

DECIPHERING THE GRAMMAR OF THE INTERNATIONAL JURISPRUDENTIAL DIALOGUE

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*“There is more than a verbal tie between the words “common”, “community”, and “communication.”. . . Try the experiment of communicating, with fullness and accuracy, some experience to another, especially if it be somewhat complicated, and you will find your own attitude toward your experience changing.”***

When the Project on International Courts and Tribunals was launched in 1997, the first logical step was to map out how many international courts and tribunals populated the international scene and of what kind. The exercise resulted in a “synoptic chart” published in a special symposium issue of

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** John Dewey (1859 –1952), American philosopher and psychologist. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 5-6 (New York: Macmillan, 1916).

this journal.¹ It provided a road map to the project for all scholars interested in the then-new phenomenon of the multiplication of international courts and tribunals. In an explanation of the chart, printed in the back, I apologetically remarked that “the greatest challenge” of compiling a compendium of international courts and tribunals was to “portray what can be called oxymoronically ‘an anarchic system’ without exaggerating its level of order.”² At that time, it was neither clear that an “international judicial system” could emerge, nor that it was desirable to have one. The chart described the large and growing list of international courts as a group of institutions with “very few links of a legal or functional nature, either within or among each major grouping or cluster,” a list of formally “self-sufficient worlds” whose placement on the same chart could be justified only on the basis of some formal similarities.³

A decade later, such a system is already spontaneously emerging.⁴ Indeed, there is growing evidence that international judges have adopted, consciously or unconsciously, by design or out of necessity, a series of *modi vivendi*—informal and non-codified but no less effective—to structure and regulate interactions between their courts, mainly with the aim of avoiding conflict of jurisdiction and of

1. The original “synoptic chart” was published in Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 739-48 (1999) [hereinafter Synoptic Chart]. The chart has been updated since. The most recent version (November 3, 2004) can be found at http://www.pict-pcti.org/publications/synoptic_chart.html.

2. *Id.* at 406.

3. Namely, the chart defines “international courts and tribunals” as those bodies that are: a) permanent institutions b) composed of independent judges who c) adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization, d) work on the basis of predetermined rules of procedure, and e) render decisions that are binding. Romano, *Synoptic Chart*, *supra* note 1.

4. For illustrations, see generally José Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX INT’L L. J. 405 (2003) (discussing the growth of the international judiciary and adjudication); William W. Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1 (2002) (evaluation of the system of international criminal law enforcement); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L. J. 191 (2003) (discussing phenomena that reflect an emerging community of transnational courts).

jurisprudence. In certain cases, it seems they are going even further, from peaceful coexistence and mutual regard for their respective spheres of competence and jurisdiction to strategic cooperation and mutual assistance to extend their own power and authority. In sum, international courts are no longer “self-contained systems.”⁵ They are gradually evolving, spontaneously and organically, if not into a “judicial system,”⁶ at least into a specific type of social network,⁷ a “judicial network,” where each international court is a node.

This paper focuses on one particular aspect of how international courts interrelate: the consideration given to

5. Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Oct. 2, 1995) (“In international law, every tribunal is a self-contained system (unless otherwise provided).”).

6. The dictionary definition of “system” is “a regularly interacting or interdependent group of items forming a unified whole as a group of interacting, interrelated, or interdependent elements forming a complex whole.” Merriam Webster (online ed. 2009), <http://www.merriam-webster.com>. See also AMERICAN HERITAGE DICTIONARY (4th ed. 2009) (“a functionally related group of elements”). Yet, legal scholars and practitioners tend to exaggerate the importance of top-down organization, based on some sort of “overarching document—a constitution, or at least a statute, treaty, or procedural code—that sets up a clear hierarchy of relationships among courts. Closer examination of a variety of existing judicial systems, however, suggests that the practices of courts themselves in ordering their relationships over time are at least as important as formal legal documents are in making judicial systems function. In other words, judicial systems can be, to a greater degree than might be expected, self-organizing.” Jenny Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 444 (2003). Scientists also recognize the idea of self-organizing systems, shaped by dynamics and competition over time. See generally SUNNY Y. AUYANG, FOUNDATIONS OF COMPLEX SYSTEM THEORIES: IN ECONOMICS, EVOLUTIONARY BIOLOGY AND STATISTICAL PHYSICS (1988) (presenting, from the perspective of scientists, the idea of self-organizing systems, shaped by dynamics and competition over time); LINTON FREEMAN, THE DEVELOPMENT OF SOCIAL NETWORK ANALYSIS (2006) (same); SOCIAL STRUCTURES: A NETWORK APPROACH (Barty Wellman & S.D. Berkowitz, eds., 1988) (same).

7. “Social networks” are social structures that facilitate communication between individuals, or groups of individuals, or organizations. “Nodes” and “ties” are central concepts of social network analysis. Nodes are the individual actors within the networks, and ties are the relationships between the actors. Special or common interests, shared values, visions, ideals, friendship, kinship, financial exchanges, and trade are all factors that scholars of social networks have identified as creating ties. Wellman & Berkowitz, *supra* note 6, at 4.

each other's jurisprudence. If there is an ongoing jurisprudential dialogue between international courts, what is the grammar of this discussion? What are the assumptions that structure it? To answer these questions, this paper puts forward a series of hypotheses about the jurisprudential dialogue between international courts, and suggests what consideration international courts would be expected to give to each other's jurisprudence if the hypotheses hold true.

Of course, it is necessary to stress that judicial autarchy and self-reference are the default posture of international courts. No international judge feels bound by the jurisprudence of another court.⁸ This should be unsurprising given the fact that, at this point in history, international courts are not hierarchically organized, and that all are, with few exceptions, self-contained jurisdictions. There are powerful constraints built into international courts' statutes that limit where judges can look for applicable law. Most international courts are by design self-contained legal islands. Moreover, a certain sense of pride and desire to defend one's own judicial turf are also important factors that prevent international judges from paying too much deference to their peers in other courts. Relying too much on other courts' jurisprudence is tantamount to abdicating one's own role. Whenever judges of one court refer to or even quote a judgment of another court, they do so only as an example of one possible solution, a solution that was adopted by the colleagues of another international court.⁹ This explains why express citation of judgments of other international courts is rare, significant variations from court to court notwithstanding. Although some judges might be more willing than others to cite other international courts, citing in international judgments will generally be done sparingly, selectively, and reluctantly.

Having said that, whenever international courts borrow jurisprudentially from one another they seem to follow a certain logic that dictates "why" and "how." Thus, our first hypothesis is that international judges have a strong

8. *See, e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶¶ 43-44 (Nov. 30, 2007).

9. DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 120 (2007).

preference for the development of an orderly international judicial system. Second, whenever given a chance, international courts will try to reinforce each other's jurisprudence by citing each other's decisions or, more subtly, nodding and winking at each other. Third, the formal nature of a judicial finding does not matter. Judges will consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, non-binding advisory opinions, or other determinations.

The hypotheses presented in this paper about the dynamics and premises underlying the international jurisprudential dialogue provide insight into the structure of the international judicial network itself. Indeed, dialogue dynamics both reveal and shape hierarchies, suggesting that the emerging "international judicial system" is not symmetrical and decentralized, but rather that certain links are stronger than others and certain nodes superior to others. Thus, a fourth hypothesis is that the emerging international judicial network is hierarchically structured. Three corollaries hypothesize what the structure is: specialized courts will consider, quote and defer to generalist courts; universal courts might consider, but will hesitate before quoting, jurisprudence of regional courts; and international courts will give little precedential value to decisions of national courts.

My hypotheses are not merely analytical. They also suggest some important fundamental normative questions: Is the process of judicial dialogue legitimate? Does dialogue and jurisprudential cross-fertilization increase or decrease the legitimacy of international judicial actors?

The hypotheses, which stem from empirical observation done elsewhere, are tentative.¹⁰ The role of precedent across

10. These hypotheses largely stem from empirical observation developed, and subsequently refined, during the work leading to the book *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES*. *Id.* The book employed social science methodology to shed insight on international judges and the networks in which they operate. The core of the analysis relies on a set of thirty-two interviews of international judges carried out over about eighteen months between 2004 and 2005, complemented by literature. The sample represented about one international judge out of seven. Interviews were of 2 to 3 hours each on the basis of a common protocol, which was followed loosely. They covered much ground, including aspects of the international

international courts is still a largely unmapped territory. While most literature to date has focused on the treatment by courts of their own precedents,¹¹ there have been very few studies about the treatment of precedent *across* international courts.¹² There is little comparative evidence of how frequent

judicial profession, such as the career and day-to-day work aspects, sociology of courts, deliberations, and interactions of the bench with other organs of the court, as well as relationships with international organizations, member states, the public, and, crucially, other international courts. The interview protocol included three specific questions on this issue: "How do you think this court relates or should relate to other international courts? Does this court take into account the decisions of other international courts? How would you characterize your relationship with judges of other international courts?" *Id.*

11. See, e.g., MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT (1996); Volker Röben, *Le précédent dans la jurisprudence de la Cour Internationale*, 32 GERMAN Y.B. INT'L L. 382 (1989) (use of precedent in the International Court of Justice); Michal Balcerzak, *The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights*, 27 POLISH Y.B. INT'L L. 131 (2004-2005); Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999) (use of precedent in WTO law, traced back to ICJ jurisprudence); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in International Adjudication (Part Three of a Trilogy)*, 33 Geo. Wash. Int'l L. Rev. 873 (2001); Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-Precedent Rule in International Trade Law: Looking Toward Stare Decisis in WTO Dispute Settlement*, 29 N.C. J. INT'L L. & COM. REG. 487 (2004); Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171 (1998); Claire Harris, *Precedent in the Practice of the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 341 (Richard May et. al. eds., 2000); Iain Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 AUSTRALIAN Y.B. INT'L L. 299 (1999); Luzius Wildhaber, *Precedent in the European Court of Human Rights*, in PROTECTION DES DROITS DE L'HOMME: LA PERSPECTIVE EUROPÉENNE, MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL 1529 (Paul Mahoney et. al. eds., 2000); Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT'L & COMP. L. J. 221 (2003).

12. For an early study of precedent across international courts, see Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 LEIDEN J. INT'L L. 483 (2002). Moreover, since arbitration plays a major role in the settlement of international and transnational disputes, it is lamentable that there are even fewer studies that include within their scope both arbitral awards and judgments of international courts. For a study of precedent in international arbitration, see PRECEDENT IN INTERNATIONAL ARBITRATION, EMMANUEL GAILLARD (ED.)

judicial borrowing—explicit or implicit—is and what may explain variation amongst courts.¹³

Of course, each hypothesis is falsifiable, too. They should be thoroughly tested. This paper, in other words, is not an attempt to put forward a coherent overarching theory, based on a complete set of mutually reinforcing and interlocking hypotheses, but, more modestly, it is an invitation to further research.¹⁴

The task of empirically validating hypotheses in this field is laborious and complex. First, it is difficult to find incontrovertible empirical evidence of jurisprudential dialogue. We know that judges (or the clerks who help in the drafting of their judgments) read cases of other courts.¹⁵ Some have even served on more than one international court.¹⁶ What we cannot exactly gauge is what impact any given major judgment of one court has on specific cases considered by other courts.¹⁷ For reasons that I will explain below, international courts rarely cite other courts. Besides, focusing on citations might be misleading. Processes of acculturation, as opposed to persuasion, play an important

(2008). FOR SOME ANECDOTAL EVIDENCE OF JUDICIAL BORROWING BETWEEN A SPECIFIC FAMILY OF INTERNATIONAL COURTS (CRIMINAL COURTS), SEE PATRICIA WALD, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT'L & COMP. L. REV. 15 (2007).

13. Ryan Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32 LAW AND SOC. INQUIRY 789 (2007).

14. As this paper was written, Erik Voeten, at the Edmund A. Walsh School of Foreign Service and Government Department at Georgetown University, was working on a paper which provides much empirical evidence of some of the hypotheses presented in the paper and also puts forward more and different explanations of the dynamics underlying the international judicial dialogue. Prof. Voeten and I worked independently of each other and were unaware of each other's work until we were very advanced in our respective works. Erik Voeten, *Borrowing and non-Borrowing among International Courts*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1402927.

15. See TERRIS ET AL., *supra* note 9, at 98 ("Contrary to what one would think, we at the ICJ do read decisions of other courts that bear on what we are doing.") (profile of ICJ Judge Thomas Buergenthal).

16. *Id.* at 30.

17. Besides, a major limitation of using judicial decisions as a data source is that working backwards from decision to influences assumes a straightforward relationship between the influencing factor(s) and the decision. Considering the host of factors (micro and macro) that influence judges' decision-making, that might lead to grossly inaccurate inferences.

role in relations between international actors.¹⁸ A contextualized study of international jurisprudence might help reveal acculturation of one court to others, but paradoxically, while for long the fundamental problem was a dearth of courts and jurisprudence, we probably now have the opposite problem, rendering a thoroughly complete research project encompassing a large and diversified range of courts over a significant time span a daunting task.

A second approach, complementary to the first, would be a sociological and anthropological analysis of judges, based on direct interviews or first-person accounts.¹⁹ However, there are significant problems with this approach, too. First, the material gathered is unavoidably highly anecdotal, even when it is submitted to a check against the literature. Second, even to the extent that it is possible to identify the inclinations of a particular court, dictated by like-minded groups of judges within that body, judges have an innate reluctance to discuss their own mental processes and the group dynamics that lead to the crafting of a decision. They are loath to restrict their options. The mystery surrounding their work provides them

18. "Acculturation" is best described as "the process by which actors adopt the beliefs and behavioral patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviors or the material costs and benefits of conforming to them." Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical and Normative Challenges*, 54 DUKE L. J. 983, 992-93 (2005). Cognitive and social pressures drive acculturation. Cognitive pressures induce change because actors are motivated to minimize cognitive discomfort (such as dissonance), while social pressures induce change because actors are motivated to minimize social costs. *Id.* at 993 n.36. Acculturation is contrasted with *persuasion*, which can be described as processes of social learning and other forms of information conveyance that occur in exchanges with transnational networks. Persuasion requires argument and deliberation in an effort to change the minds of others. The touchstone of the overall process is that actors are consciously convinced of the truth, validity, or appropriateness of a norm, belief, or practice. In short, whereas persuasion denotes the *content* of a norm, acculturation refers to the *relationship* of the actor to a reference group or wider cultural environment. On the point, see generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (forthcoming 2010).

19. Interviews are the main tool employed in INTERNATIONAL JUDGE., *supra* note 10. For an example of a first-person account by a former ICTY judge, see Wald, *supra* note 12.

with critical room to maneuver.²⁰ Third, accessibility to judges might produce biased results. Judges are notoriously difficult to investigate, especially in depth.²¹ Probably those who are willing to talk at length to scholars about what happens in the sanctum are also those who are most open to dialogue with their colleagues in other courts. Fourth, judges might not be entirely frank in their answers. They usually have an acute social awareness and tend to speak and write with an audience in mind and, thus, are likely to present themselves and their actions in a way that they think will be received favorably.²²

That said, methodological challenges, which have largely been overcome in analyses of judiciary at the national level, should be no excuse for postponing the further development of a sophisticated understanding of the logic, direction, and dynamics of the international jurisprudential dialogue.²³ For

20. RICHARD POSNER, *HOW JUDGES THINK* 3 (2008) (“The secrecy of judicial deliberations is an example of professional mystification. Professions such as law and medicine provide essential services that are difficult for outsiders to understand and evaluate. Professionals like it that way because it helps them maintain a privileged status. But they now have to overcome the laity’s mistrust, and they do this in part by developing a mystique that exaggerates not only the professional’s skills but also his disinterest. Judges have been doing this for thousands of years and have become quite good at it . . . Judges have convinced many people—including themselves—that they use esoteric materials and techniques to build selflessly an edifice of doctrines unmarred by willfulness, politics, or ignorance.”).

21. See Theodore L. Becker, *Surveys and Judiciaries or Who’s Afraid of the Purple Curtain?*, 1 *LAW & SOC’Y REV.* 133 (1966-1967) (discussing the difficulties of studying judges and noting that “the scientific study of the judicial process is one of the least developed areas in all of political science and sociology”).

22. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 19 (1997).

23. There is a rich and growing literature discussing strategies of analyzing judicial behavior at the national level. See, e.g., James Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *POLITICAL BEHAVIOR* 7 (1983) (illustrating the richness of theories of judicial behavior); Nancy Maveety, *The Study of Judicial Behavior*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 1 (Nancy Maveety, ed., 2003) (introducing a framework for understanding other authors’ studies of judicial behavior); BAUM, *supra* note 22; Charles A. Johnson, *Strategies for Judicial Research: Soaking and Poking in the Judiciary*, 73 *JUDICATURE* 192 (1989-1990) (discussing the use of personal observation and interviews); NORMAN DENZIN, *THE RESEARCH ACT: A THEORETICAL INTRODUCTION TO SOCIOLOGICAL METHODS* (3d ed. 1989) (introducing sociological methods of research). For a recent particularly insightful study of judicial behavior that combines socio-legal

long, scholars saw little need for that. International courts do not make international law, but merely apply it. Decisions of international courts do not have the force of law, and are not legally binding beyond the particular states and the particular facts in a given case.²⁴ Moreover, the received notion is that decisions of international courts occupy the bottom rung of the hierarchy of sources of international law to which the drafters of the Statute of the Permanent Court of International Justice relegated them almost a century ago.²⁵ They are not a source of international law *per se* but are merely subsidiary sources, as much as “the teachings of the most highly qualified publicists of the various nations.”²⁶ And, finally, decisions of international courts were few and far between. All these considerations made an overarching theory of precedent across international courts hardly a necessity.

That is no longer the case.²⁷ The number, pace, and impact of international judicial decisions has exponentially

research methodologies with first-person accounts, see POSNER, *supra* note 20. Posner identifies nine main theories of judicial behavior (attitudinal, strategic, organizational, economic, psychological, sociological, pragmatic, phenomenological, and legalistic). Posner laments that this literature has been ignored by most academic lawyers (although he concedes that this is changing) and by virtually all judges because of its “dearth of implications for the understanding or reform of legal doctrine and in part because it challenges the mystique of an apolitical judiciary, in which lawyers and professors are heavily invested.” *Id.* at 7 n.15.

24. Statute of the International Court of Justice art. 59, *opened for signature* June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, [hereinafter I.C.J. Statute], *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”). *See generally supra* note 9 (compiling articles explaining the legal value of judicial precedent in international courts).

25. Statute of the Permanent Court of International Justice art. 38.4, Dec. 16, 1920, 6 U.N.T.S. 391 [hereinafter P.C.I.J. Statute] (listing judicial decisions as the last source that the court should apply); I.C.J. Statute *supra* note 24, art. 38.1(d).

26. P.C.I.J. Statute, *supra* note 25 art. 38.4; I.C.J. Statute, *supra* note 24 art. 38.1(d). Admittedly, international courts’ decisions were never treated exactly as legal scholarship. The P.C.I.J. and the I.C.J. relied extensively on their own precedents but hardly ever on literature.

27. *See generally* David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, 100 AM. SOC. INT’L L. PROC. 55 (2006) (proposing a frame for studying the system of international courts

increased.²⁸ *De facto* decisions of international courts are changing the face of international law, and increasingly define the contours of the legal obligations that states face—in certain cases all states, including those that are not subject to the court’s jurisdiction, and even those that do not exist yet.²⁹ In sum, an “international common law” that is able to evolve without formal agreement between states is emerging,³⁰ making it all the more paramount to understand the forces, hierarchies, and principles underlying the international jurisprudential dialogue and the resulting lawmaking process.

The first four hypotheses are about the preferences of international judges and how such judges will relate to other courts. The fifth hypothesis is that the emerging international judicial network is hierarchically structured. Four corollaries hypothesize as to what this structure is.

I. HYPOTHESIS #1: JURISPRUDENTIAL HARMONY

The first hypothesis is that international judges have a strong preference for the development of an orderly international judicial system.³¹ Of course, one should not underestimate the potential for significant, and to an extent unavoidable, discord between international courts, particularly in the area of international crimes, which is undergoing tumultuous

and tribunals in response to the growing need for understanding this system).

28. For some recent accounting, see Karen J. Alter, *Delegating to International Courts: Self-Binding v. Other-Binding Delegation*, 71 *LAW & CONTEMP. PROBS.* 38, 57-60 tbl. 2 (2008).

29. See Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267446 (discussing the significance of the soft law impact of tribunals); Christopher G. Weeramantry, *The Function of the International Court of Justice in the Development of International Law*, 10 *LEIDEN J. INT’L L.* 309, 313 (1997) (“It is an incontrovertible fact that a decision choosing one of two or more alternative courses equally available to the judge has an impact upon the understanding of the law in the future. . . . Especially if it is an important or path-finding decision, the living law is not the same thereafter.”)

30. See generally CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (2007). See also GUZMAN & MEYER, *supra* note 29, at 1.

31. Some would argue that an orderly international judicial system is a necessity. See *infra* Part V, ¶ 2 (“Conclusion & Normative Implications”).

and rapid growth.³² However, whenever possible, they will likely frame their judgments in such a way as to minimize the chances of conflict with judgments of other courts.

For instance, if judges of one court feel differently from those of another court on a given point of law, out of judicial comity they will often simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say “they got it wrong” will generally be avoided, and probably even severely frowned upon.³³ For instance, when the Special Court for Sierra Leone had to decide whether Liberia’s former President, Charles Taylor, was immune from trial, a relevant ICJ case, the *Yerodia*,³⁴ was cited profusely.³⁵ The Special Court showed utmost regard for the jurisprudence of the prin-

32. Elements of the crime of pillage are one such area. Compare Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Judgment ¶ 754 (June 20, 2007) (finding that “the requirement of ‘private or personal use’ is unduly restrictive and ought not to be an element of the crime of pillage”), and Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Judgment ¶ 160 (Aug. 2, 2007) (holding that “the inclusion of the requirement that the appropriation be for private or personal use [to be] an unwarranted restriction on the application of the offence of pillage”), with ICC Elements of Crimes art. 8(2)(b)(xvi) element 2, ICC-ASP/1/3(part II-B) (Sept. 9, 2002) (requiring that “[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”), and *id.* at n. 47 (“appropriations justified by military necessity cannot constitute the crime of pillaging”). Cf. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) ¶¶ 237-50, 2005 I.C.J. 116 (Dec. 19).

33. However, there are some very notorious exceptions, as when the ICTY tribunal chastised the ICJ in the decision of its appeals chamber in the *Tadic* case. In the earlier *Nicaragua* case the ICJ had to determine whether a foreign State (i.e. the United States), because of its financing, organizing, training, equipping, and planning of the operations of organized military and paramilitary groups of Nicaraguan rebels (the so-called *contras*) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The ICJ held that a high degree of control was necessary for this to be the case. It required that first, a Party not only be in effective control of a military or paramilitary group, but also that the control be exercised with respect to the specific operation in the course of which breaches may have been committed. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). In the *Tadic* appeal decision the ICTY criticized the “Nicaragua test” as not consonant with the logic of the international law of state responsibility and at variance with judicial and state practice. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 116-145 (July 15, 1999).

34. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. 1 (Feb. 14).

cial judicial organ of the United Nations, but it still opted to interpret the immunity rule more restrictively than the ICJ ever did. It did so by distinguishing *Yerodia* from *Taylor*, and was thus able to depart from it without necessarily engaging the ICJ in a theoretical diatribe over the scope of immunity of heads of state from criminal prosecution.

Likewise, whenever judges of one court feel the need to depart from established case law or practices followed by other courts, they will usually try to avoid arguments on the merits of the other court's decision-making. Rather, they will stress differences in the respective constitutive instruments and missions. Recently, for instance, an ICC Pre-Trial Chamber,³⁶ subsequently confirmed by a Trial Chamber,³⁷ prohibited the practice of "witness proofing."³⁸ In doing so, it broke with the established practice of several UN international criminal tribunals, including the ICTY, ICTR, and Special Court for Sierra Leone.³⁹ The Trial Chamber noted that proofing is in common use at the ICTY and ICTR, but that the ICC Statute "through important advances . . . moves away from the procedural regime of the ad hoc tribunals, introducing additional

35. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, May 31, 2004.

36. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, Pre-Trial Chamber I (Nov. 8, 2006).

37. Prosecutor v. Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06, T. Ch. I (Nov. 30, 2007).

38. Witness proofing can be described as "a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarise the witness with courtroom procedures and to review the witness's evidence." Prosecutor v. Haradinaj, Case No. IT-04-84-T, Trial Chamber I Judgment, ¶ 8 (May 23, 2007). "Proofing" is a term used in Commonwealth adversarial systems, and is less formally known as witness "preparation" in the United States. See, e.g., John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989) (providing a broad overview of witness preparation in practice, and analyzing doctrinal uncertainties inherent in the witness preparation process).

39. See Ruben Karemaker et al., *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 LEIDEN J. INT'L L. 683 (2008) (providing a detailed review of the ICTY, ICTR, and SCSL practices before and after the ICC decision in the Lubanga case).

and novel elements to aid the process of establishing the truth."⁴⁰

II. HYPOTHESIS #2: JURISPRUDENTIAL TEAMWORK

Whenever given a chance, international courts will try to reinforce each other's jurisprudence by citing each other's decisions or, more subtly, nodding and winking at each other. By "nodding and winking" we mean implicitly accepting the substantive point of view of the other court without citing or referring to it. There might be a weak explanation for this kind of behaviour: the preference for the development of an orderly international judicial system may push international judges from mere conflict-avoidance to teamwork. However, there might also be a more convincing explanation. International courts are not supposed to write international law.⁴¹ Indeed, *de jure* rulings of international courts are not a source of international law.⁴² International judicial decisions interpret binding legal obligations, but are not themselves legally binding beyond the particular states and the particular facts in a given case. The standard notion is that in the hierarchy of

40. *Lubanga*, Giving Testimony at Trial, ¶ 45.

41. The only formally sanctioned law-making role of international courts is the adoption of their own rules of procedure. However, there are exceptions like the ICC, where rules of procedure were drafted and adopted through a classical diplomatic negotiation process. TERRIS ET AL., *supra* note 9, at 108-109.

42. In the *Legality of the Threat or Use of Nuclear Weapons*, the I.C.J. went out of its way to make clear that it is not a legislator of any sort:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), ¶ 18. In reality, it is exactly when "specifying the scope of the applicable law and noting its trend" that international judges have a chance to play a part in shaping or reshaping, progressively or regressively, international law.

sources of international law, these decisions are only a “subsidiary means for the determination of rules of law.”⁴³ International judges are fully aware that international law-making is highly controversial. But from time to time, reluctantly,⁴⁴ and often out of necessity,⁴⁵ they push the international law envelope by developing law in areas where it is either unclear or has been left unregulated by the primary lawmaker—sovereign states. Yet, if just one international tribunal argues that, for example, a given behaviour amounts to a war crime, or a crime against humanity, or even genocide, but no other international tribunal trying individuals who have committed similar acts repeats the same finding, the capacity of that original ruling to modify or add to the fabric of international law is limited. If other international criminal bodies repeat the same finding, though, and so long as the decision is not contested too loudly or by too many governments, over time it will be very difficult to argue that behaviour is not an international crime and should not be prosecuted.⁴⁶

43. P.C.I.J. Statute, *supra* note 25 art. 38.4.

44. We call them “reluctant radicals.” INTERNATIONAL JUDGE, *supra* note 10, at 118-119. See also POSNER, *supra* note 20, at 13 (Richard Posner uses the term “constrained pragmatists” when talking about law-making by judges in the U.S. legal system).

45. *Non liquet*, that is to say the impossibility of the court to decide the case because there is no law applicable, is a very rare event in international jurisprudence, not so much because international law is a complete and perfect legal system with no loose ends (S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18), but because international courts loathe abdicating their ultimate function, which is settling (or attempting to settle) the dispute. The doctrine of *non liquet* has never been invoked by either a WTO panel or the Appellate Body to permit or excuse a member’s behavior. Indeed, the only reference to the concept in any WTO panel or Appellate Body report was critical of the principle. See Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, ¶ 3.119, WT/DS90/R (Apr. 6, 1991). Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT’L L. 247, 260 (2004). On *non liquet* and its application to a particularly politically sensitive case at the World Court, see Daniel Bodansky, *Non Liquet And The Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999). See also Kati Kulovesi, *Legality or Otherwise? Nuclear Weapons and the Strategy of Non Liquet*, 10 FINNISH Y.B. INT’L L. 55 (2002).

46. There are several examples of such “envelope pushing.” In the *Akayesu* case, the ICTR found the mayor of Taba commune in Rwanda guilty

The process is somewhat paradoxical, but it is also one well known in common law, and more specifically in case law-based, systems.⁴⁷ The initial finding by the first tribunal is formally wrong, either because it contradicts black-letter law or generally accepted custom, or because there is no such norm of international law proscribing the given behaviour. But as the saying goes, “Repeat a lie a thousand times and it becomes the truth.”⁴⁸ The echo effect can be significant. While in theory international judges cannot make international law, they are also fully aware that in the end they might achieve law-making effects through repeated mutual reference. Thus, the hypothesis is that, when given an opportunity,⁴⁹ whenever judges find the normative outcome of decisions by other courts desirable, they will cite or nod to that decision in order to reinforce its precedential value.

Studying the increasingly tight and symbiotic relationship between the European Court of Justice and the European Court of Human Rights, scholars have recently suggested that international courts might attempt to frame this jurisprudential dialogue strategically, with the aim of allowing each other to increase domination of public and private actors who march into judicial arenas.⁵⁰ Of course, the applicability of this in-

of genocide through the use of rape. Prosecutor v. Akayesu, Case No. ICTR 96-4T (Oct. 2, 1998). While systematic and widespread rape during conflicts had long been considered a crime, actual prosecution had been rare even by national authorities, and surely it was always construed as a simple war crime but not as genocide, the crime of crimes. In the Media Case, the ICTR sentenced two Rwandan journalists to life and a third for thirty-five years on charges of inciting Hutu soldiers, militia, and civilians to murder hundreds of thousands of Tutsi and moderate Hutu. Prosecutor v. Nahimana, Barayagwiza, Ngeze, ICTR-99-52-A (Nov. 28, 2007). For the first time since the Nuremberg trials, an international court convicted journalists of inciting genocide.

47. “We must not confuse ‘common law’ with ‘case law.’ Ours [i.e. the U.S. legal system] is a case law system that includes but is not exhausted in common law.” POSNER, *supra* note 20, at 83.

48. Usually credited to a mastermind of manipulation of truth, Dr. Joseph Goebbels, Propaganda Minister of the Third Reich!

49. International courts do not have the power to pick and chose which cases they want to consider, as the U.S. Supreme Court does through its power to issue *writs of certiorari*.

50. See LAURENT SCHECK, INTER-JUDICIAL DIALOGUE, INSTITUTIONAL AND FUNCTIONAL LEGITIMACY IN SUPRANATIONAL JUDICIARY SPACES (2008), available at http://www.allacademic.com/meta/p251223_index.html (discussing “in-

sight to all international courts is limited by the very special nature of the relationship of the two courts, which have largely overlapping *ratione materiae* and *ratione personae* jurisdiction, but it provides strong evidence that international courts do coordinate their behaviours, even when they belong to two separate international organizations and, by design and statute, should not do so.

III. HYPOTHESIS #3: JUDICIAL DIALOGUE IS NOT AND WILL NOT BE FORMAL, AND DOES NOT REQUIRE PERSUASION

Third, the formal nature of a judicial finding does not matter. Judges will consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, non-binding advisory opinions, or other determinations of the court. What they look at is the jurisprudence rather than any specific case, and what ultimately seems to matter is only that the *ratio decidendi*, the reasoning that led the other tribunal to a given conclusion, is legally sound, plausible, and normatively desirable.

Studying how processes of “acculturation” shape human rights dialogue between courts, Ryan Goodman and Derek Jinks have noted that many of the relevant exercises of borrowing by judges encompass a broad range of foreign law including legislative acts, constitutional texts, and constitutional structures. These alternative materials are generally distinct from court opinions in that they do not provide a clear, formal explication of the reasoning behind the relevant foreign legal outcomes. Accordingly, Goodman and Jinks argue, focusing

sights into the inner circles of emerging transnational judiciary networks and to assess the impact of inter-judicial dialogues”); *see also* Laurent Scheeck, *The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?*, in *THE ECJ UNDER SIEGE: NEW CONSTITUTIONAL CHALLENGES FOR THE EUROPEAN COURT* (Giuseppe Martinico & Filippo Fontanelli eds.) (forthcoming 2009) (exploring how judges of the European Court of Justice and European Court of Human Rights have endeavored to establish transnational epistemic communities that serve as a vehicle for integration with the aim of increasing each other’s voice and power); Laurent Scheeck, *The Relationship Between the European Courts and Integration through Human Rights*, 65 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* (HEIDELBERG J. INT’L L.) 837 (2005) (exploring in depth the interplay between the European Court of Justice and the European Court of Human Rights).

on court-to-court communications creates an artificial sense that reason-giving and factors such as the logical coherence of an argument are critical to the exchange, when they are not necessarily so. Receiving courts' regard for a wider array of sources raises doubts about the extent to which judicial borrowing reflects concern for reasoned opinions and justifications rather than concern for general legal patterns and results among relevant foreign states.⁵¹

While Goodman and Jinks talk about dialogue between national courts across boundaries, their reasoning could be applied *mutatis mutandis* to international courts, with the important caveat that the latter dialogue is about a much more homogeneous body of law—international law—than in the former case. Still, acculturation seems to explain international jurisprudential dialogue (or “borrowing” as Goodman and Jinks prefer to say) better than persuasion. Persuasion requires the persuaded to admit having been persuaded. An international court might have trouble admitting having been persuaded because it might then appear to be under the clout or shadow of another court, which would run contrary to the idea that such courts are autonomous and self-sufficient judicial bodies. However, acculturation can be, and often is, unconscious and does not require admission of having been persuaded. The important offshoot of this is that networks of judges, or what Anne-Marie Slaughter calls “communities of judges”⁵² or “epistemic communities,”⁵³ are not necessarily central to the jurisprudential dialogue.

Also, the informality of this process of jurisprudential dialogue and borrowing provides courts with significant leeway, thus minimizing the cost, in terms of loss of autonomy, of the emergence of hierarchical relations. For this reason alone, attempts by member states to formalize relations between courts are going to meet significant resistance first and foremost from the courts themselves, making it difficult for anything but the weakest forms of formal coordination to emerge.

51. See generally GOODMAN & JINKS, *supra* note 18.

52. Slaughter, *supra* note 4.

53. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 2 (1992).

IV. HYPOTHESIS #4: JUDICIAL HIERARCHY

The fourth hypothesis is that, despite the fact that international courts are formally all equal and self-contained, international judges unconsciously recognize divisions and hierarchies.⁵⁴ Empirical observation suggests that courts are divided between generalist (i.e. the ICJ) and specialized fora, meaning all other international courts, such as the WTO Appellate Body, International Tribunal for the Law of the Sea (ITLOS), and International Criminal Court (ICC), as well as between regional courts, such as the European Court of Justice or the Caribbean Court of Justice, and the so-called “universal courts” whose jurisdiction is not restricted to any particular geographic area, such as the ICJ, WTO Appellate Body, ITLOS, and ICC. The structure of this emerging informal international judicial system can be sketched in three corollaries.

A. *First Corollary: Generalists trump specialists*

The first corollary to the fourth hypothesis is that specialized courts will consider, quote, and defer to the ICJ. It should be stressed that deference to the ICJ will be based not so much on the enhanced status of that court as the “principal judicial organ of the United Nations,”⁵⁵ or its seniority, having been in operation essentially since World War I, or a belief that its judges are inherently better or wiser. Rather, it will be justified by the fact that the ICJ is the international court with the largest jurisdiction *ratione materiae*, as it can hear any dispute on any matter of international law.⁵⁶ But the hypothesis is that deference will be paid only on matters of *general* public international law, which, in any event, are rarely raised before specialized courts.

Arguably, this should also imply that the ICJ will defer to specialized tribunals or bodies in matters regarding which they have special knowledge or competence. For instance, in the advisory opinion on the *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory* (the *Wall*), the ICJ

54. Voeten has empirically mapped citation patterns between courts. See Voeten, *supra* note 14, at 35-37, tbl. 1. However, he counts only actual instances of citation, neglecting the fact that courts do not need to cite each other to influence each other.

55. UN Charter art. 92.

56. I.C.J. Statute arts. 36.1-2.

referred to statements by the United Nations Committee on Human Rights on the need for restrictions to rights listed in the fundamental human rights covenants to be the least intrusive possible and proportional to the desired ends.⁵⁷ In 2007, in a dictum to the *Genocide Convention* case (Bosnia v. Serbia), the Court showed remarkable willingness to defer to the ICTY, a UN specialized criminal court: “The Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute.”⁵⁸ However, both the ICTY and the Committee on Human Rights are UN bodies, like the ICJ. It remains to be seen whether the ICJ would be willing to be as deferential towards a specialized tribunal not part of the UN family, or even the ITLOS, as the ICJ and its judges have a tendency to consider themselves the linchpin of the international judicial system, occupying in the hierarchy an exalted status similar to that of the Supreme Court of the United States in the American legal system.

Moreover, the ICJ’s deference to certain specialized bodies is qualified. In the *Wall* advisory opinion, it cited the United Nations Committee on Human Rights to find support for the finding that States are bound to respect human rights protected by the Covenant on Civil and Political Rights within their jurisdiction, even if outside of their territory.⁵⁹ But rather than taking the Committee’s word for it, the ICJ proceeded to independently verify whether the *travaux préparatoires* of the Civil and Political Rights Covenant supported that conclusion.⁶⁰ More pointedly, as the ICJ contin-

57. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *The Wall*], ¶ 136.

58. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. ¶ 403 (Feb. 26), [hereinafter *Application of the Genocide Convention*].

59. *The Wall*, *supra* note 57, ¶ 109.

60. *Id.* (“The *travaux préparatoires* of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not

ued in the *Genocide* case, “[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it”—a stiff-lipped rebuke to the ICTY for having departed, in the 1999 *Tadic* case, from the standards set by the ICJ in the *Nicaragua* case on state responsibility for actions of paramilitary units.⁶¹

B. *Second Corollary: Universal courts trump regional courts*

Universal courts might consider quoting jurisprudence of regional courts, but will hesitate to do so because they will not want to attribute particular value to the jurisprudence of this or that region in the determination of rules of international law of universal import.⁶² Granted, the ICJ, in the above-mentioned *Genocide* case, did cite and even defer to the ICTY, a regional tribunal. But the ICTY is a regional tribunal *sui generis*, being an organ of the UN, a universal organization. Also, sometimes the WTO Appellate Body reviews the case law of regional courts—for instance, a Mercosur ad hoc Arbitral Tribunal in the *Tires* case—although not for general propositions on the law.⁶³

Considering that there are at least a dozen regional international courts, some of which—such as the European Court of Justice, the European Court of Human Rights, or the Andean Court of Justice—have dockets and relevance within their regions far superior to that of universal courts, the restraint is regrettable. It undercuts, in the name of a show of even-handedness, vast and rich sources of jurisprudence.⁶⁴

fall within the competence of that State, but of that of the State of residence.”).

61. Application of the Genocide Convention, *supra* note 58, ¶ 144.

62. One ICJ judge interviewed for INTERNATIONAL JUDGE expressed the concern that “if we cite the European Court of Human Rights [hereinafter ECHR], somebody from Africa might say, ‘Why are they relying on this European court as the authority?’” TERRIS ET AL., *supra* note 9, at 121.

63. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tires*, WT/DS332/R (June 12, 2007).

64. While the European courts are well studied, the Andean Court, which has decided about 1,300 cases to date, making it one of the most prolific international courts, has just begun attracting scholarly attention. *See*

Conversely, regional courts should not feel any particular qualms considering and quoting, if needed, “universal” courts and, therefore, the prediction is that, whenever appropriate, they will do so. *Ubi maior minor cessat*.

C. *Third Corollary: National courts are no authority*

While the distinction between international and national courts has significant formal and practical significance, it obscures the fact that judicial dialogue on international law takes place also between international and national courts, and between various national courts.⁶⁵ Moreover, one could argue that when national courts apply international law to decide cases they are *de facto* acting as international courts, too.⁶⁶ If a truly viable theory of international jurisprudence ought to include all judicial institutions, national and international, what hypothesis can be articulated about how international courts will regard the decisions of national courts?

Much like the decisions of international courts, decisions of national courts are just a documentary source that can be used to provide evidence of a rule generated by one of the primary sources.⁶⁷ But while decisions of international courts do add to, or change, the fabric of international law, the impact on substantive international law of decisions by national courts is limited by several factors. First, domestic courts are relatively rarely called upon to apply rules of international law.⁶⁸ To the extent they do, often those rules have been in-

Laurence Helfer et al., *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 109 AM. J. INT'L L. (forthcoming 2009).

65. Some scholars include in their analysis both national and international courts. See, e.g., Martinez, *supra* note 6; Slaughter, *supra* note 4.

66. Yuval Shany, *National Courts as International Actors: Jurisdictional Implications*, HEBREW UNIV. INT'L L. RESEARCH PAPER NO. 22-08, 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292056.

67. As a matter of fact, the PCIJ and ICJ statutes only refer to “judicial decisions . . . as subsidiary means for the determination of rules of law,” thus implicitly including decisions of national courts. See I.C.J. Statute & P.C.I.J. Statute.

68. For instance, the Oxford Reports on International Law in Domestic Courts, a database collecting references to international law made by domestic courts, contained, by July 2008, just 350 cases from over 75 jurisdictions. OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, www.oxfordlawreports.com.

corporated into the domestic legal system. At least formally, therefore, they are no longer “international.” It follows that the jurisprudence of domestic courts can rarely offer much help to international courts in determining the content of specific rules of international law. They are a more useful source when it comes to searching for general principles of law, or for evidence of state practice when determining the content of a rule of customary international law.

Decisions by national courts, thus, will be considered purely as a last resort, to be looked at only when international sources do not help. One judge explains:

National case law will come into play mostly when international sources don't give an answer. For example, when there is a matter of what is impartiality, there is no need to go to a Canadian or German Supreme Court and find out what impartiality is when you have established case law at the global and regional level. So it becomes more subsidiary. But when it comes to, say, the question of a rather procedural issue that has never been dealt with in human rights case law, and which is very criminal law-oriented, then, why not look at the national level and try to distill, to find out what is the common denominator here, or what is the best solution, even if it is not the common denominator?⁶⁹

Granted, attitudes toward national case law might vary from international court to international court and from judge to judge. The civil law/common law divide might play a role in this variation, with international courts or regions that are in mostly common law regions being more open to “judicial borrowing” from other national courts.⁷⁰ The Special

69. TERRIS ET AL., *supra* note 9, at 122.

70. After all, common law countries are used to “judicial borrowing” from national courts of other countries belonging to the common law family. For instance, following the American Revolution, one of the first legislative acts undertaken by each of the newly independent states was to adopt “reception statutes” that gave legal effect to the existing body of English Common Law. Some states enacted reception statutes as legislative statutes, while other states received the English common law through provisions of the state's constitution. For example, the New York Constitution of 1777 provides that “[S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the

Court for Sierra Leone, for example, felt free, when considering matters of immunity, to draw upon the decision of the British House of Lords regarding Chilean dictator Augusto Pinochet.⁷¹ Similarly, it referred to both U.S. and British decisions in a case that came before the appeals chamber regarding judicial independence.⁷² The European Court of Justice, an international court with roots solidly in the civil law tradition, rarely cites national judgments, presumably for the same reason universal courts do not want to seem to rely on regional courts.⁷³ It also has to be noted that the ECJ does not cite the national courts of member states either, with the exception, of course, of referrals for preliminary rulings by member states' national courts.

Thus, to the extent one can theorize about a "universal judicial system" comprising both national and international courts, it seems that national courts are subordinate to international ones, at least from the international court's perspective. This is a proposition that is likely hardly acceptable to national courts, which, being imbued with national sovereignty—the ultimate source of legitimacy—consider themselves more legitimate.⁷⁴ The prediction is that over time national and interna-

colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same." N.Y. CONST. OF 1977 (1821). Cf. BASIC LAW OF HONG KONG, art. 8 ("The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.").

71. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004), at 24.

72. Prosecutor v. Norman, Case No SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Mar. 13, 2004), at 1137-38.

73. As one of the European Court of Justice [hereinafter ECJ] judges interviewed for INTERNATIONAL JUDGE noted, "[i]f one refers to the U.S. Supreme Court on matters such as antitrust law or questions of discrimination, one should be, in principle, open to do that also with, say, the supreme court of any other country." TERRIS ET AL., *supra* note 9, at 122.

74. That cannot also be squared with the "principle of complementarity," which subordinates the ICC to national jurisdictions. If a case is being considered by a national court, then the ICC cannot act unless the national

tional judges will develop a *modus vivendi* whereby the former recognize the impossibility of the latter citing them expressly, while the latter employ various jurisprudential techniques to signal that full and respectful consideration has been given to the jurisprudence of the former.

V. CONCLUSION & NORMATIVE IMPLICATIONS

As a conclusion, I would like to offer a few considerations about the nature and merits of the process of jurisprudential dialogue between international courts.

Since the absence of a formal relationship between the various international courts is the result of deliberate design, why does the dialogue take place at all?⁷⁵ Some argue that it is inevitable. Since “all legal systems aspire to maintain some degree of legal coherence and coordinated operation of their legal organs in order to increase the system’s effectiveness and legitimacy,”⁷⁶ international courts will inevitably develop strategies to minimize any normative disharmony and jurisdictional confusion associated with their swelling ranks.⁷⁷ Since

court is unwilling or unable genuinely to investigate or prosecute. Rome Statute, Preamble, arts. 1, 17.

75. International courts and tribunals are not created accidentally or spontaneously. To the extent that they are or are not legally and functionally related to each other, it is because there has been a specific and deliberate will to make it so. “[T]he fact is that proliferating tribunals, overlapping jurisdictions and ‘fragmenting’ normative orders. . . arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic.” Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 561 (2002).

76. Shany, *supra* note 66, at 27. As has been noted, for international courts “. . . no attribute is more important than legitimacy. Legitimacy provides courts authority; it allows them the latitude necessary to make decisions contrary to the perceived immediate interests of their constituents. Since courts typically have neither the power of the ‘purse nor the sword,’ this moral authority is essential to judicial effectiveness.” James Gibson & Gregory Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 460 (1995).

77. The greatest fear at the beginning of the phenomenon of the multiplication of international jurisdictions was the fact that it might lead to conflict jurisprudence. See Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT’L L. & POL. 679 (1999). It looks like the worst fears have not been realized. See Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DE COURS 101, 118 (1998).

international law has limited organized institutional structures by default, lacks a strong enforcement machinery, and faces a chronic “legitimacy deficit,” conflicting rulings and jurisdictional battles might have an exceptionally devastating impact on its “systemic welfare,”⁷⁸ and thus ought to, and will, be avoided.

This explains much but does not explain all, since it assumes a large degree of altruism; courts might, from time to time, sacrifice their own interest for an unspecified common cause of international courts or to avoid fragmenting international law and sowing seeds of doubt as to its exact normative content. Yet, to the extent international courts and their judges are primarily motivated by the desire to maximize their own benefits, it might also be in their self-interest to rely on each other’s jurisprudence.

First, it is inefficient to reinvent the wheel every time anew. Courts with overcrowded dockets, like the ECHR, may be inclined to defer to other courts. Moreover, as Jenny Martinez remarked when discussing emerging informal rules regulating relationships between courts (between international courts and between international and national courts), relying on the jurisprudence of other courts might also increase given courts’ power and authority.⁷⁹ “By avoiding unnecessary conflict (either with other courts or with other branches of government), courts increase the likelihood that their decisions will be obeyed. Over time, the habit of obedience to judicial decisions becomes ingrained, allowing them to issue decisions that are more controversial and still achieve a comparable level of compliance.”⁸⁰ In sum, courts might have a natural self-interest in cooperating with each other, even when, in a particular case, cooperation might mean yielding jurisdiction to another court,⁸¹ because in the long run cooperation between two formally unrelated courts can increase the power

78. Antonio Cassese, *Remarks on Scelle’s Theory of “Role Splitting” (dédoublément fonctionnel) in International Law*, 1 EUR. J. INT’L. L. 210, 213 (1990).

79. *Id.*

80. Martinez, *supra* note 6, at 448.

81. *Cf.* Walter Mattli & Anne-Marie Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, in *THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* 253, 261-62 (Anne-Marie Slaughter et al. eds., 1998) (discussing horizontal and vertical inter-court competition in the European context).

(autonomy and legitimacy) of both.⁸² Scholars studying the dialogue between the ECJ and the ECHR have found strong evidence of team-play, with the ultimate aim of “allowing each of the two European institutions to increase their domination of those public and private actors who march into ‘judicial arenas’.”⁸³

Yet, while international judges might increase the legitimacy of their *institutions* by engaging in jurisprudential dia-

82. “[S]upranational judges strategically endeavor to establish transnational epistemic communities that serve as a vehicle for political jurisprudence. As supranational courts try to bring up common ‘jurisprudential screens’ as they relate to each other in order to prevail over national and private actors, they might be able to increase the legitimacy of their courts, i.e. by relying on external norms that are often more compulsory for member states, they tend to increase both their autonomy and their legitimacy.” Scheeck, *supra* note 50, at 1; *see also* Martinez, *supra* note 6, at 448. Strategic cooperation between international courts can also go beyond mere jurisprudential coordination. For instance, when the Inter-American Court of Human Rights decided to go ahead in two cases concerning Peru (Case of Ivcher-Bronstein v. Peru, 1999 Inter-Am. Ct. H.R. (ser. C) No.54, Competence (Sept. 24, 1999); Case of the Constitutional Court v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 55, Competence (Sept. 24, 1999)), despite Peru’s withdrawal from the Court’s jurisdiction, the European Court of Human Rights wrote a spontaneous letter of support through its President, Luzius Wildhaber. The ECHR “fears that the consequences of such action [i.e. Peru’s withdrawal of its declaration of acceptance of the Inter-American Court’s jurisdiction] are serious for the development of the international protection of human rights. The process initiated by the Universal Declaration of Human Rights and followed by the European Convention and the American Convention on Human Rights, the United Nations International Covenant on Economic, Social and Political Rights and the African Charter on Human and Peoples’ Rights, originates in the perception that international legal guarantees are necessary to reinforce the effective protection of the basic rights at national level. In this respect, the role of the international legal organizations is deemed essential to establish and consolidate the precept of law throughout the entire international community, thus helping to ensure peace and stability. This has been recognized in Europe, in your Continent, and also in Africa, where an International Court is already expected to be established. Finding ourselves as close as we are to the end of a century that has witnessed the most horrible human rights violations, it can only be inferred that any movement that attempts to defy the principle of international competence is a step backward at a time when developing the protection of the basic rights constitutes a ray of hope for the new millennium.” Press Release, Inter-American Court of Human Rights, CDH-CP13/99 (Oct. 2, 1999), *available at* <http://www1.umn.edu/humanrts/iachr/pr23-99.html>.

83. Scheeck, *supra* note 50, at 2-3.

logue and borrowing between international courts, at the same time they put at risk the legitimacy of their *function*, should it appear that cases are decided with the aim of furthering institutional interests and wooing other courts, and not in the interest of the parties or the law.⁸⁴

Indeed, one might wonder to what extent the process of jurisprudential dialogue is legitimate.⁸⁵ As we saw, it takes place largely outside formal frameworks. Again, the lack of relationship between courts is not accidental. Different groups of states, often with overlapping but not identical membership, have created different international courts to achieve different goals. At times, creation of a court was the result of dissatisfaction with another court,⁸⁶ and at other times it was the attempt of a group of states to recreate a successful judicial institution created by another group of states.⁸⁷ At least in some cases, diplomats might have unintentionally created overlaps (jurisdictional and substantive) by simply not taking into consideration the multiplicity of courts and jurisdictions.⁸⁸

84. *Id.* at 1.

85. One would not go as far as saying that the jurisprudential dialogue is *ultra vires*, because one might argue it is part of the implicit powers of a judicial institution. See BROWN, *supra* note 30, at 55 (discussing implicit powers of international courts).

86. For example, the genesis of the International Tribunal for the Law of the Sea can be largely explained in terms of rejection of the ICJ, during the early 1970s, which had disgraced itself in the eyes of the majority of the UN General Assembly with the South West Africa cases. South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.), Judgment, 1966 I.C.J. 1, 6 (July 18). See Prince Bola A. Ajibola, *Africa and the International Court of Justice*, in LIBER AMICORUM IN MEMORIAM OF JUDGE JOSE MARIA RUDA 353-366 (Calixto A. Armas Barea et al. eds., 2000); Cesare P.R. Romano, *The Settlement of Disputes Under the 1982 Law of the Sea Convention: How Entangled Can We Get?*, 103 J. INT'L L. & DIPL. 84, 89 (2004) ("[T]he genesis of the International Tribunal for the Law of the Sea can be largely explained in terms of rejection of the ICJ, during the early 1970s, which had disgraced itself in the eyes of the majority of the UN General Assembly with the South West Africa cases.")

87. For example, the ECJ has been mimicked at a regional level by the Andean Court of Justice, the Caribbean Court of Justice (but only as far as its function as principal judicial organ of the Caribbean Community is concerned), and the African Union Court of Justice, to name a few. The ECHR provided the template on which the IACHR and the African Court of Human and Peoples' Rights were built.

88. Cesare P.R. Romano, *International Dispute Settlement*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1036, 1037 (Bodansky et

Be that as it may, the dialogue is a conundrum that needs to be confronted. Judicial bodies around the world are interacting with each other every day. Their judges meet, officially and unofficially. Several of them have become “professional international judges” moving from international court to international court.⁸⁹ What can sovereign states do about this conundrum? Not much. First, the exchange is largely informal, and acculturation processes might play a significant role, making it impossible to prevent jurisprudential dialogue altogether. Thus, when international courts cite each other as evidence of the correct interpretation of a given norm of international law, they do so because the judges have been persuaded by the legal reasoning of their colleagues in other courts. But if they do not cite, they might still have been acculturated to other courts, and consciously or unconsciously strive to conform their jurisprudence to that of these other courts. Again, acculturation differs from persuasion. While persuasion implies recognition of having been persuaded, acculturation does not.⁹⁰ It follows that even if prohibitions against citing decisions by any other court were enacted—along the lines of the gag orders some members of the U.S. Congress would like to put on U.S. courts⁹¹—they would be pointless since, as we

al. eds., 2007) (“[I]n international treaties, dispute settlement clauses follow the description of the agreed rules. As a result of this eventual and ancillary function, the law and procedure of international dispute settlement has long been the Cinderella of international law. After lengthy negotiations on the substance of an agreement, diplomats tend to cut and paste dispute settlement procedures from previous treaties without much thought about what would happen if these procedures actually needed to be used.”).

89. TERRIS ET AL., *supra* note 9. Still, as the case of “witness proofing” at the ICC exemplifies, migration of judges from one court to another does not ensure, *per se*, that courts will adopt the same position on similar matters. Indeed, oddly, the practice was not challenged by the defense, but *proprio motu* by the pre-trial chamber itself, presided over by Judge Claude Jorda, the former president of the ICTY. See *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, Case No. ICC-01/04-01/06, Pre-Trial Chamber I (Nov. 8, 2006).

90. Goodman & Jinks, *supra* note 18.

91. In 2004, a congressional resolution was introduced (but not passed) stating that “judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions.” H.R. Res. 568, 108th Cong. (2004). The sponsors of that resolution (Tom Feeney (R-Florida) and fifty-nine co-sponsors) seemed to suggest that a judge’s failure to do so

saw, courts do not need to cite each other to be influenced by each others' jurisprudence.

States which do not agree with law-making by international courts may threaten to, or attempt to, defy them, refusing to comply with decisions and attempting to delegitimize them by severe criticism. After all, the rate of compliance with decisions is a concern of every international judicial body and courts are sensitive to the need to maintain perceived legitimacy. In some cases, non-compliance and defiance might be politically preferable to compliance. However, non-compliance has costs, sometimes steep, and therefore can be credibly threatened or used only by powerful states. Some states might even have no choice but to comply, as non-compliance with the decision of an international court whose jurisdiction they have accepted might be unconstitutional. Moreover, non-compliance might damage the targeted international court, reducing its long-term legitimacy and effectiveness. Thus, any state envisaging a return to that court as a plaintiff might need to carefully balance the short-term gains created by non-compliance with the long-term interest of having available effective international courts to further its own national interest.

Abandoning courts by not submitting to their jurisdiction or withdrawing acceptance of jurisdiction has even steeper costs, and thus is even less likely to be used.⁹² It is not likely to produce much of a result in the long run either.⁹³ Decisions by international courts have an impact that transcends the narrow limits of a given dispute and its parties. While immediate effects can be mitigated, the fact is that decisions of international courts add, or change, or confirm the body of customary international law. Each ruling provides information about

would be grounds for impeachment. Separately, several Senators sponsored the proposal of a bill, called the Constitution Restoration Act of 2004, stating that in interpreting the U.S. Constitution, courts cannot rely on "any constitution, law, administrative rule, Executive Order, directive, policy, judicial decision or any other action of any foreign state or international organization or agency, other than English constitutional and common law." S. 2323, 108th Cong. § 201 (2004).

92. See Steinberg, *supra* note 45, at 267 ("In the contemporary WTO context, the threat of unilateral exit has limited credibility because it would be costly.")

93. See generally Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

how the court is likely to rule in the future on a similar matter, and therefore, the ruling influences the legal obligations held by *all* states—including those that are not subject to the court's jurisdiction, and even those who might never be subject, or those that do not yet exist. As Andrew Guzman and Timothy Meyer have noted, international courts' jurisprudence piggybacks on hard legal obligations, and constrains all states subject to the binding legal obligation.⁹⁴

Even if states cannot prevent the dialogue, they can still structure and steer it through *ex ante* and *ex post* mechanisms.⁹⁵ Thus, for instance, they could pay greater attention to the personality and social networks of candidates for international judicial appointments, and could carefully consider the way each round of elections or re-elections is going to modify the dynamics of the whole bench.⁹⁶ States could use the international jurisprudential dialogue to extend the influence of certain courts over others. They could finance programs of international judicial assistance, providing the time and resources needed for judges and personnel of one court to talk to and visit those of another court (assuming, of course, that they want to strengthen the courts and international law *per se*). By providing international courts with resources to increase the visibility of their rulings (e.g. by providing timely translation to English, increasing ease of research and access, etc.), they can ensure that the voice of "their courts" will not be drowned out in the international jurisprudential dialogue. It is no coincidence that the ECJ and the ECHR—two towering bodies within the respective genera of international courts—also have some of the largest budgets.

Because dialogue begets structures, states might consider formalizing relationships between courts as a way of structuring and controlling dialogue. At the regional scale, particu-

94. Guzman & Meyer, *supra* note 29, at 2.

95. For several examples, see Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 945-53 (2005).

96. Academic endeavors in this field provide useful data that states should carefully consider. *See, e.g.*, CTR. FOR INT'L COURTS & TRIBUNALS, PROCESS AND LEGITIMACY IN THE NOMINATION, ELECTION AND APPOINTMENT OF INTERNATIONAL JUDGES (2009), available at <http://www.ucl.ac.uk/laws/cict/index.shtml?judicial-selection>.

larly in Europe, a few timid attempts have been made.⁹⁷ Should Protocol 14 to the European Convention on Human Rights ever overcome Russian filibustering and enter into force, thus allowing the EC/EU to ratify the European Convention and become subject to the European Court of Human Rights' jurisdiction, the ECJ and ECHR will be brought into an even closer, but still informal, relationship.⁹⁸ At the global scale, one could imagine, for instance, allowing courts within the United Nations framework,⁹⁹ as well as those universal courts outside of it¹⁰⁰ and hybrid international criminal courts, to ask the ICJ for non-binding advisory opinions.¹⁰¹ Of course,

97. See, e.g., Thordis Ingadottir, *The EEA Agreement and Homogeneous Jurisprudence: The Two Pillar Role Given to the EFTA Court and the Court of Justice of the European Communities*, 2 Y.B. INT'L L. & JURISPRUDENCE 193 (2002) (concerning the relationship between the European Communities and the European Economic Area and the ECJ and European Free Trade Association courts).

98. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* May 13, 2004, Europ. T.S. 194 (not yet in force), *available at* <http://conventions.coe.int/Treaty/EN/Summaries/Html/194.htm> (amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221). To date, Protocol 14 has been ratified by all the members of the Council of Europe but Russia. On May 12, 2009, Protocol 14 entered into force, but only partially. Namely, the Conference of High Contracting Parties of the European Convention agreed that the provisions regarding the new single-judge formation and the new competence of the Committees of three judges contained in Protocol No. 14 to the European Convention on Human Rights are to be applied on a provisional basis with respect to those states that express their consent. Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force, concluded in Madrid on May 12, 2009, *available at* <http://conventions.coe.int/Treaty/EN/Treaties/Html/194-1.htm>. Article 17 of Protocol 14 allowing the European Union to accede to the Convention has not yet entered into force.

99. See, for example, the ICTY and ICTR, which are already twins joined by the shared Appellate Chamber, and the International Tribunal for the Law of the Sea (ITLOS).

100. See, for example, the ICC and WTO Appellate Body.

101. In 1999, then-ICJ President Stephen Schwebel, in his annual address to the General Assembly, suggested that "in order to minimize . . . significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law." Judge Stephen Schwebel, Address to the Plenary Session of the General Assembly of the United Nations (Oct. 26, 1999), *available at* <http://www>.

the power to request advisory opinions does not imply a duty on the part of the ICJ to do so. In addition, advisory opinions are not binding on the requesting party. These considerations should alleviate concerns about repeated and unwarranted intrusions into another court's sphere of judicial competence, authority, and legitimacy. Be that as it may, even if advisory opinions of the ICJ are not binding they do carry great authority and place a heavy burden on the requesting entity, especially if it decides not to follow the advice given. Thus one might also wonder whether certain international courts and tribunals should be given this power and if they would ever actually use it.¹⁰²

icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1. The question was raised anew by Schwebel's successor, Judge Gilbert Guillaume, the following year, albeit in more nuanced terms. Judge Guillaume suggested that "international tribunals . . . could be encouraged to seek advisory opinions from the Court, by way of the Security Council or the General Assembly." Judge Gilbert Guillaume, Address to the Plenary Session of the General Assembly of the United Nations (Oct. 26, 2000), available at <http://www.un.org/documents/ga/docs/55/pv/a55pv41.pdf>. See also ABILA Committee on Intergovernmental Settlement of Disputes, *Reforming the United Nations: What About the International Court of Justice?*, 5 CHINESE J. INT'L L. 39, 41, 62-64 (2006).

102. See Stephen Schwebel, *The Reality of International Adjudication and Arbitration*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 359, 363 (2004).

