Review - The New Terrain of International Law: Courts, Politics, Rights

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PETER BRETT, OCT 19 2014

The New Terrain of International Law: Courts, Politics, Rights
By Karen J. Alter
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I spent most of the last five years researching a PhD about how international law (IL) has changed world politics. My life would certainly have been easier if I had had this book. Alter's goal is 'to raise the floor for theorizing about IC [international court] influence' (p.349). She clearly succeeds. Many international relations scholars have now long doubted the traditional 'realist' view of international law as simply the product of powerful states' preferences. No-one, however, has shown in such detail why this view is mistaken, or has so powerfully illustrated the sheer range of international court activity that this view neglects. (No review, indeed, can do justice to the enormous amount of work that has gone into this book.) Empirically, Alter seeks to 'extend beyond the 'usual suspects' such as the International Court of Justice (p.350). She provides 18 case studies from around the world sorted into four categories: dispute settlement (with cases from the ICJ, International Tribunal for the Law of the Sea (ITLS), the US-Iran mass claims tribunal, and the Organization for the Harmonization of Business Law in Africa (OHADA)); administrative review (with cases from the European Court of Justice (ECJ), Andean Tribunal of Justice (ATJ), International Centre for the Settlement of Investment Disputes (ICSID), and North American Free Trade Area (NAFTA) and World Trade Organization (WTO) panels); law enforcement (with cases from the WTO, ATJ, Court of Justice of the Economic Community of West African States (ECOWAS), and Special Court for Sierra Leone (SCSL)); and finally constitutional review (with two cases from the ECJ, two from the ATJ, one from the Inter-American Court of Human Rights, and one from the International Criminal Tribunal for Rwanda).

As these distinctions show, Alter is not one of those social scientists who believes it is possible to talk about (international) law without knowing something about what it says and how it works. A mass of tables and appendices, which frequently draw on data assembled by the Project on International Courts and Tribunals, provide chapter and verse on the history, design, jurisdiction, caseload and actual role of all international courts. One of the book's great strengths is how it presents this information very simply for the non-specialist reader, but never seeks to conceal its legal complexity. The perils involved with crude attempts to code and quantify such data are made crystal clear. (Is the Iran-U.S. claims tribunal now ad hoc or permanent? Has investor-state arbitration become a species of global administrative law? If the ITLS has a 'Swiss cheese' jurisdiction how can it be classified? If courts obtain compulsory jurisdiction has dispute settlement turned into law enforcement?).

Some international lawyers have long complained that IR scholars' failure to grapple with such complexities limits their understanding. Particular complaints have been made about their understanding of compliance[1]. Posner and Yoo, for example – of whom Alter is highly critical throughout – downplay the importance of international courts on the grounds that they cannot enforce full compliance with their rulings[2]. Such 'realist' arguments have a long history. The traditional 'Austinian' view of international law is, of course, that without a world state such compliance is impossible because of a lack of effective sanctions. Alter argues, however that courts may prove *effective* even if states do not comply perfectly with their rulings. The WTO's acquisition of compulsory jurisdiction, for example, eventually obliged the United States to accede to longstanding EU demands to reform its (allegedly) unfair tax regime

for exporters – even if its panel judgements may not always have been implemented (pp.253-7). The simple existence, meanwhile, of an SCSL indictment against the former President of Liberia (Charles Taylor) greatly increased the pressure that Western diplomats could bring to bear on Nigeria for his extradition (pp.270-3).

International courts, in short, have fundamentally changed world politics even if they can hardly pretend to govern it. Alter's 'altered politics' framework analyses this process in three stages (pp.59-61). First, bargaining takes place 'in the shadow of the law' (a topic long studied by judicialisation scholars). The simple threat of litigation, that is, may already be sufficient to modify actors' instrumental calculations. After litigation itself (the second phase) has concluded, the capacity of judgements to affect political processes is determined by the mobilisation of 'compliance constituencies' behind them; 'leverage politics' (the third phase). As Alter makes clear, this framework bears some comparison with Thomas Risse and Kathryn Sikkink's famous 'norm spiral' model: 'domestic actors influence state behaviour by invoking international commitments and a government's public claims to be a rule of law actor so as to pressure governments to live up to their international commitments' (p.57). These pressures are more significant than the coercive power possessed by the legal order, than the differences between common and civil law systems, and than the varying ways in which international laws may be incorporated domestically (i.e. directly ('monism') or indirectly, via international law's domestic effects ('dualism') (pp. 11, 347).

This focus on mobilisation does not mean, however, that specifically legal factors are insignificant. For ICs, the most important domestic actors are not typically NGOs and 'norm entrepreneurs' (as in the norm spiral model), but those groups with a specific interest in rule of law issues; especially lawyers and judges' organisations – or the 'legal complex', as some sociologists prefer to say (p.292)[3]. The scale of their mobilisation is 'interactive' with the specifically legal content of the relevant IC judgement (p.61). Here Alter makes a very persuasive critique of judicial behaviouralism: the idea that judges make decisions not according to law, but according to the interests of the most powerful parties to disputes[4]. She argues that judges do, in fact, typically rule in legally sound ways when law is clear and unambiguous. They enjoy significant discretion, by contrast, to define what compliance entails, and can thus protect themselves politically by this means (e.g. pp.43, 328). Compliance requirements cannot be straightforwardly determined by reading the relevant rules, as 'realists' of various stripes are prone to assume. It is thus on the 'issue of remedies' – rather than on the main judgement of the court – 'that we are most likely to see ICs adjusting to the realities of their environment' (p.60). In 2008, for example, the ECOWAS Court of Justice found that some elements of Niger's family law were equivalent to modern-day slavery. Rather than demand that the state enforce this ruling throughout its territory, however – which would have set the stage for an obvious political confrontation – the Court pragmatically determined that only the individual litigant in question was entitled to liberation and compensation for her ordeal (pp.260-7). Mobilisation is likely to be easier to sustain in the case of judgements such as these, which are comparatively easy to enforce.

'Compliance constituencies', however, are clearly not the sole variable determining states' willingness to respect IC judgements. Alter acknowledges this by specifying a number of 'permissive conditions' which must be met for her model to hold true. The book as a whole does in fact contain a number of such qualifications. On the grandest scale, as she writes, 'the key impetus' for international court creation was a global 'distrust of governments' emerging over the course of the twentieth-century (p.154). Mobilisation around ICs may also be explicable 'to some extent … [by] global trends in rights claiming' (p.112). As a result there is now 'a deep thirst for the rule of law amongst people' (p.340). But the continued embedding of these ideational trends into international legal institutions may, ultimately, depend on the 'permissive condition of liberal values and Euro-American power' (p.160)[5]. More locally, but no less significantly, 'actors within states must care about legality' for enforcement to be possible (p.62). More specifically, 'the support of national high courts is key because otherwise governments are able to argue that they respect the rule of law notwithstanding what may be a blatant disregard for an IC ruling (p.292). For this support to be forthcoming, the model may also 'require that a generation of judges and law faculty steeped in national legal approaches first retire' – something of which there is a yet no sign in Columbia, for instance, as her case studies show (pp. 66, 259). Finally, and more specifically, 'for ICs to inhabit a constitutional review role' there is an additional need for 'a corresponding culture of constitutional obedience where domestic actors see violations of higher order laws as ipso facto illegitimate' – something which, I note in passing, appears to be on the retreat in British politics.

An equally long list of conditions was necessary for the initial emergence and diffusion of these courts. 'World

historical events' play an unusually important explanatory role in this process. Alter claims that in the West, during the Cold War, the emergence of new claims about extraterritoriality (as symbolised by the Eichmann trial), when with combined new forms of legal practice and constitutional adjudication (as symbolised by the expansive jurisprudence of the ECJ in the 1960s) were crucial conditions for the new assertiveness of ICs (pp.117-131). The end of the Col War and geopolitical stasis was, of course, then necessary for the globalisation of Western trends (p.118). This variation, however, has been notably uneven; a fact that Alter disarmingly (and very understandably, given the scope of the book) concedes she struggles difficult to explain (p.153). She only sketches some more permissive conditions. Latin America's initial scepticism of such institutions, for example, she ascribes to a 'lack of trauma during World War II', and its later enthusiasm for them is put down (in part) to the Washington Consensus, which 'pulsed through' the continent in the 1970s (pp. 133, 150). In Africa 'nationalism was probably the greatest impediment to international legal efforts', its (supposed) disappearance being a requirement for the continent's own embrace of international courts (p.137)[6]. In Asia and the Middle East, meanwhile, courts will most probably not spread until the influence of 'oil deposits', the Chinese Communist Party, the Iranian Revolution, and (even) 'problematic political leaders' has abated (pp.137-8). Only in such very specific circumstances, Alter concludes, is the space for meaningful political agency created (p.118). Only then has it proved possible for the 'extraordinary' efforts of 'idealist … legalization proponents' to come to fruition (pp. 115, 117, 130-1)[7]. (In my own view, it must be said, a 'distrust of governments', 'deep thirst for the rule of law' and 'global trends in rights-claiming' must – at the very least – be counted among the most significant and complicated developments in the political history of the world. In my work I came to the conclusion that they are too important to be treated simply as conditions. Although vast, they surely merit at least more precise specification and/or independent explanation.)

However persuasive one finds these explanations, it seems difficult to deny that Alter has identified and mapped a genuinely global phenomenon long neglected by international relations. She quotes Werner Levi to bring the point home. In 1976 Levi could still write of how states have 'adamantly opposed agreements to submit their disputes to judicial decisions by international courts (the so-called "compulsory jurisdiction")' (p.82)[8]. Yet Alter can now show how 21 of today's 24 permanent international courts possess precisely such jurisdiction in certain areas (pp.83-4). The sheer breadth and scale of this shift renders it implausible, *a priori*, 'to write institutional histories as if moments of genesis were unconnected', and to focus solely on the interests of the powerful parties to each courts' creation (p.113)[9]. It also dramatically undermines 'realist' efforts to see international law as simply the product of state consent. A better analogy, Alter suggests, would be to see courts as the 'trustees', rather than 'agents' of states. Whilst states may do much to craft initial agreements, that is, they subsequently lose control over how those agreements are later implemented (pp.9-10). It may be true, as Alter argues interestingly and in detail, that many of these new courts are 'other-binding', and thus largely serve to increase the influence of states *vis-à-vis* transnational actors (p.35-41). Yet even the creation of a small number of 'self-binding' institutions – which limit the state's own policy space – has involved dramatic compromises on the principle of national sovereignty (pp. 244-5).

From the above it is clear, as Alter says, that we are in some respects living in a 'postrealist' world' (p.344). The relationship between democratic principles and the 'rule of law' norms underpinning this world are, however, somewhat obscure, to put it mildly. This is a circle that Alter seeks to square in her normative conclusion. Here she addresses a sub-text to *The New Terrain:* an emerging, though still tentative, nationalist backlash against ICs in Latin America, Southern Africa and some other parts of the world (pp.58, 96). Alter adopts an 'evolutionary perspective' to these challenges, believing that such rumblings merely represent teething problems all such institutions have gone through in the past. She hopes her book will help persuade courts to adopt a pragmatic 'legal realist' approach, and try whenever possible to avoid confrontations with states jealous of their sovereignty (p.66). She believes her empirical conclusions illustrate the importance of establishing contacts between courts and domestic 'compliance constituencies'. This new 'democratic' basis for the legitimacy of courts is significantly at variance, of course, with standard social conceptions of the clear distinction between law and politics. (pp.364-5). That will anger some normative critics. They will also complain 'rights' and the 'rule of law' are neither defined nor distinguished in this book[10]. And they will argue that this leaves us with no criteria to evaluate the validity of court judgements; 'the rule of lawyers' rather than the 'rule of law' ensues[11]. But no such criticisms, whatever their force, can distract from this book's magnificent central achievement: the comprehensive mapping of an international-legal terrain which has so far proved too treacherous and inaccessible for other less courageous social scientists to explore.

Footnotes

[1] E.g. Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', *Michigan Journal of International Law* 19 (1998): 345-372

[2] Eric A. Posner and John C. Yoo, "A Theory of International Adjudication." *California Law Review* 93 (2005): 1-72.

[3] Lucien Karpik and Terence C. Halliday, "The Legal Complex." *Annual Review of Law and Social Science* 7 (2011): 217-236.

[4] Cf. Jeffrey A. *Segal* and. Harold J. *Spaeth*. *The Supreme Court and the Attitudinal Model Revisited.* (New York: Cambridge University Press, 2002).

[5] Some believe this condition may already no longer be met. Cf. Stephen Hopgood, *The Endtimes of Human Rights. Ithaca: Cornell University Press, 2013.*

[6] There are some very powerful reasons to doubt the reality of this disappearance, however, even in cases of apparent state collapse.

[7] This approach contrasts with the (understandably) more detailed treatment Sikkink gives to these issues. In her work norm entrepreneurship is both subject to permissive conditions and 'nested' in broader normative shifts.

[8] Werner Levi, *Law and Politics in the International Society.* Beverly Hills, CA: Sage Publications, 1976.

[9] For important example of this kind of work, *Beth A. Simmons and Allison Danner*, "*Credible Commitments and the* International Criminal Court," *International Organization* 64:2 (2010): 225-56.

[10] The closest the *New Terrain* comes to this is its claim that 'rights are intersubjective; they exist when both the rights holder and those actors who have legal duties recognize the right' (p.28).

[11] Friedrich *Kratochwil*, "Has the Rule of Law become a *Rule of Lawyers*?" in G Palombella and N Walker (eds), *Relocating the Rule of Law.* Oxford: Hart, 2009, pp.171-96.

About the author:

Peter Brett is a Teaching Fellow in Politics at the London School of Oriental and African Studies. He writes on the 'judicialisation' of African politics with a focus on Southern Africa.