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**Domestic Courts, Transnational Law, and International Order**

**By**

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Law is a cornerstone of international order – the rules and norms that regularize the behavior of global actors (Kratochwil, 1991; Onuf, 2012). Legal principles enumerate the key actors in the international system and the boundaries of their authority, while structuring the nature of their interactions. Neo-liberal and power-based approaches recognize the central role of law in influencing the parameters for both cooperation and conflict, while sociological theories map the mutually constitutive nature of legal institutions and norms for state preferences and behavior (Hurd, 2017; Koremenos, 2016). These paradigmatic debates generally focus on the formal and informal rules that operate at the international level. Building on recent work on transnationalism and developing research on the global dynamics of domestic legal systems, we delineate a research agenda that shines a light on the multiple pathways by which *domestic* law and courts shape international order. We believe that attention to domestic law not only helps to rethink how law functions in global politics but also opens up broader theoretical conversations on the sources, dynamics, and function of international order.

National legal systems are routinely delegated authority to resolve international and transnational conflicts, providing the commitments that rationalist scholars see as central to effective governance. National courts enforce (or fail to enforce) states’ obligations under international law and the rulings of international tribunals and dispute mechanisms (Hillebrecht 2012; Powell and Staton 2009; Simmons 2009). Their role, however, goes beyond simply implementing international rules written by international bodies. Domestic courts must resolve conflicts of law as globalization brings legal systems into contact with one another. Courts often serve as platforms to settle disputes between global players, using their adjudication role to even extend their authority extraterritorially ( Kaczmarek and Newman, 2011; Putnam, 2016, 2009; Raustiala, 2011; Whytock, 2009).

As these courts move to engage in transnational governance, they do not simply solve functionalist problems but may also transform global politics. They do so by altering the sites of political contestation as well as by structuring the nature of political interactions (Farrell and Newman 2014). International political battles over key concepts such as human rights, property rights, and sovereignty then unfold through courts in places like London, New York, and New Delhi. Ultimately, we argue that domestic courts may serve as sites for endogenous change in the international order. That is, they can redefine the participating actors, shape the critical norms available, and influence the structure of their interaction.

To demonstrate these theoretical and empirical claims, we integrate insights from the legal scholarship on “transnational law” to rethink the scope of international law (Halliday and Shaffer, 2015; Shaffer and Ginsburg, 2012; Whytock, 2009). This literature underscores the importance of moving beyond the domestic and international divide to analyze how law and legal actors operate across national boundaries (Jessup, 1956). In doing so, it presents an expansive view of who makes and interprets global legal norms and which texts may matter. To provide an initial roadmap of how our approach could alter traditional debates, we focus on three analytic areas – dispute resolution, rule generation, and state authority – that sit at the core of what IR scholars generally view as the remit of international law. This research agenda, then, focuses attention on the key role that domestic law and courts play in shaping who resolves global claims, the sources of international legal norms, and the authority and boundaries of the systems’ units. Importantly, which domestic courts have global consequences appears to be conditioned by the broader power dynamics that they are embedded in, with their influence often determined by the issues that private actors choose to contest.

We are not the first to diagnose the need to move from an international to transnational legal perspective. In the last decade, a growing number of researchers have examined the influence and politics of soft law in realms like banking, internet governance, and pharmaceutical regulation (Newman and Posner, 2018; Shaffer and Pollack, 2009; Zaring, 2019). The role of non-state actors, including multinational corporations and industry associations, is the central focus of research on global governance (Büthe and Mattli, 2011; Cutler et al., 1999). Others directly examine how domestic courts interpret and enforce international law, often extraterritorially (Whytock 2009; Putnam 2016; Efrat and Newman 2020). We see the article as building on each of these conversations. Our central contribution is to link the various governance functions of domestic courts to traditional IR conceptions of international order.

By making this link, the article has implications for a number of different political science debates. Most directly, it calls on scholars to continue moving away from a static, two-level game logic of domestic and international politics that generally underpins studies of legal compliance. National courts can hold states responsible (or not responsible) under their international treaty obligations but their influence can be more transformative to both levels of analysis. In short, domestic courts are not simply rule-takers or rule-enforcers. We see transnational law as creating new political opportunities for actors, be they state or non-state, to turn their domestic battles transnational, reshaping who wins and loses as well as the global norms and practice that guide legal discourse.

A focus on transnational law and domestic courts also pushes researchers to consider the full scope of legal venues involved in global politics. Much of the research that we build on taps into a growing recognition that multiple international organizations and institutions lay claims to governing the same issues. The research agenda on “regime complexity” is founded on this premise, and it successfully shows how these new arenas are altering the toolkits for states and international bureaucrats to achieve their strategic objectives (Alter and Meunier 2009). Thus far, scholars have generally considered international fora or rules as the key factors in this competition for authority potentially introducing unnecessary bias into such studies; we find that domestic institutions, such as national courts, must be included as important players across regime complexes. In this respect, we put conversations on regime complexity in dialogue with largely parallel work on multilevel governance and transgovernmental politics (Hooghe et al., 2001; Slaughter, 2004). As domestic courts engage in global governance, they produce new sites of authority available for forum shopping and legal conflict. In doing so, the article emphasizes the ways in which domestic legal systems may not only serve as commitment mechanisms (e.g through property rights or veto points) but also as generators of contentious politics.

 Finally, debates on international order are steadily converging towards an agenda focused on hierarchy, where scholars seek to identify the conditions under which states (de facto) take over functions of sovereignty from their subordinates and even adversaries (Lake, 2009; Nedal and Nexon, 2019). By examining the practice of transnational law, we find numerous instances where actors from one state voluntarily follow the rules of, or adjudicates their conflicts in, the jurisdiction of an alternate power (Efrat and Newman 2016). This fits squarely within the theoretical ambitions of hierarchy studies, but these actions are often taken by private and non-state actors. In other words, we hope the article will push hierarchy scholars in IR to re-examine who has the ability to trade sovereignty and how domestic courts are often at the center of these transactions.

In what follows we first review the transnational law concept in legal scholarship and synthesize how it is progressing within IR. We then examine three core areas of international law – dispute resolution, rule generation, and state authority – demonstrating how a transnational law approach recenters these debates away from compliance and enforcement to co-constitution. The final section discusses the contributions of this theoretical approach to IR and offers suggestions for future research on transnational law and international order. In particular, it calls on scholars to open up an empirical domain charting how differences in national courts and legal systems may help us understand when these domestic institutions leave an important imprint on the global system.

1. **Transnational Law and Rethinking International Order**

International order is fundamentally concerned with the rules and principles that influence the behavior of global actors (Bull, 2012; Ikenberry, 2014). Much of the early “ism” debates sought to determine these constituent elements, with many seeing the balance of power and the rise of a hegemon as central to the establishment of order (Gilpin, 1983; Nexon, 2009). The independent, and essential, role of international law as defining the possibilities for states became one of the central claims of constructivist works (Hurd, 2017; Kratochwil, 1991). While realists were often dismissive of international law as epiphenomenal, their agenda developed to illustrate how law can serve as a central tool for great powers to extend their own prerogatives and legitimate their actions (Drezner, 2008; Gruber, 2000). Over time, institutions, both formal and informal, became key to our understanding of how repeated patterns of interaction emerge (Avant et al., 2010; Keohane, 1988).

Despite growth in this research, IR scholars studying the relationship between international law and international order often employ a narrow definition of what constitutes the relevant law. For many, regardless of subject area, from trade to conflict to human rights, the emphasis has been on interstate treaties and international courts. In legal terms, research has focused on public rather than private international law and on formal law rather than customary or soft law.

Legal scholars, on the other hand, have expanded the notion of how law intersects with global phenomena (Halliday and Shaffer, 2015; Krisch and Kingsbury, 2006; Shaffer and Ginsburg, 2012; Whytock, 2009). Starting with Judge Philip Jessup’s (1956) Storrs Lecture, legal scholars have shifted their attention away from the traditional conception of international law as formal international rules governing interactions between states to *transnational* law as “all law which regulates actions or events that transcend national frontiers”. The move from international to transnational law breaks down a number of false dichotomies (e.g. national vs international, public vs private or hard vs soft law), which often stymie debates on international order. Instead it calls for greater attention to the interplay and interaction between levels of authority, forms of governance, and types of actors.

The expansion of what we regard as international law is already recognized by a growing body of IR theory. Scholarship under the “global governance” banner has brought attention to the important role of non-state and sub-state actors in determining global norms and rules, which may redefine the sites of political conflict (Abbott et al., 2016; Avant et al., 2010). Multinational corporations have taken a lead in defining the governance of sectors as diverse as accounting and electronics standards (Büthe and Mattli, 2011), while private and non-profit organizations contribute to the meaning and substance of human rights norms (Dancy and Michel, 2015). Whytock (2009) directly elaborated the relationship between domestic courts and these global governance debates, highlighting their role in determining the rights of global actors, and defining the boundaries of state authority.

Nonetheless, the most common analysis involving domestic courts in IR looks at how they enforce international law (Knop, 1999; Powell and Staton, 2009; Simmons, 2009; Verdier and Versteeg, 2015). Using Harold Koh’s terms, we need go beyond just this “downloading” perspective. Koh calls for a transnational law that further examines how the law is “uploaded, then downloaded,” and even “horizontally transplanted” (Koh 2005, 749). Examining these multilevel interactions is the primary purpose of Halliday and Shaffer’s (2015) agenda on “transnational legal orders.” We follow in their tradition by emphasizing the need to look at multiple sites of authority that often have various sources of legitimacy and potential political ramifications. But their interventions have been primarily directed toward taking the “law and society” approach transnational, rather than explicitly detailing the links between transnational law and international order.

A transnational perspective then requires us to move beyond theorizing states as the creators of international law or internationals courts as the sites of authority and dispute resolution. The actors who are setting, interpreting, and enforcing global rules are not just heads of government, nor are they simply private self-regulators (Bartley, 2007; Green, 2013): a focus on transnational law allows us to examine the varied landscape of actions and rules governing how different actor-types interact.

Domestic legal systems sit at the center of these cross-level dynamics. Domestic courts have increasingly become less deferential to executive bodies in issues related to foreign affairs (Benvenisti and Downs, 2009). A growing body of work, for example, details the ways in which national courts extend their jurisdiction beyond their physical borders. Within IR, Putnam’s (2016, 2009) research on US courts develops this perspective the furthest. She finds that the American high courts are most willing to extend US law beyond its borders when cases call into question fundamental American ideals. Following up on Ruggie’s (1993) seminal work, Putnam brings to light the importance of private actors in defining the role of domestic courts as they have the agency to bring claims that eventually set the precedents for what role legal systems can play globally.

These empirical phenomena have always been part of the international system, but they have not been part of the great power centric scholarly debates on order. Extradition has long been the domain of national legal bodies as states try to recover individuals that may have violated the rules of their national jurisdiction (Efrat and Tomasina, 2018). International trade since at least the nineteenth century relied on domestic courts to allow state and non-state participants to engage in economic exchange (Berman, 2006).

Nonetheless, financial integration, the mobility of people, and international institutionalization have increased the overall need for adjudication in the international system (Tzanakopoulos, 2011). Halliday and Shaffer (Halliday and Shaffer, 2015, p. 41) identify major crises, such as “financial crises, geopolitical shifts, outbreaks of armed conflict, sudden epidemics, environmental crises, sudden policy changes in key nationstates, and conflicts between existing international organizations” as catalysts for the rise of transnational law and its institutionalization. Scholars of the judicialization of international politics have similarly shown that these changes in the global (and regional) order have led to the rise of international courts (Alter, 2014; Berman, 2006; Stone Sweet, 2000). Less recognized by IR scholarship is that these same developments also revitalized the role of domestic courts in international politics (Schwartz, 2015). For example, both extradition requests and trade disputes have risen exponentially. The frequency of interaction and the rise of international regulatory frameworks raise the stakes for domestic courts as they become the nodes of a crowded transnational legal order (Benvenisti and Downs, 2009; Efrat and Newman, 2019, 2016).

Once we recognize the prevalence of transnational law, as detailed by the likes of Putnam and Whytock, we begin to see how the constituent elements of international order are evolving. It calls for a recasting of the levels of authority and their interaction. When issue areas lack existing international cooperation agreements, or when non-state actors are looking to provide neutral adjudication, they still require third party enforcement or sites backed by state power (Hillebrecht, 2012). Domestic courts then often become the default authority. This comes as a function of courts and judges having perceived legitimacy and neutrality. In line with the broader debate on international cooperation, both characteristics are essential to the functioning of any international or transnational institution (Hurd, 2017). Moreover, conditional on national rules and public international law, domestic courts may have jurisdictional grounds that allow them to take up cases and issues that often go beyond the initial legislatively defined parameters. They are the arenas within which transnational law is practiced, and thereby where the relationships that structure the international order can change (Benvenisti and Downs, 2009; d’Aspremont, 2014; Tzanakopoulos, 2011).

As we know from a mass of comparative scholarship on national legal systems, courts are not purely neutral venues (Helmke, 2012; Hirschl, 2008; Shapiro, 1981). Judges often have their own prerogatives and seek to further their own political agendas. At the same time, state and non-state actors turn to courts to advance their own distributional priorities. A natural corollary is that we should then expect domestic courts, as they govern globally, to become transnationally politicized. When national judges interact with claimants from their home and foreign states, these interactions may provide new opportunities for actors to achieve their strategic ends. The cases that judges choose and how they decide to interpret domestic or international, soft or hard, laws may forge coalitions across conventional levels of analysis.

 Domestic courts have the ability to change the political toolkits for state and non-state actors. Rather than seeing the domestic legal sphere as simply a site of compliance or transposition of international law, we see a much more dynamic relationship between the two, in which domestic courts are sites of endogenous international change (Farrell and Newman, 2016, 2014). In other words, domestic courts create new opportunity structures for global actors to generate norms and wage political conflict. Domestic courts, then, have the potential to not only resolve specific governance frictions but also to redistribute power resources or reconfigure behavioral interactions.

Here, we do not intend to suggest that all domestic courts function in this way or to the same degree. Clearly, domestic courts vary in terms of their claims to legal certainty, legitimacy, expertise, and traditions. Similarly, domestic law is embedded within larger economic and social contexts. We expect, for example, that courts in powerful countries are likely to have more transnational effects than those that are on the margins. The key goal of this intervention, however, is to first map the broad agenda, in which scholars of international affairs may pay more attention to domestic law and courts. Future work will be necessary to develop how internal institutional differences shape distinct political trajectories.

As a first promissory note on this agenda, we examine how domestic courts impact three of the constituent elements of international order. First, we show how domestic courts are central actors in world politics as they are an important adjudicator of transnational disputes. We delineate the implications of this analysis for debates on forum-shopping, regime complexity, and the distributional consequences of transnational law. Second, we illustrate the role of domestic courts in interpreting and altering the meaning of international laws, norms, and institutions. The collaborative efforts of courts across national jurisdictions provide important new pathways for the diffusion of legal practices and judicialization more generally. Finally, we analyze how national legal systems, by dictating the bounds of state authority, create the very structures that define the possibilities of cooperation and conflict in the international system. Focusing on domestic courts thereby sheds new light on the roots of state power and sovereignty. Across these domains, we show how domestic courts are providing clear governance opportunities while also expanding the scope and substance of political strategy.

1. **Transnational Dispute Resolution and the Generation of New Political Opportunity Structures**

IR scholars generally think of international institutions and international organizations as the adjudicators of global disputes (Alter, 2008; Hawkins et al., 2006). Starting from a transnational perspective, however, allows us to incorporate a broader set of disputes, a meaningful set of global governors, and new opportunities for forum shopping and political entrepreneurship. In particular, it draws our attention to the interaction of domestic sites of authority and transnational governance that is a significant component of the international legal order (Efrat and Newman, 2016; Pistor, 2019).

The underlying nature of commerce and the structure of the international system often turn domestic courts into transnational adjudicators. When firms from different countries trade with each other, they lack a natural authority in our anarchic international environment. They are also inevitably faced with commitment problems that require third party enforcers to make contracts credible. Mirroring the theoretical logic behind the role of international courts, the courts of London and New York regularly act in such a role.[[1]](#footnote-1) The scope of practiced transnational law is quite striking. Each year the British and American judiciaries hear several hundred trade-related transnational cases, involving claims that can implicate diverse concerns around economic competition, national security, and human rights (Kalyanpur, 2019; Pistor, 2019; Whytock and Quintanilla, 2011; Efrat and Newman 2020). In many instances, there are no British or American nationals involved. Often, conflicts involve state and non-state actors, and public international law rarely acts as governing law. By contrast, the World Trade Organization manages less than 25 inter-state disputes per year (WTO, 2020). In other words, domestic courts in economically central countries, like the UK and the US, serve as key sites of conflict resolution in the global legal system.

The importance of domestic courts for setting the terms and conditions of international exchange is true across a range of sectors. London courts act as the venue of choice for virtually all of the shipping industry, the bedrock of globalization, and the city has a specialized admiralty court to further its governance-monopoly over the seas (Baughen, 2015). New York, as the chief player in international finance, is the focal point for disputes arising out of the global bond market (Gugiatti and Richards, 2003). The International Swaps and Derivatives Association agreements that govern the multi-trillion dollar derivatives market are jointly given bite by courts from both jurisdictions.

But the authority of London and New York is not restricted to just firm-to-firm relations. Consider the sovereign debt markets that are used by governments across the globe to fund everything from social programs to military ambitions– again we see New York and London act as the site for disputes between bondholders and sovereign states. Landmark cases like *Argentina vs. NML*, where the US Supreme Court allowed vulture funds to seize US domiciled Argentine assets, cut to the heart of transnational law (Buchheit and Gulati, 2017). A domestic court reinterpreted a major force of customary international law, the immunity of state assets, while adjudicating a dispute between a private actor and a foreign government. A conventional international law perspective would struggle to incorporate these dynamics, and the important role of the US and UK courts in economic and geopolitical affairs would be disregarded. Why actors turn to these national authorities is unsurprising from a functional perspective: they have the most trustworthy, independent, expert judiciaries whose judgments can be enforced across the globe.

Paying attention to these transnational legal dynamics further uncovers areas of the international system that are substantially more regulated than our current models assume. Domestic courts can generally serve as adjudicators when actors from different countries specify in their contracts that they want the national court to be the seat of jurisdiction, as with the aforementioned examples. But parties can also have disputes heard in domestic courts when they can argue that their opponents are domiciled or have major footprints in the jurisdiction. This broad latitude has lead places like London and New York to fill the missing gaps in the global order.

As multinational corporations have expanded abroad, they have also been accused of flouting labor and environmental standards in their developing country hosts. With the courts in numerous emerging markets often lacking capacity, expertise, and even enforcement power over multinationals, we are seeing civil society groups turn to liberal jurisdictions for redress (Liste, 2016; Efrat and Newman 2020). For example, lacking an international venue to bring claims against multinational firms, African civil society groups are using courts in the US and Canada to hold oil companies like Shell and BP accountable for their environmental damages (Whytock and Quintanilla, 2011). Excluding national legal systems from our analyses of forum-shopping would then miss who can be held accountable, and whose claims can be given voice.

But the jurisdictional grounds of domestic courts are not only improving efficiency or filling governance gaps. By solving cooperation problems, transnational law also creates new political opportunities. Conflicts that may have traditionally been restricted to the domestic sphere could now be played out using the legal institutions and infrastructure of foreign jurisdictions. For example, as more assets are held abroad and elites traverse jurisdictional boundaries, plutocrats from emerging markets have learned how to arbitrage liberal institutions. When parties residing in the same country have a dispute, we generally expect them to use their home court system to adjudicate a claim, but now we see Russian oligarchs sue each other and Saudi royals sue each other in the courtrooms of London and New York (Kalyanpur, 2019). These disputes are primarily regarding assets held in the home country, rather than say in the US or the UK.

Actors generally gain jurisdiction by using the same mechanisms that promote transnational trade and finance: specifying a foreign court as the seat of jurisdiction, personal jurisdiction, or when the court deems itself an appropriate seat (Nougayrède, 2014). Given the high costs of using foreign courts – millions in lawyers and court fees – it is a dispute resolution mechanism available to only the privileged few. Yet economic elites have historically fought for the development of the rule of law in their home countries. The fact that they can selectively arbitrage the rule of law suggests that their incentives to push for change at home may be diminishing (Sharafutdinova and Dawisha, 2016). Such “extraterritorial litigation” has seen monumental court battles between emerging market plutocrats, such as *Berezovsky v. Abramovich*,take place in the London courts (Kalyanpur, 2019). The case was worth $5.6 billion, at the time the largest ever civil case in “British” history. It was a fight about assets, the oil company Sibneft and the aluminum company Rusal, back in the parties’ home country, Russia.

Where such political battles unfold is set to evolve as we witness a new competition for authority over the global economy. Countries like the Netherlands, the United Arab Emirates, Singapore, and even Kazakhstan are setting up their own commercial courts just as the American legal system appears to be questioning its global governance function (Bookman, 2019, 2015). The general goal of the competition is clear: to take a slice of the profits of New York and London. The proliferation of explicitly transnational courts will give international actors more opportunities to find redress and expand the boundaries of their conflicts. Whether the new courts will choose principles in line with liberal governance goals, or instead specialize in areas that undermine the status quo, such as minimizing transparency, remains unclear. Regardless, as these courts cover legal and political territory that we assume are the purview of international institutions, they have the potential to redefine the rules and norms that structure both inter-state and non-state behavior.

Given these high stakes, geopolitical concerns also appear to be driving who engages in the race to turn their domestic courts into global governors. In 2017, China announced that it would be creating its own court for disputes related to the Belt and Road Initiative (BRI). BRI is generally regarded as an economic plan to increase China’s soft power, but the fact that it is creating its own dispute resolution venue illustrates the rising power’s frustration with the current system (Erie, 2018). Any country wanting a piece of BRI’s multibillion dollar budget will transfer authority over to the Chinese state and out of the hands of the now taken-for-granted governors, Britain and the US. Scholars like Morse and Keohane (2014) have drawn attention to how rising powers are challenging conventional global governance by setting up their own international organizations that mimic, but often undermine, US-lead organizations. Such “contested multilateralism” is clearly beginning to unfold at the transnational level as well, as states compete in their application of extraterritorial legal claims (Kalyanpur and Newman, 2019). Focusing on transnational law would allow us to bring the balancing happening at different levels of analysis into one analytic debate.

Moreover, theories of regime complexity recognize a growing set of actors making claims over the same international governance arenas (Alter and Raustiala, 2018). These dynamics are, however, not restricted to international courts or organizations; domestic courts need to be factored in as potential sites of authority. Where global disputes are resolved and whose claims are considered legitimate, are a result of how domestic courts define their own jurisdictions within the international system. Forum-shopping then is not simply a result of beneficial case-law, but instead operates at a more fundamental, constitutive level. This recognition allows us to consider the multi-level interactions between national judiciaries and global governance on the one hand, and the struggle between state and non-state actors on the other.

1. **Domestic Courts and Transnational Rule making**

Judges’ rule generation and policymaking powers, beyond simply applying existing laws in dispute settlement, have long been acknowledged by political scientists (Shapiro and Stone Sweet, 2002). While choosing among alternative interpretations of law in their rulings, judges create new rules and redraw the boundaries of legality on sometimes highly contentious issues such as how to treat terrorism suspects or the extraterritorial obligations of states under international law. In the past few decades, we have witnessed the judicialization of domestic courts, whereby judges started weighing in on these “mega-politics” issue areas (Hirschl, 2008). In the international arena, scholars have largely focused on how international institutions wield this power. While IR scholars have documented the important work undertaken by national courts in holding states accountable to their international obligations and enforcing international law at the domestic level, the agency of national judges in generating new norms and laws is often overlooked (Powell and Staton, 2009; Simmons, 2009).

The norm-creation role of national judges in the international arena is similarly understudied in the norm diffusion literature. This scholarship examines the role of transnational advocacy groups as norm-creators and states as agents that internalize and diffuse these norms (Finnemore and Sikkink, 1998; Helfer, 2008; Holzhacker, 2013). Within this model, the role of domestic courts is often diminished to “downloading” and applying existing international norms and laws (Koh, 2005). Putnam’s (2009, 2016) research on extraterritorial application of domestic law and Slaughter’s (1993, 2004) work on transnational judicial dialogue are leading examples of IR research that focus on the agency of judges in global lawmaking. Building on insights from these works and the transnational law literature, we propose several significant ways in which domestic courts participate in the rule making process by creating and expanding new norms beyond national borders.

First, domestic courts assume the role of transnational rule-makers by directly interpreting national and international laws. The investigation of human rights violations committed by foreign nationals outside the US under the Alien Tort Statute (ATS) is a salient example. US judges started to use ATS to determine what constitutes customary international law in a wide range of issues from torture (*Filartiga v. Pena Irala* 1980) to employing workers in inhuman conditions (*Doe v. Unocal* 2002). Most recently in *Kiobel* (2013), the US Supreme Court drew the limits of extraterritorial applicability of customary international law. Though this decision signals that US federal court’s transnational involvement may be in decline, Putnam’s (2016) research shows that US courts maintain their position as leading regulators of extraterritorial activity in a broad range of issues including antitrust and intellectual property rights. National courts around the world have similarly set new norms by interpreting international law regarding universal jurisdiction, sovereign immunity, and state sovereignty, often times incurring costs to their respective governments in diplomatic relations. Examples include British, Spanish, German, and Belgian judges’ arrest warrants issued against state officials from Israel, Chile, the US, and Congo for alleged war crimes and human rights violations (see discussion below), as well as US and Israeli judges’ rulings on the statehood of the Palestinian Authority (Benvenisti and Downs, 2009; Schwartz, 2015).

Scholars suggest that courts’ involvement in transnational law often occur at the expense of the executive and that courts have become somewhat autonomous actors in foreign affairs (Benvenisti and Downs, 2009; Schwartz, 2015; Slaughter, 2004). Use of comparative and international law references can serve as a shield against executive or legislative backlash (Benvenisti, 2008). Although judges often reference emerging consensus in comparative law, they exercise further autonomy by cherry picking judgments that are favorable to their preferred interpretations while dismissing others (Roberts, 2011). However, the relationship between the executive and the judiciary may not always be contentious. In some cases, governments may encourage courts to take active roles in the international order in order to become norm setters, rather than followers. For example, China specifically trained legal professionals to influence transnational laws on intellectual property rights, which had previously been shaped by US and European norms. This strategy seems to have been successful, as patent filings in Chinese courts rose throughout the 2000s (Shaffer and Coye, 2017, p. 4). In some cases, the executive can directly suggest specific interpretations of international laws for domestic courts (d’Aspremont, 2014, p. 145; Rogoff, 1996). Langer (2011), similarly, finds that the incentives provided by the political branches affect European judges’ willingness to exercise universal jurisdiction on international crimes.

Second, judges shape transnational law through dialogical lawmaking with their peers sitting at other domestic courts. This judicial dialogue among judges is an important pathway for the diffusion of legal norms. When interpreting new meanings into existing law, judges often consult the rulings of foreign courts and cite each other on myriad trans-border issues (Brownlie, 2008; Slaughter, 1999; Webb, 2014). Slaughter (2003) refers to this dialogical lawmaking process as “global jurisprudence.” Europe is the leading region on this front as the dialogue among national courts have become part of a more formal and hierarchical system with European integration. Beyond regional integration models, domestic courts set new rules on a wide range of issues from refugee status to taxation of multinational corporations by engaging in a dialogue with one another. For instance, British judges refer to the rulings of Canadian, Dutch, French, German, and US courts in determining the admissibility of evidence obtained through torture (Benvenisti and Downs, 2009; Constantinides, 2014) In the US, whether national judges should engage in this transnational judicial dialogue, i.e. internalize norms developed by foreign courts, has been a topic of contention among judges as disagreements were often manifested in separate opinions (Koh, 2005). Nonetheless, even the most avid critics of comparative judicial dialogue within the US contend that it is appropriate to consider how treaty partners have interpreted an international treaty (Hathaway et al., 2011).

While Slaughter (2004) points to the spread of liberal democracies to explain the rise of transnational dialogue among national judges, this global community of judges is not solely composed of judges from Western democracies. Similar trends have emerged in other parts of the world. Benvenisti and Downs (2009, p. 67) note, for instance, that the Indian Supreme Court has become the “beacon for other courts” in the developing world on a wide range of issues. A landmark judgment by the Philippines Supreme Court on environmental protection for future generations was cited by courts in Bangladesh and India. The judicial dialogue on the death penalty included national courts from liberal democracies, former Soviet Union members, and sub-Saharan Africa (Waters, 2004). Much of the IR literature on diffusion implicitly assumes that transplanting happens from the OECD to emerging markets (Gilardi, 2012; Linde, 2014), but the transnational law literature highlights that learning and mimicry can and do take multiple pathways.

Third, and finally, legal scholars have long recognized that national court practices shape transnational law via international courts (Whytock, 2009; Benvenisti and Downs, 2009). National court judgments have historically served as a legal resource for international courts by establishing state practice. An early example is the *Lotus* case where the Permanent Court of International Justice reviewed national rulings to decide on the issue of jurisdiction between France and Turkey. The International Criminal Tribunal for the former Yugoslavia similarly engaged in a review of comparative case law to determine how national courts interpret international law (Roberts, 2011). The Statute of the International Court of Justice explicitly lists national court rulings as “subsidiary means for the determination of rules of law” (article 38(1)) and have incorporated such rulings by extensively referencing them in its judgments.

At the regional level, national court judgments compose a particularly important source of law for the European Court of Human Rights (ECtHR) (Helfer and Voeten, 2014; Hillebrecht, 2014). The Strasbourg court declared on many instances that the European Convention on Human Rights is a “living document,” meaning that the interpretation of the Convention should keep up with the changing norms in European societies. When the court is faced with highly contentious issues, such as homosexuality in the military or abortion, the ECtHR routinely consults precedents set by national courts and national laws to determine how the “European consensus” has evolved on the matter. Rulings by the domestic courts of other democratic countries, such as the US or Canada, also serve as resources to the ECtHR when it is confronted with a new issue area. The ECtHR, along with its counterpart in the EU, the European Court of Justice (ECJ), have come under fire for their controversial judgments and their “democratic deficit.” One way the ECtHR defends itself is by incorporating national courts’ judgments into its reasoning, showing its commitment to respecting state sovereignty while upholding the universality of human rights.

These recent developments show that transnational lawmaking can be viewed as part of the judicialization trend (Staton and Moore, 2011). Regardless of the channel, a transnational law perspective highlights the highly complex and dynamic pathways by which domestic law and courts shape the norms and practice underpinning international order.

1. **Redefining the boundaries of state authority and jurisdiction**

International order relies on a set of legal definitions and norms related to sovereignty, territoriality, and legitimacy (Hurd, 1999; Ruggie, 1993). In short, it hinges on the question as to what is acceptable state behavior, where does state authority begin and end, and what is the power of the state to act in international affairs. These elements of the state are frequently defined and shaped by transnational law as national courts define who oversees the boundaries of and understanding of these notions of sovereignty. Our approach, then, shifts attention from how national courts implement international law to domestic legal processes like private law and extraterritoriality that structure international politics.

At the most basic level, domestic courts can constrain the ability of their respective states to engage in international cooperation. Perhaps most famously, the German Federal Constitutional Court set down a number of limits on how the German government may engage in European cooperation. In its landmark Maastricht decision, the Court ruled that although the Maastricht Treaty itself was constitutional, “the Federal Constitutional Court will examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them” (Boom, 1995). In short, the Court places itself as the ultimate arbiter in German cooperation with the EU and has reasserted this authority most recently in European negotiations over the Euro-crisis (Fabbrini, 2014).

Similarly, domestic courts define the very capacity of the state. From issues of war-making to taxation to federalism, domestic courts place key constraints on the domestic institutions of states. These decisions, then, have critical consequences for international collaboration. In the area of insurance in the United States, for example, the Supreme Court in the 1868 case *Paul v. Virginia* determined that insurance contracts were not subject to federal regulation. This decision firmly placed insurance oversight at the state level. As the insurance industry has globalized over the last thirty years, the US government has repeatedly been blocked from centralizing authority over the sector and in turn found itself left out of key global regulatory debates. As David Snyder, assistant general counsel for the American Insurance Association, concluded, “…the state regulatory system is structurally incapable of representing US interests effectively, because it …lacks the legal authority to bind the United States” (Fletcher, 2009). Importantly, state preferences cannot be equated with institutional capacity, as domestic legal constraints frequently impede global objectives. In other words, the nature and capacity of the state is often a function of the legacies of domestic legal decisions, which may have had little engagement with potential global ramifications (Farrell and Newman 2010; Fioretos, 2011).

In the national security realm, where global ramifications are much more front and center, the US Supreme Court has decided a series of cases, which delimit the government’s ability to hold and maintain enemy prisoners (Breyer, 2015; Raustiala, 2011). In *Rasul v. Bush* and *Hamdi v. Rumsfeld*, for example, the Court ruled that those held at Guantanamo Bay and enemy combatants, who are US citizens, enjoy due process rights. The cases put increasing pressure on the US government to restrict use of extreme detention options.

At the same time, American courts are acting as a site of conflict for security and geopolitical conflicts that lack conventional international cooperation. Democrats in the US have been infuriated with the hacking of the American electoral system during the November 2016 election and by the limited response of the executive branch. Organizations like the Democratic National Committee are taking matters into their own hands to resolve the transnational conflict, by attempting to bring the Russian state to court in New York over the hacking of the DNC’s e-mail servers (Nakashima and Hamburger, 2018). Similarly, after being excluded from the US market on national security grounds, the Chinese telecommunications giant Huawei brought federal suit in Texas (Jiang and Wolfe, 2019). The firm argued the that market intervention violated the US Constitutional provision concerning Bill of Attainder, which prohibits the legislature from targeting an individual for punishment. Across these cases, we see global security debates playing out across transnational legal forums.

In this vein, domestic judges issue rulings much to the dismay of other states. Aside from the above-mentioned ATS cases, Pinochet’s detention in the UK marked a turning point on universal jurisdiction of domestic courts. Despite Pinochet’s eventual return to Chile as a free man, the arrest warrant issued by a Spanish judge and the UK House of Lords’ decision to extradite a former head of state on grounds of grave human rights violations were unprecedented examples of national judges prosecuting a former head of state. Recent work suggests that the Pinochet judgment is now deterring leaders engaged in civil wars from settling, only increasing the intensity and longevity of modern conflicts (Krcmaric, 2015). While considerable literature in IR examines how domestic political regimes shape state behavior, this literature has paid relatively little attention to the mechanisms by which law in one country may shape state authority in another. In this way, domestic courts play a critical part in structuring the nature of global political authority and the ways in which states may interact with each other.

Furthermore, an important strain of literature on transnational law explores how domestic law defines the extent to which state authority extends extraterritorially (Raustiala, 2011). In other words, under what conditions does domestic law have transnational consequences? In sectors as diverse as human rights, financial regulation, intellectual property and anti-trust, courts have come to varying conclusions (Putnam, 2016). While US courts long expressed restraint regarding extraterritoriality in general, they also explicitly extended US law in particular instances. For example, in *United States v. Aluminum Co. of America*, the Supreme Court developed ‘the effects doctrine’ in the domain of antitrust. The basic idea here is that the US legal system plays a crucial role in market behavior so long as market behavior significantly affects the US market. US courts have further extended this notion to the related idea of ‘the presence’ doctrine, in which US law may apply to actions taken outside of US borders if the firm has nexus with the US market. This presence doctrine has been increasingly used in a range of areas from sanctions to corruption to financial services with important global consequences (Kaczmarek and Newman, 2011).

In section II, we discussed how Russian oligarchs have used the broad jurisdictional grounds of places like the US and the UK to adjudicate their domestic commercial conflicts. Such “extraterritorial litigation” suggests that the development of transnational law has uneven effects on state authority – some sovereigns are losing the ability to govern the assets and individuals in their own borders as the latter seek to resolve disputes through liberal, economic powers. But the transnational legal market also gives states new ways to take on their own domestic and geopolitical adversaries. Authoritarian states are increasingly using the courts in the US and UK to target their fleeing political opposition (Cooley and Heathershaw, 2017). Consider *BTA Bank v. Ablyazov*. Mukhtar Ablyazov was chairman of BTA till it was nationalized after it found itself in financial trouble during the Great Recession. Ablyazov fled the country after being accused of stealing billions from BTA. What has since unfolded is a near decade long cat and mouse chase between the Kazakh Government and Ablyazov. The London Commercial Court is the center stage of the drama as it is the primary court resolving the fraud claim, while courts in Italy and France have become embroiled in related extraditions. Although there is no doubt Ablyazov used a web of shell companies to siphon off wealth, he was also seen as the primary political challenger to the Kazakh ruler Nursultan Nazarbayev, and only a handful of years before the fraud claim was behind bars in Kazakhstan for political dissidence.

*BTA Bank v. Ablyazov* is hardly an isolated phenomenon. Cases like *Aeroflot v. Berezovky* and *Rosneft v. Yukos* appear to follow a distinct pattern – a fallout between the state and a political opponent leads state-owned entities or bureaucracies to chase down dissidents through the domestic courts in liberal jurisdictions (Kalyanpur, 2019). Such state targeting is not restricted to domestic political opponents; in recent years we are seeing traditionally interstate disputes begin to unfold via domestic courts. The recent economic conflict between Russia and Ukraine is the most extreme. Russia is suing its former client state for not paying back a $3 billion bond. The money was initially lent to the Kremlin-backed Yanukovych government before he was ousted by mass protest in 2014, and there is little doubt that the money funded a variety of corrupt practices (Gelpern, 2014). Ukraine argues that it should be released from the odious debt, but instead it is being put on trial by a state that contemporaneously invaded its borders. All this is happening in the London courts. As legal scholar Odre Kittrie (2016) has argued, we are entering a time where law and courts are used to achieve military objectives – a time of “lawfare.” Restricting our focus to purely international law, or conventional inter-state relations, would miss these political dynamics.

The courts in liberal economic powers do not simply curtail executive authority; they structure the tools of statecraft and cooperation for domestic and foreign governments. That said, US courts have more recently reigned in some extraterritorial powers. In part a backlash against litigation, the US Supreme Court has limited the reach of US law in human rights and finance (Stewart and Wuerth, 2013; Whytock et al., 2013). In *Jesner v. Arab Bank*, for example, the US Supreme Court ruled that foreign firms cannot be sued under the Alien Tort Statute for overseas actions. This position is itself the result of evolving domestic legal trajectories, which we argue increasingly have critical global spillovers. Moreover, other jurisdictions, such as the UK, maintain more open legal regimes vis-à-vis the recognition and prosecution of foreign actions. As a result, the authority of state actors to engage in extraterritorial actions differs over time, across sectors and countries as a result of domestic legal practice.

1. **Conclusion**

Domestic law and courts are not simply passive recipients of international law. They redefine what constitutes global law and are essential to how it unfolds in practice. We join the emerging body of research aiming to move beyond the limited debate on whether domestic courts hold a monist or dualist relationship to international law (i.e. simply a channel through which to implement or transpose international law). The practice of domestic law – dispute resolution, rule generation, and the bounding of state authority – redistributes international political opportunities and structures the key norms and principles that guide international order. Moreover, it points to a broader conception of global political authority in which transnational dynamics shape both the domestic and international (Crasnic et al., 2017; Halliday and Shaffer, 2015; McNamara, 2018).

 We believe that the expanding scope of research on transnational law has significant implications for a number of mainstream IR debates that directly relate to how we conceptualize international order. For scholars of dispute settlement and resolution, it suggests that the current literature generates important biases by limiting the forums of investigation to international courts and international arbitration. Significant numbers of international cases are heard by domestic judges, who have increasingly become global governors (Whytock, 2009; Whytock and Quintanilla, 2011; Efrat and Newman 2020). In many instances, the authority of the domestic and international bodies overlaps. Forum shopping at the international level has become a key concern for scholars of international law and regime complexity (Busch, 2007; Drezner, 2009); future work in this area should more explicitly incorporate domestic courts into actors’ choice-sets, and further investigate how the types of cases vary across conventional levels of analyses. More specifically, our article suggests that how and where states choose to accomplish their strategic ends may be bounded by the opportunities created by the legal forums of foreign jurisdictions.

For those interested in the generation, diffusion, and transformation of international legal norms, the manuscript rejects the depiction of downloading from the international to the domestic. Work by legal scholars and political scientists highlights how domestic courts can fill the gaps of global governance and can often act as substantive creators of global norms. We build on these literatures to argue that domestic courts are endogenous sites for international political change. It reorients scholars to look at the dynamic interaction between the domestic and the international as well as the role of transnational legal experts on legal practice (Hale, 2015; Wallenius, 2019). A focus on transnational rule-setting could, in turn, reshape debates on compliance, which often have a top-down flavor despite recent work illustrating the importance of non-state actors driving enforcement (Dancy and Michel, 2015; Eilstrup-Sangiovanni and Sharman, 2019; Putnam, 2016). A transnational law perspective then sees the institutions that structure the international order as frequently generated by domestic legal systems.

Finally, the manuscript emphasizes the ways in which state authority in the international system is often a product of domestic legal decisions. IR scholars have increasingly devoted attention to the ways in which domestic institutions constrain and enable governments’ extraterritorial powers. The focus on transnational law, however, incorporates these insights and goes a step further, suggesting that the very definition of state sovereignty is shaped in part by domestic law and legal systems (Whytock, 2018). In other words, who gets recognized as an actor in the international system is intricately linked to the actions of domestic courts.

The natural next step is for scholars to better identify the conditions under which the legal dynamics we observe are most likely to play out. While we expect that the scope conditions for the global influence of domestic courts will vary by pathway, the existing transnational law scholarship that we review points to some key factors. First, international power dynamics condition which courts are likely to take on a global role. For example, in the dispute resolution realm we see that major powers such as the US and the UK are the most popular venues for transnational litigation. It is no coincidence that these two jurisdictions also play central roles in global financial networks or that, at different stages over the past century, they have operated as the economic hegemon. Global economic and legal structures appear to be mutually reinforcing.

Second, supply-sided factors, in particular the preferences and capabilities of private litigants, matter. The types of disputes that private claimants view as worth pursuing inevitably structures which cases a court could use to extend its influence transnationally. For example, in the absence of concerted private sector efforts, the US would not have developed the capacities to shape mergers and acquisitions abroad as courts would not have been asked to rule on the relevant domestic laws (Putnam, 2016). In this vein, who has access to financial and legal resources can also determine the kinds of cases brought before courts and the success of litigation, especially in the area of human rights (Epp 1998; Cichowski 2007). Transnational legal advocacy groups in the US have been instrumental in leading strategic human rights litigation, sometimes against multinational corporations, under ATS (Coliver et al., 2005; Holzmeyer, 2009). Intellectual property and access to medicine constitute another transnational issue area that frequently pits these two groups against one another before national courts (Helfer, 2015; Shaffer and Sell, 2014). Transnational legal advocacy groups are undoubtedly more prevalent in Western democracies, but further empirical research can systematically investigate the influence of these support structures on the ability of litigants to bring and win transnational cases before other national courts. This is particularly important as more cases are funded by private third-parties whose preferences may be at odds with national governments.

Third, the links between domestic political and legal systems shape judges’ willingness and ability to utilize transnational law. Judicial independence—i.e., judicial appointment processes, rules of access to courts, separation of powers—substantially varies across countries and will inevitably condition the global influence of domestic legal systems; the ability to potentially rule on matters of state authority are unlikely to matter if the executive branch regularly ignores or undermines the court system. Yet, we still see countries that have weak domestic judiciaries observe the rules and rulings of the British and American courts. A lack of independence or transparency could, however, theoretically increase the global influence of some domestic courts as they could explicitly cater to more illiberal clientele. Nonetheless, authoritarian regimes do sometimes empower their judiciaries for political or economic gains (Ginsburg and Moustafa, 2008). China’s efforts to participate in shaping transnational laws on intellectual property rights through judicial lawmaking shows that one logic behind building legal capacity is to increase one’s global influence (Shaffer and Coye, 2017).

Better identifying these scope conditions is crucial to our understanding of international order, particularly as more countries seek to break up the oligopoly enjoyed by London and New York (Bookman, 2019). We expect that the biggest gains will come from scholars deeply investigating the relationship between a specific legal system and global governance, as Putnam (2016) has done with the US case, or through an investigation of the same type of domestic decision making across countries as scholars of universal jurisdiction have carried out (Kontorovich and Art, 2010; Macedo, 2006). This will require a new domain of empirical work, drawing on the comparative politics literature on the diversity of domestic courts to systematically analyze how their differences shape trajectories of legal and institutional change globally.

 Theoretical insights from research on the role of domestic courts in international order are especially relevant in the wake of growing backlash against international institutions around the world and specifically against the Liberal International Order (Voeten, 2019). Future research could investigate how domestic courts position themselves with respect to transnational lawmaking and dispute resolution at a time when the legitimacy of international institutions is being called into question by member states and popular movements. Moreover, as anti-democratic governments change the face of domestic judiciaries, there is the possibility that national courts, which had long offered political legitimacy to international bodies (Alter, 1998), could be a source of tension and fragmentation within the international order.

 Finally, the essay underscores the value of building bridges across disciplines, weaving together similar discussions on transnationalism that have shaped work on global governance, more generally, and demonstrated the unique and powerful way these dynamics unfold in the legal world. Understanding these interactions are critical at a time when the international system appears on the verge of multi-polarity. Our analysis suggests that status quo powers will be in a position to continue to shape the constituent features of the international order, but that conflicts with rising powers will be shaped by the precedents, practices, and preferences of domestic legal institutions.

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1. Even in IPE research focused on the role of private arbitration venues such as the International Commercial Court and the London Court of International Arbitration (Dietz and Mattli, 2014; Hale, 2015), the private system is inevitably reliant on domestic judiciaries as the enforcement of any arbitration award must go through a national court. The so-called *lex mercatoria* can be considered another subset of transnational law. [↑](#footnote-ref-1)