NATIONAL LEGISLATURES: THE FOUNDATIONS OF COMPARATIVE INTERNATIONAL LAW

Kevin L. Cope[1] & Hooman Movassagh[2]

One critique of some common-law comparative legal academies is their intensively "court-centric" focus,[3] which, some believe, "marginalize[s]" the role of the legislative branch.[4] The same may be said of the extant comparative international law literature: most of it concerns the interpretive approaches of national courts.[5] In fact, one of the field's seminal pieces defines comparative international law as the process of "seeking to identify and interpret international law by engaging in comparative analyses of various *domestic court decisions*."[6] Not surprisingly, then, nearly all of this volume's contributions deal mostly or exclusively with courts and judicial decisions.[7] While we agree with this volume's other contributors that courts can play a significant part in diversifying how international law works across different systems, we contend that the foundation of the comparative international law project lies elsewhere. We argue that among the most important and underappreciated interpretative acts—and therefore, those currently most needing study—are the international law interpretations of national legislatures.

As we elaborate below, two major characteristics of national legislatures that distinguish them from national courts make them especially relevant to comparative international law. First, legislators are highly incentivized to confer benefits on their national, sub-national, or party interest groups. They have relatively little political motivation to enact policies that achieve or maintain cross-country international law consistency. This inward focus may reinforce (and be reinforced by) legislators' relative lack of engagement with transnational legal networks. Second, legislatures as a whole

---

[1] Research Assistant Professor of Law, University of Virginia School of Law (starting fall 2016); Ph.D. Pre-Candidate, University of Michigan Department of Political Science.

[2] Principal Education Specialist and Visiting Lecturer in International Human Rights Law, University at Albany, SUNY; formerly Lecturer, Shahid Beheshti University School of Law; Ph.D., Shahid Beheshti University School of Law. The authors thank the volume editors for their comments and observations on an earlier draft of this essay.

[3] *See* Elizabeth Garrett, *Teaching Law and Politics*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 11 (2003) (observing a "court-centric" bias in U.S. law schools); *accord* Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 170 (2008) (noting that in the United States, "the first-year slate of courses tends to be dominated by a judge-centered perspective on the law, in which all legal questions are answered by people in black robes . . . . That neither reflects reality, nor approximates how lawyers need to perceive the workings of the law.").

[4] Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 B.U. L. REV. 863, 870 (2009) (noting that "the comparative study of state and federal legislatures . . . is doubly marginalized in the legal academy," in part because "it has to do with the legislative branch of government."); *accord* Leib, *supra* note 3, at 170.

[5] *See, e.g.*, Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 57 (2011).

[6] Roberts, *supra* note 5 (emphasis added).

[7] *See* Anthea Roberts et al., *Comparative International Law: Defining the Field*, *in* COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds. 2016) [hereinafter COMPARATIVE INTERNATIONAL LAW].

have gradually gained greater say in treaty making, empowering them to promote disuniformity in how international law is received in their respective systems.[8] Although heads of state or government have historically dominated foreign relations, a "constitutional revolution" over the past twenty years has given legislatures in many states unprecedented power over treaty-making and international engagement.[9] Our own recent review of national constitutions reveals that the number of constitutions[10] that expressly provide a role for legislatures in respect of treaties now stands at 159.[11] Another study recently found that required legislative participation in treaty-making increased significantly through the late nineteenth and early twentieth century, and shot up dramatically in the second half of the twentieth century.[12] Legislatures' adjustments to and interpretations of international law therefore increasingly influence how rules apply to and in their respective states. In making these decisions, legislatures limit the range of interpretative choices later available to other branches. In essence, legislatures act as the primary gatekeepers for international law, determining if and how it will enter their respective states.

THE INCENTIVES OF NATIONAL LEGISLATORS

National courts have traditionally been seen as loyal agents of international law. Comparativists and international law scholars generally believe that, among the three branches of governments, courts most faithfully interpret international rules. In the early twentieth century, Hersch Lauterpacht characterized national courts as "the trusted mouthpieces of international law" which operated as "local divisions of the great High Court of Nations."[13] To him, international law was "the only branch of law containing identical rules administered as such by the courts of all nations."[14] As Olga Frishman and Eyal Benvenisti note, there is a longstanding normative tradition (which they

[8] CAMPBELL MCLACHLAN, FOREIGN RELATIONS LAW 149–150 (2014) (citing Mai Chen, *A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-making*, 19 N.Z.U. L. REV. 448 (2001)) (addressing this in Anglo-Commonwealth systems).
[9] *Id.*
[10] This number does not include states such as the United Kingdom and Australia, which do not have express constitutional provisions on the role of legislatures regarding treaties, but which nevertheless involve the legislature in practice or by virtue of a legislative act. As such, the actual number of national legislatures involved in states' treaty-making process is somewhat higher.
[11] *See* table at http://www.kevinlcope.com/treaties.
[12] Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514, 519 (2015); *see also* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS App'x 3.2 (2009), *available at* http://scholar.harvard.edu/bsimmons/publications?page=1.
[13] Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. YB INT'L L. 65, 93 (1929) (citing WALKER, THE SCIENCE OF INTERNATIONAL LAW (1893)).
[14] *Id*. at 95.

criticize) of scholars' implying that courts *should* be applying international law uniformly.[15]

Many adherents of this perspective subscribe to the "convergence" or "uniformity" thesis of international law, in which any given international rule should mean the same thing in every system.[16] These adherents tend to identify courts as the instruments of this convergence.[17] There is some empirical support for this normative view. In analyzing an original dataset of national court interpretations of CEDAW, Christopher McCrudden notes "a remarkable absence of divergence across jurisdictions as to the [treaty's] substantive meaning."[18] Notably, McCrudden finds "significant differences between jurisdictions" in how CEDAW "is received into the national legal and judicial systems," "in the techniques of interpretation applied," and "in the legal status of CEDAW at the national level," but finds that those differences have fairly little impact on the treaty's substantive interpretation."[19] He concludes that, though courts interpreting CEDAW pursue strategic institutional goals, by and large they do *not* appear to "see themselves as agents of a domestic community" who tailor their interpretive approaches to their own domestic system.[20] On the other hand, a core premise of this volume is that courts are not always the faithful interpreters that commentators have long thought—or urged—them to be. As several contributions and other studies illustrate, court interpretations of international law do sometimes differ in meaningful ways.[21]

Whatever the extent to which courts act as state (rather than international) agents, and regardless of how much they contribute to international disuniformity, we should expect legislatures to do so more. Legislatures are a foundation for comparative international law in part because they have relatively little motive to harmonize their interpretations with those of foreign and international institutions. They should therefore be even less likely than courts to serve as faithful agents of the international legal order. This is true for at least two reasons: (1) legislators tend to be less connected to the global networks that disseminate international law norms; and (2) legislators face greater political incentives to diverge.

---

[15] Olga Frishman & Eyal Benvenisti, *National Courts and Interpretative Approaches to International Law: The Case Against Convergence*, *in* INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE 317–18 (Helmut Philip Aust & Georg Nolte eds, 2016).

[16] *See id.* at 318.

[17] *Id.*; *see also* Daniel Abebe & Eric Posner, *The Flaws of Foreign Affairs Legalism,* 51 VA. J. INT'L L. 507 (2011) (discussing and criticizing the related view that U.S. courts should enforce universalist notions of international law against congressional and presidential encroachment).

[18] Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT'L L. 534, 535 (2015) ("[A]lthough there are prominent examples of cases in which national courts adopt substantively different interpretations of CEDAW, the evidence from [my] dataset shows a remarkable absence of divergence across jurisdictions as to the substantive meaning of CEDAW.").

[19] *Id.*

[20] *Id.* at 536.

[21] *See, e.g.*, Helmut Philipp Aust, Alejandro Rodiles & Peter Staubach, *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 LEIDEN J. INT'L L. 75, 111 (2014); Martti Koskenniemi, *The Case for Comparative International Law*, FINN. YB. INT'L L. (2009); Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT'L L. 385, 389 (2011); Roberts, *supra* note 5.

First, most legislators (at least in non-EU national parliaments) are less likely to engage with global professional networks. They generally have no universal requirement for particular education or professional training; professionally, they are a diverse group.[22] Because *local* networks provide a bigger payoff to political office-seekers, foreign education and experience represent an opportunity cost—or perhaps an actual cost—if these activities allow them to be branded as outsiders.[23] It is little surprise, then, that the socio-economic background of parliamentarians tend to more closely match those of their local or national constituents. As Donald Matthews observes, "[w]hile legislators as a group enjoy high social status, they tend to be less atypical in their social backgrounds than chief executives, top-level civil servants, or economic elites."[24]

Compare this dynamic to that of judges. Judges receive comparatively standardized training and education, which typically (especially outside the United States, United Kingdom, and Japan) includes substantial training in international law.[25] National judges often go abroad for extended legal education and subsequent training and networking. Anne-Marie Slaughter writes that, over the last couple of decades, judges have created a "global community of courts."[26] Their decisions might therefore reflect an emerging international consensus of this global network of judges, which has formed as judges embrace a transnational judicial dialogue through conferences, foreign legal training, and Internet-based correspondence.[27] Indeed, according to former ICJ President Rosalyn Higgins, national courts are increasingly engaged with international law because they want to "become part of the international mainstream."[28]

The dynamic at work for domestic legislators is nowhere near as robust. Granted, advances in communication technology and globalization generally have increasingly allowed corporate and government officials to correspond with their counterparts across national borders, and some legislators have done so. But the lack of uniform educational and professional requirements across parliamentary electoral systems, together with the

---

[22] GREG POWER, GLOBAL PARLIAMENTARY REPORT: THE CHANGING NATURE OF PARLIAMENTARY REPRESENTATION, at 109, U.N. Sales No. E.11.III.B.19 (2012), *available at* http://www.ipu.org/pdf/publications/gpr2012-full-e.pdf. For detailed data, *see* Data on Age, gender and profession of parliamentarians, *at* http://www.ipu.org/gpr/gpr/downloads/index.htm.

[23] *See* Michael Hill, *Arrogant Posh Boys? The Social Composition of the Parliamentary Conservative Party and the Effect of Cameron's 'A' List*, 84 POL. Q. 1 (2013).

[24] *See* Donald R. Matthews, *Legislative Recruitment and Legislative Careers*, LEG. STUD. Q. 547 (1984); GRANT REEHER, NARRATIVES OF JUSTICE: LEGISLATORS' BELIEFS ABOUT DISTRIBUTIVE FAIRNESS 6 (1996).

[25] *See* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 149–51 (forthcoming 2016); Ryan Scoville, PILMap (2015), at http://PILMap.org (showing the United States, United Kingdom, and Japan among the outliers in rates of compulsory law school public international law training, with less than 5% of schools so requiring); Ryan Scoville & Milan Markovic, *How Cosmopolitan Are International Law Professors?* 38 MICH. J. INT'L L. (forthcoming 2016).

[26] Anne Marie Slaughter, *A Global Community of Courts,* 44 HARV. INT.'L L.J. 191 (2003); *see* Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXF. J. LEG. STUD. 499 (2000); Anne-Marie Slaughter, *A Brave New Judicial World*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 278 (Ignatieff ed., 2005).

[27] Slaughter, *supra* note 26.

[28] Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law: A Rejoinder to Nikolaos Lavranos, Jacob Katz Cogan and Tom Ginsburg*, 20 EURO. J. INT'L L.1027, 1028 (2009).

fact that such overseas education or professional experience tends to have less salience for their constituencies, means that these international interactions translate less readily into international–oriented policy.

The second reason we expect legislatures to embrace a less internationally consistent policy is that legislative policy-making is more closely tied to domestic constituents and interest groups[29] than judicial decision-making. The desire to obtain reelection is thought to be the primary driver of legislators' behavior.[30] Legislators depend on domestic actors to keep their jobs, and are therefore incentivized to provide goods and other benefits—both public and private—to these actors.[31] They are not directly accountable to foreign or international interests, and they have little incentive to prioritize those interests over domestic ones. Several studies show that because the public "is rarely informed enough to hold leaders accountable" for their foreign policy positions, those positions are fairly disconnected from electoral success.[32] We might therefore expect legislators to oppose policies that promote international cooperation or coordination (and which may yield broad or long-term utility) but are thought to harm local interests. Prominent examples include stricter factory emissions standards, open immigration rules, and some trade liberalization.

In some electoral systems, legislators answer electorally not even to the nation as a whole, but to the provincial or sectarian interests of their respective districts, interest groups, or political parties. Compared with judges, "legislators reflect more of the diversity of opinion found in any given geographic area."[33] As Anne-Marie Slaughter has observed,

> Legislators are most directly tied to territorially defined policies. In this sense, it could be said that remaining resolutely "national," or even parochial, is their job. Even when they focus on international issues, it is generally through the prism of domestic interests rather than through an independent interest in foreign policy, much less global governance. . . .

---

[29] CECIL C. CRABB JR., GLENN J. ANTIZZO & LEILA E. SARIEDDINE, CONGRESS AND THE FOREIGN POLICY PROCESS: MODES OF LEGISLATIVE BEHAVIOR 137-157 (2000).

[30] *See* Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135 (1957). *See generally* Roger Congleton, *The Median Voter Model, in* THE ENCYCLOPEDIA OF PUBLIC CHOICE (2002) (explaining the median voter theory of legislative motivation); LEGISLATIVE BEHAVIOR: A READER IN THEORY AND RESEARCH (John C. Wahlke & Heinz Eulau eds., 1959).

[31] For a theory of how variations in the distribution of political power affect to what extent leaders provide constituents with public versus private goods (i.e., "selectorate theory"), see BRUCE BUENO DE MESQUITA, ALASTAIR SMITH, RANDOLPH M. SIVERSON, & JAMES D. MORROW, THE LOGIC OF POLITICAL SURVIVAL (2005).

[32] Elizabeth N. Saunders, *War and the Inner Circle: Democratic Elites and the Politics of Using Force*, 24 SECURITY STUD. 466 (2015); *accord* Branislav L. Slantchev, *Politicians, the Media, and Domestic Audience Costs*, 50 INT'L STUD. Q. 445–47 (2006); Erik Gartzke & Yonatan Lupu, *Still Looking for Audience Costs*, 21 SECURITY STUD. 391, 391–97 (2012); Philip B.K. Potter & Matthew A. Baum, *Looking for Audience Costs in All the Wrong Places: Electoral Institutions, Media Access, and Democratic Constraint*, 76 J. POLS. 167–81 (2014).

[33] GRANT REEHER, NARRATIVES OF JUSTICE: LEGISLATORS' BELIEFS ABOUT DISTRIBUTIVE FAIRNESS 6 (1996).

> To the vast majority of these constituencies, international cooperation usually takes a low priority.[34]

Indeed, a 2011 study of Canadian foreign policy finds that "[m]ost parliamentarians tend to have a parochial outlook that keeps their gaze fixed on domestic issues," which "makes it difficult for ordinary parliamentarians to usurp the longstanding prerogatives of the executives in the shaping of external policy."[35] In fact, some commentators have argued that it was this perceived provincialism of directly elected legislators that made the American founders reluctant to place the treaty powers in the hands of the whole Congress. The founders ultimately entrusted this task only to the smaller and more elite Senate, which at the time was not popularly elected.[36]

This domestic-driven policy preferences of legislatures plays out in a number of international issues areas. For instance, though international trade liberalization creates winners and losers in the short term, most economists accept that it benefits most societies in the long-run.[37] Yet the American voting public and legislature (like those in many other developed countries) have historically preferred protectionist policies that insulate vulnerable domestic industries,[38] a dynamic present in the 1993 North American Free Trade Agreement (NAFTA). Since the 1970s, "[k]ey elements in the Democratic coalition, particularly organized labor," have opposed free trade generally and NAFTA specifically.[39] Many faced heavy pressure from constituents and interest groups to retain protectionist trade barriers. In contrast, presidents of both parties are more isolated from public opinion better positioning them to "focus on the big picture," and "think more globally."[40] The internal debate over NAFTA's ratification showcased these phenomena; Democratic President Clinton defied his party leadership's protectionist positions in aggressively lobbying Congress to support the agreement, ultimately to success. Similar tensions between internally focused legislators and more globally oriented heads of state have occurred in other countries across a variety of international cooperation issues.[41]

Higher-court judges are somewhat like executives in this sense. Compared with legislators, they are generally more insulated from domestic electoral politics, their

---

[34] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 105 (2004).
[35] KIM RICHARD NOSSAL, STEPHANE ROUSSEL, & STÉPHANE PAQUIN, INTERNATIONAL POLICY AND POLITICS IN CANADA (2011).
[36] *Cf.* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 NYU L. REV. 932, 939–40 (2010).
[37] *See, e.g.*, L. Alan Winters, Neil McCulloch & Andrew McKay, *Trade Liberalization and Poverty: The Evidence so Far*, 42 J. ECON. LIT. 72, 72 (2004).
[38] Eric M. Uslaner, *Let the Chits Fall Where They May? Executive and Constituency Influences on Congressional Voting on NAFTA*, 23 LEGIS. STUD. Q. 347, 347 (1998) (citing William Schneider, *The Old Politics and the New World Order*, *in* EAGLE IN A NEW WORLD: AMERICAN GRAND STRATEGY IN THE POST-COLD WAR ERA (Kenneth A. Oye, Robert J. Lieber, & Donald Rothchild eds., 1992); Sharyn O'Halloran, *Congress and Foreign Trade Policy*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL (Randall B. Ripley & James M. Lindsay eds., 1993)).
[39] *Id.*
[40] *Id.*
[41] *See generally, e.g.*, Nathan Leites and Christian de la Malene, *Paris from EDC to WEU*, 9 WORLD POL. 193 (1957) (analyzing the French Parliament's domestic political reasons, including concerns for sovereignty, in rejecting the European Defense Community treaty in 1954).

average standard terms are longer, and they are unlikely to face popular election or reelection.[42] Their career paths are less likely to depend on the electorate, and more on senior judges or executive officials.[43] As a result, judges are politically freer to align their interpretations with prevailing or emerging international law norms. This is not to say that judges are untouched by domestic politics; considerations like institutional preservation and legitimacy can and do affect judicial decision-making, including on international issues.[44] In fact, Eyal Benvenisti argues that strategic considerations—i.e., protecting national and institutional interests—motivate courts to conform their decisions to international norms—thereby signaling fidelity to existing international law and preempting encroachment by international institutions.[45] Nonetheless, compared with legislatures, national courts facing international issues are more oriented toward international legal norms than toward particular domestic policy considerations. At least where doing so is in tension with achieving short-term domestic goals, legislators' relative provincialism coupled with their political incentives give them little reason to achieve or maintain global international law uniformity. As a result, we would expect that legislatures are most likely to adopt domestic-oriented—rather than international-oriented—stances on international legal issues, thereby diversifying states' international legal approaches.

LEGISLATIVE ADJUSTMENTS TO TREATIES THROUGH RESERVATIONS

With these expectations in mind, we proceed to consider how the constitutional powers of legislatures in foreign and international affairs equip them to act on these traits. Despite legislators' comparatively provincial orientation, national constitutions and/or custom generally give them some authority over how international law binds their states, including the power to accept or reject multilateral treaties. Whether or not they are well-suited to take positions on international cooperation issues, legislators are forced to do so.[46] In fact, legislative influence has markedly increased in recent decades.[47] For instance, the United Kingdom enacted statutory reforms in 2010 that, for the first time, gave its House of Commons formal power to block treaty ratification.[48]

---

[42] *See generally* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES (2005).

[43] *See generally* TOM GINSBURG (ED.), RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2008); J. Mark Ramseyer & Eric B. Rasmusen, *Why are Japanese Judges So Conservative in Politically Charged Cases*, 95 AM. POL. SCI. REV. 331 (2001).

[44] *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (espousing a strategic theory of judicial decision-making); Martin Shapiro, *Stability and Change in Judicial Decision-making: Incrementalism or Stare Decisis?* 2 LAW TRANSITION Q. 134 (1965).

[45] Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 251 (2008).

[46] SIMMONS, *supra* note **Error! Bookmark not defined.**.

[47] *See* MCLACHLAN, *supra* note 9, at 149–50.

[48] House of Commons Library, *Parliament's New Statutory Role in Ratifying Treaties*, SN/IA/5855 (Feb. 8, 2011), *available at* http://www.parliament.uk/briefing-papers/sn05855.pdf. Granted, some have observed an "erosion" or "waning" of foreign affairs legislative oversight in the United States and some other states, though the opposite trend appears to be more influential. *See, e.g.,* LINDA L. FOWLER, WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS (2015); PARLIAMENTARY

In 2000, an Inter-Parliamentary Union-organized conference[49] produced a declaration titled, "Parliamentary Vision for International Cooperation at the Dawn of the Third Millennium"[50] that, among other things, outlined the main ways that parliaments work in international affairs.[51] Adapting and modifying that typology for our purposes, we focus on three ways in which legislatures are constitutionally empowered to affect international law: (1) by issuing reservations to treaties, which alter the country's international law obligations, including bargaining with executive officials over these reservations; (2) by expressing their understanding of treaties' meaning during pre-ratification deliberations, which narrows the range of interpretative choices available to domestic courts; and (3) by deciding, consistent with their policy preferences, how to transform international law into domestic law, thereby defining the country's international law conduct,[52] which can in turn partially shape both custom and future treaty meaning.[53] The rest of this chapter shows how these duties empower legislatures to shape the diversity of international law across systems.

A legislature's ability to force a treaty *reservation* changes the meaning of international law for that state alone. With some multilateral treaties,[54] especially human rights and security/disarmament treaties, states exempt themselves from certain provisions through reservations.[55] For human rights treaties, these reservations often provide that the state's obligation regarding a provision (or the treaty as a whole) will not exceed the standards of some other national institution.[56] This other institution is expressly mentioned in the text of the reservations and may consist of the reserving state's constitution, national law, or state religion. Across all issue areas, seeking exemption from monitoring mechanisms or jurisdictional immunity is also a common basis for reservations.[57] Whatever its form, reservations alter the obligations of states with respect to the treaty, which changes the substance of international law.[58]

CONTROL OVER FOREIGN POLICY (Antonio Cassesse ed., 1980); LEE H. HAMILTON WITH JORDAN TAMA, A CREATIVE TENSION: THE FOREIGN POLICY ROLES OF THE PRESIDENT AND CONGRESS 65 (2002).

[49] Conference of Presiding Officers of National Parliaments, http://www.ipu.org/Splz-e/sp-conf.htm.

[50] The parliamentary vision for international cooperation at the dawn of the third millennium, http://www.ipu.org/splz-e/sp-dclr.htm.

[51] *Id.* (stating that parliaments affect international cooperation by: "(i) Influencing their respective countries' policy on matters dealt with in the United Nations and other international negotiating forums; (ii) Keeping themselves informed of the progress and outcome of these negotiations; (iii) Deciding on ratification, where the Constitution so foresees, of texts and treaties signed by governments; and (iv) Contributing actively to the subsequent implementation process").

[52] *Cf.* Kevin L. Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115, 1128–30 (2015)

[53] Roberts, *supra* note 5, at 57–92.

[54] Reservations generally apply only to multilateral treaties, as disagreements over specific terms of bilateral treaties are typically resolved through continued negotiation rather than reservations. Also, bilateral treaty ratification usually occurs via "definitive" executive signatures, thereby avoiding the legislature. *See* ANTHONY AUST, NATIONAL TREATY LAW AND PRACTICE 119 (2014).

[55] BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW 163 tbl.6.3 (2016).

[56] *See generally* Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEG. STUD. 397 (2007).

[57]

[58] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 612–15 (7th ed. 2008).

The division of domestic power for entering reservations differs by country, but in many systems, the legislature has some authority either to enter reservations unilaterally or to condition ratification on the entry of reservations it prefers. In Iran, the parliament can demand reservations by including reservations in the domestic version of the treaty during the process of ratification. Parliament did so for Iran's reservations to the Convention on the Rights of the Child, the Organisation of the Islamic Conference Convention to Combat Terrorism, and the Convention on the Rights of Persons with Disabilities.[59] Indeed, Iran's parliament has enough sway over ratification that the Guardian Council (whose appointments are split between the parliament and Supreme Leader) effectively barred Iran's accession to the CEDAW, despite the executive's attempts at ratification. Upon ratifying the Convention on the Rights of the Child, Iran reserved "the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation [*sic*] in effect."[60] As with other reservations required by Iran's Parliament, this reservation was included in the act passed by Iran's parliament, whereby the executive was "permitted" to accede to the CRC with the condition that it enter the reservation. Many other states also give legislatures power over reservations. To give just a few examples, under the Dutch system, the approval of the Staten-Generaal is required for all almost all types of treaties, [61] and the lower chamber is empowered to add reservations itself. [62] In India, parliamentary committees can also demand reservations.[63] And in Chile, the Congress may "suggest" the formulation of reservations and interpretative declarations to international treaties.[64]

Even without formal power to add or request reservations unilaterally, legislatures can still affect their entry. A study by Beth Simmons shows that in the majority of national constitutions, the executive needs formal legislative approval to ratify at least some types of treaties.[65] Nearly 61% of the 176 surveyed states require legislative consent for treaty ratification (with 49% requiring a majority of one body for treaty approval and 12% requiring either a supermajority in one body or a majority in two bodies).[66] An additional 7% have a "rule or tradition" of informing and consulting the legislature about potential treaties, and perhaps, receiving informal guidance.[67]

---

[59] For the text of these laws in Farsi, see CRC, *at* http://dastour.ir/brows/?lid=271250, OIC Convention, *at* http://dastour.ir/brows/?lid=320173, and CRPD, *at* http://dastour.ir/brows/?lid=320173.

[60] United Nations Treaty Database, International Covenant on Civil and Political Rights, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en. The actual enactment of Iran's Parliament requires a "national legislation" exemption.

[61] A few narrow classes of treaties do not need approval, mainly short or unimportant ones. Pieter van Duk & Bathiyyih G. Tahzib, *Parliamentary Participation in the Treaty-making Process of the Netherlands*, 67 CHICAGO-KENT L. REV. 413, 420 (1991).

[62] *Id.* at 432.

[63] N.J. Botha, *National Treaty Law and Practice: South Africa*, *in* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH (Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington eds. 2005)

[64] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 54(1)

[65] Verdier & Versteeg, *supra* note 12, at 514–33.

[66] SIMMONS, *supra* note **Error! Bookmark not defined.**.

[67] *Id.*

Thus, whether or not they have formal power to make reservations, legislators may leverage their veto power over treaties to negotiate their reservations of choice.[68] As Helen Milner and Peter Rosendorff observe, "legislative rejection of international agreements . . . indicates a failure of the legislature to exercise influence over the executive, rather than a successful influence attempt."[69] In any treaty submitted to the parliament, the executive must gain support from at least the median legislator. Unless the executive's party holds a majority of the body, this often requires enlisting members outside the executive's party. This is even more difficult in systems that require a supermajority for ratification. As such, legislative leaders may engage in behind-the-scenes, inter-branch bargaining with executive treaty negotiators.[70]

The clandestine nature of inter-branch bargaining makes it difficult to quantify how often it happens or how much it affects the substance of treaties globally. But it appears to occur to some extent in a significant number of systems. In Sweden, for instance, for treaties whose compliance requires passage or amendment to a domestic statute or which is otherwise within the purview of the parliament, the Riksdag can condition the ratification of a treaty both on entering certain reservations, and on objecting to other parties' reservations.[71] Likewise, in the United States, the Senate has long exercised the power to condition its "resolution of advice and consent" (which authorizes the president to ratify a treaty) on the entry of certain reservations.[72] In Iran, the executive must assess the value of entering a reservation to a treaty and report its findings to parliament.[73] The parliament may request modifications to a treaty submitted to it for ratification,[74] in which case, the executive effectively must renegotiate the terms based on parliament's requirements.

LEGISLATIVE INTERPRETATION OF TREATIES THROUGH UNDERSTANDINGS

Even where legislative action does not formally alter a state's treaty obligations in a way sanctioned by the Vienna Convention, legislatures promote cross-country variation by entering respective *understandings* of treaty terms. Unlike reservations, understandings do not exclude treaty obligations. Rather, they constitute the state-party's interpretations of vague or ambiguous provisions, including how they will apply in the state's domestic order. By changing how legislatures' own domestic courts interpret the treaty, understandings bolster differences in how governments view a given international law provision.

---

[68] Cope, *supra* note 52.
[69] Helen V. Milner and B. Peter Rosendorff, *Democratic Politics and International Trade Negotiations: Elections and Divided Government as Constraints on Trade Liberalization*, 41 J. CONFLICT RESOL. 117, 118 (1997).
[70] *See* Cope, *supra* note 52, at 1170–72.
[71] *See* Iain Cameron, *Swedish Parliamentary Participation in the Making and Implementation of Treaties*, 74 NORDIC J. INT'L L.,429, 452–53 (2005).
[72] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 180 (2d ed. 1996).
[73] Article 177(2) of the Parliament's Internal Rules of Procedure and article 8 of the Bylaw on Method of Drafting and Conclusion of International Agreements of 30 May 1992.
[74] Article 177(2) of the Parliament's Internal Rules of Procedure.

The U.S. system offers a fine example of legislative power to interpret treaty obligations for the state. There are different schools of thought on the extent of that power. The majority view, implied in the most recent restatement of U.S. foreign relations[75] and advocated by Louis Henkin, holds that "if the Senate makes its understanding [of a treaty provision] explicit, that understanding is binding" on domestic court interpretations.[76] Thus, while U.S. courts make treaties' language the starting point of their analysis and consider drafter intent,[77] the interpretation of the legislature often prevails.[78] In fact, the U.S. Supreme Court in *United States v. Stuart* implied in dicta that even understandings conveyed during pre-ratification Senate debate constitute strong evidence of a treaty's meaning.[79] Some judges and authors believe that such intent carries more authority even than the treaty's negotiating history.[80]

Legislative understandings can also affect a state's international legal behavior indirectly. For instance, in the U.S. Supreme Court's 2008 *Medellin v. Texas* decision, the Court held that neither the UN Charter nor the Optional Protocol to the Vienna Convention on Consular Relations (VCCR), were self-executing.[81] The majority concluded that the lack of a "clear statement" of self-execution in the treaty text or ratification materials suggested that it was not intended to be self-executing. The United States had violated the VCCR when Texas state officials did not give then-murder suspect Jose Medellin consular access and, after his conviction and appeal, refused the ICJ-ordered relief of "review and reconsideration of the convictions and sentences."[82] These events spurred the Senate to take greater responsibility for treaties' domestic operation. Shortly after *Medellin*, the U.S. Senate Committee on Foreign Relations started a practice of adding to its articles of advice and consent the Court's suggested "clear statement." These statements clarify whether the body considers the treaty to be self-executing,[83] thereby bolstering legislative control over how treaties are internally enforced.

Because Congress's understandings of treaty provisions can directly impact how the state performs its obligations, they can also carry international legal effect.[84] Relying on congressional expressed or implied understandings of meaning, domestic courts

---

[75] RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 314 cmt. D.
[76] *The ABM Treaty and the Constitution: Joint Hearings before the Committees on Foreign Relations and Judiciary*, 100th Cong., 90 (1987) (statement of Louis Henkin).
[77] *See, e.g.*, Sumitomo Shoji of America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982).
[78] *See generally* David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1406 (1989).
[79] United States v. Stuart, 489 U.S. 353, 368 n.7 (1989); *see also* Detlev F. Vagts, *Senate Research Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989) (arguing that legislative materials are pertinent to treaty interpretations).
[80] Stuart, 489 U.S. at 368 n.7; *see* Koplow, *supra* note 78, at 1420.
[81] 128 S. Ct. 1346 (2008). For an excellent background of *Medellin* and the legal issues it presented, see Ilya Shapiro, *Medellin v. Texas and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63.
[82] Avena, 2004 I.C.J. 12, 72 ¶ 97 (Judgment of Mar. 31).
[83] S. Rep. No. 110-12, at 9–10 (2008).
[84] See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, *in* PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 613-15 (1994) (criticizing this approach).

sometimes interpret a treaty differently from how a tribunal relying on plain treaty language or negotiation history would. When doing so, those courts rarely mean to enforce domestic law over international law, thereby violating the latter, as when enacted legislation contradicts a prior binding international law. Rather, they are taking the view of their national legislature as the persuasive or controlling authority on *what international law means*. In this sense, the legislative understandings of a given international law norm are transformed into judicial interpretations of that norm. And because domestic judicial interpretations of international law are one source of authority for international courts and other bodies,[85] these decisions can in turn impact the broader formation of that norm.[86] Although this phenomenon has been more closely examined in the context of U.S. law, its logic applies to any national system in which domestic courts give deference to legislative interpretations of enacted treaties. In this way, legislatures can shape domestic courts' interpretation of international law, leading to divergent practices between states in the short term but more universal norms in the long term.

LEGISLATIVE DOMESTICATION OF INTERNATIONAL LAW

In addition to affecting international law at the creation stage, legislatures diversify state conceptions of a single international norm by *implementing* or *domesticating* it. Legislatures play an active role in interpreting international law in enacting legislation giving life to international treaties in national jurisdictions. That is, particularly in dualist systems[87] (though also in monist ones), legislatures define how a state will respond to international law by translating non-self-executing treaty law into domestic law through a process that is variously known as "incorporation," "domestication," or "implementation." Legislatures also decide whether and how to take international rules into account when enacting or repealing related domestic legislation. These decisions matter for how a given law norm operates within a state and often prevail over the corresponding treaty terms themselves.[88] They also affect the content of customary international law, by enacting laws pertaining to the international relations of the state, and by codifying existing or emerging customary law into statute. This is particularly important in civil law systems, where courts are generally bound by the enactments of their national legislatures, a dynamic not limited to treaties. For instance, Iranian courts may apply custom only in cases expressly indicated by law or where written law is lacking or ambiguous.[89]

---

[85] *See, e.g.*, ICJ Statute art. 38(1)(d) (listing "judicial decisions . . . of the various nations, as subsidiary means for the determination of rules of law"); Roberts, *supra* note 5, at 58 ("In explicating international law, textbooks and articles habitually draw on domestic judgments, . . .The same is true of international courts like the (ICJ) and the (ICTY).").

[86] Roberts, *supra* note 5, at 59.

[87] *See* Verdier & Versteeg, *supra* note 65, at 523 (noting that almost all monist systems recognize exceptions for non self-executing treaties).

[88] BROWNLIE, *supra* note 58, at 45–49.

[89] QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 (1980), arts. 166–67; AINI DADRASSII MADANI [Civil Procedure Code] Tehran 1379 (2000) art. 3 (Iran).

Deciding How to Domesticate Treaties

Legislatures can often use an implementing statute both to clarify ambiguities and to stipulate the legislature's policy preferences, particularly where those preferences diverge from the plain meaning of the international norm being domesticated.[90] This act of international-to-domestic transformation can frame other state organs' view of the treaty's requirements. This, in turn, can shape the state's compliance therewith. In the United Kingdom, the power to legislate pursuant to treaties (even before the 2010 reforms)[91] "provided Parliament with an important means to check the Crown's power in foreign affairs, one that it gradually used to seize an influential role in the setting of national policy."[92] Indeed, the implementing statutory framework often binds national courts who might have preferred a different approach. As one Indian author put it, even where a treaty has been ratified, national courts of India "cannot say yes if Parliament has said no to" whether or how a treaty should be received domestically.[93] Likewise, the U.S. Congress has power to determine the state's response to international obligations. Though statutory interpretation principles require courts where possible to conform statutes to binding international law, Congress can preempt such constructions—perhaps triggering an international law violation—by clearly expressing that intent.[94] Though there are important variations, the parliaments of most dualist systems hold similar authority.[95] In essence, legislatures as a whole hold considerable power over whether and how states follow their treaty obligations.

In monist systems (which coincide strongly with countries featuring civil law traditions), legislatures' role in transforming most treaty law into domestic law is relatively small. Instead, that transformation occurs automatically with the treaty's ratification. Yet a non-trivial number of treaties require even monist systems to take additional steps for the treaty to have full effect. For instance, the 1998 Chemical Weapons Convention requires state parties to prohibit their subjects from using chemical weapons, with "chemical weapons" defined quite broadly.[96] The Convention leaves to the state party's discretion both the legal apparatus for this prohibition and the punishment for violation. How precisely to comply with these treaty requirements necessarily depends largely on a national legislative process, even in monist systems. The same is true of all treaties on international and transnational crimes. These treaties

---

[90] John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 324–25 (1992).
[91] *See* text accompanying n.48, *supra*.
[92] Melissa Waters, *Creeping Monism*: *The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (citing John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2004 (1999)). These statements were made before the 2010 reforms mentioned above, which gave the Parliament formal power to block treaty ratification. *See* text accompanying n.48, *supra* .
[93] Nihal Jayawickrama, *India*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).
[94] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
[95] Verdier & Versteeg, *supra* note 109.
[96] Kevin L. Cope, *Lost in Translation: The Accidental Origins of* Bond v. United States, 112 MICH. L. REV. (FIRST IMPRESSIONS) 133, 135 (2014).

invariably depend on national legislatures to provide the "teeth" for the crimes enumerated in the treaties and to set out specific laws for the prevention and punishment of the relevant crime within the national jurisdictions of the states parties.

Moreover, even in systems where treaties can have direct domestic effect, courts and administrative agencies may take cues from the legislature on whether and how to respond to ratified treaties. For instance, in deciding how to weigh a treaty's provisions, courts may look to whether the legislature has acted specifically to implement the treaty through legislation. Where it has been silent or implied that no legislation is necessary, courts and agencies may be reluctant to apply the terms of even a self-executing treaty. As one author notes about Sweden, "in cases where a treaty has been approved but not converted to Swedish law, administrative agencies which should take account of the treaty, have, at least, on occasion, not felt any pressure to do so [particularly] if the parliament has stated its opinion that Swedish law fully complies with the demands of the treaty."[97]

To illustrate how legislative implementation can contribute to comparative international law, consider the implementation of the Rome Statute of the International Criminal Court (ICC).[98] As one of us has noted elsewhere,[99] the Rome Statute's implementation shows how legislation can cause the ostensibly uniform ICC scheme to operate differently in different systems.[100] Under the Rome Statute, the ICC has "complementary" jurisdiction over certain international crimes: states are the preferred venue for prosecutions, and the ICC can take jurisdiction only if the domestic system of the alleged perpetrator is "genuinely unwilling or unable" to prosecute the accused. Where a state lacks adequate prosecutorial, judicial, or statutory mechanisms, the ICC is therefore likely to assume jurisdiction. To function effectively as partner jurisdictions, states-parties must therefore criminalize those things that the Rome Statute criminalizes: war crimes, crimes against humanity, genocide, and (as of 2017) the crime of aggression. Despite following the same Rome Statute blueprint, national legislatures implementing the Rome Statute crimes have used substantially different approaches.

For instance, the United Kingdom, Australia, and South Africa are a few of the states-parties that match the Rome Statute crimes precisely; the British statute simply attaches several key articles verbatim to the implementing legislation.[101] The Netherlands[102] and Germany include two of the articles verbatim. In contrast, several states have adopted narrower definitions of prohibited conduct or provided no definitions. This is meaningful, because if the alleged criminal conduct does not meet the elements of

---

[97] *See* Cameron, *supra* note 71, at 454.
[98] *See generally* W.N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW BY NATIONAL COURTS (2006).
[99] Kevin L. Cope, *Treaty Law and National Legislative Politics, in* THE POLITICS OF INTERNATIONAL LAW (Wayne Sandholtz & Christopher Whytock eds., 2016).
[100] Wayne Sandholtz, *Implementing the International Criminal Court* (unpublished manuscript), *available at* http://ssrn.com/abstract=2454824.
[101] *See* Julio Bacio Terracino, *National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC*, 5 J. INT'L CRIM. JUSTICE 421, 423 (2007).
[102] Goran Sluiter, *Implementation of the ICC Statute in the Dutch Legal Order*, 2 J. INT'L CRIM. JUSTICE 158 (2004).

the domestic definition (or if there is no domestic definition), a state cannot prosecute the offense. France, for example, did not enact a law specifically implementing the Rome Statute. For genocide, for instance, it maintained its existing, pre-ICC definition requiring that genocide be carried out as part of a "coordinated plan," which is not an element of the crime in the ICC's definition.[103] This approach has consequences for the how the ICC operates with regard to these states, as the ICC is more likely to take jurisdiction because of those states' "inability to prosecute." Still other parties, such as Venezuela, Mexico, and Colombia, define few or no ICC crimes at all. The Venezuelan legislature has defined only the crimes of torture and forced disappearance of persons.[104] Venezuela could therefore also face the inability-to-prosecute scenario for the other crimes,[105] giving the ICC jurisdiction over potential defendants in that country. This diversity of responses to a single international law norm means that the ICC mechanism would handle a Rome Statute crime committed in South Africa or Australia differently from how it would handle the very same crime committed in Venezuela or Columbia.

There are undoubtedly many reasons for these varying approaches to implementation. One theory is that the political climate of certain states explains some of it; the political will to hold officials liable for crimes like genocide, crimes against humanity, and war crimes has "rarely existed in the states of [the Latin American] region."[106] This lack of political will was expressed most effectively by many of the states-parties national legislatures' reluctance to adopt fully the ICC scheme. The result is the development of not one, but a patchwork of Rome Statute cooperation regimes.

Although this volume is interested mostly in international law divergence, legislative treaty implementation can also foster convergence. Though domestic interpretations of international law formally bind only that state, they can influence international law externally.[107] The VCLT makes the subsequent practice of states relevant to treaty interpretation by other bodies.[108] The substance of implementing legislation can constitute a key aspect of this subsequent practice. If a sufficient number of states enact legislation adopting a particular interpretation of a treaty provision, that interpretation is more likely to gain acceptance elsewhere.

Codifying Customary International Law

In addition to implementing treaties, legislatures sometimes codify existing or emerging customary law into domestic code. Though courts often recognize and apply custom themselves, sometimes the norms are complex enough that a detailed statutory framework is more appropriate. For example, both the United Kingdom (State Immunities Act of 1978) and United States (Foreign Sovereign Immunities Act of 1976)

---

[103] Terracino, note 101, at 426–27.
[104] Hugo Relva, *The Implementation of the Rome Statute in Latin American States*, 16 LEIDEN J. INT'L L. 331, 364 (2003).
[105] Terracino, *supra* note 101, at 428.
[106] Relva, *supra* note 104, at 366.
[107] Jackson, *supra* note 90, at 325 (citing VCLT Art. 31); Roberts, *supra* note 5, at 57–92.
[108] See VCLT art. 31; Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM J. INT'L L. 179, 179 (2010).

have codified the customary law of foreign state immunity. These statutes developed specific statutory regimes that were largely in-line with the existing "restrictive approach" to foreign sovereign immunity, under which states are not immune for commercial-like conduct (*acta gestionis*).[109] In 1972, the Council of Europe states had also enacted a state immunity treaty, the European Convention on State Immunity. Other states, including Argentina, Australia, Canada, Malaysia, Pakistan, Singapore, and South Africa codified the restrictive approach in their own statutes in the years following.[110] Though each was modeled after the same CIL norm, their approaches differ in important ways. For example, the European Convention adopts a presumption of non-immunity and enumerates conditions in which states are immune, while the U.K. and U.S. acts begin with a presumption of immunity and list criteria for stripping that immunity.[111] These different legislative approaches to the same international rule mean that a state might receive state immunity in the United States for a given transaction but no immunity in a European state for a similar transaction.

As with treaties, national legislative codifications of customary international law can also foster convergence. Legislative actions constitute state practice and *opinio juris* for the purpose of developing evidence of customary international law.[112] The ICJ recognized as much in its 1955 *Nottebohm* decision. Having stated that nationality laws are an exercise of domestic jurisdiction, the court stated that certain principles were deducible from such national legislation that could be applied on the international plane.[113] In determining the customary international law on jurisdictional immunities, the ICJ also recognized the diversity of national legislation on the issue. It conducted a comparative analysis of national legislation on the question of a "territorial tort exception" to immunity in respect of *acta jure imperii* causing death, personal injury, or damage to property.[114]

Returning to the state immunity example, both the U.K. and U.S. approaches have influenced the development of foreign sovereign immunity in national legislatures and courts, as well as the customary international law itself.[115] The United Nations adopted a

---

[109] Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209, 214 (2015).

[110] David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment, 2010/02, OECD Publishing, *available at* http://dx.doi.org/10.1787/5km91p0ksqs7-en (citing The State Immunity Act 1978 (UK SIA); State Immunity Act (1982) (Canada SIA); Foreign State Immunities Act 1985 (Australia FSIA); Immunities and Privileges Act 1984 (Malaysia); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Foreign State Immunities Act 1981 (South Africa); 7 Law No. 24,488 of 31 May 1995 (Argentina)).

[111] Georges R. Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185, 186–87 (1979).

[112] *See Statement of Principles Applicable to the Formation of (General) Customary International Law*, International Law Association, 2000, at 17–18, *available at* http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376.

[113] Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955, at 20-23, *available at* http://www.icj-cij.org/docket/files/18/2674.pdf.

[114] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, ¶¶ 62 et seq.

[115] Verdier & Voeten, *supra* note 109, at 214.

convention in 2004 using the restrictive approach, which was partly inspired by the U.S. and U.K. models.[116]

Legislative Opposition and Structure

Finally, the diverse preferences of legislatures, as well as the constitutional rules governing foreign relations, can determine how a state complies with international law. Legislatures are not monoliths, and a given body comprises a wide range of views about its state's ideal relationship with the international legal system. This distribution typically exceeds that of a state's executive officials, who are likely appointed by a single head-of-state seeking like-minded actors to carry out her agenda.

Distribution of legislative preferences can affect how a state responds to international laws even after they are created. For example, divided government and more rigorous lawmaking processes can both frustrate attempts to implement any given law that would implement some prior commitment. Legislative systems with greater structural barriers to enacting legislation may make compliance with international law more difficult in some cases, but easier in others. For instance, Yonatan Lupu finds that the more legislative "veto players" a state has (i.e., independent political actors empowered to block a state action), the more costly it is for executives to violate human rights treaties.[117] He finds that after a state ratifies a treaty, opposition groups in legislatures can raise the costs of enacting legislation that would violate the treaty provisions. Although authoritarian leaders can bypass the legislature, it is costly to do so; cloaking repression in the rule of law via democratic mechanisms is preferable. As a result, states that empower opposition parties with legislative veto powers, Lupu concludes, experience less repression and other rights abuses.[118] In a similar vein, Lisa Martin argues that institutional struggles between domestic branches legitimize state commitments and strengthen international cooperation.[119] And Kenneth Schultz finds that domestic competition from opposition parties makes a government's threats to other states stronger and more credible.[120]

Such mechanisms and opposition veto players can also complicate international law compliance. That is, they can enable opposition parties attempting to block measures designed to uphold prior commitments. For instance, in 2005, after the ICJ's *Avena* decision but before the Supreme Court decided *Medellin*, Republican President George W. Bush intervened in the matter, issuing a memorandum to the U.S. Attorney General. The memo purported to direct Texas courts to fulfill the U.S.'s international legal

---

[116] *Id.* The Convention had not yet entered into force as of mid-2016, though it had acquired 28 signatures and 21 of the 30 ratifications needed. United Nations Treaty Series, "United Nations Convention on Jurisdictional Immunities of States and Their Property," Dec. 2, 2004, *at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&Chapter=3&lang=en (last accessed May 20, 2016).

[117] Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 AM. J. POL. SCI. 578 (2015).

[118] *Id.*

[119] *See generally* LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000).

[120] KENNETH A. SCHULTZ, DEMOCRACY AND COERCIVE DIPLOMACY 9, 95–96, 114, 243 (2001).

obligations by complying with *Avena* and by reconsidering Medellin's and the other 50 Mexican nationals' cases.[121] In 2008, a few months before the Supreme Court decided *Medellin*, two Democratic members of Congress introduced a bill in the U.S. House of Representatives, the *Avena Case Implementation Act of 2008*, to address the impasse.[122] The bill created a cause of action for foreign nationals who, like the *Avena* petitioners, had been convicted of crimes but had not received their Vienna Convention consular notification rights. One might have thought it would have bipartisan support: it was largely consistent with President Bush's position on the issue, and it might have spared the United States further international embarrassment. Yet the House Committee on the Judiciary never acted on the bill.[123] The legislative history provides no insight into the reason. We can assume, however, that few legislators were eager to support retrials for foreigners convicted of violent felonies, especially on the basis of esoteric international-law procedural errors.

CONCLUDING THOUGHTS

To explain how a state's behavior relates to international norms and why that behavior differs from that of other states, it is important to examine more than just judicial decisions. We also need to look at what happens before a court receives the case; at how that law was received in the national legal system. In the case of treaties, this can be a lengthy, multi-stage process, involving the national legislature, civil society, executive officials, administrative agencies, courts, and, sometimes, branches of sub-national and local governments.[124] In this sequence, the first significant domestic point-of-entry for these agreements often involves the national parliament. Legislatures serve this role through the several dynamics discussed above. Parliament-demanded reservations, legislative understandings, executive-legislature bargaining, and minority parties' leveraging concessions can all help or hinder a state's attempts at coordination.

Those decisions about the treaty's place in the state's legal system also shape later decisions by other governmental and non-governmental actors. And even before an issue reaches the courts, these interpretations can help to diversify an ostensibly uniform international rule. National legislatures and legislation should therefore form the presumptive starting point for most comparative international law analyses. Studies that try to explain international law variation across systems, but which overlook these processes, risk missing a big part of the comparative international law story.

---

[121] Memorandum from President George W. Bush to the Attorney General of the United States (Feb. 28, 2005), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html.

[122] Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2008), *available at* http://www.govtrack.us/congress/billtext.xpd?bill h110-6481.

[123] Legislative History of H.R.6481 – Avena Case Implementation Act of 2008, *at* https://www.congress.gov/bill/110th-congress/house-bill/6481/all-actions-without-amendments.

[124] *See* Kevin L. Cope & Cosette D. Creamer, *Disaggregating the Human Rights Treaty Regime*, 56 VA J. INT'L L. __, 16–17 (2016).