commitment to international oversight of how state actors conduct war.

The establishment of war crimes courts also affected human rights legal systems. War crimes courts would be dealing with the worst offenses in war; meanwhile human rights violations have long been seen as a potential precursor to all out war. With war crimes on the rise, in the 1990s national courts in Belgium and the United Kingdom became more willing to invoke universal jurisdiction to prosecute human rights abuses in Latin America and Africa, and to limit claims of foreign sovereignty immunity. New European grants of jurisdiction came on top of changes in the United States application of its revived Alien Tort Claims Act (Burley, 1989). The prospect of prosecuting human rights violations in Europe and America led Latin American courts to reverse grants of amnesty so as to prosecute human rights violations themselves (Sikkink and Lutz, 2001). With the end of violent military dictatorships, and the growth of membership in the inter-American human rights system from 11 countries in 1979 to twenty five countries today, it became possible for the Inter-American Human Rights system to start working (Cavallaro and Brewer, 2008). These changes contributed to the Inter-American Commission's decision to start forwarding more cases to the Inter-American Court, and to allow greater participation of non-governmental organizations.

The African human rights system has been slower to evolve. The sorts of challenges that affected the early European human rights systems continue to plague the nascent African Court of Human and Peoples Rights. Few countries have accepted the African Court's jurisdiction, which makes both the Commission and the Court hesitant to use their formal powers. Frustrated by the slow growth of the African human rights system, regional integration systems have expanded their human rights actions. The largest change has occurred in the Economic Community of West African States (ECOWAS), which in 2005 gave its Court of Justice the authority to hear private appeals of human rights violations. As ECOWAS leaders sought to transform their system, they often found themselves limited by the existence West African Economic and Monetary Union (WAEMU). To disband the WAEMU would certainly cost jobs, and it might end up undermining

the negotiating leverage of the smaller francophone countries. Indeed non-francophone Nigerian countries complain bitterly that WAEMU members vote as a block and paralyze ECOWAS, even when doing so is counter to the interests of certain WAEMU states (Adebajo and Rashid, 2004: 40-1). The desire not to conflict with WAEMU, and the major political barriers to activating the African Union's human rights system, may help explain why the major reform of the ECOWAS legal system involved giving it a human rights jurisdiction when it might have made more functional sense to authorize private litigants to bring violations of the economic community law to the community court. The difficulties human rights activist face in the African Union system also led to innovation in the ECOWAS human rights system. Unlike the European, Inter-American and African Human Rights system, the ECOWAS system does not require that litigants first exhaust domestic remedies (Nwogu, 2007).

With the important exception of the Court of the Organization for the Harmonization of Business law in Africa, Africa's economic courts have barely been involved in litigating economic disputes. But the ECOWAS Court has been willing to make bold demands of member states with respect to human rights (Ebobrah, 2010). The courts of the South and East African Development Communities have also used 'good governance' provisions as a tool to promote democracy and respect for human rights. The provisional authority Court of the South African Development Community (SADC) is currently in abeyance as the region tries to deal with push back from Zimbabwe's leader over SADC rulings condemning the seizing of land (Ebobrah, 2010). The East African Court of Justice still operates, but its rulings involving Kenyan elections have led to the creation of an appellate body and a procedural change that allows judges to be suspended from the EACJ if they are facing investigations at home.<sup>16</sup> These amendments are facing legal challenges, and democracy advocates are highly mobilized, pressing for meaningful change. Thus one should not yet count these courts out (Gathii, 2010). But it is clear that the prospects for Africa's regional courts depends to a large extent on whether democracy and the rule of law can better establish itself in African member states.

---

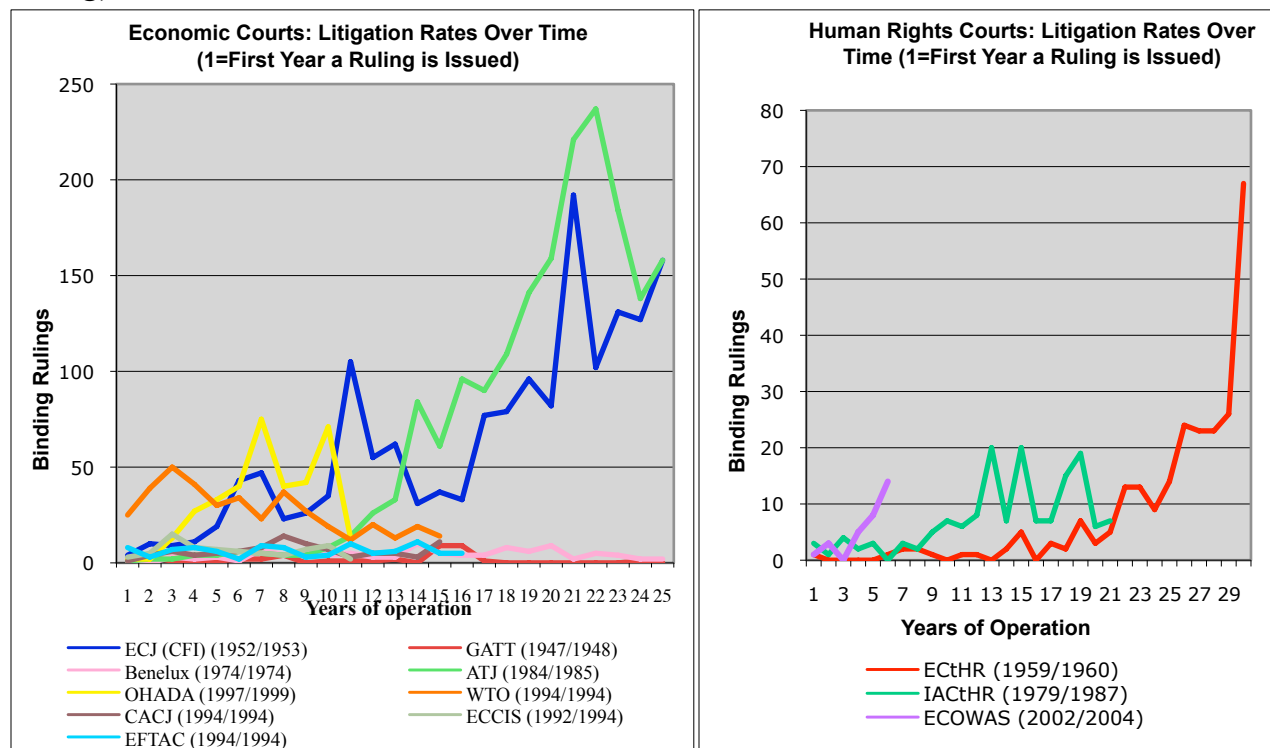
<sup>16</sup> The Kenyan government felt that its member of the EACJ used the EAC procedures for his own partisan ends, hence the reform which allows it to investigate and suspend its own judge. For a discussion of these changes, and legal challenges to them, see: <http://www.theeastafrican.co.ke/news/-/2558/255150/-/t68v1pz/-/index.html>

## ***An Evolutionary Perspective on International Judicial Authority***

The ICs created since the end of the Cold War are understandably at an earlier stage of development compared to their European counter-parts. If Europe is any guide, it may well take a long time for them to establish their authority. This is not to say that all ICs will follow trajectories of Europe's international courts. Rather, my point is that Europe's ICs also did not look very impressive in their first years of operation. The graphs below crudely capture what might be considered an 'evolutionary perspective' on international courts. Litigation rates are indicative of legal demand for IC rulings, which would only occur if IC rulings were seen as useful. In the graphs below, 1 denotes the year the court issued its first binding ruling (the legend notes the year the court was created, and the year it issued its first ruling). New international legal systems begin slowly, as awareness of the legal system is low and potential litigants are uncertain of whether or not litigation makes sense. The real question is what happens over time? The graphs suggest that the more recent ICs are not all that different than the ECJ and ECtHR in their early days. An evolutionary perspective also suggests that short-term assessments can be very misleading. For both the ECJ and the ECtHR, political crises led advocates to rally around each legal system. Crisis may actually be less dangerous for an IC than is indifference, because crises focus political attention and make accepting IC rulings and IC authority a rallying cry for opposition politicians. For all of these reasons, it is too early to draw any firm conclusions about the post-Cold War ICs.



### Graph 6a & b: Litigation Rates over Time (1=First year court issues a binding ruling)



Source: Alter, 2010. Legend notes year the court was formally established and the year the Court issued its first binding ruling. The apparent decline in OHADA litigation is likely affected by data collection and litigation problems related to the crisis in the Ivory Coast, where the Court is located.

The graphs raise many interesting questions. What counts for rising litigation levels in some systems? There may be endogenous sources of change: learning and the development of international jurisprudence, the building of legal fields, and changes in the legal order adopted in order to improve the systems' functioning. And there may be exogenous sources of change in litigation rates. For human rights courts, for example, litigation rates may rise as human rights violations rise. For economic courts, rising usage may well track the extent of secondary legislation in effect and the extent of trade among member states. But in most cases there will be a mix of endogenous and exogenous change. Law may itself create the changes in trade and human rights, generating a virtuous circle of law generating and rising demand (Stone Sweet, 1999).

Equally interesting is that some systems maintain relatively stable rates of litigation. This could be because legal issues are resolved so that disputes settle outside of court, or because dissatisfaction with existing legal systems leads to disuse of the system or to the creation of new international legal orders, which siphon off demand. For the WTO line above, the lowering levels

of litigation may reflect in part that outstanding and unresolved disputes (pent up demand from the GATT system) got resolved. It is also possible that the existence of regional trade systems affect the choice of forum where disputes get raised.

One should not confuse an ‘evolutionary’ perspective with a ‘teleological’ perspective where one assumes a given trajectory for IC development. The graphs above show great diversity in the usage of international legal systems. Some of the variation is easily explained. The IACtHR, ECtHR and original GATT system were lightly used because the lack of compulsory jurisdiction for the courts made potential litigators more cautious. The Benelux and EFTAC systems are lightly used because few countries fall under each court’s jurisdiction. Less clear, however, is why similarly designed institutions show such diversity in usage. Why did Europe’s ICs evolve? Why do some of Africa’s ICs seem to be awakening, while others are not? Why have Africa and Latin American regional systems borrowed the European model of ICs, while in Asia there is only one international legal mechanism, which by all appearances is a paper tiger, and the Middle East as yet has no functioning systems? An evolutionary perspective begs such questions.

### **Explaining the Spread of Permanent International Courts**

This brief history of the evolution and spread of international courts has a number of common themes. First, *Europe has been a leader in creating international economic, criminal and human rights courts*. Why Europe? Post WWII, European governments turned to diplomats and leaders who had been active in the anti-fascist resistance movement. This elite in particular believed that European governments needed more than a non-binding General Assembly declaration and a paralyzed UN Commission on Human Rights to ensure that gross violations of human rights would be addressed. While a number of European leaders were skeptical about international institutions, the architects of Europe’s supranational systems and the officials who populated these institutions were committed to a political project of subjugating European governments to international oversight (Madsen and Vauchez, 2005, Sacriste and Vauchez, 2007).

Still, it is important to note that Europe did not set out to be an exporter of international legal systems. In the 1960s a number of regions copied Europe’s approach to regional economic integration, omitting however the Economic Community’s legal mechanisms. Most of these regional integration efforts were seen as failures (Haas, 1970, Haas, 1975, Mattli, 1999, Nye, 1971). While observers did not attribute the failure to a lack of a supranational legal structures, participants

in these endeavors could not help but notice that Europe's ECJ was proving useful in addressing legal issues associated with regional integration. When the Cold War ended, the European Community ended up assuming the role of perhaps the most powerful political promoter democracy and the rule of law around the world, through enlargement of its own membership and by once again advocating the spread of regional integration systems. When regional integration returned as a policy objective in the 1980s and 1990s, integration architects paid greater attention to the legal problems presented by regional integration. Legal architects drew up blueprints for regional ICs in the 1980s, emulating the EC's legal system. It took a while to convince political leaders to embrace international judicial oversight, but eventually the European approach to international law spread (Alter, 2011).

In yet another unintended twist, the European Union's failure to stop war from breaking out in Yugoslavia, and its inability to stop atrocities in Europe and Rwanda helped pave the way for the creation of the International Criminal Tribunal for Yugoslavia and the assertion of universal jurisdiction over human rights abuses in other countries. These two steps helped fuel the drive for an international criminal court.

Second, *the Cold War encouraged Europe's supranational initiatives, and the end of the Cold War facilitated the spread of international courts.* The Cold War was a silent background force shaping the development of Europe's supranational legal institutions. With UN institutions blocked by Cold War rivalries, and the International Trade Organization rejected by the U.S. Senate, the only solution left was for Europe to construct its own regional human right and trade institutions. The Cold War then facilitated European integration by creating a common threat that kept European governments focused on working together. Economic prosperity and respect for human rights remained politically important because they served to differentiate the West from the East in the ideological war between capitalist democracy and authoritarian socialism, keeping domestic support for communist parties in the West limited. Knowing that a strong Western European economy served the United State's own Cold War political and economic interests, the US actively supported and facilitated European integration efforts. The United States agreed to special exemptions for regional trade agreements in the GATT trading system, and it maintained for many years a negative terms of trade so that European countries and Japan could grow their economies. The relatively stability and predictability of the Cold War also surely helped in the slow transformation of the European Community's legal system.

The end of the Cold War unleashed a series of changes—a rush of states and peoples wanting to escape the Soviet orbit, and the rise and spread of neo-liberal economic ideas. Europe and the United States wanted to bring former Soviet satellites into the Western economic and security system. The prospect of growing membership provided an impetus to finally address a number of problems that had accrued within existing economic and human rights structures.

Third, *the overlapping nature of national, regional and international jurisdiction propels advancements at each level.* The lens of regime complexity allows us to see how developments reverberate across international legal systems. Where international litigation advances take hold, liberal democracies find themselves already constrained by international legal rules. These countries then advocate for the spread of binding rules and for improvements in the international legal mechanisms to address noncompliance by others, so that other states will be equally bound by international legal commitments. Regionally based activists simultaneously learn from developments in the United States and Europe, adapting foreign models to the specific needs of the region. Meanwhile, the least attractive enforcement system for international rules has courts in one country sitting in judgment over the behavior of actors in another country, which occurred when the US passed its 1974 Trade Act, when American and European courts started to assert universal jurisdiction over crimes committed in Latin America and Africa, and when the UN Security Council started creating ad hoc war crimes bodies. Because of these external assertions of judicial authority, multilateral legal systems became newly attractive. And where multilateral systems exist, governments still prefer to resolve disagreements close to home rather than experience international adjudication, and thus multilateral enforcement gives rise to regional enforcement mechanisms, and to domestic enforcement of international rules so as to stave external assertions of authority.

We also find spillovers across international legal systems. The weakness of the African Union's Human Rights system contributed to the grant of human rights jurisdiction to the ECOWAS court, and to the EACJ and SADC court's willingness to entertain legal cases that invoked the vague 'good governance' provisions of the economic communities. Most trade specialists assume that Africa's regional courts are empty gestures. Their awakening with respect to human rights litigation is yet another example of how regime complexity creates cross-institutional reverberations.

Fourth, *the United States is a present yet ambivalent participant in the spread of international courts.* The United States helped to found the United Nations, and it supported

European integration to create a strong counter to the Soviet Union. But American conservatives have been a constant force challenging the authority and legitimacy of international institutions. In the 1940s, Republicans ran against President Franklin Delano Roosevelt on a platform that opposed many initiatives in the United Nations that Roosevelt had supported. Republican candidates lost, but the Republican Vice Presidential candidate in 1944, John Bricker, became a Senator in 1946. In 1949 he proposed to the Republican dominated Congress a constitutional amendment, the so-called Bricker Amendment, which would have significantly restricted ability of the United States to negotiate and ratify international treaties. The Senate rejected Bricker's amendment in 1954, but the amendment failed by just one vote. To win the fight against the Bricker Amendment, the Secretary of the State (John Foster Dulles) testified that the administration did not intend to submit the Genocide Convention or the Covenant on Civil and Political Rights to the Senate for approval. The Brickerite coalition and sentiment has remained an enduring force in American politics. The United States is not consistently opposed to international courts and tribunals (Romano, 2009), if only because Congress is only sometimes able to shape US positions on international legal issues. When it comes to ratifying treaties (Moravcsik, 2005), and to political positions taken by Republican administrations, the political power of the Brickerite coalition reveals itself. The conservative movement has been able to limit the American embrace of international legal instruments, with the one exception of the United States support of a more robust legal system for the World Trade Organization. While there remains a strong base of domestic political support for multilateralism and for international courts (Kull and Ramsay, 2009), America has been unable to either lead or stop the global spread of international legal authority.

### ***Conclusion: New Research Questions about International Courts***

Especially for more recently created ICs, we lack adequate histories and explanations for why member states decided to submit to international judicial oversight. This article has suggested that global forces emanating from Europe and the end of the Cold War facilitated the spread of international judicial approaches around the world. I argued for an evolutionary approach to considering the development of international legal systems, where one does not make firm conclusions based on crises or recent histories of ICs. At the same time, clearly the spread of ICs reflects the dominance of American and European power. While the US and Europe may not have directly pressured regions around the world to create or enhance their international legal systems,

belief in the benefits of liberal economics, democracy and the rule of law drives the US and Europe to support actors that demand their governments submit to judicial accountability.

The lens of international regime complexity encourages viewing the international judiciary as a system, even if there is no formal hierarchy organizing different international judicial systems. Legal scholars often fear that without hierarchy and order there will be chaos. But as scientists well know, systems can and do exist without hierarchy just as order exists within chaos and international anarchy. It is likely that the international judicial system will remain incomplete. There will be gaps in legal coverage even if the laws, formally speaking, are equally binding across systems. There will be possibilities that ICs contradict each other, and maybe even inconsistencies in legal doctrines, which persist for long periods of time. But this will not necessarily create legal confusion. We likely all wish that the international legal system were less complex to understand and navigate, and that it was consistently as effective as the most effective national legal systems. But just as law in action differs from law on the books within national systems, the international legal system can survive and function without ever reaching an ideal state of organization and efficiency.

For the scholar, the advent of international judicialization in diverse regions and across different issue areas creates new laboratories where one can investigate what make international law and international legal systems more and less effective in shaping societal and state behavior. We can investigate how international economic, human rights and war crimes systems differently affect individual states and societies. We can investigate how similarly designed systems may work differently in different contexts. We can chart how legal communities get informed and built around international legal mechanisms, and thus how legal fields change in light of increased international judicial activity. We can investigate the mechanisms of cross-fertilization across international legal institutions. And we can investigate why the distribution of international judicialization is so uneven (Kingsbury, 2011). Why do some countries readily agree to international judicial oversight, while others refuse to submit to international legal authority? Why do some countries submit but then violate international legal rules, knowing they might be brought to court? Why do some legal violations lead to litigation, while others are ignored? These and many other questions naturally arise in light of the trend and variation this paper has identified.

## Bibliography

- Adebajo, Adekeye and Rashid, Ismail O. D. 2004. *West Africa's security challenges : building peace in a troubled region*, A project of the International Peace Academy. Boulder, Colo. ; London: Lynne Rienner Publishers. Reprint.
- Allain, Jean. 2000. *A century of international adjudication : the rule of law and it[s] limits*. The Hague: T.M.C. Asser Press. Reprint.
- Alter, Karen J. 1998. "Who are the Masters of the Treaty?: European Governments and the European Court of Justice." *International Organization* 52 (1): 125-152.
- Alter, Karen J. 2001. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press. Reprint.
- Alter, Karen J. 2003. "Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System." *International Affairs* 79 (4): 783-800.
- Alter, Karen J. 2008. "Delegating to International Courts: Self-binding vs. Other-binding Delegation." *Law and Contemporary Problems* 71: 37-76.
- Alter, Karen J. 2009. *The European Court's Political Power: Selected Essays*. Oxford: Oxford University Press. Reprint.
- Alter, Karen J. 2010. "The New International Courts: A Bird's Eye View." BCICS Working Paper No. 09-001.
- Alter, Karen J. 2011. "The Global Spread of European Style International Courts." *Manuscript under review*.
- Alter, Karen J., Helfer, Laurence and Saldias, Osvaldo. 2011. "Transplanting the European Court of Justice: The Founding of the Andean Tribunal of Justice." Onati Working Paper Series.
- Alter, Karen J. and Meunier, Sophie. 2009. "The Politics of International Regime Complexity." *Perspective on Politics* 7 (1): 13-24.
- Barton, John H., Goldstein, Judith H., Josling, Timothy Edward and Steinberg, Richard H. 2006. *The Evolution of the Trade Regime*. Princeton: Princeton University Press. Reprint.
- Bass, Gary Jonathan. 2000. *Stay the hand of vengeance: the politics of war crimes tribunals*, Princeton studies in international history and politics. Princeton, N.J.: Princeton University Press. Reprint.
- Bates, Ed. 2011. *The Evolution of the European Convention on Human Rights*. Oxford: Oxford University Press. Reprint.
- Boerger-De Smedt, Anne. 2008. "La Court de Justice dans les négociationis du traité de Paris instituant la CECA." *Journal of European History* 14 (2): 7-34.
- Börzel, Tanja. 2001. "Non-compliance in the European Union: pathology or statistical artifact." *Journal of European Public Policy* 8 (5): 803-824.
- Burley, Anne-Marie. 1989. "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor." *American Journal of International Law* 83: 461-493.
- Burley, Anne-Marie and Mattli, Walter. 1993. "Europe Before the Court." *International Organization* 47 (1): 41-76.

- Cavallaro, James L and Brewer, Stephanie Erin. 2008. "Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court." *American Journal of International Law* 102 (4): 768-827.
- Cohen, Antonin. 2007. "Constitutionalism without Constitution. Transnational Elites between Political Mobilization and Legal Expertise (1940s-1960s)." *Law & Social Inquiry* 23 (1): 109-136.
- Danilenko, Gennady M. 1999. "The Economic Court of the Commonwealth of Independent States." *New York University Journal of International Law and Politics* 31: 893.
- Dezalay, Yves and Garth, Bryant G. 2002. *Global prescriptions : the production, exportation, and importation of a new legal orthodoxy*. Ann Arbor: University of Michigan Press. Reprint.
- Dunoff, Jeffrey. 2009. "Does the United States Support International Tribunals? The Case of the Multilateral Trade System." In *The Sword and the Scales: The United States and International Courts and Tribunals*, edited by C. Romano, 322-394. Cambridge: Cambridge University Press.
- Ebobrah, Solomon T. 2010. "Human rights developments in African sub-regional economic communities during 2009." *African Human Rights Journal* 10 (233): 233-267.
- Friedrich, Carl J. 1954. "Introduction: The Background of These Studies and the Development of the Draft Constitution." In *Studies in Federalism*, edited by R. Bowie and C. Friedrich, xxv-xlii. Boston: Little Brown.
- Gathii, James. 2010. "The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries." *Oregon Review of International Law* 12 (2): 245-283.
- Gillingham, John. 1991. *Coal, steel, and the rebirth of Europe, 1945-1955 : the Germans and French from Ruhr conflict to Economic Community*. Cambridge [England] ; New York, NY, USA: Cambridge University Press. Reprint.
- Greer, Steven. 2006. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge: Cambridge University Press. Reprint.
- Guzman, Andrew T. 2008. *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press. Reprint.
- Haas, Ernst. 1970. "The Study of Regional Integration." *International Organization* (Autumn).
- Haas, Ernst. 1975. *The Obsolescence of Regional Integration Theory*. Berkeley: University of California Press. Reprint.
- Hagan, John. 2003. *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*. Chicago: University of Chicago Press. Reprint.
- Hagan, John, Levi, Ron and Feralles, Gabrielle. 2006. "Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Tribunal for the Former Yugoslavia." *Law & Social Inquiry* 31 (3): 585-616.
- Hanson, Brian. 1998. "What Happened to Fortress Europe?: External Trade Policy Liberalization in the European Union." *International Organization* 52 (1): 32.
- Harlow, Carol and Rawlings, Richard. 1992. *Pressure Through Law*. London: Routledge. Reprint.



- Helfer, Laurence and Alter, Karen. 2009. "The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community." *Journal of International Law and Politics* 42 (4): 871-928.
- Helfer, Laurence, Alter, Karen and Guertzovich, Maria Florencia. 2009. "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community." *American Journal of International Law* 103: 1- 47.
- Helfer, Laurence R. 2008. "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime." *European Journal of International Law* 19 (1): 125-159.
- Helfer, Laurence and Slaughter, Anne-Marie. 1997. "Toward a Theory of Effective Supranational Adjudication." *Yale Law Journal* 107 (2): 273-391.
- Helfer, Laurence and Slaughter, Anne-Marie. 2005. "Why States Create International Tribunals: A Response to Professors Posner and Yoo." *California Law Review* 93 (May): 899-956.
- Hoffmann, Stanley. 1966. "Obstinate or Obsolete? France, European Integration, and the Fate of the Nation-State." *Daedalus* 95 (3): 862-915.
- Hudec, Robert E. 1993. *Enforcing International Trade Law: Evolution of the Modern GATT System*. New Hampshire: Butterworths. Reprint.
- Kagan, Robert. 2002. "Power and Weakness." *Policy Review* No. 113.
- Keohane, Robert, Moravcsik, Andrew and Slaughter, Anne-Marie. 2000. "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* 54 (3): 457-488.
- Keohane, Robert O. and Victor, David G. 2011. "The Regime Complex for Climate Change." *Perspectives on Politics* 9 (1): 7-23.
- Kingsbury, Benedict. 2011. "International Courts: Uneven Judicialization." In *Cambridge Companion to International Law*, edited by J. Crawford and M. Koskenniemi. Cambridge: Cambridge University Press.
- Kull, Steven and Ramsay, Clay. 2009. "American Public Opinion on International Courts and Tribunals." In *The Sword and the Scales: The United States and International Courts and Tribunals*, edited by C. Romano, 12-29. Cambridge: Cambridge University Press.
- Madsen, Michael Rask. 2009. "Legal Diplomacy: Law Politics and the Genesis of Postwar European Human Rights." In *Human Rights in the Twentieth Century: A Critical History*, edited by S.-L. Hoffmann. Cambridge: Cambridge University Press.
- Madsen, Mikael Rask and Vauchez, Antoine 2005. "European Constitutionalism at the Cradle. Law and Lawyers in the Construction of a European Political Order (1920-1960)." In *In Lawyers' Circles. Lawyers and European Legal Integration*, edited by A. Jettinghoff and H. Schepel, 15-34. The Hague: Elzevir Reed.
- Mansfield, Edward and Reinhardt, Eric. 2003. "Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements." *International Organization* 57 (3): 829-862.
- Mattli, Walter. 1999. *The Logic of Regional Integration*. Cambridge: Cambridge University Press. Reprint.

- Milward, Alan. 1992. *The European Rescue of the Nation-State*. London: Routledge. Reprint.
- Moravcsik, Andrew. 1995. "Explaining International Human Rights Regimes: Liberal Theory and Western Europe." *European Journal of International Relations* 1 (2): 157-189.
- Moravcsik, Andrew. 2000. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization* 54 (2): 217-252.
- Moravcsik, Andrew. 2005. "The Paradox of US Human Rights Policy." In *American Exceptionalism and Human Rights*, edited by M. Ignatieff, 19. Princeton: Princeton University Press.
- Mouloul, Alhousseini. 2009. "Understanding the Organization for the Harmonization of Business Laws in Africa (O.H.A.D.A.)." Paris.
- Noland, Marcus. 1997. "Chasing Phantoms: The Political Economy of USTR." *International Organization* 51 (3): 365-387.
- Nwogu, Nneoma. 2007. "Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS." *Journal of Human Rights* 6: 345-36.
- Nye, Joseph S. 1971. "Comparing Common Markets: A revised Neofunctionalist Model." *International Organization* 24 (4): 796-835.
- Posner, Eric A. and Yoo, John C. 2005. "A Theory of International Adjudication." *California Law Review* 93 (1): 1-72.
- Rasmussen, Morton. 2010. "From Costa v. Enel to the Treaties of Rome: A Brief History of Legal Revolution." In *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, edited by M. P. Maduro and L. Azoulai. Portland: Hart Publishing.
- Robertson, A.H. and Merrills, J. G. 1994. *Human Rights in Europe*. Manchester: Manchester University Press. Reprint.
- Romano, Cesare. 2009. *The Sword and the Scales: The United States and International Courts and Tribunals*. Cambridge: Cambridge University Press. Reprint.
- Romano, Cesare. 2011. "A Taxonomy of International Rule of Law Institutions." *Journal of International Dispute Settlement* 2.
- Ruggie, John. 1983. "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order." In *International Regimes*, edited by S. Krasner, 195-232. Ithaca: Cornell University Press.
- Sacrste, Guillaume and Vauchez, Antoine. 2007. "The Force of International Law: Lawyer's Diplomacy on the International Scene in the 1920s." *Law & Social Inquiry* 32 (1): 83-107.
- Savelsberg, Joachim J. and King, Ryan D. 2007. "Law and Collective Memory." *Annual Review of Law and Social Science* 3: 189-211.
- Schabas, William A. 2001. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press. Reprint.
- Schermers, Henry G. 1999. "Acceptance of International Supervision of Human Rights." *Leiden Journal of International Law* 12: 821-831.

- Shaffer, Gregory C. 2003. *Defending Interests: Public-Private Partnerships in WTO Litigation*. Washington D.C.: Brookings. Reprint.
- Shaffer, Gregory C., Sanchez Badin, Michell Ratton and Rosenberg, Barbara. 2008. "The Trials of Winning at the WTO: What Lies Behind Brazil's Success " *Cornell International Law Journal* 41 (2): 383-502.
- Shklar, Judith. 1964. *Legalism: Law, Morals, and Political Trials*. Cambridge: Harvard University Press. Reprint.
- Sikkink, Kathryn. 2004. *Mixed Signals*. Ithaca: Cornell University Press. Reprint.
- Sikkink, Kathryn and Lutz, Ellen. 2001. "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America." *Chicago Journal of International Law* 2: 1-33.
- Slaughter, Anne-Marie. 1995. "International Law in a World of Liberal States." *European Journal of International Law* (6): 503-538.
- Stein, Eric. 1981. "Lawyers, Judges and the Making of a Transnational Constitution." *American Journal of International Law* 75 (1): 1-27.
- Stone Sweet, Alec. 1999. "Judicialization and the Construction of Governance." *Comparative Political Studies* 32 (2): 147-184.
- Tallberg, Jonas. 2003. *European Governance and Supranational Institutions: Making States Comply*. London: Routledge. Reprint.
- Vachez, Antoine. 2010. "The transnational politics of judicialization: Van Gend en Loos and the making of EU polity." *European Law Journal* 16 (1): 1-28.
- Weiler, J. H. H. 1992. "Primus inter Pares: The European Court and National Courts—Thirty Years of Cooperation." *unpublished manuscript*.
- Weiler, Joseph. 1991. "The Transformation of Europe." *Yale Law Journal* 100: 2403-2483.
- Weiler, Joseph. 2000. "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement." Jean Monet Working Paper Series WP 09/00.