Henrik Palmer Olsen
Henrik Stampe Lund (Eds.)

The Making of iCourts

New Interdisciplinary Legal Research

Nomos

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN 978-3-8487-8412-7 (Print)
978-3-7489-2788-4 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8412-7 (Print)
978-3-7489-2788-4 (ePDF)

Library of Congress Cataloging-in-Publication Data
Olsen, Henrik Palmer | Lund, Henrik Stampe
The Making of iCourts
New Interdisciplinary Legal Research
Henrik Palmer Olsen | Henrik Stampe Lund (Eds.)
632 pp
Includes bibliographic references.

ISBN 978-3-8487-8412-7 (Print)
978-3-7489-2788-4 (ePDF)

1st Edition 2022

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-8412-7 (Print)
ISBN 978-3-7489-2788-4 (ePDF)
DOI https://doi.org/10.5771/9783748927884

Onlineversion
Nomos eLibrary

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I. Introduction

The Making of iCourts

iCourts: The Making of a New Agenda for Legal research

By Henrik Stampe Lund and Henrik Palmer Olsen

Introduction – iCourts as an international research hub

"No man is an island entire of itself; every man is a piece of the continent, a part of the main" - John Donne (1572-1631)[1]

Introduction

iCourts is a research center for international courts and international law with a physical location at the Faculty of Law in Copenhagen[2]. It is founded on a large Center of Excellence (CoE) grant from The Danish National Research Foundation (DNRF)[3] - the first ever DNRF CoE grant to a faculty of law. The purpose of this book is to show how the establishment, operation and ambitions of a research center - exemplified by icourts - can impact a whole field of research. We seek to achieve this by documenting how *iCourts* has become an internationally leading research environment. Since its establishment in 2012, iCourts, under the leadership of Professor in European law and integration, Mikael Rask Madsen has brought a whole new approach to the study of international law and international courts: More empirical, more data oriented, more interdisciplinary, and more comprehensive than previous research centers in the field, thereby reinvigorating and expanding the field.

In this introduction we will outline the story of how iCourts was conceived and how it was made operationable as a unified center structure which has managed to expand throughout the decade it has existed so far.

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1 Poem by John Donne, later famously quoted by Ernest Hemingway in the novel "For Whom the Bell Tolls" (1940).

2 "iCourts – The Danish National Research Foundation's Centre of Excellence for International Courts", https://jura.ku.dk/icourts/.

3 The Center of Excellence (CoE) is a specific funding instrument founded by the Danish National Research Foundation (DNRF). See more at www.dg.dk.

We will further provide an impression of the mark iCourts has made in the field over this decade by republishing a selection of articles, which display both the broadness and depth of what iCourt is about. We do so, however, in what is perhaps an unusual way: rather than choosing articles written by iCourts staff we have chosen to focus on articles written predominantly by researchers who, over the years, have visited iCourts in Copenhagen. To illustrate the geographical reach of iCourts, we have selected contributions by researchers coming from all over the world. To further convey how this research connects to iCourts (even if authored by researchers who have only been visiting), we have asked each of the authors to write a short introduction entitled "My iCourts experience" in which they each explain their encounter with the Center.

The Landscape is Changing

Our motivation behind this book is not only that we wish to celebrate iCourts, but also that we wish to share the learning points harvested over the years since the establishment of the Center ten years ago. We believe that there is still a lot to be learned about research management and how to build a healthy working environment in research. We are of course fully aware that there are limits to what can be learned from a case study of only one research center, but we believe that the challenge of building up and sustaining a strong research environment is one that many researchers and research managers will be familiar with. We therefore assume that the overarching theme will resonate well with anyone tasked with organizing independent, public and curiosity-driven discovery in the setting of a university or a similar institution.

The main audiences of this book, then, we think, are researchers, especially senior researchers and research managers, Principal Investigators on external funded projects, heads of small or larger groups of researchers, and research managers at different levels, who are looking for inspiration on how "the next new" constellation in their research field could be undertaken.

When research institutions are more exposed to competing for resources (public and private), when such institutions are under demand for demonstrating impact, and when, at the same time a smaller number of top researchers gradually gain a bigger part of the available funding, then the increased importance of the function and role as Principal Investigator (PI) becomes more prevalent. We find that this development is a megatrend

in contemporary research, which cuts across different countries as well as different research areas.

This development is not unfamiliar to researchers working in natural science, medicine, engineering etc., who for many decades is used to working in smaller or larger working collectives in investigating natural phenomena and working on shared experiments in labs. It is a rather new experience for many researchers in humanities, the social sciences, theology, and legal studies (generally referred to as Social Science and Humanities - SSH). The tradition in SSH research is more that of single author publications and often with a preference for attributing high esteem to monographs. SSH has also traditionally been organized in flat non-hierarchical research units and often with no particular focus on attracting funding from sources outside their own institution. Over the last couple of decades there has perhaps been a tendency to move a little away from this "one man alone" approach in order to promote more collective research efforts, but generally not to the extent of organizing research around commitment to a common research plan. Neither is a more formalized organization around a work hierarchy, with a PI responsible for ensuring execution on the agreed research plan, a widespread form of organization in SSH. Generally speaking SSH research disciplines are therefore more challenged regarding the behavioral and cultural aspects of the PI-model, which is increasingly being promoted by research funders. This puts pressure on SSH in general and calls for leadership in SSH faculties to find ways of responding to this new situation where they must find creative ways of aligning their organizations to the funders demands without mechanically mimicking the Natural Science model. For some disciplines this is a defining moment.

Research funding increasingly goes to collective projects led by a PI. This creates a need for research organization and management and thereby a demand for knowledge about how to effectively organize and manage research in a collective project that is guided by an overarching research plan. The ability to perform as a research center or research group now becomes the key element. This still depends, of course, on individual excellence, but individual excellence is no longer enough. What were recently factors that would be considered administrative and thereby external to research (funding, communication, impact, relevance, leadership) has today - for better or worse - become *de facto* research-internal factors and evaluation criteria for selection of which research projects to support. Not having answers to those challenges is not a viable option any longer.

So the landscape of SSH research is changing and SSH institutions need to adapt. How? This introduction and the various testimonies from

iCourts visitors that preface the articles should be read as an attempt to provide inspiration for an answer to that question. By providing both a view from the inside (in this introduction) and from the outside: partners who know and have been visiting iCourts, we hope to convey the image of iCourts has managed to inspire new research and tom extend pushing the boundaries of what - in the field of international law and international courts - can be studied and how it can be studied.

So if what is stated and explained in this introduction is a partial story involving our self-understanding, our narrative of ourselves (as told by the two editors), the accompanying "my iCourts experience" introductions to each of the published articles represent the broader diversity of voices - it is, in some sense, the perspective of "the other": a slightly more distanced "sociological" look at the center. And rather than drawing any conclusions, we have decided to leave that implicit conversation between the many views to the hermeneutics of the reader of this book. We hope others will be inspired to seek their own answers to how the changing research landscape can be navigated.

The Blue Sky: Basic Research with a bottom up agenda

The *iCourts* team at the time of the application consisted of a small group of researchers employed at the Faculty of Law. When the Center was inaugurated in 2012 it accommodated around 12 researchers. Today, ten years later, this has increased to 50+ employed researchers from all continents and approximately 20 different nationalities.[4] *iCourts* today also has a worldwide outreach. Among the contributors to this book are visitors and former staff members that pursue their career in many different locations on the planet (see the various short "my *iCourts* experience" introductions inserted before each of the research articles).

One thing is that iCourts has an international identity. Another is that it has - in line with the requirement of all DNRF centers - a distinct focus on basic "blue sky" research. This was an important agenda for the Center right from the get-go. The research plan for *iCourts*, both for the original application (covering 2012-2018) and the extension (DNRF requires an assessment by a panel of international experts after the first 4 years as a basis for deciding whether to fund the final 4 years of the original envisioned 10 year DNRF funding period) was marked by an ambition to undertake

4 See Appendix IV.

groundbreaking new research, which would uncover new basic knowledge of international courts as a legal, political and societal phenomenon. The agenda was to explore these courts in ways that had never been done before. Therefore, the exploration was necessarily risky: There was a risk that the research plan could not be executed as originally envisioned or that it would not produce the desired results.

The "high risk - high gain" approach to research was rooted in the Center from the very beginning and is in many ways what characterizes Blue Sky research. But there was also a preparedness to make adjustments to the research plan if some elements should turn out not to work. One example of a change that was implemented was the move away from the original design of three distinct areas of research and research groups: Institutionalisation, Autonomisation, and Legitimisation (see further below). One year after the foundation of the center this research design (outlined in the original application) was changed to the benefit of a more flexible collaboration across research topics - a change, which after a couple of years led to a better integration of researchers and more co-authored articles among staff members. The center structure changed roughly speaking from three fixed research groups with their own staff to a more polycentric cluster formation defined by those researchers, who actually work together across research projects and topics. That more dynamic model resulted in: 1) greater visibility of young and entrepreneurial researchers with multiple collaborations internally at the center and 2) a closer relation of the PI to several staff members across the entire center. This has enhanced both internal collaboration and coordination resulting in a stronger collective identity of the Center.

Another important element, shaping the center, has been the strategic decision at the very foundation of iCourts to focus on recruitment of younger scholars. Instead of playing safe and hiring already established research names, with their own pre-existing projects, a bottom up approach was chosen. In that way a high level of commitment to the center and the research agenda was established. Roughly speaking the center identity and common will to pull together was in that sense effectively established almost at the same time at the center. Once established, the support for the center has had strong traction: like a kind of path dependency, new researchers have adapted to the shared collective culture through the various center activities.

The next natural step in the development is of course a gradual transition of this first generation of researchers to more independence, not least through funding of their own research and beginning experience as Principal Investigators. This transition phase has been one of searching

for the best balance between the PIs ambitions on behalf of the specific center project (pursuing the iCourts research agenda) and understanding that the already built up center structure represents a critical resource for implementing the very same new additional PI-projects. This requires a flexible, pragmatic and open-ended definition of center identity. In that sense it is crucial to understand that the center is neither something neat and done to adapt to or just a house of multiple projects. It is a negotiated halfway house between two, where new PI's lean towards the center and the center adapts flexibly to the new incoming research projects.

Embracing visitors

In a research environment where achievement of the unit - the Center - is what really counts, collaboration between researchers is the main resource for driving things forward. But collaboration is not only a matter of collaborating with cohabitants. Most authors in this book have been guest researchers from other institutions under the *iCourts* visiting programme[5], a programme, where all researchers in the area of International Law can apply for a 1-3 month stay at the center - independently of their career stage. Each applicant is evaluated by an informal evaluation process with two residing researchers as evaluators. During their stay, visitors give a presentation at the weekly one hour lunch seminars, and are encouraged to deliver an *iCourts* working paper.[6] The guest researcher is a part of the daily interaction, hosted by one of the staff members, and shares an office with other guest researchers located at the very physical core of the *iCourts*, so that they easily meet and interact with everybody right from the beginning. The secret behind being an international hub for research is to have several access points beyond proper academic positions, such as a visiting programme, an annual Ph.D. Summer School[7], and frequently occurring co-organized events like book launches, seminars and conferences.

Perhap the most productive point of access to visit *iCourts* has been the Marie Curie funding scheme (under the EU Frameworks programmes), since 2012 seven professors and postdocs has been employed in general for a two years period at the center doing research on an individually

5 Full List of visitors 2012-2021: See Appendix V. See also: "Visiting programme", https://jura.ku.dk/icourts/visiting-programme/.

6 See Appendix VI.

7 See: "iCourts Summer School", https://jura.ku.dk/icourts/education/summer-school/.

chosen project related to the landscape of International Courts. This kind of funding has represented - and still represents - a luxurious opportunity for a center to expand beyond the ordinary internal staffing schedule and to get new innovative input from other research institutions: new research ideas and new perspectives on how to do things.

These encounters also raise the awareness of the importance of being a welcoming and integrating host. Moreover, in a long term perspective, a good relationship with visitors increases career opportunities for individual researchers (both to their and the center's benefit), and sometimes leads to a closer institutional cooperation between the home-institutions of the involved researchers. It opens up doors in other ways and can lead to co-funding of international conferences, collaboration on research funding applications and the like. Visitors to iCourts have in many ways shaped iCourts and contributed to making it what it is today.

The pre-history of iCourts:

At the University of Copenhagen, the Law department was established as a Faculty in its own right in the early 1990s. At that time, the Faculty was what could probably be described as a traditional law faculty/department. Teaching was organized around well known areas of law: tort, contract, administrative, constitutional, international, family, EU, procedural, etc. law. Research, similarly, was mostly organized around these classic areas of law. Newer areas had begun to emerge: health law; energy law; IT law, but did not disturb the overall image of a faculty with a traditional organization and outlook. Research, moreover, was predominantly national in both content and form: mostly focused on Danish law, written in Danish and published in Danish or Nordic journals. Participation in international and/or interdisciplinary research did not enjoy high esteem and neither did the ability to generate external funding or to get notice and recognition in the broader scientific community. Instead, being well connected to the Danish legal profession was seen as prestigious. To capture this state of affairs, one could say that the old faculty was characterized by a culture of seeking recognition from legal practitioners and legal institutions more than from academia and scientific institutions. To some extent it still is, but today there is a better balance: general criteria for scientific recognition: publication in internationally well reputed journals, and ability to attract and successfully lead externally funded research projects, plays a much bigger role in achieving recognition in the faculty than it did before. The key to this transformation has been organizational change.

In 2006 a new dean, prof. Henrik Dam took office. He immediately launched a restructuring of the Faculty, abandoning the established and traditional departments and replacing them with smaller dynamic units labeled as research centers. This organizing structure for research at the faculty still exists in the Faculty today. The key to understanding this structure is that research centers are formed in a bottom-up process where researchers group together around a shared research agenda and apply for approval to be established as a research center. Faculty guidelines for research centers require that applicants must put forward a plan for a high quality research project, which includes internationally recognised research publications, applications for external funding, contribution to development of the Faculty's study program and a plan for societal dissemination and impact.

This transformative process resulted in the formation of six new research centers that was established as the new organizing structure for research in 2008. Today, in 2021, this structure is still in place and the law faculty has a total of 10 research centers, and it seems clear that the new organization provides more room for entrepreneurial and talented researchers, thereby injecting new dynamic energy into the Faculty.

One of the research centers established as part of this process was the Center for Studies in Legal Culture (CSLC). Originally initiated by professor of legal history Ditlev Tamm, who reached out to the then newly appointed professor of jurisprudence Henrik Palmer Olsen and (also, then, newly appointed) associate professor Mikael Rask Madsen (Mikael became a professor of European Law and Integration in early 2010), this new center rapidly established itself as one of the faculty's largest research centers, covering both interdisciplinary research and areas in law and innovation. After some years, however, it became clear that the center's range was too broad and the interest of its members too heterogeneous.

From Idea to Project: The First contours of iCourts

The Team

At this point the close collaboration between Mikael Rask Madsen and Henrik Palmer Olsen in both teaching, research and PhD training (Mikael as formal head of CSLC and Henrik as Head of the Faculty's PhD school and part of the CSLC management team) led to the idea of applying for funding for a new, more focused and intellectually ambitious research endeavor. Soon the aim was set and it was set high: A Center of Excellence

grant from the Danish National Research Foundation. Mikaels doctoral work – performed in France (Mikael obtained a *Docteur en sociologie politique* from *l'École des Hautes Études en Sciences Sociales*, in Paris in 2005) and focusing on the establishment of the field of Human Rights in Europe - was a source of inspiration, but a center of human rights would obviously not fit the bill: it would not have been sufficiently original or distinct to match the methodological ambitions of the founders.. Over time the idea of a research center with a focus on international courts more broadly was formed.

International human rights courts were of course a large part of the picture and Mikaels deep knowledge of European Human Right politics could immediately be drawn upon as an inspiration for broadening out the agenda. Other international courts in other legal areas are also institutions with a political history, an active jurisprudence and a need to build legitimacy around its judicial practice.

The idea gradually took form and the next step was to build a team of researchers who would constitute the original core researchers. Some members of the previously mentioned CSLC had a profile that fitted quite well the idea of a new interdisciplinary research agenda. Joanna Jemielniak, who was researching international economic law and arbitration and who also had a keen interest in legal theory and "law and language", accepted to join. So did Anne Lise Kjær who was experienced in discourse analysis applied to law, and who had for some years been researching the role of linguistic diversity in EU law.

But there was also a wish to expand beyond staff that was already employed at the law faculty. Mikael reached out to Prof. Karen Alter, whom he had met at a conference in 2007. Karen had, already in 2003 published *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* and was still researching the political power of the CJEU. Their shared interest in the history of European legal integration - Mikael coming from European Human Rights law and Karen from EU law - led them to collaborate more closely and Mikael invited Karen to join the iCourts application.

Henrik had previously collaborated with prof. Marlene Wind in regards to his research on judicial review. Marlene was a well known politics scholar in Denmark and had been researching EU law and politics for some time. She was interested in doing some further work on the role of the CJEU in regards to domestic law. This core team of researchers, three of which had a background education in law (Mikael, Henrik and Joanna), two in political science (Karen and Marlene) and one in language studies

(Anne Lise Kjær), were the platform from which the original iCourts would later evolve.

Object and Agenda

Finding the right field to focus on, when aiming to establish a new research endeavor is crucial. Especially when the objective is to establish a basic science research center which can attract funding. The inspirations that brought the focus on iCourts to life were numerous:

1) The overarching megatrend of internationalization in both economy, culture and technology was one operating factor. The post cold war era was injecting a lot of optimism in international organizations - including international courts - as vehicles for collaboration, peace and progress.
2) Another was the need to focus on a tangible research object: International law would be far too broad and abstract, but international courts have a much more concrete existence and makes for an object that can be clearly delimited.
3) Focusing on international courts as a whole was furthermore original. Research had previously been done on specific aspects of individual courts, but so far, no one had brought together a team to comprehensively research international courts as one overarching phenomena.

On this background, *iCourts* would research "all international courts" and the aim of the research was defined as that of exploring how international courts increasingly integrate into a broader structure – a transnational rule of law – which gradually takes shape as a feature of contemporary global governance. This aim also revealed that iCourts, although embedded in a law faculty, would become the host of a wide reaching interdisciplinary research endeavor: International courts were right from the beginning conceptualized as institutions that were legally recognizable, but simultaneously with an emerging political role.

The evolution of International Courts as hubs of international governance had to be researched across the boundaries of law and politics. New forms of judicialized international law were emerging out of the fast growing jurisprudence of international courts and the growing activity of these courts was setting its marks on international and domestic politics in ways that had not yet been understood. iCourts were setting out to explore this new knowledge frontier.

Organization and Approach

But it's not enough to have a research agenda. A workable research agenda is in need of institutional organization. Figuring out how to reflect the interdisciplinary character of the research endeavor and the most important research questions in a, not only workable, but excellent, organizational set-up is part and parcel of DNRFs criteria for excellence.

The solution was to have three partly overlapping dimensions of inquiry: Institutionalisation; Autonomisation and Legitimisation (see further below) and the team of researchers distributed over these three dimensions with the Principal Investigator located at the center of the proposed Center. This was to become an important point about iCourts: The PI's role is not envisaged in a hierarchical structure, but in a collaborative structure. The PI is not at the top of the organization, but in the middle. This created momentum also for the rest of the organization - horizontal oriented, collaboration and self-initiation became key.

The three overlapping dimensions of inquiry would ensure a systematic analysis of the institutional evolution of ICs across legal subject areas that would go well beyond existing research at the time. One of the points made in the application was that existing research had a tendency to use findings from a small sample of ICs to draw conclusions about ICs in general. The iCourts endeavor was intended to broaden the institutions and actors studied, and to put forward a comprehensive program that was deeper embedded in empirical findings than what had hitherto been the case.

The Institutionalization leg would provide an analysis of the historical origins, organizational developments and institutional character (including relations to member state stakeholders etc) of individual international courts with a view to proposing a generalizable analysis of how ICs evolve in and respond to developments in law, politics and society.

The Autonomisation leg was intended to bring to fruition a systematic analysis of the emergence of judicialized international law in terms of an 'international legal knowledge' as the outcome of a dual process of how 1) international courts devise new concepts and practices in order to respond to new socio-political and legal problems, and 2) how they apply and reformulate existing, legal concepts, cognitive schemata and institutional and professional practices.

Finally, the legitimization leg was aimed at providing a systematic analysis of the crucial legitimacy issues of international courts understood as an actual and on-going process of legitimization in which these courts'

legal and institutional development reflects the legal, political and democratic challenges they continuously face.

As mentioned above, a deeper commitment to empirical grounding of the research was part and parcel of iCourts from the get-go. So too was interdisciplinarity. Mikael drew inspiration from his time with Pierre Bourdieu in the late 1990's to lay out the framework that would allow this interdisciplinary and empirical approach to take shape in the form of a proper and focused research endeavor. Adapting Bourdieu's well known concept of "field" as an analytical framework, allowed us to construct a notion of international courts as institutions which various agents would struggle to influence, shape, use, engage or in other ways interact with. These activities can be seen as structured in a social space ("field") where a struggle between different agents over influence takes place continuously. Within this field, different legal and political agents (e.g. government officials, diplomats, lawyers, legal scholars, judges) contest over how law should be understood and applied. Agents bring to this ideationally contested space different economic, cultural, social and symbolic capital, and to some extent also draw on their personal trajectories, in an effort to shape understandings of law and of the role of international courts as international institutions. By deliberately abandoning more established approaches such as doctrinal formalism and Principal-agent theories, etc. and instead introducing this more dynamic Bourdieusian approach, the center and its individual researchers were inspired to be more creative.

Data, data, data

One important dimension of this approach was the introduction of the iCourts database of decisions from international courts. Spurred on by the drive towards a more empirical approach, the attempt was made to add a new and innovative dimension to the study of doctrinal law. Whereas doctrinal research was traditionally an exercise in ad hoc information search and building interpretations from previous textbooks and other publications in the field, there was a sense that doctrinal studies was somewhat out of touch with the jurisprudential reality: The European Court of Human Rights and the Court of Justice of the European union were both churning out many more decisions than could be picked up by doctrinal legal scholarship, and doctrinal scholarship was notoriously silent on how it would select and/or deselect the cases included for analysis. Building a comprehensive database of case law text and including metadata from these courts was a first step in being able to get closer to a more comprehensive view of how case law evolved over time. The

ability to build such a database at all was a basic strategic choice right from the beginning: Early on a data specialist, Ioannis Panagis, was hired in as an in-house capacity at the center, a couple of years later, another data specialist, Nicolai Nyströmer, joined the center. In that way researchers at iCourts had direct access to high-level technical competences.

Next step was to expand activities through new grants to exploit this database. A grant from Independent Research Fund Denmark to pursue a project entitled "From dogma to data" set out to computationally model doctrinal develop through the use of citation analysis and building from the fact that both ECtHR and CJEU cite their own prior case law quite extensively when they make new decisions. This project soon spilled over into other initiatives and computational approaches to analysis is today a well-integrated part of iCourts research.

As was mentioned above – the organizational structure of iCourts was a topic that was addressed already in the application. Importantly, this was not forgotten or neglected (as it sometimes is) after the grant was activated and iCourts started operating. All the different academic meeting formats for exchange of comments, views and suggestions have been focused on communication in the whole research group: Not only is everyone welcome - everyone is also expected to contribute. That is at least one of the secrets of a vibrant collegial environment. Some elements, such as seminars, conferences and a PhD summer school are well known events that are widely used in academia. Such forms of academic exchange have been used extensively in iCourts, ensuring a continuous collective spirit of giving and receiving feedback from colleagues at almost all stages in the research process. One important part of this has been to emphasize that academic interaction is most meaningful during the actual research process. Presenting work in progress has therefore been prioritized. The insight is that the author of a working paper can absorb input and comments and can thereby improve the paper, rendering the final article better. Presenting a finalized paper often leads to a more defensive attitude in the author, since, at this stage, nothing in the paper can be changed.

iCourts also added an additional layer in the way center interaction was structured. This layer could be seen as a kind visualization of the center's intellectual infrastructure. By initiating a process for keeping track of Research Progress and mapping the relationships between researchers in regards to their collaborative efforts, the trajectory of the research program was systematically chartered and tested against input from researchers on how their research contributed to the overall research agenda and its three overlapping dimensions (see above). Both at the level of center administration and the individual researchers, this has facilitated a continuous

survey of Center's progress and challenges and has made it possible to constantly focus and adjust the use of resources. This process has helped to improve each participant's understanding of the project as a whole, and has promoted lateral modes of thinking going beyond the individual dimensions of the project.

Visitors and Socializing

Furthermore a systematic opening up of iCourts to the outside world via an ambitious visitors program has ensured that the iCourts agenda has been shared and disseminated widely and has become well known throughout the global environment of international law and politics scholars. Both long and short term visitors, as well as the so-called "permanent visitors" (researchers with a special and long term relationship to iCourts build on continuous visits) has been closely integrated to the Center's daily life and has made it possible to build a large and strong network to the benefit of all involved. This network has been crucial in building a presence and visibility of iCourts as an internationally renowned research center.

Last but not least, should be mentioned the very important role of social interaction and collegiality in the Center. A combination of collective commitment to research excellence and social events has been an important ingredient in making the center what it is today. Creating an open and egalitarian environment in which there is room for everyone to be taken seriously, while simultaneously keeping respect for the fact that scientific progress is often driven by critique and that therefore it is important to both give and receive critique, has been an implicit ethos in daily research practice. But the center has also built social events around achievements. Book launches, grants, important articles, the PhD summer school, conferences and other major events have all been occasions for adding social events to celebrate the hard work behind these achievements. Furthermore, the annual iCourts retreat – an event where all iCourts researchers meet up for a 1-2 day combined academic seminar and social gathering – has been a useful way of both taking stock of the previous years development and launching new initiatives and bringing renewed attention to the overall agenda of the center.

Second Round adjustments

A part of DNRF's CoE-model is a midterm evaluation conducted by an international independent panel of estimated experts in the field. An important task of the PI is to provide a new research plan for the second

half of the ten year funding period. The main shift in research focus that followed from this was a turn towards an emphasis on the power and impact of international courts beyond their mere jurisprudence. The ambition is to investigate and understand the variations in the power and impact of IC in our contemporary world, and to study these judicial institutions within the larger regimes of political, legal and social spaces in which they operate. This amounts to a further broadening of the Horizon: and to include contextual factors beyond what was not part of the original research plan. *iCourts* would now look beyond the international courts themselves to see how they interacted with other institutions and what impact that interrelationship would have on those other institutions.

In addition to a changed research focus with a new emphasis on the power of international courts, the center also launched a push for a broader and more societal oriented communication of its research. The most recent initiative in the area of communication of research to a broader audience is the so-called *iCourts Insights*[8], which are one-page presentations of new research findings by one of the center's researchers. The format is similar to a press release. The structure is to answer three questions: What we knew before? What do we know now? and the Implications of new knowledge? As it is the case with most of the format and the infrastructures at the center in general it has two interrelated components: on the one hand it has the character of an inside-out research outreach to people interested in the particular research area - as a part of making iCourts more visible - one the other hand it is at the same time an entrance and access point for researchers interested in visiting iCourts or just getting to know about the center and its activities.

Sometimes one can notice a rather direct causality between different parts of the infrastructure. Outreach turns into input when for example a researcher's attention is caught by a specific working paper, attending the Summer School etc., and then, one or two years later leads to a stay as a visitor or even an employment; or, as in other cases, a returning visiting researcher organizes a collaboration or conference between his or her home institution and iCourts; or a postdoc leaving the Center for another research institution, but continuing working with single members of iCourts in their capacity as Global Research Fellows.[9] In all this diversity of interaction in the element of the infrastructure one probably finds some of the most interesting and unplanned long-term impacts of the Center.

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8 See: "iCourts insights", https://jura.ku.dk/icourts/insights/.
9 See: "Staff", https://jura.ku.dk/icourts/staff/.

Operations – a look into the machine room

All the research plans, methods and ambitions mentioned in the previous section are carried out in daily operation and practice; internally in the interaction among staff members and externally with cooperation partners. The following is a brief look into the everyday life of the center: iCourts as a workshop of research activities, consisting of well-known components and ingredients in any research process, but still in a concrete combination and specific accentuation of different parts of the socio-cognitive processes and a specific research culture. All this together could be called the non-material research infrastructure, which makes up the center's valves and pistons - the proverbial *iLab*.

Because the starting up of iCourts was not simply a prolongation of an already existing research milieu, the very foundation of the center was an opportunity to design the different parts of the organization according to contemporary needs, standards and expectations. Ideas and suggestions from younger employees for example concerning homepage and use of Twitter have probably had a more direct influence than it would have had if *iCourts* had been just the continuation of a pre-existing and well established research collaboration.

In building up the center, and it's daily operations there have equally been a focus on keeping a "young approach" to decision-making: focusing on continuous interaction among the staff members, striving for the least possible level of formalization in decision making, making sure that meeting are kept short and always build around a written research agenda, to ensure a continuous "eye on the ball" approach. In line with this, the backbone of the center is the weekly occuring one-hour lunch seminar on Wednesdays at noon, build around half an hour research presentation of research in progress (the center, as a principle, almost never meet around published research) and half an hour with questions and comments from the group. The presenters are often researchers from outside the center, guest researchers, collaboration partners etc.

To promote internal transparency and transparency among researchers, there is a monthly staff meeting with a short and concise research presentation by one or two staff members, and research related briefings, for example staff (particularly junior staff), reporting back on a specific task, for example update of the iCourts homepage, coordination of events at the center, involvement in planning of conferences, issuing of monthly newsletter etc. Every researcher at *iCourts* has some delegated task to be responsible for, also for the overall and edifying reason not to start a

research career with a misconception of a false contradiction between intellectual and practical work: it's never enough that your research resides in your head - you must bring it out into the world, and that requires involvement and understanding also with the necessary administrative procedures required for that purpose. Each single member of the group is thereby both consigner and recipient. In that way it is ensured that the whole center is on the same page. Having a fixed and regular meeting is sometimes also helpful to catch unforeseen challenges and approaches from outside.

iCourts has also experimented with formats over the years: Science lab: Presentation of very early drafts and ideas, that is not open for participation from outside the research group, to create the opportunity for outspoken criticism; Roundtables: an opportunity for Ph.D. students to get informal feed-back on the draft for their research plan; Mock defense: preparation for the actual defense of the Ph.D. thesis prior to submission; Book launches: Both celebration of published books from iCourts staff (more a social event celebrating the achievement than an occasion to develop research), but in recent years also book launches by visitors or earlier employees at the center.

Sometimes new formats are invented with new projects. An example of this is the Breakfast briefings (one hour morning sessions) that was invented in relation to the project International Law & Military Operations (InterMil) in which both researchers and practitioners in the field share their experience.

Other more major formats for framing research and research training is also an integrated part of the center's operation. An annual retreat which takes place outside the regular premises of iCourts, often at a conference hotel in the countryside, is now a well established tradition. The format is a full day of intensive discussion of research papers in progress with 15 minutes for each paper, two discussants for each paper that present and comment on the paper and afterwards an open discussion with input from the whole group. The whole point is that the author doesn't present his/hers own paper, but receives intense comments and recommendations for further development of the paper. This also stimulates broader involvement with the on-going research in the center - often leading to co-authored papers.

The iCourts PhD summer school

The Ph.D. Summer School, established in 2013 by Henrik Palmer Olsen and since 2014 managed by associate professor Anne Lise Kjær, is a one-

week long event with participation of 25 international Ph.D. students from around the globe, with a focus on lectures in how to research International Courts and International Law and smaller group seminars where PhD students work on assignments that are supposed to support their research performance. In line with the active involvement of guest researchers. Senior visiting professors such as Karen Alter, Laurence R. Helfer and Cesare Romano have over the years provided additional academic capacity to the summer school, thereby making it a truly interdisciplinary and international experience.

The blend of research activities: giving feed-back on the individual projects, providing focused methods-workshops (discussing for example qualitative methods, network-analysis, semi-structured interviews, comparative studies, and case selection methods) with perspectives from experienced researchers from around the world have been much appreciated by the participating phd students. Getting to hear accomplished and well respected researchers share their experiences, mistakes, and advice often provides valuable insights to younger scholars. To round off the summer school, and to lift the experience further, there is a final public talk, often by leading practitioners in the field, (over the years, the summer school has hosted talks by Sir Charles Michael Dennis Byron, former President of the Caribbean Court of Justice, professor Gunther Teubner, Luis José Diez-Canseco Núñez, former President of the Court of Justice of the Andean Community, and Sir Michael Wood, Member of the International Law Commission, and others.

The Summer School also has a strong social dimension taken care of by Ph.D. students and postdocs at iCourts. This gives the center's younger scholars a role in the organization of the summer school and provides them with an entry to a larger network, since they will naturally liaise with not only the participating Ph.D. students, but also the more senior visitors. This can be useful in the longer run. Moreover, very often participants in the summer school later on return to iCourts through the visiting programme, and thereby strengthening and further building the relations between iCourts and scholars around the world who share the research interest in international courts and international law.

Concerning development of the Ph.D. training programme at iCourts, two Ph.D. students at the center managed to achieve a dual degree, one as

a dual degree in political science and law from Northwestern University[10] and University of Copenhagen, and another one as a dual degree in Law between Université Paris 1 Panthéon, Sorbonne, and University of Copenhagen.

The PI-model and the University

iCourts is by nature and definition founded as a Principal Investigator organization with one responsible PI for a whole research group, that together implement a common research plan. Since one of the objectives and expectations from the beginning has been to obtain additional funding for research projects, the PI-model has multiplied internally at the center over the years.[11] External funding and research management are deeply connected in this kind of collective PI-projects. Each component enters into a dynamic unity: What is word and sentences in the research plan is numbers and job positions in the budget. What is risk taking in the research plan is prioritization of economic resources in the budget. What is a major deliverable in the plan equates employment of researchers in the organization. All this involves decision making and looking for the best possible balance in the implementation of the research vision.

Being in a position as PI makes it possible to act more independently and to choose and employ your own staff and co-workers, make major decisions on research plans or taking calculated risks, fund your own conferences and fields trips, and therefore be in more financial control of the research activities than in the normally more static research organization where each researcher is just another employee out of many others in a department. This autonomy comes with a price: scientific and budgetary reporting at set intervals, some degree of red tape and a number of management related tasks. This requires more transparency than in individual research. Reaching a high level of autonomy as a PI on a collective project is hard work built on continuous active judgment about best to achieve research ends within a given budget limit and the pressure of external accountability to the funders and the host of the project.

At the end of 2021 iCourts have a total of eight larger projects with separate independent PI's. To become a PI is a major change from being "only" a researcher with no specific responsibilities other than to teach

10 See: "Doctoral Programme – Dual degree with Northwestern University", https://jura.ku.dk/icourts/education/doctoral-programme/#dual-degree-northwestern-university.

11 More about the specific PI-projects of iCourts later in this introduction.

and produce one's individual research, to becoming responsible for hiring, budgeting, managing etc.: Everything that the PI-role involves. Skills like being able to "read" an organization and to exercise self-reflection in regards to leadership suddenly becomes not only nice-to-have, but need-to-have. This is visible, for example, in the need to balance ambition on behalf of the specific project being funded, against attention to the pre-existing organizational structure (center, institute, faculty). The project is important and must follow its own logic. But the pre-existing organization is a critical resource for implementing the activities of that very same project. This dialectic is reproduced at every level in the organization (University/faculty, Faculty/institute/center, Center/PI-project). The irony and mental challenge is of course that what you at one level of the organizational hierarchy want others to understand, is exactly what you yourself is expected to understand at another level of the same hierarchy. The same self-reflection and flexibility is of course also required by any prudent host institution. Since the PI-funding schemes are an important part of contemporary research funding, not least in basic research, the institutional competition has changed to not only educate tomorrow´s researchers, but also nourish tomorrow's research leaders and principal investigators. The best institutions will be those who are capable of both supporting new strong, independent PI-led externally funded projects and integrating those same projects by developing the institution in such a way that there can be a productive fusion of and mutual adaptation between projects and host organization.

The point is that research activities can not and should not be wholly isolated from tasks related to logistics, communication, budgeting etc. around the research. To make both dimensions - the end and the means to the end - work flawlessly together is an important factor in the ambition of making a research center an international leading hub in a given discipline, since only this way can funding, research and organization support each other.

Two examples of iCourts in the role as an international hub based on a previous build up global network and subsequent capacity to fund, organize and handle the logistics around major events. The two internal very different events in the history of iCourts that both required quite a deal of planning and accuracy in the logistics was:

1. The Brandeis Institute for International Judges (BIIJ) in 2016 under the title "The Authority of International Courts and Tribunals: Challenges and prospects" organized closely together with director Leigh Swigart and director Daniel Terris from Brandeis University. In the BIIJ 2016

participated 15 highly renowned and international judges, mainly a closed meeting between iCourts researchers and based on Chatham rules of confidentiality.[12]

2. The ICON-S (The International Society of Public Law) conference in 2017 "Courts, Power and Public Law" with close to 1000 participants with keynote speakers not only scholars, but also judges, NGO-leaders and other practitioners (Hyperlink). The organizational skills and muscles to be able to host this kind of small or big high-level events, demonstrates the need of supporting functions to redeem research objectives and being able to be a local and temporary host for a traveling meeting conference format.[13]

In retrospect it was probably not a coincidence that both events took place at the time where iCourts after respectively four and five years in operation as a Center of Excellence really had to demonstrate major outcome and international collaboration triggered by the investment made by the DNRF. As it is often the case, causality runs two ways. The events that manifest an already status as a hub for research also cemented and enlarged exactly that very same position. A lot of contacts, collaborations and output relates back to the ICONS-S conference, and probably for many years onwards.

Center Director - a short portrait

The best way to get a view of Mikael Rask Madsen as a center leader and PI is to read the short "my iCourts story" published alongside the articles in this collection. Many of these speak not only about iCourts, the center, but also about Mikael, the center leader. Still we have decided to add a little extra to this, and we will do so through a short retelling of a situation that occurred in one of the many conferences Mikael has participated in.

Although anecdotal evidence doesn't count in genuine research, a short story might be informative regarding the personality and temperament of the center director. At a conference with attendance of a high-ranking and internationally experienced diplomat, a participant among the audience towards the end asked a question to the panel in a long winded and less comprehensible English. As time goes by, the embarrassment spreads among the audience, nobody really understands the question, even with

12 See: Brandeis Institute for International Judges, "The Authority of International Courts and Tribunals: Challenges and Prospects", https://www.brandeis.edu/ethics/publications/international-justice-pubs/pdf/biij-2016.pdf.

13 See: "ICON-S 2017 Programme", https://icon-society.org/wp-content/uploads/2017/07/170630-ICON-S-Conference-2017-Programme-1.pdf.

the utmost mobilization of goodwill, so how should the panelist respond? The co-panelist is a little puzzled and looks inquiring at professor Madsen, who silently puts his hand on the arm with a gesture signaling: "I take care of it". When the conference participant finishes, Mikael answers: "I´ve got that question many times all over the world…" and continues with an account of something relevant for the actual event. Everybody is relieved by the diplomacy, including the respect for the participant, and feeling reassured by the well-judged handling of the situation. Such an awkward situation has no given outcome beforehand, neither good nor bad, but it seems to be receptive for discretion and good judgment - supported by a portion of boldness to act in the situation. Experience, professionalism and courtesy are characteristic for Mikael - alongside his hard work and dedication to excellent research of course.

But that is not all. Any organization and any human interaction needs, in order to be both rational, functional and efficient, an explicit hierarchy and a clear chain of command; a division of roles and responsibilities. But a leader of a research organization should also be prudent enough to realize that it is not possible to know ahead of time where the best and next good research ideas will come from. Mikael has revealed his insight on this in an interview conducted in a Danish book that contains 25 interviews with leading researchers published by DNRF in collaboration with The Royal Danish Academy of Science and Letters. A knowledge-based organization exposed to competition in a contemporary globalized world - "the global marketplace for knowledge" - with an open-minded and egalitarian approach will at any time defeat a more traditional minded organization: "knowledge has no hierarchy". In other words: Hierarchical seniority cannot be translated to valid currency in the knowledge economy: Being in touch with the cutting edge of research requires active participation, position is not enough. Mikael also reflects on this in the same interview:

> "Another fundamental principle is that the money is allocated to where things happen, the hierarchy is uninteresting in that context. If you want to be a part of it, things have to happen. That might sound cynical, but that is in reality the condition for elite research today. My time should be used to supervise where there are activities with possibility for new ideas and breakthroughs".[14]

14 The Scientific Frontier: Conversations with 25 Contemporary Researchers in Denmark, 2020, Chapter 3, p. 38, published by the Danish National Research Foundation and the Royal Danish Academy of Science and Letters.

This insight is surely also what drives a more egalitarian approach to organizing the research center than seen in many other places. Seniority, of course, should not be deleted, and there is a social hierarchy that exists between full professors on the one hand and postdocs on limited term contracts. But Mikael always insists that in the proverbial lab, in academic discussion, etc. communicative equality and the better argument always prevails.

There is no fixed recipe for skilled research leaders, each one presumably has a rather unique combination of skills. In the case at hand, even though a highly competitive temperament and by nature a high achieving personality, other abilities are mixed into Mikaels habitus. The distinct no-nonsense attitude and often looking for ways to tease, for example in meetings with the faculty management, scheduled to an hour, shaking his head signaling that it can't possibly take more than half an hour to sort out the issue on the agenda, is combined with a non-hierarchical approach, empathy and respects towards especially younger scholars.

Mikael is obviously very fond of Pierre Bourdieu. Among many anecdotes he has told about Bourdieu, the following is also telling of Mikael himself. Back in 1968, where one of the researchers on Bourdeiu's team was eager to participate in the student demonstrations in the streets of Paris, Bourdieu allegedly hold him back, to keep focus on collecting data to a common research project, which, by the way, was a part of preparing Bourdieu's famous academic work on the Parisian *Banlieues* (suburbs). What at that moment in history, back in 1968, seen from the perspective of the researcher in Bourdieu's team, could be perceived as a contradiction between political engagement and research, was in fact a prudent long term preparation for a more informed and evidence based public discussion of one of the most important topics in contemporary society. Insisting on the independence and separation of research and politics is not an apolitical act, on the contrary it shows a sense of the importance of creating a not too direct and activist link between the relatively autonomous spheres of research and society. Today the ability to retain a sufficiently clear distinction between research and activism is perhaps more important than ever.

That way of thinking and acting as a researcher of course also refers even further back in time to the founders modern sociology, particularly Max Weber, that in his renowned lecture "Wissenschaft als Beruf", stresses that research don't tell us how to live or what choices to make in life, but require an effort of each researcher to distinguish between fact and opinions, and not least being able to recognize, what Weber calls "inconvenient facts". The key approach in the auditorium is "intellectual integrity",

politics as such, should have no place in the lecture room - least of all not when the topic is politics.[15] Mikael is very much a bearer of this tradition in his leadership. Societal and even University politics are very rarely on the agenda in iCourts. Excellent research is always at the top of the agenda.

The big picture: Global research policy

Our account of the vision, design and daily operation of iCourts is *one example* of an answer on how to deal with the changing framework conditions around the university sector the last couple of decades. There are without a doubt many other possible avenues to follow and other good answers to this new situation. Which makes it even more important to share examples of experience with different organizational set-up across universities and higher education concerning how to develop answers. Many voices raise with good reason concerns about the increasing demand for immediate societal impact, increased competition over funding, the increasing vulnerability of researchers on short-term contracts, etc. not to mention goal collision between different demands from the state and private funders.

Our aim here is not to provide a general appraisal of the development of the national or global research policy, but instead to share an experience from a specific point of view. One large scale observation might however be appropriate to add in this context. Recent years have witnessed an increasing perception of the higher education system as an integrated part of the overall societal transformation towards a knowledge-based economy. Competitive knowledge institutions have become a *sine qua non* in the national and global economy. The state is no longer beyond competition and needs spearheads in the knowledge production. The historical irony is that if the vision broadly speaking in the 1960s among many porgressive researchers was a university intervening in amore activist way in the surrounding social reality, the university sector has now got even more than they asked for, in respect of expectations for social involvement. It could be argued that one of the tasks for a modern university is to explain and increase the sense of the importance of general appreciation of research as a public good beyond the economic dimension.[16]

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15 *Max Weber Gesamtausgabe*, Abteilung I: Schriften und Reden, band 17, Wolfgang J. Mommsen (Hrsg.), Tübingen 1992, p. 96.

16 "The Humanities as a Public Good and the Need for Developing Accountability Strategies", Henrik Stampe Lund, *Humanities* 2015, 4, 98-108, https://doi.org/10.3390/h4010098. An example of the very close link between research and employ-

This also goes for basic research. Basic research is not genuine research without a large degree of autonomy, but autonomous research is not in itself an isolated activity. There is no necessary contradiction between independent research and a high level of accountability to the surrounding society. On the contrary: accountability is the key to secure the autonomy of research under the new historical and political conditions and the current research policy. The key words for academic freedom and autonomy is accountability and transparency, the ability to report back to funders and the public about the work and outcome of the research. An exercise that, by the way, supplies the environment itself with tools and awareness about choices, options, consequences, risk, use of resources, and thereby a management instrument. Writing your history is also a reflection useful for future choices. And having the luxury of independence also makes one aware about being exposed to one's own failures and lack of excuses when things go wrong. The PI also gets a specific role in this regard, for more often than not, success *and* failure can be attributed to the PI as grant holder. The ability to organize and drive a research agenda and keep a good relationship to the host institution is absolutely key in this regard.

Predictions of the future or estimate of possible scenarios is often imagined under the assumption that the future can be seen as a linear extension of the present situation. It is tempting to forecast that it is likely that research policy in the future will focus even more on expectations for impact and "social return". This might very well be true for the near future, but with the accumulating experiences any downsides of that approach will become visible and will lead to other approaches being seen as equally or more attractive ways of managing the research landscape. Any given historical development contains its own discrepancy and internal potential reflectivity. A future scenario that takes both dimensions into account, on the one hand some degree of conformity to existing forceful research policy agendas and on the other hand reactions on the limits of the rationality of the very same policy, is more likely to hit the mark.

The specific balance on the many parameters in play in contemporary research (basic vs applied research; research vs. education; competitive based vs. basic funding; scientific vs. societal impact; etc etc) is of course hard to predict, but we find it almost certain that Research management is looking into a more complex picture where the rather fixed, homogeneous

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ment policy: "Supporting growth and Jobs – An agenda for the modernization of Europe´s higher education system", European Commission COM(2011)567 final: Supporting growth and jobs. Publications Office of the EU (europa.eu).

and stable hierarchy, behind national borders, is gradually substituted by a more fluent and differentiated international system with much more opportunities for entrepreneurial and mobile researchers - but also a much more unequal distribution of research means and a polarized labor market for researchers.

But one thing might be certain in this overall change: No matter where or at which level a researcher or a research institution is placed in this development, the difference between being on the agenda-setting or the simply agenda-implementing side of the fence is bigger than ever. The choice for Research administrators today, Rectors, Deans, Head of Departments etc. is the following: Do you create an institution and environment that is running after objectives and agendas set by others or do you design a somewhat autonomous organization that is capable of participating in setting objectives and an agenda for contemporary research? The latter is obviously more difficult and risky, but also that much more rewarding when it succeeds. It is the classic theme of "high risk - high gain vs. low risk low gain" that plays out here. To be a successful leader in the contemporary complex research landscape that is showing up ahead of us, you need to work out which "risk profile" provides the best competitive advantage for your institution - whether that is a small group, a larger center, a department, a faculty or a university.

Selection of articles

Although we wish to acknowledge the important role and hard work of the iCourts PI, we also wish to emphasize that the center is very much a collective achievement. It is the result of an active participation by all iCourts staff and thereby of the resolve by all to actively join and support, not only the overall research project and its academic ethos, but also the collective organizational ambition which calls upon every single member to play their role and commit to carrying their part of the work, that being Ph.D. Summer School, newsletter, organizing seminar series, working paper series, assessing applications to the visitors program and engaging in the role of host for visitors, participating in funding applications, organizing conferences, taking charge of iCourts Twitter account etc. etc.

It is important for us as editors, to emphasize this, because it is key to explaining the criteria we selected for which articles to include in this book: Since it is a tribute to iCourts as a whole, we have deliberately chosen to NOT include articles authored by present iCourts members of staff. Instead we have chosen to show the impact of iCourts through articles published by iCourts associated visitors and past members of staff:

Researchers who have collaborated with and stayed at the iCourts center - mostly over longer periods of time. Some of these researchers even have accrued status as "permanent visitors", thereby highlighting their frequent and close collaboration with the center.

The choice not to include publications from permanent iCourts staff has not been easy. iCourts staff is our closest colleagues and we know that they would all have been excited to contribute. Moreover, we also know that their research is of outstanding quality and would have been highly appreciated by the readers of this book. However, we have decided to honor iCourts as a whole and a international hub, and we have found it to be true to the original iCourts spirit that we do this by letting guests and former staff tell their iCourts story and to let their research contribution stand as a representation of the innovative and multi-facetted breadth of original research from Courts.

Our aim has been to highlight how iCourts have been an international hub for a new generation of research on international courts and international law.This approach has also allowed us to introduce a little editorial twist: We have asked each of the authors to provide their personal "iCourts experience" as an introduction to their article. In this way we hope to provide a view of iCourts as seen from the outside.

This approach to the book is an important point in itself. iCourts have always sought to achieve more than international recognition for its own research. It has actively sought to set an agenda for the research field itself and has tried to achieve this by an active engagement with researchers and research environments across the globe who are committed to bring forth new knowledge about international courts and their role in international society. Focusing on this achievement, by displaying some of the innovative research that has been produced by iCourts visitors and by offering their iCourts experience as evidence of what iCourts have achieved is therefore, for us, the best way to honor and pay tribute to iCourts as a whole as well as personally to the Center leader.

Choosing which publications to include in this book has not been easy. We have opted for a composition of articles that show the diversity and consistent high quality across legal fields and geographies and in respect to both theoretical development and more empirical work as well as legal history.

Influencing the very delimitation on which the center's research efforts were based, Cesare Romano's article "A Taxonomy of International Rule of Law'' has in many ways been important for iCourts right from the beginning. Romano was one of the earliest visitors to iCourts and has entertained numerous times at the iCourts PhD summer school on the art

and role of definition in legal scholarship. Although not published in the iCourts era (the article is from 2011) it has played an important role in the life of iCourts and Romano and is therefore included in the book as the first article.

A defining feature of iCourts is its ambition to cover international courts as a whole - rather than simply studying one or a few enumerated courts. In our selection of articles we have tried to show how this has been operationalised. First of all, we have wanted to show the breadth of studies in terms of geographical plurality. We have therefore included articles that contribute new research on international courts with regional jurisdiction in both Europe (Cali, Mayoral, McAuliffe, Odermat, Palmer Olsen, Vauchez, Yildiz), Africa (Daly, Ebobrah) and Asia (Sperfeldt) as well as international courts with global jurisdiction (Giannini, Alter, Helfer, Levi, Romano). Secondly we have included articles that precisely transgress research that focus on individual courts, by theorizing the role of some institution in international law across several courts and jurisdictions (Levi, Ebobrah, Yildiz) or international courts more broadly (Alter, Helfer, Romano, Yildiz)

Another example of breadth is the ambition to study international courts across the various established disciplines of law. iCourts has not been constrained by being limited to study only, say, human rights law or criminal law. Instead, iCourts research have been conducted in almost all fields of law dealt with by international courts: human rights (Cali, Daly, Ebobrah, Yildiz), criminal law (Giannini, Levi), international law (Alter, Helfer, Romano, McAuliffe).

Whether European, American or other geographies and whether human rights law, criminal law or other legal fields, iCourts has also been pioneering new interdisciplinary approaches to law - something that we have also sought to illustrate by our selection of publications. While mostly avoiding engagement with the well known legalistic approaches characteristic of much doctrinal legal research being produced in legal faculties, the ambition of iCourts has been to be at the forefront of new innovative approaches to legal studies. Adopting and adapting contemporary approaches from various other disciplines has led to studies of international courts that have brought new light on how these courts operate - both internally and in relation to other actors. Examples are research that connects law to the study of institutional authority, thereby revealing the factors that determine the scope and impact of international courts (Alter, Helfer, Ebobrah, Giannini); research that connect law's development to historical institutionalism (Levi, Vauchez), studies that relate law to the role of trust (Mayoral); and so on. Studies that employ data science and network analysis have

contributed to the establishment of a whole new field of computational legal studies (Palmer Olsen); Linguistic approaches have been used to reveal new insights on the method of reasoning employed by international courts (McAuliffe). Altogether, these articles we have selected, and the institutional context we have described constitute precisely what we are aiming to capture with this book, the role of iCourts in contributing to the development of New Interdisciplinary Legal Research.

iCourts as a workshop – an impressionistic hand sketch

Henrik Stampe Lund

"Was heute nicht geschieht, ist morgen nicht getan", from Faust by Johann Wolfgang von Goethe

In daily life, many things might seem random and even confusing. Although seen from a distance and over time, patterns in the many experiences in life emerges clearer. When I today look back on ten years of work at iCourts it strikes me, how much it mirrors my very first school experiences. In my role as administrator and responsible for the organizational activities in the daily operation of the center – I realized, how much all those tasks with building different frameworks for a collective research project, not least driven by young scholars, reflected my first school experiences as a boy at a left-wing, progressive school experiment in the early 1970's. It was a public school based on so-called reform pedagogy and democratic reforms in general back from the 1960's: Project-driven and less focused on direct conformity with the skills required by the surrounding society.

The defining features of iCourts has been the collective aspect, a group of researchers implementing a common research plan, among them many young and imaginative researchers from all over the world, many different meeting formats targeted toward feed-back from colleagues and exchange of knowledge in general; in short a learning organization with a pronounced egalitarian and merit oriented culture.

The building of the iCourts research center was not a customization to and conformation with an already existing organization, but an occupation in the interface to the unknown and the yet untried, where one needs all the energy, motivation and wealth of ideas a collective can mobilize. Competitive spirit among staff members combined with team spirit simply makes the cake bigger. If the iCourts story shows anything, it is that collective collaboration in an international context is everything else than a zero sum game.

In was in that spirit that Mikael and I in the first years meet at our weekly Monday management meetings at noon to make status and discuss big and small issues in an informal atmosphere. Sitting with our notes

and papers and at the same time eating our homemade lunch. The same packed lunches, as we had made for our own children the very same morning, before bringing them to kindergarten or school. Mikael with an open sandwich with liver pate, and supplemented by a cucumber or a carrot. The whole situation was a mixture of a machine room for decisions and a literal workshop – sometimes spiced up by Mikael with educational anecdotes, from his stay in Pierre Bourdieu's research group in Paris.

I have always perceived Mikael as a center director who wanted to hear your sincere opinion, liked to be challenged, and at the same time oriented towards consensus – and as *a leader for whom the power of the argument actually counts*. I have never experienced Mikael play the card of higher rank or mere institutional authority to promote a point of view or specific case. My best guess is that he would see this as a defeat – for both, if it should end there.

Perhaps it is not only at a personal level, that my early school childhood experiences, mirrors a project-oriented, egalitarian, and open-ended approach to a center building, but also a manifestation of a historical causality at a deeper level: That a democratic culture simply is superior in relation to producing new insights. The German author Botho Strauss states in the novel *The Young Man* (1985): "there is a wide range of recent discoveries in the field of micro-physics and molecular-genetics, which would not have been found and articulated without a deeper *democratic intuition*; that a human mind embossed by hierarchical ideals never would have discovered". Elsewhere he talks about the "multiple connected will step in place of the recognition of hierarchy". Judging from the iCourts approach with the least possible formalized hierarchy, where all voices are heard, and insights and contributions can originate from all parts of the organization, there is a core of truth, that a democratic spirit can catch more possibilities in its thinking than more traditional and old-fashioned ways of interaction between people. It's simply a question about practical rationality.

This is, in my opinion, deeper than something purely cognitive and intellectual. It is also about personality and temperament. During the years I have noticed that Mikael with joy and warmth in his voice talks about earlier employees at the center, that have done well afterwards in other research organizations. His competitive spirit doesn´t stand in opposition to caring for each single person. Psychologically it is easy to be only one or the other, but to incarnate both dimensions is the recipe of true leadership.

Even – or exactly – in situations under pressure the work environment there is a surplus of humor, always an anecdote, or a teasing remark. In situations where Mikael accentuates the importance of being effective,

I sometimes play along and to refer to Max Weber's account for the protestant view of wasting time as a sin, and he simulates an apparently guilty body language – and we move on to our respectively tasks. Mikael creates generous rooms for self-management; a space, you have no doubt, is expected to be filled with full responsibility.

Throughout the lifetime of iCourts one specific parallelism has struck me. While we on one side as a research center has been following a moving object in the shape of International Courts, the institutionalization and historical development of International Courts, we worked on the other side on the institutionalization and construction of our own center. Also a kind of moving object. You could get that strange thought, that we by investigating ourselves, using ourselves as empirical evidence, could get a better understanding of the courts' struggle for reaching legitimacy. A judge employed at iCourts once summarized his own first experiences as an International Judge really in a very plain remark: "They put you in an office with a chair, a table and a telephone – and you just try to do your best". It's that simple – and it's that complicated. It could count as a credo in all open-ended processes: You try to do your best at each step in the building process, and you need all the qualified input, you can get.

All those small iCourts stories and impressions during the years are by definition biased and not impartial at all, but hopefully they also convey concrete experiences with building a contemporary organization, and hopefully are able to catch today's opportunities and offer up-to-date answers. The real test of that is of course the ability of iCourts to catch the opportunities of tomorrow in the field of International Courts, and Global Legal Governance in general, that are more needed than ever – both the International Courts and the interdisciplinary and empirical oriented legal research in the field.

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II. Contributions from visiting professors

A Taxonomy of International Rule of Law Institutions

Cesare P.R. Romano[*]

This article revises and updates a seminal article written by the author in 1998, which was the first attempt to tally how many and what kind of international courts and tribunals existed at that point in time. It contained a chart that placed international courts and tribunals in a larger context, listing them alongside quasi-judicial bodies, implementation-control and other dispute settlement bodies. The present article has three aims. The first is to provide an update, since several new bodies have been created or have become active in the last decade. The second aim is a bit more ambitious. It is time to revise some of the categories and criteria of classification used back in 1998. More than a decade of scholarship in the field by legal scholars and political scientists has made it possible to gain a better understanding of the phenomenon. The abundance of data over a sufficiently long time-span is making it possible to start moving away from a mere 'folk taxonomy' towards a more rigorous scientific classification. The hallmark of truly scientific classifications is that classifying is only the final step of a process, and a classification only the means to communicate the end results. Besides making it possible to discover and describe, scientific classifications crucially enable prediction of new entities and categories. Thus, the third aim of this article is to attempt to discern some trends and make some predictions about future developments in this increasingly relevant field of international law and relations.

Order and simplification are the first steps toward the mastery of a subject.
Thomas Mann

Order is the shape upon which beauty depends.
Pearl S. Buck

It has often been said that one of the most remarkable features of international law and relations since the end of the Cold War has been the rapid

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multiplication of international institutions controlling implementation of international law and/or settling disputes arising out of its interpretation and implementation. Yet, the sheer dimensions of the phenomenon, with well over 142 bodies and procedures, has defied many attempts to comprehensively map this fast growing sector of international relations.

This article revises and updates an article I wrote in 1998 and published in the NYU Journal of International Law and Politics.[1] That article, entitled 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', was the first attempt to tally how many and what kind of international courts and tribunals existed at that point in time. It contained a Synoptic Chart that placed international courts and tribunals in a larger context, listing them alongside quasi-judicial bodies, implementation-control and other dispute settlement bodies.[2] The Synoptic Chart was also diachronic; it included bodies that once existed but that had ceased operations or were terminated, bodies that had been long dormant, and also bodies that had just been proposed.

The Synoptic Chart, which was prepared for the Project on International Courts and Tribunals (PICT), has since been updated three times, the last of which in November 2004,[3] and has been cited and reproduced in several articles and books since.[4] Every scholar who has ventured, or will venture, in the field of international courts and tribunals at some point had to grapple with the preliminary question of demarcating the scope of their research and pinpoint exactly which intuitions and bodies were to be considered. This article aims to provide an updated and improved taxonomy of bodies in the field.

This article has three aims. The first is limited. As we just said, since several new bodies have been created or have become active since it was published, an update is overdue. The second aim is a bit more ambitious. It is time to revise some of the categories and criteria of classification used back in 1998. More than a decade of scholarship in the field by legal scholars and political scientists has made possible a better understanding of the phenomenon. The abundance of data over a sufficiently long time-span is making it possible to start moving away from a mere 'folk

1 Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU J Intl L Pol 709–51.
2 Ibid. 718–19.
3 PICT <http://www.pict-pcti.org/publications/synoptic_chart.html> accessed 24 November 2010.
4 See eg Jose' E Alvarez, *International Organizations as Law-Makers* (OUP, Oxford 2005) 404–07.

taxonomy'[5] towards a more rigorous scientific classification. The hallmark of truly scientific classifications is that classifying is only the final step of a process, and a classification only the means to communicate the end results. Besides making it possible to discover and describe, scientific classifications crucially enable prediction of new entities and categories. Thus, the third aim of this article is to attempt to discern some trends and make some predictions about future developments in this increasingly relevant field of international law and relations.

1. *Classification, Typology and Taxonomy*

Since the dawn of time, humans have tried to make sense and understand the world around them by arrangement or ordering of objects and ideas in homogeneous categories that could be juxtaposed or put in relation with one another. It is ingrained in our nature. Almost anything – animate objects, inanimate objects, places, concepts, events, properties and relationships – may be classified according to some scheme. We use classification in every aspect of our lives. When we go to the supermarket for oranges, we know we are on the right track when we can see vegetables. When our email inbox starts to get overwhelmed with emails, we create named subfolders and sort our emails into them for ease of retrieval later. Yet, while classification, and the science of it, is arguably one of the most central and generic of all conceptual exercises, it is also one of the most underrated and least understood.[6]

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5 A folk taxonomy is a vernacular naming system, and can be contrasted with scientific taxonomy. Folk biological classification is the way people make sense of and organize their natural surroundings/the world around them, typically making generous use of form taxa like 'shrubs', 'bugs', 'ducks', 'ungulates' and the likes. Astrology is a folk taxonomy, while astronomy uses a scientific classification system, although both involve observations of the stars and celestial bodies and both terms seem equally scientific, with the former meaning 'the teachings about the stars' and the latter 'the rules about the stars'. Folk taxonomies are generated from social knowledge and are used in everyday speech. They are distinguished from scientific taxonomies that claim to be disembedded from social relations and thus objective and universal.

6 Kenneth Bailey, *Typologies and Taxonomies: An Introduction to Classification Techniques* (Thousand Oaks, California: Sage Publications 1994) 1–2. See also, in general, Geoffrey Bowker and Susan Leigh Star, *Sorting Things Out: Classification and its Consequences* (Boston, MIT Press 1999).

In its simplest form, classification is defined as the ordering of entities into groups or classes on the basis of their similarity.[7] Statistically speaking, we generally seek to minimize within-group variance, while maximizing between-group variance.[8] We arrange a set of entities into groups, so that each group is as different as possible from all others, but each group is internally as homogeneous as possible.[9]

Taxonomy and typology are both forms of classification, and in fact they are terms often used interchangeably.[10] But if one was to find a fundamental difference between the two, it is that while the term typology tends to be used in social sciences, the term taxonomy is more generally used in biological sciences.[11] While typologies tend to be conceptual, taxonomies tend to be empirical.[12] Since this article carries out a rather empirical classification of international bodies, and we rely on the categories of the Linnaean classification, we will call this exercise a taxonomy of international rule of law bodies, not a typology. Still, one could call this exercise a typology, too.

Taxonomies use taxonomic units, known as taxa (singular taxon). A taxonomic scheme ('the taxonomy of...') is a particular classification. In a taxonomic scheme, typically taxa (categories) are arranged hierarchically, by 'super-taxon/sub-taxon' relationships. In these generalization-specialization relationships (or less formally, parent-child relationships) the sub-taxon has all the same properties, behaviours and constraints as the super-taxon, plus one or more additional properties, behaviours or constraints, which differentiate it from the other taxa. The utility of taxonomies is thus that they make it possible to immediately grasp the essential traits of the classified object by simply knowing in which category and with which other objects it has been grouped. The progress of reasoning proceeds from the general to the more specific when descending the hierarchy, and the opposite when ascending. For example, a bicycle is a subtype of two-wheeled vehicle. While every bicycle is a two-wheeled vehicle, not every two-wheeled vehicle is a bicycle, since there are also motorcycles, scooters, tandems and the like. Going up the hierarchical tree, a two-wheeled vehicle is a sub-type of vehicle, but not the only one, as there are also airplanes, animal traction vehicles and so on.

7 Bailey, ibid. 1.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.

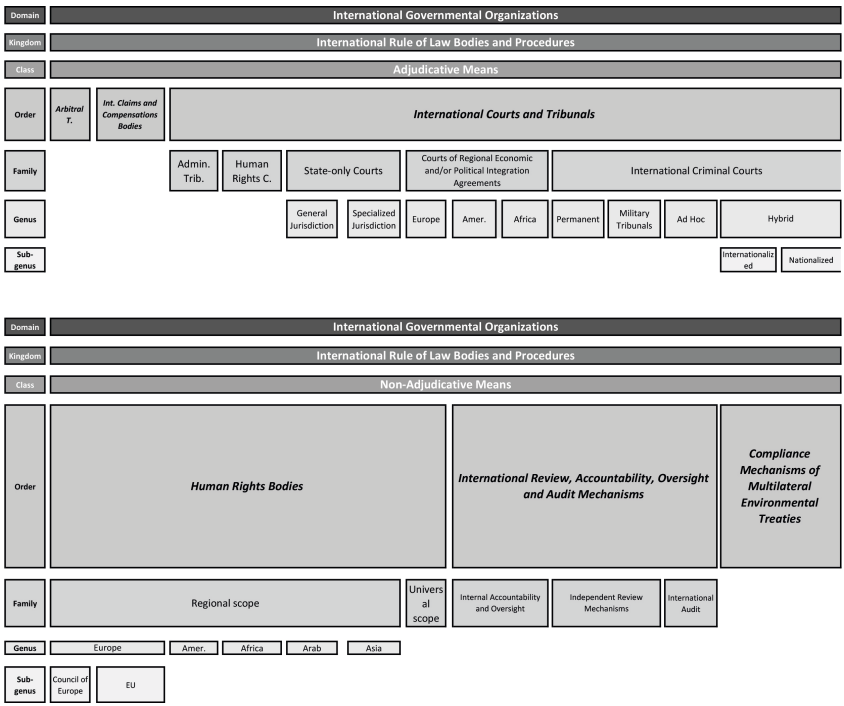
The biological classification, sometimes known as 'Linnaean taxonomy', from its inventor, Carl Linnaeus, brought order in the seemingly chaotic complexity of life on our planet, and was the essential pre-requisite for the development of numerous branches of science, starting with the theory of evolution. Famously, the ranks of the Linnaean taxonomy are, in increasing order of specificity: Kingdom, Phylum, Class, Order, Family, Genus and Species. When needed in biological taxonomy, intermediary taxa, such as Super-Families or Sub-Species, are also resorted to.

If we apply the nomenclature of the 'Linnaean taxonomy' to international courts and tribunals, a classification, from the most specific to the broadest category, might look like this:

Species: Special Court for Sierra Leone
Sub-genus: International
Genus: Hybrid criminal courts
Family: International criminal courts
Order: International Courts and Tribunals
Class: International Adjudicative Bodies
Kingdom: International Rule of Law Bodies and Procedures
Domain: International Governmental Organizations

A whole taxonomical scheme would look like this (Figure 1).

Fig. 1. A Taxonomy of International Rule of Law Institutions and Procedures



Again, anything can be classified according to countless criteria. Other scholars might put forward equally valid classifications, and surely the various categories could be named in other ways (e.g. Level 1, 2, 3 etc.). However, because the Linnaean taxonomy is still the most widely known form of taxonomy, I find it expedient to adopt it when classifying international bodies. The only deviation is that I will not use the term 'species' that sounds exceedingly naturalistic, but rather the generic term 'body' to indicate the various courts, tribunals, procedures and the like considered in this classification.

The basic rule of all forms of classification is that classes (taxa) must be both exhaustive and mutually exclusive.[13] If N entities are to be classified, there must be an appropriate class for each (exhaustivity), but only one correct class for each, with no entity being a member of two classes (mutu-

13 Ibid. 3.

al exclusivity). Thus, in the ideal classification, there must be one class (but only one) for each of the N persons.

However, this is most definitively not an ideal classification. The rules of classification must be applied with a minimum degree of flexibility, if one is to produce a classification that is still minimally meaningful to those in the field. Indeed, the chosen field presents significant classification challenges. Some bodies might simply not perfectly fit the various categories. Some might fit two or more separate categories. For instance, the Caribbean Court of Justice (CCJ) is unique because it has both original and appellate jurisdiction. In its original jurisdiction, the CCJ is responsible for interpreting the Revised Treaty of Chaguaramas that establishes the Caribbean Community Single Market and Economy. Thus, when acting in that capacity, it would be classified in the family of 'Courts of Regional Economic and/or Political Integration'. Yet, the CCJ is also a sort of national court, therefore falling outside the scope of this classification, as it is the common final court of appeal for those states which have accepted its jurisdiction (at the moment, Guyana and Barbados).

Other international courts straddle categories in other ways. The adjudicative body of the Organization for the Harmonization of Business Law in Africa (OHADA), a regional economic integration organization, is the OHADA Common Court of Justice and Arbitration. It can be classified in multiple taxa because it has multiple functions. First, it provides advice to the Council of Justice and Financial Ministers on proposed uniform laws before they are adopted by it. Second, it acts as court of cassation common to OHADA members, in place of national courts of cassation, on all issues concerning OHADA laws. Third, it monitors and facilitates arbitrations: it appoints arbitrators when they cannot be chosen by the parties; it monitors the proceedings so as to ensure their impartiality; and it reviews the arbitral awards before they are rendered, without having the power to impose changes on their substance.

Otherwise, consider the future African Court of Justice and Human Rights, the result of the merger between a human rights court (i.e. African Court of Human and Peoples' Rights) and a court of a regional economic and political integration agreement (i.e. the Court of Justice of the African Union). How should it be classified?

Bodies can straddle different orders. For example, the World Trade Organization (WTO) and Mercosur (Mercado Comu´n del Sur) dispute settlement machineries have a two-level structure: an arbitral panel, as first instance of jurisdiction, and an appellate body. The first level of jurisdiction fits the order of Arbitral Tribunals, but the appellate level falls in the

order of International Courts and Tribunals, and specifically the family of State-only Courts and the Genus of Courts with Specialized Jurisdiction.

Finally, some courts might fit in either family depending of what jurisdiction they exercise. Consider, for example, the Court of Justice of the Economic Community of Western African States (ECOWAS). It is, in essence, a court of a regional economic integration agreement, similar to the European Court of Justice. However, in recent years it has ruled on human rights issues, mimicking a human rights court. The European Court of Justice, now called the Court of Justice of the European Union, once it starts exercising jurisdiction over the European Charter of Fundamental Rights, will take on functions of a proper human rights court too.

Some bodies can concurrently be International Administrative Tribunals whenever they, or special courts or chambers within them, are endowed with jurisdiction to hear employment disputes between the organization and its employees, and Court of Regional Economic and/or Political Integration Agreements. Thus, until 2004 in the European Community/Union, the Court of First Instance exercised jurisdiction over administrative matters. The Central American Court of Justice has appellate and last instance jurisdiction for disputes concerning administrative acts of the organs of the Central American Integration System that affect the organization's employees.

One final caveat. As in the case of the original Synoptic Chart, I tried to be as exhaustive as possible. However, it is no attempt to classify all international organizations, not even just international governmental or intergovernmental organizations. It is too vast a world. The Yearbook of International Organizations lists almost 2,000 entities.[14] The main focus of this article is international courts and tribunals; but to shed some light on their nature, it is also necessary to zoom out and place them in a wider context. But even that might be too ambitious. Like any classification, this is a work in progress; one that could strive to completeness only through the contribution of all in the field.[15]

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14 This is the sum of 'conventional international bodies' (245 = Federations of international organizations, universal membership organizations; intercontinental membership organizations; regionally oriented membership organizations) and 'other international bodies' (1743 = organizations emanating from places, persons, or bodies; organizations of special form; internationally oriented organizations). Yearbook of International Organizations (Brussels, Union of International Associations, 2004/2005), Number of International Organizations in this Edition by Type, app 3, Table 1.

15 Please, send corrections additions or comments to cesare.romano@lls.edu.

A. Domain: International Governmental Organizations

The beginning point of our taxonomy is the Domain of International Governmental Organizations (also referred to as Intergovernmental Organizations). Of course one could begin even higher in an ideal taxonomical scheme. For instance, one could conceive of a generically labelled 'International Organizations' group that would comprise several separate domains, one of which would be 'International Governmental Organizations'. But there would also be several other separate domains, one of which would certainly be 'Non-Governmental Organizations' that would branch out into 'non-profit organizations' and 'for-profit organizations', and so on. However, that would take us too far from the object of this taxonomy.

All international governmental organizations share three fundamental characteristics. They are:

(i) Associations of states and/or other international governmental organizations;
(ii) established by a treaty or other instruments governed by international law; and
(iii) capable of generating through their organs an autonomous will distinct from the will of its members.[16]

The first criterion needs little explanation. The parties to the constitutive instruments of the organizations in question are a state and/or another intergovernmental organization. While members of international organizations are predominantly States, international organizations themselves have become increasingly active as founders and/or members of other organizations. For instance, the European (Economic) Community (EC), an international governmental organization, although one of a special kind, which sometimes is referred to as 'supra-national organization', is a founding member of the WTO and a member of the Food and Agriculture Organization of the United Nations. None of the bodies considered in this classification has as parties to their statute entities other than sovereign states or international governmental organizations.

Second, all international governmental organizations are established by an international legal instrument. This legal instrument is exclusively

16 Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' MPEPIL (3rd edn), s A2. The International Law Commission also adds that they are 'possessing ... own legal personality'. International Law Commission 'Report of the International Law Commission, Fifty-fifth Session' [5 May-6 July and 7 July-8 August 2003] GAOR 58th Session Supp 10, 38.

governed by international law. Typically, this is a treaty. The Rome Statute of the International Criminal Court is an example. Similar constitutive instruments are subject to ratification and confirmation by States and international organizations seeking membership, respectively.[17] However, it can also be an international legal instrument deriving its force from a treaty. For instance, the ad hoc international criminal tribunals for Yugoslavia and Rwanda were established by Security Council Resolutions, deriving their force ultimately from Chapter VII of the Charter of the United Nations.[18] Likewise, the Court of First Instance of the European Communities was originally established by a decision of the Council of Ministers,[19] whose authority to issue such decisions ultimately rested on the EC treaties. Similarly, the hybrid criminal courts established in Kosovo and East Timor, were established by Regulations issued by the Special Representative of the Secretary General.[20] The authority of similar regulations rests on UN Security Council Resolutions.[21]

It should be noted that this does not mean that International rule of Law Bodies and Procedures must have been established *solely* by an international legal instrument. For instance, the genus of hybrid criminal courts, comprises bodies that have been established both by an international legal instrument, such as a treaty, and by national law.

Finally, the third fundamental criterion of this Domain is that organizations and/or bodies must be capable of generating through their organs an autonomous will distinct from the will of their members. This helps distinguish intergovernmental organizations from other forms of multilateral policy-making. For instance, the so-called Group of Eight (G8) is, however influential it might be, is just a periodic meeting of head of states of eight states, not an international governmental organization. There is

17 Sometimes international governmental organizations are simply created by governmental consensus reached at international conferences (eg Organization of the Petroleum Exporting Countries (OPEC)) or by a decision of an international organization (eg United Nations Industrial Development Organization (UNIDO) created by United Nations General Assembly Resolution 35/96 of 13 December 1979).

18 The Statute of the ICTY was adopted by UN Security Council Resolution 827 (1993). The one for Rwanda was UN Sec Res 955 (1994).

19 Decision of the Council of Ministers (EC) 88/591 (24 October 1988) [1988] OJ No 88/L319/1 (25 November 1988) vol 31, 1.

20 In the case of East Timor, Reg 2000/11. In the case of Kosovo, Reg 2000/34 and 2000/64.

21 Res 1272 of 25 October 1999 and the United Nations Mission in Kosovo (UNMIK) through Res 1244 of 10 June 1999.

no permanent structure. Joint declarations of the G8 are not an expression of the group itself but rather consolidated statements of the Heads of State and Government.[22] The decision of an international court or tribunal, reached by a group of independent judges, who do not represent the states that appointed them or whose nationality they have, is an expression of such an independent will. As a matter of fact, the will of international courts and tribunals can be so independent as to challenge directly major interests of states that create and fund them.

B. Kingdom: International Rule of Law Bodies and Procedures

Continuing with the nomenclature of the Linnaean taxonomy, the Domain of International Governmental Organizations can be broken down into several sub-types, called Kingdoms. One of those could be dubbed 'International Rule of Law Bodies and Procedures'.[23]

All bodies within this Kingdom share the fundamental traits of the Domain of International Governmental Organizations, but what characterizes bodies within this Kingdom and separates them from other kingdoms are three further criteria:

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22 Ina Gätzschmann, 'Group of Eight (G8)' MPEPIL (3rd edn).

23 The rise of this kingdom amongst international organizations has been dubbed the 'legalization of world politics.' Kenneth Abbott and others, 'The Concept of Legalization' (2000) 54 Intl Org. It has been noted that since the end of the Second World War, through the signing of an array of treaties and the delegation of decision-making powers to international agencies, states have accepted a growing number of international legal obligations, with three key characteristics. First, states' behaviour is increasingly subject to scrutiny under the general rules, procedures and discourse of international law, and often domestic law as well. Second, these rules are increasingly precise in the conduct they require, authorize or proscribe. Third, and this goes to the core of the phenomenon of the multiplication of international institutions referred to at the beginning of this article, the authority to implement, interpret and apply those rules, and to create further rules and/or settle disputes arising out of their implementation, is often delegated. These three phenomena (obligation, precision and delegation) are the 'three dimensions' of the so-called 'legalization of world politics'. International courts and tribunals are a specific aspect of the larger phenomenon of the legalization of world politics; a phenomenon that could be called the 'judicialization of world politics'. Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge* (Oxford, OUP 2007) 6. The 'judicialization of world politics' is characterized by a high degree of delegation.

(iv) They apply international legal standards;
(v) act on the basis of pre-determined rules of procedure;
(vi) at least one of the parties to the cases they decide, or situation they consider, is a State or an international organization.

Broadly speaking, entities within this Kingdom are the incarnation of a widely shared aspiration to abandon a world where only sovereign states matter, in favour of an order where fundamental common values are shared, protected and enforced by all members of a wider society, composed not only of states but also of international organizations and individuals, in all of their legal incarnations.

More specifically, all bodies in this kingdom, when applying international legal standards and pre-determined rules of procedure, act 'under the shadow of the law'.[24] This is a crucial distinction. For instance, while both the International Court of Justice (ICJ) and the UN Security Council or the Organization for Security and Cooperation in Europe or the Assembly of the African Union engage in international dispute settlement, it is only the ICJ that does so being guided mostly, if not solely, by legal considerations. This is why the ICJ is classified here as an 'International Rule of Law' body and the others are not, although the others might ensure that the rule of law is respected by enforcing international law.

As to the first criterion, in general, bodies within this Kingdom carry out two basic functions: monitoring compliance with international law, and/or settling disputes arising out of the implementation or interpretation of those standards. All organizations and bodies belonging to this Kingdom rely on international law to carry out their functions, be that verifying compliance with international standards or settling disputes. Specifically, substantive law and procedural law used by international courts and tribunals is international law, not the domestic laws of any given state. Be that as it may, it should be noted that to meet this requirement international rule of law bodies do not need to rely *solely* on international law. For instance, sometimes international courts might apply, besides international law, other bodies of law. To wit, hybrid international criminal courts, like the Special Court for Sierra Leone, can apply, besides international law, the criminal laws of the country in which they have been set up.

Second, they act on the basis of rules of procedure that are abstract, being set before the arising of any case or situation, and are public. Most of

24 Jose' E Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 Texas Intl L J; Alvarez (n 4).

the time, it is the bodies themselves that are given the power to draft their own rules of procedure; sometimes they are not. But the point is that the parties to the case, dispute or situation under scrutiny, do not have control over them. There are some limited exceptions, though. For instance, in certain instances, the parties might have some limited control over the way in which an adjudicative body proceeds. In international arbitration, the parties are believed to have complete control over which rules of procedure the arbitral tribunal will apply. In reality that is not completely true. More often than not, the parties either select off-the-shelf sets of rules of procedure (like those of the United Nations Commission on International Trade Law – UNCITRAL), or delegate the task of drafting and adopting them to the arbitrators. Rarely, if ever, do the parties themselves draft rules of procedure *ad hoc*.

Third, the last criterion is that all bodies belonging to this kingdom handle situations, where at least one of the parties is a State or an international governmental organization. This criterion is self-explanatory. It just requires a clarification for what concerns international criminal courts. Bodies within this family try cases where an individual is the defendant. States cannot be charged with international crimes, yet.[25] Prosecution is done by an organ of the criminal court or tribunal in question, called 'Office of the Prosecutor' that is an organ of an international organization or agency. In this sense, the family of international criminal courts satisfies this criterion.

This last criterion separates this Kingdom from national courts or arbitral tribunals deciding cases of commercial disputes between entities located in different jurisdictions. Thus, the International Chamber of Commerce, the London Chamber of Commerce or the Stockholm Chamber of Commerce, all institutions that facilitate international commercial arbitration, do not belong to this grouping. Even though they are well-established institutions of international repute and usefulness, they handle only disputes between private parties. Nor, for that matter, have they been established by treaty. Rather, they are incorporated in the national legal system of certain states (i.e. France, UK and Sweden).

Finally, as every other criterion, this one, too, must be applied with a minimum degree of flexibility. For instance, while the Permanent Court of Arbitration mostly facilitates the settling of disputes between states or

25 Derek Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility' (1998) 9 EJIL 163–73.

states and private individuals, sometimes it facilitates the settlement of disputes between private parties, too.

C. Class: Adjudicative Means

The Kingdom of International Rule of Law Bodies and Procedures can be divided in at least two distinct classes:

- Adjudicative Means and
- Non-Adjudicative Means

All organizations and bodies belonging to the Adjudicative Means class share all the traits of those belonging to the super-types (i.e. the Domain of International Governmental Organizations and the Kingdom of International Rule of Law Bodies and Procedures), but what sets the Class of Adjudicative Means apart from the class of Non-Adjudicative Means are two features.

(vii) They produce binding outcomes;
(viii) They are composed of independent members.

First, the decisions of the organizations and bodies belonging to the Adjudicative Means class are binding, legally binding. It means that the outcome of the process, be it called decision, award, report or otherwise creates a new legal obligation on the parties, namely compliance with the outcome. Conversely, the outcome of Non-Adjudicative Means is not legally binding. They are just recommendations that the parties are free to adopt or reject. Granted, certain international courts, besides issuing binding judgments, sometimes also have the power to act in a non-binding fashion. For example, the International Court of Justice can issue advisory opinions that are not binding. Yet, advisory jurisdiction is not the only, nor the most important, jurisdiction it has. Most of the time, the ICJ issues binding judgments in contentious cases. Also, recommendations of some of the non-adjudicative means, such as the findings of the Inter-American Commission on Human Rights, or the World Bank Inspection Panel, or the implementation committee of any of the major environmental treaties, carry significant weight and can be authoritative. Still, they are not legally binding.

Second, they are composed by individuals who serve in their own personal capacity and do not represent any state. These individuals are called judges, in the case of international courts and tribunals, arbitrators, in the case of arbitral tribunals, or experts or just plainly members, in the

case of bodies monitoring compliance with international legal regimes.[26] These individuals are required to possess at a minimum integrity, often high moral character, and specific professional qualifications such as, in the case of the major international courts and tribunals, those for appointment to the highest judicial office in their own countries, or be experts of recognized competence in the applicable law areas.

Again, the requirement of independence should be understood properly. It does not mean that the parties do not have control over who is nominated to serve in these bodies, or the composition of the body, or the composition of the particular bench, chamber or panel that decides the matter. Members of bodies within this Class are always nominated by governments and selected through various mechanisms to serve. In arbitration, parties have a large control over the composition of the panel, although in most cases it is not a total control. An arbitral tribunal is normally composed of an odd number of arbitrators. Each party selects an equal number and then the party-appointed arbitrators are often given the power to pick an umpire, chair or president. Even in the case of some international courts and tribunals, the parties can have a degree of control over the composition of the bench that will decide a case to which they are party. For instance, in the International Court of Justice, if the parties agree, they can have the case heard by a selected group of judges (a 'chamber', in ICJ jargon) rather than the full court. Or, if a judge of their nationality is not sitting on the bench, they can appoint a judge ad hoc. But, these considerations notwithstanding, members of bodies belonging to this Class, once appointed, are required to act independently.

Before continuing descending the lineage towards the Order international courts and tribunals, the focus of this article, it is necessary to discuss briefly the Class of Non-Adjudicative Means, since the bodies in this Class play an important and growing role, in international law and relations.

26 The exception to the rule that members of international courts and tribunals are called judges is the WTO Appellate Body, whose members are just called 'members. This is due to the fact that historically, the WTO and its members have resisted characterizing the WTO Appellate Body as a judicial body, mostly for fear of losing control over it.

D. Class: Non-Adjudicative Means

All bodies in the class of Non-Adjudicative Means share the trait of producing outcomes that are not binding. They are called 'reports' or 'recommendations' and do not create a legal obligation on their recipients, who remain free to adopt or ignore them. Some of them might be composed of independent members, an essential trait of the Adjudicative Means class, but not all do. Some might be composed of governmental representatives.[27]

Thus, the UN Human Rights Council, or the United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee on Conventions and Recommendations belong to the class of Non-Adjudicative Means because they are composed of States' representatives and not independent experts and because they issue non-binding reports. The Inter-American Commission of Human Rights is composed of independent experts but still the outcome of its work is a non-binding report, not a binding decision.

The Non-Adjudicative Means class is composed of at least three distinct Orders, which can be divided in Families, Genera and Sub-Genera, totaling about 75 bodies, procedures and mechanisms currently active:

(a) Human Rights Bodies
- Bodies with Universal Scope
- Bodies with Regional Scope
  - Europe
    - European Union
    - Council of Europe
  - Americas
  - Africa
  - Arab Countries
  - Asia-Pacific

27 Some are composed of representatives of governments but also representatives of non-governmental organizations, such as trade unions or employers' organizations. This is the case of the International Labour Organization bodies such as the ILO Committee of Experts on the Application of Conventions and Recommendations; ILO Conference Committee on the Application of Conventions; ILO Governing Body Committee on Freedom of Association.

(b) International Review, Accountability, Oversight and Audit Mechanisms
- Independent Review Mechanisms
- Internal Accountability and Oversight
- International Audit

(c) Compliance Mechanisms of Multilateral Environmental Agreements.

(a) Human Rights Bodies: bodies of this Order are made of independent experts whose general mandate is to monitor compliance by States, party to human rights treaties, with their obligations to respect and ensure the rights set forth therein. In particular, the two main functions they carry out are examining:

Reports that States must regularly file about their implementation of the rights contained in the relevant human rights treaties; and 'considering communications'[28] by individuals alleging violations of human rights treaties by states party;

From time to time, these bodies also consider communications by a State or a group of States against another State alleging breach(es) of relevant human rights treaty obligations;[29] and prepare commentaries to the relevant human rights instruments.

Human Rights Bodies are a large Order, comprising at least 33 bodies currently in operation plus several more that have been discontinued. This large Order could be broken down in several sub families. One possible way of sub-categorizing these bodies would be dividing them between bodies of regional governmental organizations (and then dividing them into genera corresponding to the major regions) and all bodies belonging to international organizations with a global scope (i.e. 'Universal Bodies'). Another way would be to differentiate between bodies that have compulsory jurisdiction from those whose jurisdiction is optional. Compulsory

28 In UN practice, complaints of violations of human rights obligations are generally referred to as 'communications', while the regional human rights systems speak of 'petitions', 'denunciations', 'complaints' or 'communications'.

29 The inter-state human rights complaints mechanism has never been used at the global level. At the regional level, the former European Commission of Human Rights dealt with 17 inter-State cases until it was disbanded in 1998. The European Commission referred to the European Court of Human Rights one case before and three cases after the entry into force of Protocol No 11. The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights have each heard one such case.

jurisdiction means that States Parties by ratifying the convention have accepted the competency of the body to receive complaints, whereas optional jurisdiction requires a separate declaration, or ratification of a special protocol, by the States in question. At the global level, only the Commission on the Elimination of Racial Discrimination enjoys compulsory jurisdiction, while the jurisdiction of the other human rights treaties is optional.

A number of non-adjudicative mechanisms may be listed. The list which follows notes the year in which each mechanism began operating:

- Bodies with Universal Scope
  1. ILO Commission of Inquiry (1919)
  2. ILO Committee of Experts on the Application of Conventions and Recommendations (1926)
  3. ILO Conference Committee on the Application of Conventions (1926)
  4. (UN) Commission on the Status of Women (1946)
  5. ILO Governing Body Committee on Freedom of Association (1950)
  6. (UN) Committee on the Elimination of Racial Discrimination (1969)
  7. (UN) Human Rights Committee (1976)
  8. UNESCO Committee on Conventions and Recommendations (1978)
  9. (UN) Committee on the Elimination of All Forms of Discrimination Against Women (1981)
  10. (UN) Committee on the Elimination of Discrimination against Women (1982)
  11. (UN) Committee on Economic, Social and Cultural Rights (1987)
  12. (UN) Committee Against Torture (1987)
  13. (UN) Committee on the Rights of the Child (1990)
  14. International Humanitarian Fact-Finding Commission (1992)
  15. (UN) Committee on Migrant Workers (2004)
  16. (UN) Committee on the Rights of Persons with Disabilities (2008)
- Bodies with Regional Scope
  - o Europe
    - Council of Europe
  17. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989)
  18. European Commission Against Racism and Intolerance (1993)
  19. European Committee of Social Rights (1998)

20. Council of Europe European Commissioner for Human Rights (1999)
21. Committee of Expert on Issues Pertaining to the Framework Convention for the Protection of National Minorities (2005)
22. Group of Experts on Action against Trafficking Human Beings (2009)
    - European Union
23. European Ombudsman (1992)
24. European Union Agency for Fundamental Rights (2007)
    o Americas
25. Inter-American Commission of Women (1948)[30]
26. Inter-American Commission on Human Rights (1979)
27. Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities (2007)
    o Africa
28. African Commission on Human and Peoples' Rights (1987)
29. The African Committee of Experts on the Rights and Welfare of the Child (2002)
    o Arab Countries
30. Arab Commission of Human Rights (1968)
31. Arab Human Rights Committee (2009)
    o Asia-Pacific
32. ASEAN Intergovernmental Commission on Human Rights (2009)

Also, it should be taken into account that some thematic rapporteurs or working groups appointed by the United Nation Human Rights Council may also accept complaints about violations of specific human rights. For instance, this is the case of the Working Group on Disappearances; the Working Group on Arbitrary Detention; the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also bases her work on the receipt of communications as does the Special Rapporteur on Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous

30 The Inter-American Commission of Women was created at the Sixth International Conference of American States (Havana, 1928) to prepare 'juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political equality of women in the continent'. However, it is only the Ninth International Conference of American States (Bogota´, 1948) that approved the first Statute of the Commission, which consolidated its structure and authorized the Secretary General of the Organization of American States to establish the Permanent Secretariat of the Commission.

Products and Wastes on the Enjoyment of Human Rights. If these were added, the list would be even longer.

(b) International Review, Accountability, Oversight and Audit Mechanisms: bodies within this Order are internal organs or divisions or mechanisms of international organization, particularly those with large budgets or that disburse large quantities of funds. They ensure the compliance with organizations' policies and integrity of the organizations' activity. One could distinguish at least three Families of such bodies.

- Independent review mechanisms: These allow individuals, groups and other civil-society stakeholders harmed by international development banks' projects to allege that the institution failed to comply with its own policies and procedures in pursuing a particular development project. They are designed to provide mediation and compliance review services to stake- holders regarding banks' projects in both the public and private sectors.
  1. World Bank Inspection Panel (1994)
  2. Inter-American Development Bank Independent Investigation Mechanism (1995)
  3. Asian Development Bank Inspection Policy (1995)
  4. Office of the Compliance Advisor/Ombudsman for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) (1999)
  5. Asian Development Bank Accountability Mechanism (2003)
  6. Independent Recourse Mechanism of the European Bank for Reconstruction and Development (2003)
  7. African Development Bank's Independent Review Mechanism (2004)
- Internal Accountability and Oversight: These are divisions within international organizations that are responsible for ensuring the integrity of an organization's activities. To further this goal, the divisions are typically responsible for investigating allegations of corruption, fraud or staff misconduct; and promoting a professional culture denouncing these practices amongst the Bank staff and the regional member countries. These bodies report their findings to the head of the organization (e.g. the Bank's President), who ultimately decides whether the investigation confirms the claims filed.

Although the Independent Review Mechanisms and the Internal Accountability and Oversight bodies and processes are related, they are made to address different types of grievances. The former address the organizations'

actions, while the latter address individuals' (within the bank or outside the bank) actions.

Examples of Internal Accountability and Oversight bodies and processes are:

8. Office of the Chief Compliance Officer of the European Bank of Reconstruction and Development
9. Integrity Division of the Office of the Auditor General of the Asian Development Bank (1999)
10. World Bank Group Department of Institutional Integrity (1999)
11. Office of Audit and Oversight of the International Fund for Agricultural Development (2000)
12. Black Sea Trade and Development Bank Procedure for the Receipt, Retention and Treatment of Complaints (2001)
13. Oversight Committee on Fraud and Corruption of the Inter-American Development Bank (2001)
14. Inter-American Development Bank Office of Institutional Integrity (2004)
15. Anti-Corruption and Fraud Division of the Office of the Auditor General of the African Development Bank (2005)

- International Audit: these are internal control bodies of international governmental organizations that check that the organization's funds are actually received, correctly accounted for and spent in compliance with the rules and legislation. The results of these bodies' work, published in reports, are used by the main organs of the organization as well as by Member States, to improve the financial management of the organizations. Examples of these bodies are:

16. European Court of Auditors (1977)
17. United Nations Office of Internal Oversight Services (1994)
18. Court of Auditors of the West African Economic and Monetary Union (2000)

The Court of Auditors of the West African Economic and Monetary Union and the European Court of Auditors are not quite international courts, despite the appellation. They do not formally adjudicate. Sometimes, as in the case of the European Court of Auditors, they may be called upon to provide opinions on new or updated legislation with a financial impact.

(c) Compliance mechanisms of multilateral environmental agreements: the bodies of this Family share the common goal of furthering the implementation of the relevant environmental agreements. To this end, and

similarly to what Human Rights Bodies do, they carry out two main functions within international environmental regimes. First, they consider periodic reports by states about the measures they took to implement obligations contained in the relevant treaties and, second, they consider cases of alleged non-compliance. They are 'non-confrontational, non-judicial and consultative in nature'.[31] In most cases, they are made of representatives of states, even though, sometimes they might be bound to 'serve objectively and in the best interest of the Convention'.[32] However, in few significant cases, such as, for instance that of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), they are made of independent experts serving in their personal capacity. Bodies made of independent experts acting in their personal capacity approximate in nature and operation adjudicative means, to the point that sometimes they have been referred to as quasi-judicial bodies. In any event, their decisions are never binding but only reports transmitted to either the conference of all parties to the relevant treaty or a special subset (e.g. a Compliance Committee). This makes them a substantially different breed from adjudicative mechanisms.

Most major international environmental regimes that have been created since the 1990s feature one of these bodies or procedures. Several of those created before 1990 were retrofitted with similar bodies and procedures. A non- exhaustive list would include:

1. Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer (1990)
2. IMO Sub-committee on Flag State Implementation (1992)
3. Implementation Committee of the Protocols to the 1979 ECE Convention on Long-Range Transboundary Air Pollution (1997)
4. Kyoto Protocol Compliance System (1997)
5. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)

31 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447; 38 ILM 517 (1999) art 15.

32 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 126; 28 ILM 657 (1989). Decision VI/12 on Establishment of a Mechanism for Promoting Implementation and Compliance, doc UNEP/CHW.6/40 (10 February 2003) Annex, para. 5.

6. Multilateral Consultative Process for the United Nations Climate Change Convention (1998)
7. Stockholm Convention on Persistent Organic Pollutants (2001)
8. Convention on the Protection of the Alps and its Protocols (2002)
9. Committee for the Review of the Implementation of the Desertification Convention (2002)
10. Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal Compliance Committee (2003)
11. Espoo Convention on Environmental impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment (2003)
12. Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Compliance Committee (2003)
13. 2003 Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention
14. Compliance Committee of the Cartagena Protocol on Biosafety (2005)
15. International Treaty on Plant and Genetic Resources for Food and Agriculture (2006)
16. 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter (2007)
17. Barcelona Convention on the Protection of the Mediterranean Sea and its Protocols (2008)
18. 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (2008)

E. Orders of International Courts and Tribunals, Arbitral Tribunals and International Claims and Compensations Bodies

The Class of 'International Adjudicative Means' can be divided in at least three distinct Orders:

(a) International Courts and Tribunals
(b) Arbitral Tribunals
(c) International Claims and Compensations Bodies

(a) International Courts and Tribunals: all bodies within the Order of International Courts and Tribunals share seven fundamental traits.[33] They:

(i) have been established by an international legal instrument;
(ii) rely on international law as applicable law;
(iii) decide cases on the basis of pre-determined rules of procedure;
(iv) are composed of independent members/judges;
(v) only hear cases in which at least one party is a State or an international organization;
(vi) issue legally binding judgments; and
(vii) are permanent.

Again, as in every taxonomical scheme the sub-type shares all the traits of the super-type, but has also some of its own that sets it apart from all other sub-types at the same level of the taxonomical scheme. Thus, all bodies included in the 'International Governmental Organizations' Domain satisfy the first criterion in this list. All 'International Rule of Law Bodies and Procedures' Kingdom satisfy criteria one, plus those from two through five. All those belonging to the 'International Adjudicative Means' class satisfy all those criteria plus the sixth one (issuing binding judgment). It is only the seventh criterion (permanency) that truly distinguishes international courts and tribunals from the other orders belonging to the Class of International Adjudicative Means.

33 See Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU J Intl L Pol 713–23. Others have used a different list of criteria. For instance, Christian Tomuschat originally listed five (permanency; establishment by an international legal instrument; international law as applicable law; predetermined procedures; and legally binding judgments). See Christian Tomuschat, 'International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction', in *Judicial Settlement Of International Disputes: International Court Of Justice, Other Courts And Tribunals, Arbitration And Conciliation: An International Symposium* (Berlin; Heidelberg; New York, Springer 1987) 285–416. Several years afterwards, he relied still on five criteria but replaced 'establishment by an international legal instrument' with 'independence of the judges'. 'International courts and tribunals are permanent judicial bodies made up of independent judges which are entrusted with adjudicating international disputes on the basis of international law according to a pre-determined set of rules of procedure and rendering decisions which are binding on the parties. Contrary to international arbitral bodies, the composition of International courts and tribunals does not reflect the configuration of the litigant parties in a specific dispute according to a model of parity'. Christian Tomuschat, 'International Courts and Tribunals' MPEPIL (3rd edn) para. 1.

Yet, permanency is an easily misunderstood criterion. What is meant when it is said that 'international courts and tribunals' are permanent is not that the court or tribunal itself is permanent. Rather, that they are made of a group of judges who are sitting permanently and are not selected ad hoc by the parties for any given case. The bench as a whole may sit in smaller groups of judges (chambers or panels), but the decision it issues is still on behalf of the whole court or tribunal. The fact that judges serve a limited term does not invalidate the criterion since judges might rotate but the bench is permanent.

Thus, the ad hoc criminal tribunals, such as the ICTY and ICTR and the hybrid criminal tribunals, such as the Special Court for Sierra Leone, are temporary institutions that will be terminated once they complete their mandate. However, they are permanent because, once their judges have been appointed, they decide a long series of cases relating to the same situation. Judges can rotate, but there is at any given time a group of judges (the bench) that is not constituted ad hoc to hear a particular case.

The WTO dispute settlement system meets the requirement of permanency of the bench only partially. Indeed, disputes between WTO members are to be submitted to an ad hoc panel, composed of three experts chosen by the parties. These elements closely recall arbitral tribunals. The Appellate Body, converse- ly, has more pronounced judicial features. It is a standing organ that decides appeals against findings of ad hoc panels and is composed of seven persons, three of whom sit on any one case in rotation and can hear only appeals relating to points of law covered in the report and legal interpretations developed by the panel. The same is true in the case of the adjudicative procedures of the Mercosur. First, disputes are decided by arbitral panels. Awards can be appealed before the Permanent Tribunal of Review.

Permanency is the criterion fundamentally distinguishing the Order of International Courts and Tribunals of Arbitral Tribunals and International Claims and Compensation Bodies, both of which belong also to the Class of International Adjudicative Means.

(b) Arbitral Tribunals: Arbitral Tribunals are essentially *à-la carte* exercises in justice, where the parties are free to pick and chose the arbitrators, applicable law (substantive and procedural). They are disbanded after the award is rendered. Because they are ad hoc in nature, it is impossible to provide a comprehensive list of arbitral tribunals. There are as many as the disputes they decided. However, there is a limited number of permanent international governmental organizations whose sole *raison d'être* is to facilitate international arbitration. Curiously enough, the first one of the list, the oldest of all, is the Permanent Court of Arbitration (PCA) that is

famously neither a 'court' nor 'permanent.' What is permanent in the PCA is its bureaucracy (the registry), not its arbitrators, who are appointed ad hoc for a given case and are disbanded after the award is rendered.

1. Permanent Court of Arbitration (1899)
2. International Joint Commission (1909)
3. Bank for International Settlements Arbitral Tribunal (1930)
4. International Civil Aviation Organization Council (under the 1944 Chicago Convention the ICAO Council has certain dispute settlement competences) (1944)
5. International Centre for the Settlement of Investment Disputes (1966)
6. Gulf Cooperation Council Commission for the Settlement of Disputes (1981)
7. Court of Arbitration for Sport (1984)
8. North American Commission on Environmental Cooperation (1993)
9. NAFTA Dispute Settlement Panels (1994)
10. Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997)
11. Arbitration and Mediation Center of the World Intellectual Property Organization (1994)

There are a number of such institutions that have been long dormant, or were never resorted to, that should be listed, at least for sake of completeness and because they might still be activated:

12. Arbitral Tribunal of the Inter-governmental Organization for International Carriage by Rail (OTIF) (1890)
13. Arbitral College of the Benelux Economic Union (1958)
14. Court of Arbitration of the French Community (1959)
15. Arbitration Tribunal of the Central American Common Market (1960)
16. OSCE Court of Conciliation and Arbitration (1994). Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China (1994)

(c) International Claims and Compensation Bodies: likewise, all international mechanisms and institutions established to settle claims arising out of international conflicts (e.g. the United Nations Compensation Commission), or major domestic unrest (e.g. the Iran–USA Claims Tribunal or the 1868 American–Mexican Claims Commissions) are ad hoc bodies and fail

the permanency test. As in the case of Arbitral Tribunals, a comprehensive list is beyond the scope of this article. Almost 90 mixed arbitral tribunals and claims commissions were created in the 19th and 20th century in the wake of armed conflicts and revolutions. Most of them were created in the aftermath of the First and Second World Wars.

Amongst those still active, there are:

1. Iran-United States Claims Tribunal (1980)
2. Marshall Islands Nuclear Claims Tribunal (1983)
3. Eritrea-Ethiopia Claims Commission (2000)

F. Families of International Courts and Tribunals

The Order of 'International Courts and Tribunals' can be divided in at least five distinct Families. Listed about in the order in which they emerged, they are:

(a) State-only Courts
(b) Administrative Tribunals
(c) Human Rights Courts
(d) Courts of Regional Economic and/or Political Integration Agreements
(e) International Criminal/Humanitarian Law

(a) State-only Courts: International Courts and Tribunals of this family have jurisdiction mostly if not exclusively over cases between sovereign states. There are only three courts that belong to this Family, at this time:

1. International Court of Justice (1946)[34]
2. International Tribunal for the Law of the Sea (1996)
3. World Trade Organization Appellate Body (1995)

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea is open, in some circumstances, to state enterprises and natural or juridical persons, but, to date, it has heard only cases involving states. The International Court of Justice can issue advisory opinions at the request of certain UN principal organs and some authorized agencies,

34 The International Court of Justice is the successor of the Permanent Court of International Justice (1922- 1946). Although they are formally two separate institutions, there is a large degree of continuity between the two, to the point that both, together, are usually referred to as the 'World Court'.

but the court rarely issues advisory opinions that are, in any event, not binding.

Because courts of this Family can only hear cases between states, and because there are fewer than 200 states in the world, they serve a numerically small community and, accordingly, their caseloads tend to range from a few to several dozen per year. However, exactly because they hear cases between sovereign states, their cases tend to attract public attention, particularly in the countries involved. The International Court of Justice is the only international court that has both universal jurisdiction and can hear any dispute on any matter of international law (i.e. general jurisdiction). The other courts in this family all have specialized jurisdiction in a specific area of international law (i.e. law of the sea and WTO law). It is thus possible to separate this Family in two quite distinct Genera.

It should be noted that, because of their state versus state nature, in these courts, diplomacy and sovereignty play important roles. These are the courts where the arbitral heritage and the dispute settlement original rationale of international courts and tribunals is the most evident. They are, in a way, old-style courts, carrying in their structure and jurisdiction traits of the early days of the development of the current galaxy of international bodies.

(b) International Administrative Tribunals*:* The second Family of interna- tional courts and tribunals is the one made of administrative tribunals, boards and commissions in international organizations.[35] International administrative tribunals are bodies of a judicial character attached to international organiza- tions, whose main function is to adjudicate disputes between international organizations and their staff members. International administrative tribunals meet all criteria to be classified as international courts. However, they form a family that is the most different in nature from the others Families within the Order of International Courts and Tribunals, up to the point that they are usually not listed amongst international courts in legal scholarship. Admittedly, in several respects, they recall more domestic administrative tribunals than international courts. The law they apply is indeed international law, but of a very specific kind, that is to say internal regulations of international organiza- tions. Disputes concerning the rights and duties of international civil servants closely resemble similar disputes between national agencies and their employees. After all, the only rationale for having international administrative

35 See, Anna Riddell, 'Administrative Boards, Commissions and Tribunals in International Organizations' MPEPIL (3rd edn).

tribunals is simply that international organizations enjoy jurisdictional immunity and municipal courts have no jurisdiction to settle disputes between them and their personnel.

All major international organizations are endowed with some administrative tribunals, boards and commissions. A comprehensive list is therefore beyond the scope of this article. However, the most significant ones are:

1. International Labour Organization Administrative Tribunal (1946)[36]
2. United Nations Administrative Tribunal (1949)[37]
3. Appeal Board of the Organization for Economic Cooperation and Development (1950)
4. Appeals Board of the Western European Union (1956)
5. Council of Europe Appeals Board (1965)
6. Appeals Board of NATO (1965)
7. Appeals Board of the Intergovernmental Committee for Migration (1972)
8. Appeals Board of the European Space Agency (1975)
9. Administrative Tribunal of the Organization of American States (1976)
10. World Bank Administrative Tribunal (1980)
11. Inter-American Development Bank Administrative Tribunal (1981)
12. Asian Development Bank Administrative Tribunal (1991)
13. International Monetary Fund Administrative Tribunal (1994)
14. African Development Bank Administrative Tribunal (1998)
15. Latin American Integration Association Administrative Tribunal (2002)
16. European Civil Service Tribunal (2005)

(c) Human rights courts: The features that this Family possesses, apart from all other families of international courts and tribunals, are that their subject matter jurisdiction covers certain specific human rights treaties and that they hear cases brought by individuals against states. Individuals can submit to these courts – directly (in Europe) or indirectly through specific organs of international organizations called commissions (in the Americas and Africa)—cases concerning the violation of their rights as provided for

36 The International Labour Organization Administrative Tribunal acts also as administrative tribunal for a number of other international organizations.

37 Replaced the League of Nations Administrative Tribunal (1927–1945).

in the respective basic regional human rights agreements. They might also have jurisdiction to hear cases brought by states against other contracting parties to those human rights treaties, and thus share a feature with the family of states-only courts, but in practice state to state human rights litigation is a very rare occurrence.[38]

At this time and age, there are three human rights courts, all of them with regional jurisdiction:

1. European Court of Human Rights;
2. Inter-American Court of Human Rights; and
3. African Court of Human and Peoples' Rights.

There is not yet a human rights court with jurisdiction at the universal level, though one has been proposed from time to time. Nor are yet human rights courts with jurisdiction over other areas of the globe.

The range of issues addressed by courts in this family is considerable, and is in many regards similar to the human rights issues addressed by national supreme courts: for instance the death penalty, extra-judicial killings, condi- tions of detention and fair trials; issues of discrimination, freedom of expression, participation in political life, relationships within the family; and rights to housing, health and sexual identity.

(d) Courts of regional economic and/or political integration agreements: The courts and tribunals of this Family reflect the growing trend towards regional arrangements for economic co-operation and integration and the consequential need for dedicated dispute settlement arrangements.

Numerically, this is the largest Family of international courts and tribunals. Excluding the courts that have been discontinued, one can count about two dozen such bodies. However, most of these never actually started functioning, or, after timid beginnings, were abandoned and have not been used for years, or are active, but only minimally. Only about ten of those are actually active or active at significant levels. Even so, for the sake of clarity and simplicity courts of this family are better broken down in three basic Genera, corresponding to three regions: Europe, Americas and Africa.

The relatively large number of courts makes this Family rather more heterogeneous than other Families within the order of international courts and tribunals. Nonetheless, one can discern certain patterns and similarities. For instance, one of the features distinguishing courts within this Family from those of other Families is that they exercise various kinds

38 See (Section F.a), above.

of jurisdiction, other than contentious and advisory, and can be accessed by a larger and more diverse array of parties. Thus, a typical court of a regional economic and/or political organization can be seized by any State member of the organization, claiming violation of the organization's legal regime by another State party or the organization's organs; or can hear cases brought by the organizations organs alleging a member State has failed to comply with the organization's laws; or hear cases brought by individuals against either Member States or Community organs for violation of the organization's laws. Also, some courts of this family cross-over to the family of International Administrative Tribunals whenever they, or special courts or chambers within them, are endowed with jurisdiction to hear employment disputes between the organization and its employees,[39] or human rights courts whenever they rule on human rights matters or apply human rights legal documents, like the Charter of Fundamental Rights of the European Union.[40]

But what is truly unique about several courts in this family is that most can be seized by national judges or courts of Member States. Whenever matters pertaining the interpretation or validity of the organization's laws are raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a 'preliminary ruling' thereon.[41] No other Family of international courts, with the partial exception of hybrid criminal courts, bridges the gap to this extent between the national and the international judicial sphere.

Overall, several of the courts within this family have been deliberately designed on the template of the European Court of Justice (now called the Court of Justice of the European Union).[42] Not only is it the longest standing and in many ways most successful of all, entrenching and, at times, driving the European process of integration, but it has also provided the template, acknowledged or unacknowledged, of other courts of regional economic integration agreements. As regional economic and/or political integration agreements have spread around the world, sometimes in an attempt to recreate the 'European miracle', so have courts of this family.

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39 See (Section F.b), above.

40 See (Section F.c), above.

41 The name is somewhat of a misnomer in that preliminary rulings are not subject to a final determination of the matters in question, but are in fact final determinations of the law in question.

42 Ruth Mackenzie, Cesare Romano and Yuval Shany, *The Manual on International Courts and Tribunals* (Oxford, OUP, 2nd edn, 2009) 250.

Nowadays, Africa is the home to most of the European Community-like organizations and, thus, home to most courts of this Family.[43]

Yet, the influence of the European model should not be overstressed. Indeed, while many regional courts have followed the ECJ template,[44] others are more akin elaborate permanent arbitral tribunals. For instance, the NAFTA dispute settlement system does not rely on permanent courts but rather on a series of ad hoc arbitral panels.[45] The NAFTA model – as well as the one of the WTO – patently influenced the design of the dispute settlement system of Mercosur. It is a two-level system that is a cross-over between the European, ECJ-like and the North American and WTO templates. The two-level (arbitral panel and appellate body) set up is derived from the WTO dispute settlement system. The NAFTA imprint is obvious at the first jurisdictional level of the system, where cases are heard by Ad Hoc Arbitral Tribunals, while a permanent judicial body, named Permanent Tribunal of Review, somewhat similar to that of traditional regional economic agreements, is the appellate level. The ASEAN Dispute Settlement Mechanism is a rather close replica of the WTO Dispute Settlement system.

Europe

- Active
  1. Court of Justice of the European Union (2010)[46]
  2. Benelux Economic Union Court of Justice (1974)

43 It should be noted, incidentally, that mimicking the European Community structure has not necessarily led to the same results. Many regional courts in Africa are inactive or suffer other problems.

44 This include courts whose structure and jurisdiction resembles that of the ECJ (eg the Andean Tribunal of Justice and, to a certain extent, the Economic Court of the Commonwealth of Independent States); and hybrid courts that combine ECJ-like functions to that of national highest court of appeal (eg the Caribbean Court of Justice).

45 This is why it is not listed in this classification amongst international courts, but rather in the Order of Arbitral Tribunals.

46 This is the judicial body of the European Union (EU). It is made of three separate international courts: the European Court of Justice (originally established in 1952 as the Court of Justice of the European Coal and Steel Communities, as of 1958 the Court of Justice of the European Communities), and its two-partially subordinated courts: the General Court (created in 1988; formerly the Court of First Instance) and the Civil Service Tribunal (created in 2004).

3. Economic Court of the Commonwealth of Independent States (1993)
4. EFTA Court (1994)

- Dormant or active at very low levels
  5. European Nuclear Energy Tribunal (OECD) (1957)
  6. European Tribunal on State Immunity (Council of Europe) (1972)

Africa

- Active
  7. Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (1997)
  8. East African Court of Justice (2001)
  9. Court of Justice of the Economic Community of West African States (ECOWAS) (2001)
- Dormant, or active at very low levels, or nascent
  10. Judicial Board of the Organization of Arab Petroleum Exporting Countries (1980)
  11. Court of Justice of the Economic Community of Central African States (1983)
  12. Court of Justice of the Arab Maghreb Union (1989)
  13. Court of Justice of the African Economic Community (1991)
  14. Court of Justice of the West African Economic and Monetary Union (1996)
  15. Court of Justice of the Common Market for Eastern and Southern Africa (1998)
  16. Southern Africa Development Community Tribunal (2000).
  17. Court of Justice of the Central African Monetary Community (CEMAC) (2000–)
  18. Court of Justice of the African Union (2003)[47]

47 The Court of Justice of the African Union is intended to be the 'principal judicial organ of the Union' with authority to rule on disputes over interpretation of AU treaties. African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008 http://www.unhcr.org/refworld/docid/4937f0ac2. html, accessed 25 November 2010, art 2.2. A protocol to set up the Court of Justice was adopted in 2003, and entered into force in 2009. However, at this time the court has not yet started operating. In 2008, a protocol to merge it with the African Court of Human and Peoples' Rights, thus creating a new African Court of Justice and Human Rights, to be based in Arusha, Tanzania, was adopted. 2008 Protocol on the Statute of the African Court of Justice and Human Rights <http://www.africa-union.org/root/au/Documents/Treaties/text/ Protocol%20on%20the%20Merge%20Court%20-%20EN.pdf>, accessed 25

Americas

- Active
  19. Court of Justice of the Andean Community (1984)
  20. Caribbean Court of Justice (2001)
  21. Permanent Review Tribunal of the Mercosur (2004)
- Dormant or active at very low levels
  22. Central American Tribunal (1923)
  23. Central American Court of Justice ('Corte Centroamericana de Justicia') (1994)

Asia

- Active

ASEAN Enhanced Dispute Settlement Mechanism (2005)

(e) International Criminal Courts: Courts belonging to this Family are a completely different breed from all other international courts. They are highly specialized and exercise only one kind of jurisdiction – criminal jurisdiction— that is not exercised by any court of the other families. In the exercise of criminal jurisdiction they try international crimes and, eventually, determine appropriate criminal sanctions. Defendants in international criminal cases are always individuals, particularly high-level political and military leaders or those most-responsible, while the burden of the prosecution is shouldered by the Office of the Prosecutor, an organ of an international organization.[48]

The international criminal courts and tribunals family can then be divided into four fundamental Genera (in parenthesis the years in which they became operational and eventually terminated operations).

(i) International Military Tribunals
  - International Military Tribunal at Nuremberg (1945–46)
  - International Military Tribunal for the Far East (1946–48)

(ii) Permanent International Criminal Courts
  - International Criminal Court – ICC (2004)

(iii) Ad Hoc International Criminal Tribunals

November 2010. The African Court of Justice and Human Rights will have two chambers – one for general legal matters and one for rulings on the human rights treaties.

48 See (Section A), above.

- International Criminal Tribunal for the Former Yugoslavia – ICTY (1993)
- International Criminal Tribunal for Rwanda–ICTR (1995)

(iv) Hybrid criminal tribunals (also known as 'mixed criminal tribunals' or 'internationalized criminal tribunals')

- Serious Crimes Panels in the District Court of Dili, East Timor (2000–2005)
- Panels in the Courts of Kosovo (2001)
- War Crimes Chamber of the Court of Bosnia-Herzegovina (2005)
- Special Court for Sierra Leone (2002)
- Extraordinary Chambers in the Courts of Cambodia (2006)
- Special Tribunal for Lebanon (2009).

International Military Tribunals: for several structural and procedural reasons, the International Military Tribunal at Nuremberg (1945–1946) and the International Military Tribunal for the Far-East (1946–1948) (also known as the Tokyo Tribunal) are a genus of their own within the Family of International Criminal Courts. Grouping them in this family, or even within the Order of International Courts and Tribunals, is not without problems. First of all, at this time in history there does not exist an active international military tribunal. Second, unlike most, if not all bodies in this family and order, the Nuremberg and Tokyo tribunals were not genuine international bodies but rather military occupation courts. The powers that vanquished Germany and Japan unilaterally established them, were prosecutor and judge and enforced sentences. As a matter of fact, the Tokyo Tribunal was not established by treaty but rather by a special proclamation of General Douglas MacArthur, issued in his capacity as Supreme Commander of the Allied Powers in Japan. The basis of MacArthur's powers was not a treaty, but rather customary international law, and, specifically, laws of war. Still, the Nuremberg and Tokyo tribunals are included here because they are important precedents that paved the way for the emergence, almost a half-century later, of all other genera of international criminal bodies.[49]

Another significant difference between bodies of this genus and those of all other genera of international criminal courts is that the United Nations did not play any role in them. Conversely, the United Nations has been,

49 Amongst other precedents one could also consider the African Slave Trade Mixed Tribunals (1819–1866 circa), or the International Prize Court (1907) that was supposed to adjudicate on issues pertaining to the jus in bello. The Statute of the International Prize Court never entered into force.

to varying degrees, involved in the creation and/or operation of all other international criminal courts. The reason why the UN did not play any role in the international military tribunals is obvious. At that time the UN was just taking its first, tentative steps. But this also suggests why it is unlikely that there will be more international military tribunals in the future. It is hard to imagine such bodies without some degree of United Nations participation, and that would place any future similar bodies within one of the other Genera in this Family. *Permanent International Criminal Courts:* what separates this genus from all others is that courts of the other genera are temporary institutions with limited jurisdiction (*ratione loci*, *temporis and personae*). This genus is made of bodies that are permanent and have jurisdiction not strictly limited.

The only court belonging to this genus is the International Criminal Court. The jurisdiction of the ICC includes crimes committed after the entry into force of the Statute on 1 July 2002 but with no temporal limit going forward. The ICC is a court with, at least potentially, universal scope, as ratification of the Rome Statute of the ICC is open to any state. The number of States that have done so (currently 116) has gradually expanded since the entry into force of its Statute. Conversely, the jurisdiction of all other criminal courts in this family is restricted geographically (e.g. to the Former Yugoslavia, Sierra Leone, Cambodia, Lebanon or other areas).

Given the permanent and universal nature of the ICC, it is possible that this Genus will always remain populated by only one body. It is indeed difficult to see how there could be sufficiently wide support to create another permanent and universal alternative international criminal court. However, considering that several major powers, including the United States, have shown little intention to ever accept its jurisdiction, the possibility should not be completely ruled out.

Ad Hoc International Criminal Courts: bodies of this genus have the unique distinction of having been created by resolutions of the UN Security Council, acting under Chapter VII of the UN Charter. There are currently only two of them: International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The characteristic this genus shares with the International Military Tribunals and the Hybrid Criminal Courts genera is that it is made of temporary judicial institutions. Also, like all other international criminal courts genera but the Permanent one, they are also reactive institutions, having been created after large-scale international crimes have been committed, not before. Specifically, the ad hoc Tribunals have been created as means

to foster restoration of international peace and security in specific regions and will exist until the United Nations Security Council decides that they have terminated their mission. At the time of this writing, under the so-called 'completion strategy' adopted by the UN Security Council, the ICTY reported it could finish the last appeals by 2014 and the ICTR by 2013, provided none of the fugitives were apprehended in the meantime.[50]

Unlike all other bodies in the Family of international criminal courts, the ad hoc tribunals are tightly connected to the United Nations, being subsidiary organs of the UN Security Council. This gives them two fundamental advantages over all other criminal bodies. First, they can rely on UN Security Council powers to have their orders and decisions enforced. Security Council backing is something all other courts do not necessarily enjoy. Second, their financing is secured because their budgets are part of the larger UN budget for peace-keeping operations. All UN members have a legal obligation to pay a share of the UN regular and peace-keeping budgets. However, hybrid criminal courts are funded through voluntary contributions, which have proven to be unreliable. The ICC budget is shared only by States party to the Rome Statute, a considerably smaller pool of contributors than those of the United Nations. Finally, it should be mentioned that the ICTY and ICTR are much more similar to each other than probably any other bodies belonging to the same groups in this classification. Indeed, the two ad hoc tribunals have been called the 'twin tribunals' because of their structural and jurisdictional similarities.

Arguably, they are Siamese twins joined at the head since Appeals Chambers are comprised of the same judges.[51]

Hybrid: what distinguishes hybrid criminal tribunals from the other three Genera of international criminal tribunals is that they are not purely international.[52] They combine in their structure, law and procedure elements of both international and domestic criminal jurisdictions. They

50 Letter dated 31 May 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, 1 June 2010, S/2010/270, para. 8; Letter dated 28 May 2010 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, 28 May 2010, S/2010/259, para. 82.

51 See Statute of the International Tribunal for Rwanda, Article 12, paragraph 2.

52 On hybrid criminal tribunals, see generally Cesare PR Romano, Andre Nollkaemper and Jann Kleffner, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, OUP 2004) and Cesare PR Romano, 'Mixed Criminal Tribunals' MPEPIL (3rd edn).

are usually composed of a mix of international and national staff (judges, prosecutors and other personnel) and apply a compound of international and national substantive and procedural law. Ad Hoc International Criminal Tribunals and Permanent International Criminal Courts are purely international endeavours, created by the international community at large and prosecutions and trials are held on behalf of humanity. In the case of those two Genera, nationals of the countries where crimes occurred play a very limited role and appear before tribunals only as either suspects or victims.[53] They are also all geared towards the prosecution of high-level political and military leaders. Conversely, hybrid courts are not necessarily focused only on those most responsible at the highest levels of the political and military leadership, but have in many instances prosecuted lower-ranks.

Hybrid criminal tribunals make up a very diverse genus, each body being the result of unique political and historical circumstances. Should a finer classification be attempted, probably one could identify two sub-genera. One could be called, for lack of a better expression, 'internationalized domestic criminal tribunals'. These are in essence national criminal courts that have been injected, for the sake of ensuring their independence, impartiality and overall due process, some international elements. The other could be called, 'domesticated international criminal tribunals'. These are bodies that in structure, powers and rationale are very similar to fully international courts, like the ICTY or ICTR, but that have been localized by adding national elements, such as judges, prosecutors and by adding some local laws to the otherwise fully international procedural and substantive law.

Placing bodies within Sub-Genera is ultimately a matter of choice of criteria, degree and point of view. Also, some bodies might have started at one point of the spectrum and then moved to a different point as circumstances changed. For instance, the hybrid criminal body in Kosovo started as a national one with a robust international presence (called, 'Regulation 34 & 64' Panels), where international judges could veto their national counterparts, but morphed into a decidedly national body with a light international oversight provided by the European Union (EULEX). The same could be said about the War Crimes Chamber of the Court

53 Another reason why International Military Tribunals are misfits in this larger family is that they are not created and operated by the international community at large, but only the victor powers. Nationals of the countries where crimes occurred were both prosecutors and judges.

of Bosnia-Herzegovina, which has operated under the increasingly more relaxed supervision of the ICTY. On the other hand, the Special Court for Sierra Leone and, to a lesser degree, the Special Tribunal for Lebanon are international courts in structure and rationale but with national elements to localize them. Finally, the Extraordinary Chambers in the Court of Cambodia seem to be somewhere astride the two groups. Depending on how they are viewed, they are either the most international of national courts or the most local of international courts.

2. *Conclusions*

At the risk of being proven spectacularly wrong in a decade or so, I would like to make a few educated guesses – and a few wishes – about how the Kingdom of International Rule of Law Bodies and Procedures might develop in the short, medium and long term. After all, any classification that aims to be more than a folk-taxonomy must enable predictions, possibly accurate.

The first prediction, but probably merely a matter-of-fact observation, is that the breathtaking expansion of the number of bodies administering International Rule of Law is leveling off. The breakneck pace of the 1990s and 2000s is giving way to more modest gains.

There are two main forces that are already at work to slow down the pace at which new international rule of law bodies are being created. The first one is strictly pragmatic. As the international infrastructure expands, so do the costs of maintaining it. At a time when states, and particularly those into whose pockets most of the international agencies fish, are under enormous budgetary pressure, there is little chance of some major new body being created.

The second is political. In the never-ending power struggle between the judiciary and the elected powers (executive and legislative) for much of the 1990s and 2000s judges have been gaining ground, nationally (particularly in the West), and internationally. The tide is turning back, across the board, slowly but unmistakably.

Moreover, most, if not all, areas of international relations that were apt at being legalized and judicialized, have been so. Issues like financial and monetary relations, military activities and migration, matters that presently are at the centre and front of international attention, are as unlikely to give rise to judicial and quasi-judicial bodies as they have always been. Rules about national and international budgetary and financial matters might be tightened, and the need for independent and impartial enforce-

ment of those rules becoming more apparent, but I cannot imagine the creation of an International Financial Court, or anything like that, with a broad mandate. At best, something might emerge with a limited scope on certain issues, such as bad-faith manipulation of markets or fraud, but even that is a very long shot.[54]

One might reply that military activities and immigration have already been well legalized and judicialized. After all, that is the stuff of international humanitarian law and human rights law, two of the areas of international law that have given rise to a vast array of bodies during the past two decades. However, I surmise that the legalization and judicialization of those fields have left untouched large areas that are, indeed, very much central to contemporary international relations discourse. One of those is when, and to what extent, states should be mandated to use force. It is a variation of the *jus ad bellum* that could be dubbed *jus foederis* and *jus ad defendum*. Although states have, for centuries, entered into legally binding agreements committing to go to war to defend each other or support each other's plans, from the Athenian League to the United Nations and NATO, I simply cannot see an international judicial body being given the power to bindingly declare that a state has violated those obligations by refusing to deploy troops. Second, although in recent years a new responsibility to protect civilians from international crimes has emerged—leaving aside the fact that many still contest the very existence of the rule – I cannot possibly imagine an international judicial body being created or given the power to ultimately declare that some states, or the international community as a whole, have failed to live up to that obligation. To the extent states might want to submit those matters to adjudication, the International Court of Justice could be resorted to, without the need for a new body.

Incidentally, exactly because it is the main judicial organ of the United Nations, and because the United Nations is the main universal organization of our time, the ICJ is going to remain for long the only one in the Genus 'General Jurisdiction' of the 'State-only Courts' Family, of the 'International Courts and Tribunals' Order.

The same reasoning could apply to the International Criminal Court, another giant with universal aspirations, occupying most of its field. Indeed, given the permanent and universal nature of the ICC, it is possible

54 Martha Graybow, 'Lawyers seek global forum to handle Madoff cases' (2009) Reuters <http:// www.reuters.com/article/idUSTRE5286FE20090309> accessed 4 January 2011.

that this Genus will always remain populated by only one body. It is difficult to see how there could be sufficiently wide support to create another permanent and universal alternative international criminal court. However, considering that several major powers, including the United States, have shown little intention to ever accept its jurisdiction, the possibility should not be completely ruled out. Similarly, the creation of permanent criminal courts at a regional level, at some point in the future, cannot be entirely ruled out. After all, once international regimes are created at the global level, soon or later, they are replicated at the regional level, too or vice-versa. The whole international infrastructure is full of redundancies.

If any new international criminal adjudicative bodies are going to emerge they are most likely to be of the hybrid Genus. This has been an exceedingly prolific category. Six new bodies have been created in the span of a decade and a few more were proposed. Because they are highly flexible tools, that can be shaped to meet any particular area and situation, they are going to remain the answer of choice of the international community to calls for international justice. But that is only until the day the international community realizes that they are failing miserably to deliver on the many promises they made.[55] Then I predict the return of the ad hoc international criminal tribunals, once it is realized they were criticized too harshly, too soon.

What is definitively not coming back is the Nuremberg and Tokyo-style military tribunals. The world has hopefully grown beyond victors' justice. It is hard to imagine such bodies without some degree of United Nations participation.

Should any developments take place, it will be at the regional level, not the global one. In particular, big and rising Asia has by and large remained at the margins of the phenomenon of the legalization and judicialization of world politics.[56] There are timid signs that Asia might after all, one day, follow the trend. For instance, in 2009, the Arab Human Rights Committee and the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights were created. These bodies, once they start operating, might one day give rise to more bodies of similar type and then perhaps a full blown judicial institution, like a human rights court. Bangladesh was the last Asian state to ratify the Rome Statute of the ICC in March 2010. Japan is going to appear before the

55 Laura Dickinson, 'The Promise of Hybrid Courts' (2003) 97 AJIL 295–310.

56 See, 'Can You Hear Me Now? Making the Case for Extending the International Judicial Network' (2009) 9 Chi J Intl L 233–73, 255.

International Court of Justice for the first time in its history in a case brought by Australia on whaling in the Antarctic. All these developments deserve headlines, but when compared to the size of the continent and growing role that Asia is playing in the international scene, they are very modest indeed.

Looking ahead, well into the 21st century, there are far more cogent reasons to doubt that the judicialization of world politics might be a permanent phenomenon. The West, the traditional champion of legalization and judicialization, is seeing its relative share of wealth and influence decreasing. Europe, whic has inspired much of contemporary judicialization in all continents, is losing its capacity to inspire and provide models of development to be replicated by emerging new democracies that aspire to become economic powerhouses. At the same time, the heralded great powers of the 21st century, Brazil, Russia, India and China (collectively called BRICs), have been largely left untouched by the judicialization of international relations. They rarely submit to the jurisdiction of international courts and tribunals. They remain unexcited and ambivalent towards the benefits of an international system based on the rule of law, overseen by a large cadre of independent and impartial international bodies.

In the end, what the world needs is not more Rule of Law Bodies and Procedures, but better ones. It needs bodies that are better staffed, by a well-trained cadre of truly independent experts; better funded, with more resources to cope with a growing tide of cases and situations; and bodies whose decisions are better enforced by virtue of greater integration in the national legal systems, and acceptance by national judges, and more respectful political leadership, nationally and internationally.

My iCourts experience

Last week, tragedy struck. I was doing dishes and a cherished iCourts mug — one of those that are given to all participants of iCourts summer schools — slipped out of my fingers and broke. Until then, I was the proud owner of a complete collection, from 2012, the first iCourts summer school, to 2019, the last one before the world was shut down by the Covid 19 pandemic.

Every day, those mugs are the first thing I see. I grab one when I reach in the cupboard, with my eyes still not quite open, to brew a quick coffee with my Nespresso machine. Then, it sits on my desk, as I start going through my clogged email inbox. Sometimes, as I turn it in my hand, my mind goes back to Copenhagen, to the colleagues and the students I had the pleasure to interact with over the years.

For almost a decade, iCourts summer school was the highlight of my academic year. Once a year, for two weeks, I could retreat with a group of bright graduate students from all over the world, to discuss, in an informed and intelligent way, issues that have been at the core of my work since the mid-1990s. As you can imagine, finding people who get excited about arcane aspects of the law and procedure of international courts and tribunals is not easy in Santa Monica, California, the beach town by the Pacific where I live. Even at the school where I teach — Loyola Law School, Los Angeles — few students are interested in international law and even fewer in international adjudication. Rarely anyone ask me a question about this or that international court. However, once a year, for two intense and beautiful weeks, all I talk about is that!

One of my contributions to the study of international courts and tribunals has been the systematization and classification of international adjudicative bodies. When I was managing the Project on International Courts and Tribunals, at New York University, in the 1990s, at the outset I set out to try to find out all international adjudicative bodies that had ever been created, or even just proposed. Mapping the terrain is the necessary first step in preparation of any endeavor and, as I begun, I quickly realized that no one had compiled a truly comprehensive list. Obviously, at the outset, I had to answer a question for which there was no easy answer: what is an international court or tribunal? The criteria used until then were much wanting. Moreover, the multiplication of international adjudicative bodies that took place during those years, and the differentiation of their functions, tested the limits of existing classifications.

Over the years, I articulated a series of criteria to classify international adjudicative bodies, and published various lists and tables to help scholars navigate a vast and rapidly expanding universe. Finally, in 2011, I published an article entitled "A Taxonomy of International Rule of Law Institutions", in the *Journal of International Dispute Settlement*, (Vol. 2, No. 1, 2011, pp. 241-277), reproduced in this book, which tried to organize not only international adjudicative bodies, but also cognate "genera", "families", "orders" and "classes" of the much larger "kingdom" of the international rule of law bodies".

It is probably because of that foundational article that, at iCourts, I was assigned the task of delivering the kick off lecture. It quickly came to be known among my colleagues as the "duck lecture". Applying to international courts the famous abductive reasoning test "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck", I led students, much like a mother duck, into the mare magnum of international adjudicative bodies. After that, I spent the rest of the week raptured, listening to the lectures of my colleagues and engaging the students in our afternoon workshops, where we honed their dissertation-writing skills.

When I did my last lecture, in 2019, my mood was somber. After witnessing and chronicling the tumultuous development of international adjudication for almost three decades, the tide was turning. Everywhere I looked, I saw disillusion and disappointment with international institutions, and the scapegoating of international courts and tribunals. Yet, I also saw an opportunity for reflection, reform and rebirth. I called the students to action, urging them not to limit themselves to studying international courts and tribunals, but also to find ways to practice before them and to advocate for them, domestically and internationally.

I have no doubts iCourts alumni will play a key role in the next critical phase of the development of the international judiciary. I remain in touch with many students, former iCourts fellows who have taken off in academia, and my colleagues, in Copenhagen and around the world. iCourts created a large cosmopolitan intellectual community that will carry the study of international courts and tribunals as a discrete field, separate from the study of international dispute settlement from which it branched out, well into the century. I am honored to be part of it and I look forward continuing this exciting intellectual journey together.

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Coping with crisis: whither the variable geometry in the jurisprudence of the european court of human rights+

*Başak Çali**

ABSTRACT

This article offers a new take on the diagnosis of the crisis of the European human rights system by focusing on the diversification of the attitudes towards the European Court of Human Rights by national compliance audiences, namely domestic executives, parliaments, and judiciaries. This diagnosis holds that national compliance audiences of the European Court of Human Rights can no longer be characterized as lending overall support to the human rights acquis of Europe, that centers around the European Court of Human Rights as the ultimate authoritative interpreter of the Convention. Instead, alongside states that continue to lend overall support to the Court's authority over the interpretation of the Convention, two new attitudes have developed towards the Convention across the Council of Europe. First, there are now national compliance audiences that demand co-sharing of the interpretation task with the European Court of Human Rights. Second, there are national compliance audiences that flaunt well-established Convention standards, not merely by error, or lack of knowledge of adequate application, but with suspect grounds of intentionality and lack of respect for the overall Convention acquis. Following this diagnosis, I argue that instead of holding on to a business as usual attitude, the Court has also developed coping strategies in order to handle this fragmentation by investing in a human rights jurisprudence of a variable geometry, recognizing differentiation in the individual circumstances of states as a basis for human rights review.

INTRODUCTION

The European Court of Human Rights, its continuously evolving case law, and the effects of its judgments in domestic, transnational, and international contexts have attracted significant academic attention from multidisciplinary perspectives. Scholars of the European Court of Human Rights

+ I would like to thank the organizers of and participants at the Wisconsin Journal of International Law Annual Symposium on Regional Human Rights Systems in Crisis (31 March 2017), the WZB Berlin Colloquium on Global and Comparative Public Law (30 May 2017), Mikael Madsen, Mattias Kumm, and Matej Avbelj for comments on earlier versions of this paper, and to Stewart Cunningham for his excellent research assistance.

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have studied the genesis and development of the Convention system,[1] issue-specific contributions of the Court's case law to human rights interpretation over time,[2] and the interpretive canons of the European Court of Human Rights.[3] Academic work has also focused on the reception of the

1 *ED BATES*, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010); THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (*Jonas Christoffersen & Mikael Rask Madsen* (eds.) 2011; *Mikael Rask Madsen*, From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics, 32 LAW SOC. INQ. 137 (2007) [hereinafter From Cold War Instrument to Supreme European Court].

2 See generally *MARIE-BÉNÉDICTE DEMBOUR*, WHEN HUMANS BECOME MIGRANTS: STUDY OF HUMAN RIGHTS WITH AN INTER-AMERICAN VIEWPOINT (2015); DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (*Eva Brems* (ed.), 2012); *JAMES A. SWEENEY*, THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST COLD WAR ERA: UNIVERSALITY IN TRANSITION (2013); *Antoine Busye*, Dangerous Expressions: The ECHR, Violence and Free Speech, 63 INT'L & COMP. L.Q. 491 (2014); *Lourdes Peroni & Alexandra Timmer*, Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law, 11 INT'L J. CONST. L. 1056 (2013).

3 See generally *Yutaka Arai-Takahashi*, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); *Andreas Føllesdal, Birgit Peters & Geir Ulfstein* (eds), CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN, AND GLOBAL CONTEXT (2013); *Jonas Christoffersen*, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009); *Laurens Lavrysen*, HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2016); *GEORGE LESTAS*, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004); *DIMITRIS XENOS*, THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2012); *Oddný Mjöll Arnardóttir*, Rethinking the Two Margins of Appreciation, 12 EUR. CONST. L. REV. 27 (2016); *Eva Brems*, The 'Logics' of Procedural Review by the European Court of Human Rights, in: PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 17 (*Janneke Gerards & Eva Brems* (eds.), 2017); *Eva Brems & Laurens Lavrysen*, Procedural Justice in Human Rights Adjudication: The European Court of Human Rights, 35 HUM. RTS. Q. 176 (2013); *Başak Çalı*, Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions, 29 HUM. RTS. Q. 251 (2007); *Kanstantsin Dzehtsiarou*, European Consensus and the Evolutive Interpretation of the European Convention on Human

Strasbourg case law in domestic contexts,[4]compliance with the judgments of the European Court of Human Rights,[5] as well as the normative and social legitimacy of the Court.[6]

A central theme in these studies is the nature of the European Convention on Human Rights as a "living instrument" and the necessity for the case law of the European Court of Human Rights, as the authoritative interpreter of human rights for its forty-seven member states to respond to its wider political and legal contexts. The case law of the European Court

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Rights, 12 GER. L.J. 1730 (2011); *Janneke Gerards,* How to Improve the Necessity Test of the European Court of Human Rights, 11 INT'L J. CONST. L. 466 (2013); *Laurence R. Helfer,* Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 EUR. J. INT'L L. 125 (2008); *George Letsas,* The Truth in Autonomous Concepts: How to Interpret the ECHR, 15 EUR. J. INT'L L. 279 (2004); *Alastair Mowbray*, A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights, 10 HUM. RTS. L. REV. 289 (2010); *Dean Spielmann*, Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine; Waiver of Subsidiarity of European Review?, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2012).

4 *Helen Keller & Alex Stone Sweet* (eds)., A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008); ALICE DONALD, JANE GORDON & PHILIP LEACH, EQUAL & HUMAN RIGHTS COMM'N, THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS (2012); *David Kosar,* Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design, 13 UTRECHT L. REV. 112 (2017).

5 *DIA ANAGNOSTOU*, EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DOMESTIC POLICY (2013); *COURTNEY HILLEBRECHT,* DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE (2014); *PHILIP LEACH ET AL.*, RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF 'PILOT JUDGMENTS' OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL (2010).

6 *Patricia Popelier, Sarah Lambrecht & Koen Lemmens* (eds), CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS (2016); *Richard Bellamy,* The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights, 25 EUR. J. INT'L L. 1019 (2014); *Başak Çali, Anne Koch & Nicola Bruch,* The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights, 35 HUM. RTS. Q. 955 (2013); *Andreas Føllesdal*, The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights, 40 J. SOC. PHIL. 595 (2009); *Mikael Rask Madsen,* The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash, 79 LAW & CONTEMP. PROBS. 141 (2016).

of Human Rights has shown, and continues to show, that interpretation of the Convention by the Court does not take place ina legal and political vacuum. The Court's case law, for better or worse, has always shown sensitivity, not only to what is a desirable moralinterpretation of rights,[7] but also what is a reasonable and a feasible interpretation of the Convention, given the type of rights at stake,[8] the state of the European[9] or international consensus[10] on the scope of specific rights, and whether the complexity of issues at stake may besuch that "opinions within a democratic society might reasonably differ widely" on the interpretation of the scope of a right.[11]

A central debate that the European Court of Human Rights has grappled with in the past fifteen years has been whether it has been, and is, facing a crisis and whether it needs further reform.[12] The crisis talk about the European Court of Human Rights is multifaceted. Some focus on the unprecedented rise of repetitive cases, numbering hundreds of thousands, in the docket of the Court that has precipitated ongoing reforms as to how the Court handles its caseload.[13] Others focus on the backlash against the Court, in particular from parliaments and judiciaries of well-established democracies, who argue that the European Court of Human Rights may have gone too far in its (expansive) interpretation of rights as a living instrument, at the expense of the margin of appreciation that domestic

7 Rantsev v. Russia, 2010-I Eur. Ct. H.R. 65, 123.

8 Hatton v. United Kingdom, 2003-VII Eur. Ct. H.R. 189, 217 (discussing wide margin of appreciation when economic development projects are at stake).

9 A v. Ireland, 2010-VI Eur. Ct. H.R. 185, 189; Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1, 4; X v. Austria, 2013-II Eur. Ct. H.R. 1, 6.

10 Demir v. Turkey, 2008-V Eur. Ct. H.R. 395, 398.

11 Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, 380.

12 COUNCIL OF EUR. STEERING COMM. FOR HUMAN RIGHTS, THE LONGER-TERM FUTURE OF THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2015), https://book.coe.int/usd/en/online-bookshop/7178-pdf-the-longer-term-future-of-the-system-of-the-european-convention-on-human-rights.html (last accessed 6 december 2021); *Spyridon Flogaitis, Tom Zwart & Julie Fraser* eds., THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH (2013); *STEVEN GREER*, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006); *Steven Greer*, What's Wrong With the European Convention on Human Rights?, 30 HUM. RTS. Q. 680 (2008).

13 EUROPEAN LAW INST., STATEMENT ON CASE OVERLOAD AT THE EUROPEAN COURT OF HUMAN RIGHTS 11–12 (2012), http://www.europeanlawinstitute.eu/projects/publications/.

authorities should be given.[14] Yet, others focus on the "implementation crisis" of the judgments of the European Court of Human Rights, emphasizing that the number of states outright ignoring or arguing that they do not need to comply with all judgments of the Court have considerably increased over the years.[15]

In this article, I have two aims. First, as a point of departure, I aim to offer a new take on the diagnosis of the crisis of the European human rights system by focusing on the diversification of the attitudes towards it by national compliance audiences, namely domestic executives, parliaments and judiciaries. This diagnosis holds that national compliance audiences of the European Court of Human Rights can no longer be characterized as lending an overall support to the human rights acquis of Europe, that centers around the European Court of Human Rights as the ultimate authoritative interpreter of the Convention. Instead, alongside states that continue to lend overall support to the Court's authority over the interpretation of the Convention, two types of new attitudes have developed towards the Convention across the Council of Europe. First, there are now national compliance audiences that demand co-sharing of the interpretation task of the Convention with the European Court of Human Rights. These audiences demand to share the interpretive work with respect to the scope of, and restrictions on, Convention rights based on the quality of their own decision-making procedures for human rights interpretation nationally.

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14 *Katja Ziegler, Elizabeth Wisk & Loveday Hodson* (eds.) THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP? (2015); *Tilmann Altwicker*, Switzerland: The Substitute Constitution in Times of Popular Dissent, in *Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.), CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 385 (2016); *B. M. Oomen*, A Serious Case of Strabourg-bashing? An Evaluation of the Debates of the Legitimacy of the European Court of Human Rights in the Netherlands, 20 INT'L J. HUM. RTS. 407 (2016); *Michael Reiersten*, Norway: New Constitutionalism, New Counter-Dynamics?, in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 361 (*Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.), 2016); *Hendrik Wenander*, European Court of Human Rights Endorsement with Some Reservations, in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 239 (*Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.)) (2016).

15 In 2016, the Committee of Ministers reported that the total number of unimplemented cases was just fewer than 10,000. See COMM. OF MINISTERS, COUNCIL OF EUR., ANNUAL REPORT 2016: SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2016), https://rm.coe.int/1680706a3d/; see also *Nils Muiznieks*, The Future of Human Rights Protection in Europe, 24 SEC. & HUM. RTS. 43, 45 (2013).

Second, there are national compliance audiences that flout the well-established Convention standards, not merely by error, or lack of knowledge of adequate application, but with suspect grounds of intentionality and lack of respect for the overall Convention acquis. Following this diagnosis, I argue that instead of holding on to a business as usual attitude, the Court has developed coping strategies in order to handle the fragmentation of the attitudes of its audiences, adjusting itself to the demands for less Strasbourg interpretive interference or none at all.[16]

This article's central argument is that the European Court of Human Rights has responded to the fracture of the overall attitudes of its national audiences towards the Convention by investing more in a human rights jurisprudence of a variable geometry, recognizing differentiation in the individual circumstances of states as a basis for human rights review.[17] Specifically, the Court has developed two novel lines of substantive rights jurisprudence: (1) new procedural review standards that allow the European Court of Human Rights to defer to national authorities who are deemed to act in good faith when applying the Convention and interpreting the Convention; and (2) an emerging novel bad faith jurisprudence under Article 18 of the Convention through which the Court is able to

16 The responses of the Court to its repetitive case law crisis also has an important remedial response dimension, in the form of the development of the pilot judgment procedure and as well as the introduction of the yet never practiced infringements proceedings under Article 46 of the European Convention for states that do not comply with the judgments of the Court. This remedial jurisprudential response is beyond the scope of this study. On the evolving remedy jurisprudence of the European Court of Human Rights, see Philip Leach, No Longer Offering Fine Mantras to a Parcel Child? The European Court's Developing Approach to Remedies, in: *Andreas Follesdal & Geir Ulfstein* (eds.), CONSTITUTING EUROPE: THE EUROPEAN CONVENTION IN A NATIONAL, EUROPEAN AND NATIONAL CONTEXT 142 (2013). On the infringement proceedings, see *Fiona de Londras & Kanstantsin Dzehtsiarou*, Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights, 66 INT'L & COMP. L.Q. 467 (2017).

17 See, e.g., *Andrew Cornford*, Variable Geometry for the WTO: Concept and Precedents, UNCTAD/OSG/DP/2004/5 (2004); *Mike Goldsmith*, Variable Geometry, Multilevel Governance: European Integration and Subnational Governance in the New Millenium, in: THE POLITICS OF EUROPEANIZATION (*Kevin Featherstone & Claudio Maria Radaelli* (eds.), 2003); *Craig Van Grasstek & Pierre Sauvé*, The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?, 9 J. INT'L ECON. L. 837 (2006); *John A. Usher*, Variable Geometry or Concentric Circles: Patterns for the European Union,46 INT'L & COMP. L.Q. 243 (1997).

identify not only that a Convention right was violated, but that it was violated in bad faith[18]

In what follows, Part I lays out the fracture of the attitudes of the Court's national audiences towards the European Court of Human Rights, in particular since the 2000s. It shows that demands for more good-faith deference to national institutions, led by the United Kingdom, and practices of bad faith disrespect of the Convention that have arisen inthe case of reversed or stalled democratic transitions in Eastern Europe and the Caucasus have simultaneously put the Court's ability to treat all the national audiences it faces equally under strain. Part II analyzes how the Court has coped with this fracture through its substantive case law, first by elucidating a novel standard in respect of the margin of appreciation based on who the Court deems to be good faith interpreters and thus guardians of the Convention and, secondly, by developing a badfaith jurisprudence under Article 18 for those states that show disrespect for the Convention values. Part III assesses the implications of what may now be termed as a more pronounced variable geometry of jurisprudence of the Court that differentiates between the underlying attitudes of national authorities to the Convention. In conclusion, I reflect on whetherthese coping strategies will enable the Court's jurisprudence to incentivize better human rights interpretation nationally, or whether this new multi-faceted jurisprudence may deepen the crisis by leaving the Court vulnerable to charges of double standards.

I. A CONVENTION EUROPE THAT NO LONGER IS

The evolution of the European Court of Human Rights from a Cold War institution with a small national audience and hardly any cases in

18 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-178753; Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-144124; Tymoshenko v. Ukraine, App. No. 49872/11, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-119382; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-83247; Gusinskiy v. Russia, 2004- IV Eur. Ct. H.R. 129; see also Helen Keller & Corina Heri, Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights Untapped Potential to Protect Democracy, 36 HUM. RTS. L.J. 1

its docket in its early days of the 1960s[19] to an influential human rights court right through the 1970s and 1980s is well documented.[20] A central feature of the rise in the influence of the European Court of Human Rights in the 1970s and throughout the 1980s was its relatively homogenous domestic audiences in Western Europe.[21] The old and founding members of the Convention demonstrated respect for the Court's interpretive authority of the Convention, even if at times, they offered slow or begrudging compliance with its judgments.[22] That the Court was delivering a European public good, for all the members of the Council of Europe, through its development of European human rights law, however, was not fundamentally contested.[23] This overall support for the Convention enabled commentators, in the mid-1990s, to hail the Convention system as a "remarkable success" and a model forcomparative learning.[24]

The expansion of the jurisdiction of the European Court of Human Rights beyond Western European states started in 1990 with Turkey accepting the Court's compulsory jurisdiction.[25] For most of its early years under the jurisdiction of the Court, Turkey was under a state of emergency and carried out policies that were suspected of constituting gross human rights violations,[26]cases unfamiliar to the Court's docket at that time. A flood of gross human rights violations cases against Turkey followed the acceptance of compulsory jurisdiction.[27] Through the Turkish cases, the European Court of Human Rights started to address large volumes of right

19 From Cold War Instrument to Supreme European Court, supra note 1.

20 Id.

21 From 1953 to 1990 twenty-one Western European member states accepted the optional compulsory jurisdiction of the ECtHR – Denmark (1953), Ireland (1953), Netherlands (1954), Belgium (1955), Germany (1955), Austria (1958), Iceland (1958),Luxembourg (1958), Norway (1964), United Kingdom (1966), Malta (1967), Italy (1973), France (1981), Switzerland (1974), Sweden (1976), Portugal (1978), Greece (1985), Spain (1981), Lichtenstein (1982), Cyprus (1988), San Marino (1989). See COUNCIL OF EUR., 1994 Y.B. EUR. CONV. ON H. R 1, 21.

22 See *DAVID HARRIS ET AL*., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 29–31, 3d ed. (2014).

23 *Çali, Koch & Bruch,* supra note 6.

24 *Laurence R. Helfer & Anne-Marie Slaughter,* Toward a Theory of Effective Supranational Adjudication, 103 YALE L.J. 273 (1997).

25 See COUNCIL OF EUR., supra note 21.

26 See *Aisling Reidy, Françoise Hampson & Kevin Boyle*, Gross Violations of Human Rights, Invoking the European Convention on Human Rights in the Case of Turkey, 15 NETH. Q. HUM. RTS. 161 (1997).

27 *Başak Çali,* The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before

to life, torture, and disappearance cases, bringing its jurisprudence closer to that of the Inter-American Court of Human Rights.[28] The extension of the Court's reach to Turkey and the flood of cases this caused may have been a signal of things to come, with the expansion of the Convention to an audience of Eastern, Central European, and Caucasus states in various stages of transition from communist regimes to rule of law democracies in the 1990s and 2000s. That expansion, of course, also covered Russia. But with the end of the Cold War, bringing the Convention to the states of a new and wider Europe was seen as worth the risks this may bring to the relatively homogenous Convention audience of the 1980s.[29] The Court's jurisdiction covered eighteen states in 1990.[30] This expanded to thirty-six states in 1997[31] and to forty-seven by 2007.[32] In line with this expansion, the caseload of the Court, too, saw a significant increase, often made up of repetitive violations of the Convention, pointing to systemic and structural problems in ensuring respect for the Convention.[33]

The initial expansion of the Council of Europe to cover Eastern and Central Europe took place at the time when the Council of member states also opted for a stronger judicialisation of the Convention system. The Commission and the opt in Court system was abandoned in 1998 and the Court became a compulsory full-time Court for all members of

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the European Court of Human Rights, 1996-2006,35 LAW & SOC. INQ. 311, 312 (2010).

28 Id.

29 *Pamela A. Jordan,* Does Membership Have its Privileges? Entrance into the Council of Europe and Compliance with Human Rights Norms, 25 HUM. RTS. Q. 660 (2003). But see *Mark Janis*, Russia and the Legality of Strasbourg Law, 8 EUR. J. INT'L L. 93 (1997).

30 See COUNCIL OF EUR., supra note 21.

31 Finland (1990), Turkey (1990), Czech Republic (1992), Bulgaria (1992), Slovak Republic (1992), Hungary (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Estonia (1996), Albania (1996), Andorra (1996), Latvia (1997), Moldova (1997), FYROM(1997), Ukraine (1997), Croatia (1997).See Chart of signatures and ratifications of Treaty 005, COUNCIL OF EUR. TREATY OFFICE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=vFZ7AeW4 (last accessed Jan. 6, 2018).

32 Finland (1990), Turkey (1990), Czech Republic (1992), Bulgaria (1992), Slovak Republic (1992), Hungary (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Estonia (1996), Albania (1996), Andorra (1996), Latvia (1997), Moldova (1997), FYROM(1997), Ukraine (1997), Croatia (1997), Russian Federation (1998), Georgia (1999), Armenia (2002), Azerbaijan (2002), Bosnia and Herzegovina (2002), Serbia (2004), Montenegro (2004), Monaco (2005). Id.

33 See EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT 2010 14 (2011), http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf.

the Council of Europe,[34] showing the strong support for the European Court of Human Rights amongst its Western European members as the ultimate interpreter of the Convention at the time. Supported by its Western European founders, the European Court of Human Rights has thus embarked on the role of a transmission belt of human rights values developed through its case law to its new and enlarged national compliance audiences. In this process, the Committee of Ministers of the Council of Europe, the political arm that supervises the execution of human rights judgments, further confirmed the centrality of the role of the European Court of Human Rights by asking for more guidance from it in the execution process of human rights judgments.[35] In other words, even in the first half of the 2000s, the central presumption was that the Court enjoyed overall support and backing from its old member states and the central task of the Court was understood as diffusing Convention norms, as interpreted by the Court, for all.

A. FRACTURES AMONGST WESTERN EUROPEAN FOUNDERS: THE UNITED KINGDOM IN THE LEAD

This attempt to cultivate a unified attitude towards the Convention system in the new members, however, faced what may have been an unexpected challenge from one of the original founders of the Convention system, the United Kingdom, from the mid-2000s onwards. This challenge, over time, has gathered support, even if less vocal, outside of the UK,[36] and, thus, has been an important catalyst in the subsequent division in attitudes of overall support towards the Convention system among the Western European founders. It is for this reason that a more detailed tracing of the UK's destabilization of the Western European human rights acquis requires attention.

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34 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, art. 19, Nov. 5, 1994, E.T.S. 155.

35 Comm. of Ministers, Resolution of the Comm. of Ministers on Judgments Revealing an Underlying Systemic Problem, 114th Sess., Doc. No. Resolution Res (2004)3 (2004), https://wcd.coe.int/ViewDoc.jsp?p=&id=743257&Lang=fr&direct=true.

36 See *Oomen* supra note 14; see also *Altwicker*, supra note 14; *Reiertsen*, note 14; *Wenander*, supra note 14.

The UK accepted the compulsory jurisdiction of the Court in 1966.[37] Following on from that, the Court has played an important role in the UK human rights scene, both domestically and with respect to its colonies and extra territorial military presence.[38] Whilst the UK had raised its disagreements with cases decided against it by the Court throughout engagement, it has remained a complier with the judgments, even if it was, at times, a begrudging complier.[39] Despite this, it was only in 2000 that the Human Rights Act came into force in the UK, incorporating the Convention into the British domestic legal order and making the Convention rights directly justiciable in UK courts.[40] An intense domestic engagement with the Convention in the domestic courts, including the then UK House of Lords, followed.[41]

In 2005, two particular events kick-started a debate in the UK concerning the European Court of Human Rights as the rightful and ultimate interpreter of the Convention. First, on July 7, 2005, London faced the most serious terrorist attack on its soil since the time of the conflict in Northern Ireland.[42] In response to this, the UK Government began a concerted effort

37 Declarations made to the Secretary-General of the Council of Europe by the Government of the United Kingdom of Great Britain and Northern Ireland Recognizing the Competence of the European Commission of Human Rights to Receive Individual Petitions and Recognizing as Compulsory the Jurisdiction of the European Court of Human Rights, (Strasbourg, 14 Jan. 1966), http://treaties.fco.gov.uk/docs/fullnames/pdf/1966/TS0008%20(1966)%20 CMND-%202894%201966%2014%20 JANUARY%20 STRASBOURG%3B%20 DECLARATIONS%20TO%20SECRETARY-GENERAL%20OF%20COUNCIL%20OF%20EUROPE%20BY%20NI%%2020RECOGNISING%2%200COMPETENCE%20OF%20%20HUMAN%20RIGHTS.PDF

38 *Donald, Gordon & Leach*, supra note 4. 39 Courtney Hillebrecht, Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights, 13 HUM. RTS. REV. 279 (2012).

39 *Courtney Hillebrecht*, Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights, 13 HUM. RTS. REV. 279 (2012).

40 Section 6 of the Human Rights Act requires all public authorities to act in a way which is compatible with the Convention rights unless primary legislation requires them to act otherwise. Human Rights Act 1998, c. 42, § 6 (UK).

41 Th*omas Poole & Sangeeta Shah,* The Law Lords and Human Rights, 74 MOD. L. REV. 79 (2011).

42 7 July London Bombings: What happened that day?, BBC NEWS (July 3, 2015), http://www.bbc.com/news/uk-33253598.

to deport individuals who may pose a national security risk to the UK.[43] This policy included the securing of diplomatic assurances from receiving states prior to the deportation of non-nationals suspected of posing security risks.[44] This received pushback from the European Court of Human Rights with respect to deportations to countries where the Court saw risks of torture and inhuman treatmentand unfair trials.[45] Second, on October 6, 2005, the European Court of Human Rights delivered the *Hirst v. UK* judgment, which found that the UK ban on prisoner voting was incompatible with the Convention.[46] Thisjudgment was seen as too intrusive by the UK Parliament on its prerogative to decide on the distribution of democratic rights across its citizenship.[47] Whilst the Labour Party was still in power, in 2006, a Conservative Party backbencher, Douglas Carswell, submitted a report to the Joint Parliamentary Committee on Human Rights entitled "Why the Human Rights Act must be scrapped" signaling that the UK rights culture was under threat from Strasbourg.[48] Whilst this report did not at the time register any shockwaves in Strasbourg, in 2009, a widely circulated speech by Lord Hoffman, a member of the House of Lords, did.[49] In this speech, Lord Hoffman epitomized the decay of the European human rights acquis in the UK. In what has subsequentlybecome a core (and unfortunately worded) objection to the ultimate interpreter role of the European Court of Human Rights Lord Hoffman stated, "it cannot be right that the balance we in this country strikebetween freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court."[50]

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43 Full text: The prime minister's statement on anti-terror measures, GUARDIAN (Aug. 5, 2005), https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1.

44 Id.

45 See Othman (Abu Qatada) v. United Kingdom, 2001-I Eur. Ct. H.R. 159.

46 Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187.

47 A motion was passed in the UK's House of Commons on 10 February 2011 in which it was noted that the issue of prisoners' voting rights was a matter for 'democratically elected lawmakers.' *Alexander Horne & Isobel White,* PRISONERS' VOTING RIGHTS (2005 TO MAY 2015)33–37 (2015), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport.

48 JOINT COMMITTEE ON HUMAN RIGHTS, THIRTY-SECOND REPORT, 2005–06, (HOUSE OF COMMONS) (UK).

49 *Leonard Hoffman*, Lord of Appeal in Ordinary, The Universality of Human Rights, Address at the Judicial Studies Board Annual Lecture (Mar. 19, 2009).

50 Id. at 36.

Soon after this pushback to the ultimate interpretive authority of the European Court of Human Rights, the Conservative Party came into power in the UK in May 2010.[51] Commenting on the *Hirst v. UK* judgment, the new UK Prime Minister went on record to say that the judgment made him "physically ill," thus signaling that the executive branch, too, had grave concerns over the Strasbourg Court which aligned with the criticisms made by Lord Hoffman.[52] By this time, non- compliance with the *Hirst* judgment had filled the docket of the Strasbourg Court with repetitive cases from prisoners in the UK.[53] The European Court of Human Rights, therefore, delivered a pilot judgment, a procedure devised primarily for the new Eastern and Central European members in democratic transition,[54] in the *Greens and MT v. UK* asking the UK authorities to find a legislative solution to the repetitive cases from prisoners within six months.[55] To date, this judgment remains unimplemented, although twelve years after *Hirst*, the UK authorities submitted an action plan in November 2017 to implement the judgment.[56]

This move by the Court, treating the UK like any other member of the Convention acquis, resulted in a third backlash, this time from the UK Parliament. On February 10, 2011, MPs voted overwhelmingly in favour of maintaining a blanket ban on preventing prisoners from voting.[57] This cross-party vote against a judgment of the European Court of Human Rights was justified by many in the UK Parliament due to a sense that Strasbourg was unduly expanding the scope of interpretation of the

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51 Election 2010, BBC NEWS, http://news.bbc.co.uk/2/shared/election2010/results/ (last accessed Mar. 3, 2018).

52 *Andrew Hough*, Prisoner vote: what MPs said in heated debate, TELEGRAPH (Feb. 11, 2011, 6:45 AM), https://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in- heated-debate.html.

53 Greens. v. United Kingdom, 2010-VI Eur. Ct. H.R. 57; see also Firth v. United Kingdom, App. No. 47784/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-146101; McHugh v. United Kingdom, App. No. 51987/08, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-151005; Millbank v. United Kingdom, App. No. 44473/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng/?i=001-163919.

54 *Antoine Buyse*, The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges, 57 NOMIKO VIMA 1890 (2009).

55 Greens, 2010-VI Eur. Ct. H.R. at 78.

56 Communication from the United Kingdom to the Council of Europe concerning the Action Plan to implement the Hirst (No. 2) v. the United Kingdom ((Application No. 74025/01) and other prisoner voting cases, 2 November 2017, DH-DD(2017)1229, https://rm.coe.int/1680763233.

57 523 PARL. DEB., H.C. (2011) col. 584 (U.K.).

Convention rights at the expense of the well qualified domestic national authorities.[58] By 2015, the Conservative Party included the denunciation of the European Convention on Human Rights in its election manifesto.[59]

The questioning, by the UK, of the ultimate authority of the European Court of Human Rights to lead human rights interpretation in Europe did not remain a domestic affair. The UK also brought this domestic change in the attitudes towards the Convention system to the Council of Europe and demanded a concerted political reaction to the Court's expansive interpretation from other member states. A culmination of this has been the High Level Conference on the Future of the European Convention of Human Rights hosted by the UK in Brighton in 2012.[60] At this conference, after much political and diplomatic talk to keep the human rights acquis intact, the UK won a concession from the supporters of the Convention system to insert a paragraph into the Preamble of the Convention, which places a special emphasis on subsidiarity and margin of appreciation in the Convention system.[61] The newly found heightened emphasis on the concept of subsidiarity was a call to the Court to let go of its claim to be the sole interpreter of the Convention and to recognize the domestic

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58 Id. at cols. 498–505.

59 U.K. CONSERVATIVE PARTY, CONSERVATIVE PARTY MANIFESTO 2015 73 (2015).

60 *Vaughne Miller & Alexander Horne*, THE UK AND REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 1 (2012).

61 EUR. COURT OF HUMAN RIGHTS, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, para. 12(b) (2012) [hereinafter Brighton Declaration], http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

> The States Parties and the Court share responsibility for realizing the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.

Id. Protocol 15, which shall incorporate this into the preamble of the Convention has not yet come into force as the Protocol has not yet been ratified by all forty seven members of the Council of Europe. For the status of ratifications of Protocol 15, see Chart of signatures and ratifications of Treaty, TREATY OFFICE (Feb. 31, 2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=aCWRGPbJ.

authorities as co-interpreters of the Convention rights.[62] The Brighton Declaration and resulting protocols thus turned the UK's specific demands into a European political document signaling a demand for deferential directionto good faith domestic interpreters in the jurisprudence of the Court.

B. THE NEW EUROPE: RISE OF REVERSE TRANSITIONS AND ILLIBERAL DEMOCRACIES

The Convention system's expansion eastward, all the way to Vladivostok and the Caspian Sea, was based on the assumption that the Convention principles would in time be diffused in the laws, judicial decisions, and political attitudes in newly emerging European democracies. For most of Eastern and Central Europe, the accession to the European Convention system pre-dated the accession process to the European Union (EU).[63] The EU funded major training projects on the European Convention System in all the new member states of the Council of Europe with a view to entrench the Convention acquis in the new Europe.[64] Whilst the cases coming from the new member states of the Council of Europe steadily increased over the years, this has not been seen as posing an "attitude problem" towards the Convention system or the role of the Court in interpreting the Convention for the new members of the European fam-

62 On normative support for the co-interpreter theory for the Convention, see *Samantha Besson*, Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 279 (*Rowan Cruft*, *S. Matthew Liao & Massimo Renzo* eds., 2015).

63 Hungary, Poland, Bulgaria, Estonia, Slovenia, Czech Republic, Lithuania, Slovakia, Romania, Latvia and Croatia all joined the Council of Europe between 1990 and 1996. Most of the above joined the EU in 2004, with Romania and Bulgaria joining in 2007 and Croatia in 2013. See COUNCIL OF EUR, supra note 21.

64 For an overview of ongoing and completed projects in Eastern and Southern Europe, including the Russian Federation and Turkey, see Southeast Europe and Turkey, COUNCIL OF EUR., http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/south-east-europe-turkey (last visited Jan. 28, 2018). See also Eastern Partnership Countries and the Russian Federation, COUNCIL OF EUR., http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/eastern-partnership-countries-and-russian-federation (last visited Jan. 28, 2018).

ily.[65] In this process, the Court's jurisprudence, too, has become richer and focused on new terrain, such as institutionaljudicial reform[66] and transitional justice.[67] In effect, the Convention system was broadly regarded as helping the new member states to democratize and restructure their administration of justice systems.[68] Given the lack of outright challenges to the Convention system by itsnew members, the Court's crisis from the perspective of the new members has often appeared to be one of inadequate implementation,lack of knowledge of the Convention, or lack of capacities or resourcesto give effect to the Convention.[69]

Attitudes amongst the newer members towards the Convention, however, have seen significant changes since the early 2000s. In particular, in the past decade, instead of steady democratic transitions, Europe has seen the emergence of new forms of national governance that range from authoritarian or semi/competitive authoritarian regimes to illiberal democracies.[70] Whilst categorizing different states is often amatter of debate both as regards empirical accuracy and political correctness – be they called stalled/reversed democratic transitions or semi/competitive authoritarian regimes – these anti-democratic governance structures that stand in direct conflict with the Convention acquis extend to the Caucasus, Russia, Turkey, Ukraine, and also into European Union member states, such as Hungary and Poland.

What is common in this new terrain of national compliance audiences is not just their minimal commitment to formal democratic institutions, such as elections, but their attitude in favour of limiting protections of civ-

65 *Helen Keller & Alex Stone Sweet* (eds.), A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008); *Leonard M. Hammer & Frank Emmert* (eds.), THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE (2012).

66 *David Kosa & Lucas Lixinski*, Domestic Judicial Design by International Human Rights Court, 109 AM. J. INT'L L. 713, 715 (2015).

67 *James Sweeney*, Restorative Justice and Transitional Justice at the ECHR, 12 INT'L CRIM. L. REV. 313.

68 *Cali, Koch and Bruch*, supra note 6.

69 *Lisa McIntosh Sundstrom*, Advocacy Beyond Litigation: Examining Russian NGO Efforts on Implementation of European Court of Human Rights Judgments, 45 COMMUNIST & POST- COMMUNIST STUD. 255 (2012).

70 See *Steven Levitsky & Lucan A. Way*, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010); See also *Marina Ottaway*, DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM (2013).

il and political rights if opposition groups demand these rights.[71] What is more, semi-authoritarian regimes typically exercise strong control over the judiciary or curb the powers of the judiciary and thus prevent the Convention standards from having any real purchase as domestic legal remedies.[72] For semi-authoritarian regimes, the attitude towards the Convention system is no longer a good faith acceptance of the standards developed by the European Court of Human Rights. Instead, these regimes offer a systemic challenge to the authority of the Convention system and the Convention's non- negotiable structural requirement of pluralist democracy and rule of law as underpinning human rights protections. In 2015, for example, the Russian Federation amended the Federal constitutional law on the Constitutional Court of Russian Federation to empower the Constitutional Court to decide whether the judgments of the ECtHR are 'enforceable' under the Russian Constitutional system.[73] Similarly, Turkey's President Erdoğan vowed to bring back the death penalty in Turkey, despite the fact that the abolishment of death penalty is a non-negotiable value of the Convention acquis and a prerequisite to membership to the Council of Europe.[74] The European Court of Human Rights' ever-rising repetitive

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71 Id.

72 See Cengiz v. Turkey, Apps. Nos. 48226/10 & 14027/11, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-159188.

73 See *Ilya Nuzov*, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, INT'L JOURNAL OF CONSTITUTIONAL LAW BLOG (May 13, 2016), http:// www.iconnectblog.com/2016/04/russias-constitutional-court-declares-judgment-of-the-european-court-impossible-to-enforce. Following on from this, the Russian Constitutional Court declared Anchugov v. Russia and Yukos v. Russia as judgments impossible to enforce in 2016 and 2017 respectively. See Judgment of the Constitutional Court of the Russian Federation regarding the constitutionality of execution of the European Court of Human Rights judgment of July 14, 2015 in the case of Anchugov and Gladkov, 2016, No. 12-П/2016 (Russ.); Judgment of the Constitutional Court of the Russian Federation regarding the constitutionality of execution of the European Court of Human Rights judgment of 31 July 2014 in the case OAO Neftyanaya Kompaniya Yukos v. Russia, 2017, No. 1-П (Russ.), http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf; see also *Iryna Marchuk,* Flexing Muscles (Yet) Again: The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case, EJIL: TALK! (Feb. 13, 2017), https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of- the-authority-of-the-ecthr-in-the-yukos-case/.

74 Claiming victory, Turkey's Erdogan says may take death penalty to referendum, REUTERS (Apr. 16, 2017), http://www.reuters.com/article/us-turkey-referendum-erdogan-idUSKBN17I0SP. In 1989, the Council of Europe made the abolition of the death penalty a condition of accession for all new member states. See

case law also reflects the domestic decay of rule of law in member states. The Court now deals with cases that concern interference of the executive and legislature with the judiciary,[75] detention and imprisonment of journalists[76] and human rights defenders,[77] as well as the targeting of opposition politicians.[78] The assumption that more training and awareness of the Convention system will lead to enduring respect for Convention standards at the national level no longer stands up to scrutinyin this new geography.

II. COPING WITH THE FRACTURED CONVENTION ACQUIS

What has been the response of the European Court of Human Rights towards the fracture of the overall attitudes of its national audiences towards the Convention? The Court has responded to these attitudinal changes both through formal channels of communication with its political masters,[79] as well as in writing and speeches by its individual judges.[80] It has, however, also gone beyond these communicative gestures and shown increased willingness to respond to the attitudinal shifts in its fractured national audiences through its substantive case law, departing from what

COUNCIL OF EUR., DEATH PENALTY FACTSHEET, https://rm.coe.int/16800 8b914 (last visited Mar. 3, 2018).

75 See Baka v. Hungary, App. No. 20261/12. Eur. Ct. H.R. (2016), http://hudoc.echr .coe.int/eng?i=001-144139; Salov v. Ukraine, 2005-VIII Eur. Ct. H.R. 143; Volkov v. Ukraine, 2013-I Eur. Ct. H.R. 73.

76 See Fatullayev v. Azerbaijan, App. No. 4098/07, Eur. Ct. H.R. (2010), http://hudoc .echr.coe.int/eng?i=001-98401; Şener v. Turkey, App. No. 38270/11, Eur. Ct. H.R. (2014) (Fr.), http://hudoc.echr.coe.int/eng?i=001-145343.

77 Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr. coe.int/eng?i=001-161416.

78 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc. echr.coe.int/eng?i=001-178753; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013.

79 The ECtHR's contribution to the 2015 Brussels conference explained that the principle of subsidiarity is about the sharing, and not the shifting, of responsibility for human rights protection in Europe. See EUR. COURT OF HUMAN RIGHTS, CONTRIBUTION OBRUSSELS CONFERENCE (Jan. 26, 2015), https:/ /www.echr.coe.intDocuments/2015_Brussels_Conference_Contribution_Court_E NG.pdf.

80 Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, 14 HUM. RTS. L. REV. 487 (2014).

may be termed as its "standard jurisprudence."[81] In other words, the Court has chosen to accept that the national compliance audiences are indeed different from each other in terms of how much trust the Court can place on them and that they need to be treated as such in the case law of the Court. This new outlook – emphasizing different treatment for different national institutional arrangements and national cultures of human rights in terms their domestic ability and willingness to respect the Convention acquis – has led the Court to develop sui-generis forms of good faith and bad faith jurisprudence in its substantive case law, alongside its own standard jurisprudence which continues to bethe major output, in terms of number of cases.[82]

To see how the Court's jurisprudence diversified based on the trust it has on the audiences it interacts with, it is first helpful to clarify what constitutes the general characteristics of the "standard jurisprudence" of the European Court of Human Rights. After all, the European Court of Human Rights has long been well known for its variable standards of review related to its long-standing employment of the margin of appreciation doctrine carving out exceptions to uniform applications of a single standard. What, then, is new in its sensitivity to the differing attitudes of national audiences?

The standard jurisprudence of the European Court of Human Rights may be identified through two important features: (1) it speaks to all states

81 Scholars of the European Court of Human Rights have recently started to use the term 'standard jurisprudence' partly in an attempt to capture the qualitative changes in the Court's case law in its newly changing political environment. See, e.g., *Oddný Mjöll Arnardóttir*, Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation, EUR. SOC'Y OF INT'L L. 2015 ANN. CONF. (2015), http://ssrn.com/abstract=2709669; see also *Matthew Saul*, Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights, 20 I.J.H.R. 1077 (2016). A further distinction introduced in the scholarship is between substantive review under the standard case law of the Court and procedural review under the institutional deferential case law of the Court. See *Patricia Popelier*, The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights, in THE ROLE OF CONSTITUTIONAL COURTS IN MULTI-LEVEL GOVERNANCE 249 (*Patricia Popelier et al*. eds., 2013); PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (*Janneke Gerards & Eva Brems* eds., 2017); Brems & Lavrysen, supra note 3.

82 Total number of judgments delivered by the Court in 2016 was 1926. See EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT (2016), http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf.

in one voice;[83] and (2) it has developed specific interpretive approaches and tests for each right in the Convention with the presumption that these interpretive approaches will have *erga omnes*effect throughout the Convention system.[84]

Speaking in one voice to all member states of the Council of Europe requires the Court to use the same interpretive tests for all similar cases before it when determining the scope and limitation conditions of rights. These interpretive tests are often framed in specific Strasbourg jargon and are repeated in judgments in highly stylized forms. For example, in assessing the justifiability of a right's limitation by a state the Court looks at the case as a whole, exploring whether the domestic law that led to the limitation was foreseeable or accessible, whether the interference served a legitimate aim, whether it was necessary in a democratic society, and whether it was proportionate.[85] Equally, the Court asks whether the reasons given by national authorities to justify their decisions are relevant and sufficient, without discriminating between who the authorities are and the quality of their domestic decision making processes.[86] At the end of each judgment, the Court concludes by either finding or not finding a violation, without going into further detail as to whether the violation was a grave one.[87]

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83 In the Court's standard language, even the margin of appreciation doctrine seeks to speak to states in one voice, holding that some Convention rights may attract a narrow, whilst others attract a wide margin of appreciation for all states. See *HOWARD CHARLES YOUROW*, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

84 For an account of rights-based jurisprudence of the Convention, see Case-law analysis, EUR. COURT OF HUMAN RIGHTS, http://echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n14278064742986744502025_pointer (last accessed Jan. 28, 2018).

85 On authoritative exposés of these texts, see *PHILIP LEACH*, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS (2017); WILLIAM SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY (2015).

86 See Coster v. United Kingdom, Eur. Ct. H.R. (2001), http://hudoc.echr.coe.int/eng?i=001-59156; Nikula v. Finland, Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/eng?i=001-60333; Sidibras v. Lithuania, 2004-VIII Eur. Ct. H.R. 367; Axel Springer AG v. Germany, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/eng?i=001-109034.

87 This has been the case even for gross human rights violations perpetrated by state actors. *Çali,* supra note 27.

For every Convention article, there exist fine-grained tests, transferable from country to country, accounting for the scope of rights, and, in the case of qualified rights, approaches for distinguishing justifiable limitations from violations.[88] Despite this, the Court's standard case law also recognizes that national authorities may enjoy a margin of appreciation with respect to assessing the scope and limitations of certain rights.[89] In identifying the scope of rights, the Court pays due attention to whether there exists a European consensus in developing new implied rights for Convention articles and holds that, where the European consensus is lacking, states may have a margin of appreciation as to defining the scope of rights.[90] How the Court verifies such consensus is subject to debate.[91] In identifying conditions for the restrictions of rights, the Court has also indicated whether states enjoy a narrow or a wide margin of appreciation depends on their proximity to the facts of a case or national authorities' proximity to the local forces.[92] This, too, attracted much criticism due to the risks of over-determination of such proximity.[93] In situations where the Court has identified a narrow margin of appreciation, however, it has employed the same tests, namely necessity in a democratic society and proportionality, for all cases coming from all countries of the Council of Europe.[94] That is, when the margin is narrow, like cases are treated alike regardless of which country they come from. In other words, both the lack of European consensus and presence of a wide margin of appreciation due to subsidiarity concerns simply signaled that the Court was not yet able to develop uniform standards that ought to have an *erga omnes* effect across the Convention system.

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88 See EUR. COURT OF HUMAN RIGHTS, supra note 82.

89 *Dean Spielmann*, Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review? (2011- 2012), 14 CAM. Y.B. EUR. LEGAL STUD. 381 (2012).

90 *KANSTANTSIN DZEHTSIAROW*, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEANCOURT OF HUMAN RIGHTS (2015).

91 *Janneke Gerards & Hanneke Senden*, The Structure of Fundamental Rights and the European Court of Human Rights, 7 INT'L J. HUM. RTS. 619, 651 (2009).

92 See, e.g., Buckley v. United Kingdom, App. No. 20348/92, 1996-IV Eur. H.R. Rep. 1291–93.

93 *Kevin Boyle*, Human Rights, Religion and Democracy: The Refah Party Case, 1 ESSEX HUM. RTS. REV. 1, 14 (2004).

94 *Tarlach McGonagle* (ed..), EUROPEAN AUDIOVISUAL OBSERVATORY, FREEDOM OF EXPRESSION, THE MEDIA AND JOURNALISTS: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (2013).

A. LETTING GOOD FAITH INTERPRETERS BE

A central feature of the Western European pushback against the European Court of Human Rights has concerned the need for adequate recognition of the domestic institutions, in well-established rule of law respecting states, as the co-appliers and co-interpreters of the European Convention on Human Rights. The argument has been that, if domestic institutions in rights-respecting states approach the Convention with good faith, why should the European Court of Human Rights always be the winner in reasonable disagreements with these domestic good faith interpreters? In its case law of the 2000s, the Court has taken this pushback seriously and embarked upon a path that offers deference to thegood faith interpreters of the European Convention on Human Rights, whether judiciaries or parliaments, provided that a level of quality assurance of their domestic rights interpretation is in place.

This new good faith jurisprudence is qualitatively different from the operation of the margin of appreciation in the "standard review" case law of the Court. In the latter, the reason to defer to a national decision- maker is based on the nature of the right itself or the specific facts of the case or the lack of a European consensus. In this new good faith jurisprudence, the quality assurances provided by domestic decision makers in respecting the Convention takes center stage. It is for this reason that some commentators have categorized this new form of deference under the umbrella of procedural review of domestic authorities, rather than a substantive review of whether the right is appropriately protected by domestic authorities.[95] This new type of procedural deference to domestic authorities has shown itself as deference both to domestic courts and to parliaments, who are seen,prima facie, as engaging with the Convention in good faith. How then does the Court identify who is a good faith domestic interpreter of the Convention?

The *Von Hannover* case of 2012 is one of the first cases that displayed a normative account of deference to good faith interpreters, where the reasons for deference to national authorities shifted from substantive review concerns to procedural concerns based on the quality of the reasoning of the judicial decision makers.[96] The case is unique in the sense that Germany has been a strong supporter of the Convention acquis, even

95 PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES, supra note 81.

96 Von Hannover v. Germany (No. 2), 2012-I Eur. Ct. H.R. 399.

though the German Constitutional Court, in a 2004 judgment, recognized that in the case of a hypothetical conflict with a Strasbourg interpretation and the Constitutional Court's interpretation flowing from the German Constitution, the latter would prevail.[97]

The *Van Hannover* case involved the question of whether the German courts correctly balanced the right to privacy of Princess Caroline of Monaco and the freedom of expression of German newspapers.[98] A novelty of this case was that this was the second time that the applicant appeared before the European Court of Human Rights due to similar, but not identical facts. In the first case, decided in 2004, the European Court of Human Rights found a violation of the Convention by holding that the domestic judges did not strike a fair balance between right to privacy and freedom of expression.[99] In this second case, the German Constitutional Court indicated that it had taken into account the principles laid down by the Court in balancing rights.[100] In response, the Court carefully stated that "where the balancing exercisehas been undertaken by the national authorities in conformity with the criteria laid down in the Courts case law, the Court would require strong reasons to substitute its view for that of the domestic courts."[101] In other words, the Court signaled that it would not review the actual substantive balance of considerations by German domestic courts, so long as the German Courts paid due attention to such considerations. This approach was decisive in the Court's finding that there was no violation of theright to privacy in this case, as the Court did not find strong reasons to substitute the decision reached by domestic courts. The Court, therefore, acknowledged that the German courts had responsibly engaged in abalancing exercise.[102]

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97 See BVerfG (Federal Constitutional Court), 2 BvR 1481/04, Oct. 14, 2007.

98 Von Hannover (No. 2), 2012-I Eur. Ct. H.R. 399.

99 Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41.

100 See BVerfG (Federal Constitutional Court), 1 BvR 1602/07, Feb. 28, 2008.

101 Von Hannover (No 2), 2012-I Eur. Ct. H.R. 399. For cases with similar reasoning structures, see Obst v. Germany, App. No. 425/03, Eur. Ct. H.R. (2010) (Fr.), http://hudoc.echr.coe.int/eng?i=001-100463; Schüth v. Germany, 2012-V Eur. Ct. H.R. 397; Siebenhaar v. Germany, App. No.18136/02, Eur. Ct. H.R. (2011) (Fr.), http://hudoc.echr.coe.int/eng?i=001-103236.

102 Due to the emphasis on responsible action by domestic courts, I have elsewhere called this new doctrine, "the responsible courts" doctrine. See *Başak Çali,* From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights, in*: Oddný Mjöll Arnardóttir & Antoine Buyse* (eds.), SHIFTING CENTRES OF GRAVITY IN HU-

This form of reasoning constitutes a departure from thesubstantive review doctrine of the European Court of Human Rights and shows that the calls for subsidiarity of the Court in favour of domestic courts when applying the Convention had struck a chord. Instead of scrutinizing the reasons given by domestic courts to justify their decisions, the requirement, instead, opts for strong reasons to trigger the Court's substantive review. Evidence for due regard to the interpretive standards developed by the Court lets the responsible domestic interpreters be as to the outcome of a case. As co-appliers of humanrights standards, responsible domestic courts were thus given deference to determine whether the Convention is violated or not.

In *Palomo Sanchez v. Spain*, the European Court of HumanRights employed its quality of decision-making focused good faith deference standard to a case. This case was a first in terms of a judicial dialogue between Spanish Courts and Strasbourg because the issues at stake had never previously arisen before the European Court of Human Rights.[103] Unlike *Von Hannover*, therefore, what was at stake in this case was whether responsible domestic courts could be trusted to interpret the Convention and balance competing rights, in the absence of Strasbourg having ruled on the principled issues and considerations in advance.[104]

In *Palomo Sanchez*, domestic courts (and subsequently the European Court of Human Rights) had to balance the freedom of expression rights of workers with the right to privacy of managers and co- workers.[105] Delivery workers who were dismissed from their jobs by an industrial bakery company in Barcelona had earlier brought proceedings against the company before Spanish employment tribunals seeking recognition of their status as salaried workers (rather than self- employed or non-salaried delivery workers), in order to be covered by the corresponding social security regime.[106] Representatives of a committee of non-salaried delivery workers within the same companyhad testified against the applicants in those proceedings.[107] The applicantsset up the trade union *Nueva Alternativa Asamblearia* (NAA) in 2001 to defend their interests and subsequently published a cartoon in the NAA newsletter showing the company manager

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MAN RIGHTS PROTECTION: RETHINKING RELATIONS BETWEEN THE ECHR, EU AND NATIONAL LEGAL ORDERS 144 (2016).

103 Sánchez v. Spain, 2011-V Eur. Ct. H.R. 187.

104 Id.

105 Id.

106 Id. at 11.

107 Id.

and two workers who testified against them in an undignified position.[108] They were dismissed from work as a result of this cartoon.[109]

In this case, similar to *Von Hannover* (2), the Grand Chamber signaled that it would defer to domestic courts that are deemed to act responsibly in discharging the domestic interpretation of theConvention.[110] It went on to decide that the domestic courts had duly recognised the importance of freedom of expression and that the decisionof the domestic courts was not "manifestly disproportionate."[111] With this decision, the European Court of Human Rights signaled that so long as a domestic court was prima facie viewed as giving due recognition to the Convention, the Court would not lay out how a substantive review of competing interests must be carried out.[112] Furthermore, the Court has introduced a new concept to its jurisprudence of procedural deference: manifest disproportionality as opposed to standard proportionality.[113] Dissenting judges in the *Palomo Sanchez* case took issue with the Court's willingness to assign such a carte blanche co-interpretation role to domestic courts without itself clarifying the full range of jurisprudential considerations substantively at stake in a case that gives rise to potentially new issues.[114] In particular, the dissenting judgments highlighted the absence of a fulsome discussion by the Court of the freedom of expression standards in the labor rights and trade unions dispute context.[115] This distinguishes the *Palomo Sanchez* case from *Von Hannover* where the issues at stake had previously been considered bythe Court. In other words, by deferring to good faith interpreters of the Convention in this instance, the Court has forgone its right to develop the Convention interpretation for Council of Europe countries as a whole andduly placed itself in a subsidiary role for the interpretation of the Convention.

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108 Id. at 195–96.
109 Id. at 196.
110 Id. at 214–15.
111 Id. at 220.
112 Id. at 218–219.
113 Id. at 220. In more recent case law, the Court has also started to employ the formula of "neither arbitrary nor manifestly unreasonable" to justify its deference. See Alam v. Denmark, App. No. 33809/15, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-175216; Ndidi v. United Kingdom, App. No. 41215/14, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-
114 See Sánchez, 2011-V Eur. Ct. H.R. at 221 (dissenting opinion of Tulkens, J. et al.).
115 Id.

The 2017 Grand Chamber judgment in the case of *Hutchinson v. United Kingdom* points to the ongoing expansion of the deference to domestic courts into a new direction. In this case, at stake was whether the European Court of Human Rights should reconsider its own previous findings concerning the application of Article 3 (torture, inhuman or degrading treatment) of the Convention to cases concerning life prisoners if domestic courts give assurances that their understanding of the treatment of life prisoners in said country coheres with the Convention.[116] On July 9, 2013, the European Court of Human Rights held, in *Vinter and Others v. United Kingdom*, that whole life orders in the UK violate Article 3 of Convention.[117] In so doing, the Court held that the legal framework in the UK failed to provide legal certainty as to when lifers can ask for a review of their sentence.[118] It also pointed to the absence of a dedicated review mechanism to this end under UK law.[119] In 2014, the UK Court of Appeal in *R v. McLoughlin* considered the *Vinter andOthers* judgment of the European Court of Human Rights and held that even though the legal framework drawn up by the Home Secretary for reviewing parole for life prisoners may seem restricted, the executive is under a duty to take into account the Convention and any failure to do so would be subject to appeal before UK Courts.[120] In the light of this assurance by the Court of Appeal of the United Kingdom, the European Court of Human Rights overturned its *Vinter* decision in Hutchinson and found the UK legal framework compatible with Article 3 of the Convention.[121] In so doing, the Court emphasized that "the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities."[122] The *Hutchinson* case is a further expansion of the deference to good faith interpreters, as the Court treated the UK courts' assurances to take into account the Convention as a reason to reverse its own previous jurisprudence on the matter.[123]

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116 Hutchinson v. United Kingdom, App. No. 57592/08, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-150778.
[117] Vinter v. United Kingdom, 2013-III Eur. Ct. H.R. 317.
117 Vinter v. United Kingdom, 2013-III Eur. Ct. H.R. 317.
118 Id. at 350–53
119 Id. at 353.
120 R v. McLoughlin [2014] EWCA Crim 188 (Eng.).
121 Hutchinson, App. No. 57592/08, Eur. Ct. H.R.
122 Id. para. 71.
123 As Judge Sajo pointed out in his separate opinion, this further put the Courts at odds with its decision delivered against the Netherlands on the irreducibility of life sentence in the case of Murray v. Netherlands, App. No. 10511/10, Eur. Ct.

The deference of the Court towards good faith interpreters that it trusts has also been apparent in cases where the Court has interacted with national Parliaments.[124] The *Animal Defenders v. United Kingdom* case of 2013 and the *SAS v. France* judgment of 2015 are two examples in which the Court has forgone the carrying out of a substantive proportionality analysis of the measures taken by parliaments based on the quality of decision-making procedures in the legislative contexts.[125] The *Animal Defenders* case concerned the blanket ban on political advertising by the UK Parliament and whether this violated freedom of expression.[126] The Court first started out by holding that in the field of freedom of expression states enjoy a narrow margin of appreciation.[127] Under its standard case law this should have led to a substantive proportionality analysis of the impugned law. It, however, held that an almost blanket ban on political advertising was not disproportionate because of thequality of the parliamentary and the judicial debates in the UK context.[128] In so doing, the Court held that in instituting a blanket ban the Parliamenthad duly considered other options and that was sufficient to ensure compliance with the Convention.[129] In this respect, the Court found that adebate taking place in Parliament was worthy of deference without a substantive review of proportionality.

The *SAS v. France* case concerned the banning of face veil in public places by both houses of the French Parliament with an overwhelming majority.[130] Whilst the ECtHR emphasized the autonomy of women to choose their own dress and the importance of the protection of minority cultural identities for political pluralism and the potential Islamophobic motives to introduce such as ban,[131] it nevertheless relied on the fact that the law was introduced by the legislature based on a concern for covered faces and noted its subsidiary role and the direct democratic legitimacy of the national legislature.[132] The latter meant that the government had a wide margin of appreciation when considering whether limitations on

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H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-138893. See Hutchinson, App. No. 57592/08, Eur. Ct. H.R. (Sajo, J., separate opinion).

124 *Matthew Saul*, The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments, 15 HUM. RTS. L. REV. 745 (2015).

125 S.A.S. v. France, 2014-III Eur. Ct. H.R. 341.

126 Animal Def. Int'l v. United Kingdom, 2013-II Eur. Ct. H.R. 203.

127 Id. at 232.

128 Id. at 233–34.

129 Id. at 235–37.

130 S.A.S., 2014-III Eur. Ct. H.R. at 354.

131 Id. at 370–71, 378–79.

132 Id. at 373–74, 380.

the right to manifest one's beliefs were"necessary."[133] In the *SAS* case, the Court, therefore, indicated that the duly established parliamentary deliberations are a trigger for the employment of its margin of appreciation. It thus held that the blanket ban on the burka in France meet the procedural review standards espoused by the Court.[134]

What these cases show is that the ECtHR has started to develop procedural deference standards that focus on the trust it has to domestic judges and parliaments to interpret the Convention on their own right. The *Van Hannover* case aside, all other cases further point to the Court letting good faith domestic interpreters be, even when the Court's prior substantive review of the issues at stake are absent or even when the Court's prior substantive review of the issues in previous cases are at odds with the preferences of the domestic interpreters. There is, therefore, a much larger substantive interpretive space carved for domestic judiciaries and parliaments based on the procedural qualities of their decision-making processes.

B. TURN TO BAD FAITH JURISPRUDENCE

Since the mid-2000s, a second novel preoccupation of the Court's substantive case law has been the question of how to address states' use of their powers for reasons that are not themselves grounds forlegitimate restrictions of rights in the Convention. States' bad faith use oftheir powers is prohibited under Article 18 of the Convention, which states that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they are prescribed."[135] The *travaux preparatoires* of the Convention show that insertion of Article 18 to the Convention was a conscious choice on the part of drafters to ban misuse of state power in restricting rights.[136]

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133 Id. at 381.

134 Eva Brems, SAS v. France: A Problematic Precedent, STRASBOURG OBSERVERS (July 9, 2014) https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/.

135 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 18, Nov. 4, 1950, 213 U.N.T.S. 221. No other regional or international human rights treaty has a provision equivalent to Article 18 save for Article 30 of the Inter American Convention on Human Rights.

136 *Keller & Heri*, supra note 18.

Despite the concerns of the drafters that pre-World War II (WWII) practices of using state power to undermine rights may be a possibility in the post-WWII Europe, the (former) European Commission on Human Rights and the European Court of Human Rights treated"Article 18 risks" to be not relevant in their pre-2004 jurisprudence and instead operated under a strong presumption of the good faith of the stateparties when analyzing Convention violations.[137] In the first ever casethat discussed Article 18, *Kamma v. Netherlands*, the Commission approached the article in a narrow way and imposed a high threshold for proving bad faith on the part of the applications.[138] It held that Article 18 is not an autonomous article and, therefore, can only be raised in conjunction with other articles of the Convention that allow for restrictions to be placed on rights.[139] The Commission further held that suspicion by applicants that an illegitimate pretexts/hidden agendas exist cannot be enough, and that the applicants has a duty to establish such agendas.[140] The Commission, therefore, made the trigger of Article 18 a very onerous task by applicants.

This narrow reading of Article 18 was followed by the Court. It also cohered with the Court's commitment to developing its standard jurisprudence. The Court saw itself as developing the interpretation and application of the individual rights for the Council of Europe as a whole without seeing the need to point the finger at particular states for having illegitimate agendas domestically. Taking for granted the underlying commitment of all member states to the Convention, the Court thusrefused to imagine its audience as intentionally seeking to undermine the Convention. Not only did the Court not find any violations of Article 18 until 2004, it has also often been the case that the Court did not consider the examination of Article 18 claims necessary.[141]

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137 A review of the database of the case law of the European Court of Human Rights, HUDOC, shows that neither the Commission nor the Court found any violations of Article 18, together with any of the rights protected under the Convention, until 2004. On the Court's recognition of a strong presumption of good faith, see also Khodorkovskiy v. Russia, App. No. 5829/40, Eur. Ct. H.R. para. 255 (2011), http://hudoc.echr.coe.int/eng?i=001-104983.

138 Kamma v. The Netherlands, App. No. 4771/71, Eur. Comm'n on H.R. (1974), http://hudoc.echr.coe.int/eng?i=001-95625.

139 Id. at 9.

140 Id. at 10.

141 See Engel v. Netherlands, App. No. 5100/71, 1 Eur. H.R. Rep. 647 (1976); Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. Ct. H.R. 245 (1979); Sporrong v. Sweden, App. No. 7151/75, 5 Eur. Ct. H.R. 35 (1983); Bozano v. France, App. No. 9990/82, 9 Eur. Ct. H.R. 297 (1986); United Communist Party

This lack of interest in Article 18 shifted in 2004, when a Chamber of the Court for the first time ever found a violation of Article 18, in conjunction with Article 5 (right to liberty and security of person) in *Gusinskiy v. Russia*.[142] The case concerned the detention of a Chairmanof the Board of and majority shareholder in ZAO Media Most, a private Russian media holding company, which also owned NTV, a popular television channel.[143] The detention of the applicant ended when he agreed to sell his company to Gazprom, a Russian state controlled energy company, under favourable conditions.[144] Following on from this, Gusinskiy argued that his detention was an abuse of power by the authorities and that the authorities detained him in order to force him to sell his company.[145] Gusinskiy further argued that the authorities intended to silence his media outlets through this forced sale, due to its critical views of the government.[146]

The Court's initial approach when finding a violation under Article 18, in conjunction with Article 5 in the Gusinksiy case wascautious and brief. The Court, following *Kamma*, emphasized that Article 18 of the Convention does not have an autonomous role and thatit could only be applied in conjunction with other Articles of the Convention.[147] The Court, however, found that the direct evidence provided by the application was compelling to prove bad faith on the partof the state authorities. This evidence included the fact that Gazprom asked the applicant to sign an agreement when he was in prison, and a State minister endorsed such an agreement.[148] All charges against the applicant were dropped as soon as he signed the agreement.[149] Russian authorities also did not contest this direct evidence.[150] All of these facts, the Court held suggested that "the applicant's prosecution was used to intimidate him."[151]

Following on from Gusinskiy, the Court has continued to consider Article 18 cases in conjunction with other articles, primarily with respect

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of Turkey v. Turkey, App. No. 19392/92, 26 Eur. Ct. H.R. 121 (1998); Ipek v. Turkey, 2004-II Eur. Ct. H.R. 1.

142 Gusinskiy v. Russia, 2004-IV Eur. Ct. H.R. 129.
143 Id. at 136.
144 Id. at 136, 138–40.
145 Id. at 150.
146 Id. at 150–51.
147 Id. at 151.
148 Id. at 150.
149 Id. at 138–40.
150 Id. at 151.
151 Id.

to cases coming from Eastern Europe and the Caucasus. Thecountries from which Article 18 cases come from are also the countries with repetitive rights violations cases[152] and those that have fallen off the democratic transition track. In six cases that followed *Gusinskiy*, *Cebotari v. Moldova* (2007), *Lutsenko v. Ukraine* (2012), *Tymoshenko v. Ukraine* (2013), *Mammadov v. Azerbaijan* (2014), *Jafarov v. Azerbaijan* (2016), and *Merabshivili v. Georgia* (2016), the Court also found aviolation of Article 18, in conjunction with Article 5.[153]

Cebotari, the then-head of a Moldovan state-owned power distribution company called Moldtranselectro, argued that likeGusinskiy, his arrest and subsequent release from custody was made conditional upon making statements desired by the government, which constituted a violation of Article 18.[154] The Court agreed with Cebotori.[155] Starting from *Lutsenko,* the Article 18 cases of the Court turned to a particular problem in decaying democracies, that of controlling or punishing opposition political

152 See generally Country Factsheets, COUNCIL OF EUR., http://www.coe.int/en/web/execution/country-factsheets (last visited Jan. 3, 2018).

153 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-178753; Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-144124; Tymoshenko v. Ukraine, App. No. 49872/11, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-119382; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-83247; In Khodorovskiy and Lebedev, the Court did not find a violation. Khodorovskiy v. Russia, Apps. Nos. 11082/06 & 13772/05, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-122697. In Tchankotadze v. Georgia, the Court found the Article 18 claim manifestly ill founded. Tchankotadze v. Georgia, App. No. 15256/05, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-163799. In Navalnyy and Ofitservo v. Russia, where Article 18 violations were brought in conjunction with Article 6 (right to fair trial) and Article 7 (no punishment without any law), the Court observed that these two provisions, in so far as relevant to cases, did not contain any express or implied restrictions that can trigger an Article 18 examination. Navalnyy v. Russia, Apps. Nos. 46632/13 & 28671/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161060. In Navalnyy v. Russia, the Court did not find a violation of Article 18 in conjunction with Article 11 (freedom of assembly). See also Navalnyy v. Russia, App. No. 29580/12, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-170655 (currently pending before the Grand Chamber). 154 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 5, 47. 155 See id paras. 52–53.

154 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 5, 47.

155 See id. paras. 52–53.

movements or civil dissent. Of these cases,three concern the detention of politicians who held high government positions prior to changes in government in Ukraine and Georgia.[156] Lutsenko was a former Minister of the Interior and the leader of the opposition party Narodna Samooborona, in Ukraine,[157] Tymoshenko was a former Ukrainian Prime Minister and one of the leaders of the Orange Revolution,[158] and Merabishvili was a former Prime Minister andMinister of the Interior in Georgia.[159] These politicians argued that their detention was a form of retribution by the incoming governments andhad the aim of preventing them from taking part in the political life of their countries.[160] In relation to Azerbaijan, the two Article 18 casesbrought before the European Court of Human Rights concerned the silencing of civil dissent through criminal law.[161] Ilgar Mammadov was a political activist and an academic[162] and Rasul Jafarov was a well-known civil society activist and human rights defender.[163]

In all of the seven cases where Article 18 was raised and violations found by the Court, the applicants were detained under variousprovisions of domestic criminal law.[164] Applicants argued not only that these detentions did not have a legitimate aim, therefore not meeting the criteria laid out by the Court in its Article 5 case law, but also that the detention of the applicants in these cases served illegitimate aims pursued by the

156 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 6–7; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 9; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. para. 7.

157 Lutsenko, App. No. 6492/11, Eur. Ct. H.R. para. 7.

158 Tymoshenko, App. No. 49872/11, Eur. Ct. H.R paras. 8–12.

159 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 6.

160 See id: Tymoshenko, App. No. 49872/11, Eur. Ct. H.R.; Lutsenko, App. No. 6492/11, Eur. Ct. H.R.

161 Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. para. 106 (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. paras. 83–84 (2014), http://hudoc.echr.coe.int/eng?i=001-144124.

162 Mammadov, App. No. 15172/13, Eur. Ct. H.R. para. 6.

163 Jafarov, App. No. 69981/14, Eur. Ct. H.R. para. 6.

164 See Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 13; Jafarov, App. No. 69981/14, Eur. Ct. H.R. para. 11; Mammadov, App. No. 15172/13, Eur. Ct. H.R. paras. 16, 29; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 14; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. paras. 8– 9; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. paras. 31–32 (2008), http://hudoc.echr.coe.int/eng?i=001-83247.

domestic authorities, removing the applicants from thefull protection of the Convention as a whole.[165]

In response to these cases, the Court's approach to the standard of proof for finding a violation of Article 18 has started to shift from a more to a less onerous one. In *Cebotari v. Moldova*, the Court continued to employ an exacting standard of proof test and held that no objective person could identify the commission of an offence by Cebotari and the applicant convincingly showed the existence of a hidden agenda.[166] In the two Ukranian cases, *Lutsenko* and *Tymoshenko* as well as in *Mammadov v. Azerbajian*, the Court did not require direct proof of bad faith, but also pointed out that immediate facts surrounding the cases can provide evidence for finding a violation of Article 18.[167]

In the 2016 cases of *Jafarov v. Azerbaijan* and *Merabishvili v. Georgia*, the Court started to debate whether the high burden of proof on the applicants in showing fact-specific illegitimate purposes is adequate in reversed democratic transitions and whether more contextual evidence as to what goes on in a country is also relevant.[168] The case of *Jafarov v. Azerbaijan*, which concerns the continuing detention of human rights defenders in the country, the Court, for the first time, took a more expansive contextual approach, not only looking at the specificimmediate facts surrounding the case, but also the general conditions of treatment of human rights defenders in the country.[169] In so doing, it was willing to adduce evidence from the general context of the systemic difficulties that human rights NGOs are facing in Azerbaijan as an Article 18 trigger condition.[170] In the case of *Merabishvili v. Georgia*, the Chamber held that the burden of proof does not necessarily have to rest on the applicant to show the pursuance of illegitimate purposes by state authorities.[171] Some of the burden of

165 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 69, 93; Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 85, 145; Mammadov, App. No. 15172/13, Eur. Ct. H.R. paras. 80, 133; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. paras. 249, 289; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. paras. 49, 100; Cebotari, App. No. 35615/05, Eur. Ct. H.R. para. 41.

166 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 52–53.

167 Mammadov, App. No. 15172/13, Eur. Ct. H.R. para. 137; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 294; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. para. 104.

168 See Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 153–63; see also Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 102–07.

169 See Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 159–61.

170 See id.

171 See Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 83.

proof for disproving a hidden agenda may also fall on the government authorities, if the facts of thecase so require.[172] In this case the Court also, for the first time, found that even if the Court finds no violation of a substantive article by itself, (in this case Article 5) that does not mean that there may not be a violationof that Article in conjunction with Article 18.[173]

The Grand Chamber judgment of the European Court of Human Rights in 2017 has gone further than the previous case law on Article 18. It has decided that the burden to prove bad faith should be identical to proving violation of any other provision of the Convention.[174] It should therefore not be exclusively "borne by one or the other party"[175] and governed by the standard of "beyond reasonable doubt."[176] This decisive lowering of the standard of proof for bad faith violations gives a new flexibility to the Court to investigate bad faith violations.[177] Despite this, however, the Court has not so far developed a more principled view about what it means to find bad faith violations as opposed to good faith violations and what responses are owed to bad faith violations of the Convention.[178] Given the rise of Article 18 cases at the Court's door, not only focusing on detention as a tool to suppress dissent, but also on other rights such as freedom of movement, freedom of assembly, and freedom of expression,[179] we are likely to see further developments in the bad faith jurisprudence of the Court.

172 Id. paras. 311–12.
173 Id. para. 102.
174 See id paras. 310, 316.
175 Id. para. 311.
176 Id. para. 314.
177 In the Court's own words, however, circumstantial evidence "means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts." Id. para. 317.
178 For a criticism of the Grand Chamber judgment, see *Basak Çali*, Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse? VERFASSUNG BLOG (Dec. 3, 2017), http://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a- mouse/.
179 See Ecodefense v. Russia, App. No. 9988/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-173049; Ganbarova v. Azerbaijan, App. No 1158/17, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-177540; Todorova v. Bulgaria, App. No. 40072/13, Eur. Ct. H.R. (2017) (Fr.), http://hudoc.echr.coe.int/eng?i=001-175880.

III. WHITHER THE VARIABLE GEOMETRY IN THE EUROPEAN COURT OF HUMAN RIGHTS SUBSTANTIVE CASE LAW?

The above analysis shows that the substantive case law of the European Court of Human Rights since the mid and late 2000s hasshown a heightened degree of awareness of the changing attitudes towards the Convention system amongst its domestic audiences. This newly emerging case law takes account of the fact that the Convention now has an increasingly heterogeneous, fractured audience. On the one hand, the UK- led criticism of the Court as micro-managing the domestic life of the Convention in well-established democratic states with strong judiciaries has led to the shifting of more interpretive powers to national authorities that the Court trusts. This practice is heightened, in particular,after the Brighton Declaration of 2010. On the other hand, the Court is recognizing that some states' formal commitment to the Convention maybe a façade hiding bad faith circumvention of the Convention by domestic authorities. The standard jurisprudence of the European Courtof Human Rights is now sandwiched between two types of case law that operate under differentiated logics of trust: a principled deference tostates that demand to be seen as Convention-respecting in their ownways, and a new tendency to identify bad faith attitudes towards the Convention protections.

This two-headed development shows that the European Court of Human Rights has opted for a new variable geometry of its substantive case law. Variable geometry is a concept often used in regional integration and global trade contexts in order to address irreconcilable differences between states through differentiated commitments to a single legal order.[180] In the case of the European Union, the term is used to describe the idea of differentiated integration in the EU and it acknowledges that, in light of the expansion of the EU, not all states may be able or willing to integrate at the same speed.[181] In the case of the World Trade Organization, it refers to inserting flexibility of commitments into the free trade regime.[182] The new variable geometry in the case of European human rights points to differentiation based ongood and bad faith of domestic Convention

180 Cornford, supra note 17 (on variable geometry and the World Trade Organization); Goldsmith, supra note 17 (on variable geometry and the European Union).

181 *Constantinos Yanniris,* Diversified Economic Governance in a Multi-Speed Europe: A Buffer Against Political Fragmentation?, 13 J. CONTEMP. EUR. RES. 1412 (2017).

182 Cornford, supra note 17.

interpreters: whether a state is found in violation of the Convention and how this violation is classified (standard or in bad faith) depends on the attitudes of domestic institutions to the Convention and the degree to which the Court isconvinced that states do not operate with illegitimate purposes when restricting Convention rights. In other words, the European Court ofHuman Rights no longer speaks to all Council of Europe member statesin one voice, but recognizes that different tracks of jurisprudence may be applicable, which range from the quality-based deference approach, to standard case law interpretations, to findings of bad faith violations. The voice that the Court chooses to speak to states thus depends on how thesestates approach the Convention and its underpinning values. This is what we may call a realist turn in the case law of the Court as the Court develops an increasing awareness of whom it interacts with instead of imagining a homogenous nondescript audience.

This new realist turn in the jurisprudence of the European Court of Human Rights to respond to its fractured domestic terrain comes with risks and opportunities. Two risks of the new variable geometry jurisprudence of the European Court of Human Rights are apparent: (1) politicization of the European Court of Human Rights in the eyes of its national audiences (an external risk); and (2) the increased heterogeneity of the case law of the Court, undercutting its *avant-garde* role to develop the Convention as a living instrument for all Council of Europe member states (an internal risk). Both risks can have effects on the authority perception of the European Court of Human Rights not only amongst states, but also amongst members of civil society and individual applicants.

The risk of politicization of the European Court of Human Rights is due to the support that the new variable geometry jurisprudencemay lend to the charge that the Court is seen to be an institution of double standards. An aspect of the new good and bad faith jurisprudence of the Court is the distribution of this case law between states. Whilst Western European states have been on the receiving end of good faith deference to domestic interpreters, Eastern European states have been on the receiving end of the bad faith jurisprudence.[183] This is not to suggest that the Court has intentionally distributed the cases along this axis. It may, however, easily be seen to draw a "civilizational standard" betweenwest and east Europe by those who would like to promote a deeply political vision of the European Convention system. This may, however, be countered by holding that this is not a new risk as such. The Court's case law, even un-

183 Keller & Heri, supra note 18.

der the standard margin of appreciation doctrine, has generated a similar debate.[184] In addition, it may be an unfair demand to ask the Court to pretend that "all is quiet on the Western front."[185]

Perhaps a deeper risk of politicization of the Court lies in the increased likelihood of the Court using its new good faith and bad faith jurisprudence inadequately. For example, the Court has backtracked from previous findings in its standard case law with respect to cases brought against the UK on at least two occasions discussed here, first in *Animal Defenders* and then in *Hutchinson*, admitting that its standard jurisprudence did not apply in its entirety to the UK.[186] Given the UK's public and well-known criticism of the Court, the increased use of the good faith track with respect to the UK may support the impression that the use of the doctrine is deeply political and without a core normative content.

This concern around backtracking from the Court's standard jurisprudence with respect to the UK, has been raised in the dissenting opinions of the Court, in particular, with respect to the consolidation of its deference to trusted domestic human rights interpreters.[187] In the *Animal Defenders* case, this concern was raised by the dissenting opinionof Judges Ziemele, Sajó, Kalaydijeva, Vucinic, and de Gaetano, who queried how a blanket ban on political advertising can be proportionate only because the UK Parliament has found it so after deliberating on the matter.[188] In the context of the case, the judges stated that "we find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it."[189] In the *Hutchinson* case, the dissenting opinion by Judge Albuquerque employed a much stronger dissent to what he saw as the Court creating a special jurisprudence for the UK when he stated that:

> The present judgment may have seismic consequences for the European human-rights protection system. The majority's decision repre-

184 Arnardóttir, supra note 3.

185 The phrase inspired by Erich Maria Remarque's 1929 novel originally entitled in German Im Westen nichts Neues.

186 Hutchinson v. United Kingdom, App. No. 57592/08, Eur. Ct. H.R. paras. 70–73 (2017), http://hudoc.echr.coe.int/eng?i=001-150778; Animal Def. Int'l, 2013-II Eur. Ct. H.R. 203, 233– 35 (2013).

187 See Hutchinson, App. No. 57592/08, Eur. Ct. H.R. para. 29; Animal Def. Int'l, 2013-II Eur. Ct. H.R. at 249.

188 Animal Def. Int'l, 2013-II Eur. Ct. H.R. at 249.

189 Id. 190 Hutchinson, App. No. 57592/08, Eur. Ct. H.R. at 29 (Albuquerque, J., dissenting).

> sents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does notdeliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows an increasing hostility to the Court.[190]

Yet, it is not only the deference to trusted states that risks politicizing the judicial function of the Court. The simultaneous and nascent development of the Article 18 case law of the Court too poses a similar risk. The Article 18 case law of the Court, by its preference to distinguish between ordinary and bad faith violations of the Convention, may fuel criticism from European states that bad faith is not evenly considered in the case law of the Court or denials of bad faith by state authorities.

In *SAS v. France*, for example, commentators pointed out that a hidden agenda or a pretext was not beyond reasonable doubt.[191] This case, however, fell on the the good faith track, and not the bad faith. In response to the finding of a violation of Article 18 in the *Merabishvili* Grand Chamber case, it was reported that Georgia's Minister of Justice Tea Tsulukiani said that "the state considers the case to have been decided in its favour."[192] The lowering of the standard of proof for Article 18 in this case may thus make it less likely for governments to accept guilt. There are yet strong voices at the bench of the Court saying that thebad faith case law must go even further. Some judges insist that the original founders of the Convention meant for this differentiation ofblame and that the Court must speak up when states structurally backslide from rule of law and democratic

190 Hutchinson, App. No. 57592/08, Eur. Ct. H.R. at 29 (Albuquerque J., dissenting).

191 *Saïla Ouald Chaib & Eva Brems,* Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe, 2 J. MUSLIMS IN EUR. 1 (2013), p. 11–13.

192 *Philip Leach,* Georgia: Strasbourg's scrutiny of the misuse of power, OPEN DEMOCRACY (Dec. 2017), https://www.opendemocracy.net/od-russia/philip-leach/georgia-strasbourgs-scrutiny-of-the-misuse-of-power.

governance.[193] Judge Küris stated, in his separate yet concurring opinion in the case of *Tchankotadze v. Georgia*, in which the Court found the Article 18 claim manifestly ill- founded, that the use of legal systems for illegal ends in some member states of the contemporary Council of Europe is a case of "every school boy knows."[194] In such cases, Küris argued, merely declaring a violation of the Convention does not adequately account for the root causes of the violation and the Court must seize an active role in identifying democratic decay.[195] Given that bad faith is now out of the Pandora'sbox, however, the central challenge for the Court is to identify how this doctrine can have purchase across Convention rights and what consequences should follow from finding Article 18 violations.

The second risk for the simultaneous emergence of good and bad faith jurisprudence is the impact this will have on the development of the Convention standards by the European Court of Human Rights. For most of its existence the core function of the European Court of Human Rights has been the emission of Europe-wide standards to national decision makers in all aspects of the Convention. The new variable geometry jurisprudence complicates this mission because in considering whether there has been a violation of the Convention in new cases, the Court will now not only review the nature of the right, and the availability of European consensus on the scope of the right, but also the attitudes of the domestic convention interpreters and the quality of their decision-making procedures. The deference accorded to some states based on the quality of their decision-making procedures will mean that in some Convention rights, the Court no longer imposes uniform standards. Engaging in an assessment of the quality of domestic decision-making is thus in conflict with the carrying out of a substantive review of the act or omission of the state to push the Convention standards further as a living instrument.[196] Engaging in bad faith jurisprudence, on the other hand, requires the Court to deepen its substantive review in order to uncover hidden agendas for restricting rights.

The newly found interest in good and bad faith in the case law of the Court, however, also presents opportunities for the Court. The diversity of the countries under the jurisdiction of the European Court of Human Rights is not of the Court's own doing. The European landscape has

193 *Keller & Heri,* supra note 18.

194 Tchankotadze v. Georgia, App. No. 15256/05, Eur. Ct. H.R. para. 9 (2016) (Küris, J., concurring), http://hudoc.echr.coe.int/eng?i=001-163799.

195 Id. paras. 48–51 (Küris, J., concurring).

196 Animal Def. Int'l, 2013-II Eur. Ct. H.R. 203, 249 (2013).

indeed shifted by developments in the UK, on the one hand, and in Russia, Turkey, and other Eastern European states on the other. The Court's new variable geometry jurisprudence merely takes thesefundamental changes into account rather than pretending that Europe continues to have – more or less – the same attitude towards the Convention acquis. The Court is seeking to operate more deferentially towards well-established democracies with strong rule of law systems and focus more robustly on serious violations of human rights where domestic health of democracies are under threat.[197] These new developments can, therefore, be seen as a continuum of the Court'sstrategic responses to managing diversity and universality through its variable use of margin of appreciation[198] and not a break from them. The Court, having taken a realist turn in its case law, is now in a unique position to develop normatively defensible good and bad faith approaches to the Convention and human rights interpretation. The current patchwork of cases discussed here so far shows a piecemeal case- by-case approach that is in need of a more principled defense of distinguishing between good and bad faith attitudes towards the Convention by the Court.

IV. CONCLUSION

This article argued that shifts in the underlying attitudes of domestic states towards the European Court of Human Rights could be understood as an alternative frame to understand the "crisis" of the European Convention regime. This alternative framing does not replace other framings of the Court's crisis as being related to its increase in caseload, the non-implementation of judgments or a backlash. Rather it complements them by pointing to the fact that the diversity of attitudes towards the Convention in the European political and legal landscape is part of the ensuing crisis of the European Court of Human Rights. As a corollary to this, it was further argued that the European Court of Human Rights has been responsive to these attitudinal changes and has, through its substantive case law, aimed

197 See Brighton Declaration, supra note 61; see *also Mikael Rask Madsen*, Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?, J. INT'L DISP. SETTLEMENT (forthcoming 2018).

198 For a recent example of Court's long standing efforts to manage universality and diversity, see A.P. v. France, Apps. Nos. 79885/12, 52471/13 & 52596/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-172913.

to address its increasingly heterogeneous audience through embracing the realities of its new terrain. It has done so by seeking to award the good faith interpreters with deference to them in the interpretation and application of the Convention and by signaling the bad faith interpreters by delivering Article 18 violation judgments. These twin developments, in turn, created a novelty in the international human rights landscape by giving way to a new variable geometry in human rights case law where trust to domestic authorities is central. This new variable geometry, however, also means that the Court now offers tailor made jurisprudential responses to its diverse audience, and has opened itself to new risks of not getting it right.

This argument may be countered by arguing that the small handful of cases discussed in this article do not disturb, in significant ways, the reach and breadth of the standard jurisprudence of the Court and the authority of that case law. After all, the Court continues todeliver a significant amount of judgments canvassing its well-establishedcase law in repetitive cases, for example, in favour of the protection of asylum seekers and non-refoulement,[199] or in cases related to discrimination on the grounds of sexual orientation.[200] Compared to the number of judgments delivered by the Court each year, the case law discussed in this Article may be regarded as marginal in numbers. Whilst not high in number, however, these cases show fundamental shifts in the underlying logic of the standard jurisprudence of the case law and (at least currently) they are saturated across two opposite geographical contexts. As such, their effects on the perception of the Court's authority are significant compared to the large volume of repetitive judgments the Court delivers each year.

In this new jurisprudential era of variable geometry, the Court's clarity of reasoning will continue to be its most important arsenal against its highly-fractured audience, in offsetting the risks of its jurisprudence being seen as randomly tailor made for certain countries. In this respect, the Court must work to normatively connect its rights-based deference doc-

199 Khlaifia v. Italy, App. No. 16483/12, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-170054; Sharifi v. Italy, App. No. 16643/09, Eur. Ct. H.R. (2014) (Fr.), http://hudoc.echr.coe.int/eng?i=001-147287; Tarakhel v. Switzerland, 2014-VI Eur. Ct. H.R.195; Trabelsi v. Belgium, 2014-V Eur. Ct. H.R. 301; Sufi v. United Kingdom, App. No. 8319/07, 54 Eur. H.R. Rep. 9 (2012).

200 For a detailed list of recent cases related to discrimination on the grounds of sexual orientation see EUR. COURT OF HUMAN RIGHTS, SEXUAL ORIENTATION ISSUES (Feb. 2018), http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf.

trines with its institutional quality-based procedural deference doctrines in more coherent ways rather than offering separate tracks of reasoning for different sets of states. On bad faith case law, too, the Court should have a consistent approach towards investigating the hidden agendas undermining human rights, wherever they may occur. Whether the Court will succeed in speaking in one voice through its new variable geometry case law will continue to be tested in years to come.

My iCourts experience

Tribute to Mikael Madsen

I met Mikael Madsen, the socio-legal scholar of the European Court of Human Rights, much earlier than Mikael Madsen, the person and the director of iCourts. Mikael's 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics', published in the *Law and Social Inquiry* in 2007, is one of the most influential pieces on my own field of scholarship - the European Court of Human Rights. In this seminal piece, Mikael blended doctrinal studies of the case law of the European Court of Human Rights with a broader political and historical contextual analysis of the emergence of the institutional architecture of human rights in Europe in a pathbreaking way. His venue of publication was also inspiring. I think it is because I read this piece in 'Law and Social Inquiry' that I submitted my first socio-legal piece on the Strasbourg Court, 'The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006' to the same journal. So, a double thank you, Mikael.

I met Mikael the person and the institution-builder of iCourts much later. I think the first time we met in person was when we were both invited as panellists to a conference on the backlash towards the European Court of Human Rights in 2012 in the Netherlands, a phenomenon that since then had a prominent place in Mikael's scholarship. I still recall how we greeted each other as long-time friends and colleagues at this first encounter. And I think the first thing Mikael told me, with great excitement, was that he was about to establish iCourts with his colleagues in Copenhagen and what his plans were to deepen and broaden the empirical study of international courts and tribunals at this new institution. I replied with the usual joke, 'what is it with you Nordics and the study of international courts?' I also remember that we then immediately proceeded to cook up a research project that we may be able to pursue together. It was clear to both of us that we needed to go comparative in the study of regional human rights courts and commissions, but the question was how. I think the rest of the encounter was about ways of figuring this out. This short, but incredibly familiar encounter on a cold, snowy day

in the Netherlands led to our now near decade-long collaboration seeking to better understand the comparative law and politics of regional human rights courts.

My first meeting with iCourts the institution was through the first workshop we held on comparative human rights courts in Copenhagen. This first workshop needed a follow up – which led to a memorable gathering of scholars at my then home institution, the Centre for Global Public Law at Koç University in Istanbul. I still have dazzling memories of this workshop, yes, for the exchange of intellectual thoughts, but more particularly for the dinner in a cosy old-school fish restaurant in the fish market in Beşiktaş. It goes in my memory as one of the most fun workshop dinners I have ever attended, and much credit for this goes to Mikael. Six years on, in 2018, our collaborative work with Frans Viljoen, Alex Huneeus, Laurence Bourgorgue-Larsen and Larry Helfer culminated in a special issue in the *International Journal of Constitutional Law* on Comparative Regional Human Rights Courts and Commisions. This opened up a new research agenda for the study of the law and politics of human rights courts in a space sandwiched between comparative constitutionalism and comparative international law.

My first impressions of the then young iCourts were that of a dynamic welcoming research institution filled with energy and enthusiasm. The Centre expanded significantly since then and has produced important scholarship and empowered many researchers, both early career and more experienced. To this day, I remain very impressed with the ability of the iCourts team to retain that energy, enthusiasm, collegiality and good humour. Mikael's and my research paths also continue to cross, thankfully. In 2021, we collaborated one more time on a special issue, this time in *ECHR Law Review*, on the comparative responses of the Council of Europe organs, beyond its court, to the decay of rule of law and human rights protections in Europe. We asked Mikael how his 2007 piece speaks to the legal and political context of human rights decay in Europe of the 2020s. In this piece, Mikael engages in a conversation between his 2007 take on the origins and the development of the European human rights law and 2020s Europe. I for one look forward to many more conversations with Mikael, over written word, or in person in an old-school Istanbul fish restaurant.

EU Law Classics in the Making: Methodological Notes on Grands arrêts at the European Court of Justice

Antoine Vauchez

To a large extent, EU law is a history made of many judicial stories. It is hardly possible to conceive of a class, a seminar, not to mention a textbook, in EU law that would not draw extensively on the rather stable list of cases that are purported to have established this body of law into an autonomous discipline with a limited set of core constitutive principles.[1] The string of cases that forms the Pantheon of ECJ landmark decisions reads like a success story of a Court, the European Court of Justice (ECJ), that progressively secured its now firmly established authority over the law of the Union. And yet, after decades of exegesis, we still know surprisingly little about these *grands arrêts* that "shaped" EU law as we know it. As a result of the continuous efforts to summarize, aggregate, index, and order them, Europe's founding decisions have turned into a rather simplified set of principles: *Van Gend en Loos* equals "direct effect," *Costa* means "supremacy," *Defrennes* is "non-discrimination," *Cassis de Dijon* "mutual recognition," thereby forming an uninterrupted and consistent chain of cases that map out EU legal landscape. While these equivalences may prove useful as a memo board for teaching purposes, they have often led away from a thick description of these cases *as* political, legal, and social "events" that are fully part of the history of the European Union. With few remarkable exceptions,[2] most studies in law or political science have actually converged in viewing these landmark cases as sorts of black

1 I am grateful to the editors of this volume, to Rachna Kapur and to the students of American University in Washington for their useful comments on an earlier version of this essay.

2 In particular: *Eric Stein,* The Making of a Transnational Constitution, American Journal of International Law, 75, 1 (1981), p. 1–27; *Karen Alter and Sophie Meunier*, The New Constitutional Politics of Europe: European Integration and the Path-breaking Cassis de Dijon Decision, Comparative Political Studies, 26, 4 (1994), p. 535–561; *Kalipso Nikolaidis,* Kir Forever? The Journey of a Political Scientist in the Landscape of Recognition, in: *Loïc Azoulai and Miguel Maduro* (eds.) The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, London 2010.

boxes whose established meaning was somehow taken as a "given" and as a starting point for the analysis. While the dominant stream of legal scholarship has built sophisticated yet ahistorical and apolitical accounts of the progressive unfolding of ECJ jurisprudence, political scientists have accumulated large-n databases of hundreds of ECJ cases in search for the prevailing (State or transnational) interests that ultimately structured judicial outcomes. In both cases, what actually happened "around" the case has little importance, since the judicial outcome was ultimately determined either by the judges (as the "authentic interpreter" of the law) or by external (State or EU) interests (as the last instance determinant of the law). Research-wise, this means that there has been very few empirical inquiries that broke down cases into historical contexts, social constellation of actors, competing legal and political strategies, etc.[3] This chapter suggests that it is time to retrieve "cases" as historically and socially complex "moments" that cannot be reduced to mere steps in a developmentalist narrative, but need to be taken as an entry point into the deep entanglement between law, society, and politics in the EU context.[4]

Yet, over the past years, there has been a growing sense of frustration over this judicial *vulgate*. With its *parti pris* of combining views coming from different scholars, disciplines, and actors, the volume edited by Loïc Azoulai and Miguel Maduro, *Classics of EU Law*, confirmed that there was room for a promising research strand that would look at landmark cases, not just for what they have become after decades of celebration, but for what they have been *at the time*.[5] Despite the difficulties of accessing

3 But see recent work undertaken under the umbrella of iCourts: *Mikael Madsen and U. Sadl*, Becoming European (Legally): Unpacking the Self-Portrait of the EU Legal Order in the Pre- Accession Case-Law Dossiers, Columbia Journal of European Law, forthcoming; *Urska Sadl*, What Is a Leading Case in EU Law? An Empirical Analysis, European Law Journal, 40, 1 (2015), p. 15–34; and *Amalie Frese's* ongoing Ph.D at the University of Copenhagen and the Université Paris 1-Sorbonne on the fabric of nondiscrimination case law in both European courts; or *Billy Davies*, Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949–1979, Cambridge and New York 2012.

4 On this entanglement, see *Antoine Vauchez*, Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity, Cambridge 2015.

5 L*oïc Azoulai and Miguel Maduro* (eds.), The Past and Future of EU Law, op. cit. See also the recent editorial on The Critical Turn in EU Legal Studies, Common Market Law Review, 52 (2015), p. 881–888; and *Jean-Paul Jacqué*, Les 'communautaristes' sous le regard des politologues, Revue trimestrielle de droit européen 4 (2012), p. 737–741.

archival documents from the European Court of Justice,[6] sociologists and historians have attempted to connect the micro-history of the courtroom dynamics to the broader political and legal dynamics of EU polity-building.[7] This surge of interest in ECJ cases has developed even more in the context of the recent fiftieth anniversary of *Van Gend en Loos* and *Costa* that resulted in a variety of publications,[8] conferences, and seminars.[9] It is not the least value of this scholarly turn that it allows to envision a renewed interdisciplinary dialogue across disciplines after years when the gap across methodologies and research puzzles had grown wider and wider.[10] By opening the judicial black box and following the social, political, and intellectual ramifications of legal practice, the thick description of cases has a potential to bridge *in concreto* disciplinary research traditions and insights. The present volume is testimony to the promises of this new terrain of study for EU law. Yet, as we collectively engage in this renewed research agenda, and as the European Court of Justice is (finally) opening

6 For a long time, the ECJ has not given any archives to the Historical Archives of the European Union in Florence. Recently, the HAEU has signed a deposit agreement with the ECJ for its historical archives to be transferred: it is still unclear what types of documents will be transmitted. On the many questions raised by judicial archives, see an interesting article in the New Yorker on the Supreme Court's papers: *Jill Lepore*, The Supreme Paper Caper, New Yorker, December 1 (2014).

7 On Van Gend en Loos, see *Antoine Vauchez*, Integration through law: Contribution to a socio- history of EU common sense, Working paper, European University Institute, Robert Schuman Center, 2008/10; *Billy Davies*, Resisting the European Court of Justice, op. cit.; *Morten Rasmussen*, Revolutionizing European Law: A History of the Van Gend en Loos Judgment, International Journal of Constitutional Law 12, 1 (2014), p. 136–163; and *Antoine Vauchez*, The Transnational Politics of Jurisprudence: Van Gend en Loos and the Making of EU Polity, European Law Journal 16, 1 (2010), p. 1–28.

8 See inter alia, on Van Gend en Loos, see the special issue by European Journal of Constitutional Law, 12, 1 (2014); on Costa, see the issue by the Revue de l'Union européenne, August 2015.

9 For example, Joseph Weiler has hosted a yearly seminar ever since his return to the European University Institute devoted to the study of Court's cases (e.g., in 2014–2015: When the Court gets it wrong. Reviewing the fundamentally wrong cases from the ECJ).

10 See *Christian Joerges*, Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration, European Law Journal, 2, 2 (1996), p. 105–135; *Grainne de Búrca*, Rethinking Law in Neofunctionalist Theory, Journal of European Public Policy 12, 2 (2005) p. 310–336; and *Jo Shaw*, The European Union: Discipline Building Meets Polity Building, in: *P. Cane and M. Tushnet* (eds.), Oxford Handbook of Legal Studies, Oxford 2003, p. 325–352.

part of its archives, it might useful to think twice about possible unseen intellectual implicits and methodological implications of a case-centered narrative of EU law's history.

Searching (for) cases

While it might seem obvious to study cases when studying the law, this is without trappings if one does not question beforehand which cases are brought to light.[11] As aptly shown by French legal sociologist Evelyne Serverin,[12] "important" cases rarely surface naturally as the outcome of a spontaneous process of decantation. They are most often selected by courts and their legal community of reference through a variety of techniques and procedures that skim off the large amount of decisions delivered every year.[13] Recent methodological trends that investigate citations' networks allow now to show how some decisions become "hubs" and acquire "authority scores,"[14] while others are progressively sidelined.[15] What is taken as "raw (judicial) material" is therefore the *endpoint* of a long filtering process. One may end up studying only the "survivors" of this selection process, taking them as a proxy for what the case law *actually* is (leaving behind the unselected cases as "outliers" or "anomalies"). By "sampling on the dependent variable," as political scientists would say, one misses the

11 Quite tellingly, critical traditions of law, such as in Italy the so-called "giurisprudenza alternativa" quite diffused among left-wing lawyers in the 1970s, made a point of selecting non- canonized cases from lower-rank jurisdictions in domains such as labor law, with a view to reverse, to some degree, the pyramid of legitimacy within the legal field; on these attempts, see *Antoine Vauchez*, L'institution judiciaire remotivée. Le processus d'institutionnalisation d'une 'nouvelle justice' en Italie (1960–2004), LGDJ 2005.

12 *Evelyne Serverin,* De la jurisprudence en droit privé. Théorie d'une pratique, Lyon 1985.

13 *Antoine Vauchez,* Transnational Communities of Lawyers before International Courts, in *Karen Alter and Cesare Romano* (eds.), Handbook of International Adjudication, Oxford 2013.

14 *J. H. Fowler et al.,* Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents, Political Analysis, 2007, 15, p. 324.

15 Interestingly, the decisions that have the highest authority score are not always the ones that are mostly taught in law schools. *Yonathan Lupu and Erik Voeten,* Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights, British Journal of Political Science, 42, 2 (2013), p. 413–439.

whole process that turns a multitude of cases into a handful of emblematic *grands arrêts*.

Of course, things would be easier if there was such a thing as a *common* understanding of what "landmark cases" refer to *in fact*. Alas, it proves impos- sible to craft an ontological definition of what a landmark case is (as opposed to non-landmark cases). Just like there is no *ex ante* definition of what a "classic" is in art or literature, there is no general and transhistorical notion of the intrinsic properties of a *grand arrêt* that does not eventually end up with tautological definitions of "greatness."

As a matter of fact, some cases promot- ing "great principles," like that of *Commission EEC v. Luxembourg and Belgium* of 13 November 1964 (the "dairy products" case), which stated quite bluntly an unprecedented breach to the reciprocity principle in the case of European treaties, have been somehow forgotten in the course of history (*forgotten landmark*).[16] Symmetrically, other cases that had a "foundational potential" because of their antecedence in affirming "great" legal principles have remained ignored: interestingly, a case like *Humblet v. Etat belge* (1960) never made it as a "landmark case" of the Court, although it was arguably the first one to state the principle of supremacy four years ahead of *Costa* (*ignored landmarks*).[17] Only a *historical* inquiry into the broad political and legal context of the case would explain why it was not pinpointed as such at the time. Last but not least, legal greatness cannot even be defined by the political or economic relevance, as many cases that were politically "famous" or "infamous" at one point of history (often because of conflicts between the ECJ and the Member States) never made it to the Pantheon of EU law, often because they were simply redundant in terms of legal principles.

With the lack of robust criteria for singling out *grands arrêts*, some may argue that the "I-know-it-when-I-see-it" test could apply. Yet, landmark cases often lack the "grandeur," the stylistic clarity, and the argumentation auda- city that we may expect from them with the hindsight: when reading landmark cases, it often appears that the legal solution in the case is limited to one specific situation and could not necessarily be reproduced or extended much beyond the specific circumstances.[18] The legal lexicon

16 On this, see *William Phelan*, Supremacy, direct effect and "dairy products" in the early history of European law, EUI Working paper, Law Department 11 (2014)

17 CJCE, 16 décembre 1960, Humblet v. État belge, aff. 6/60, Rec., p. 1125, n 7.

18 This is certainly related to how courts' prudentia in peddling new legal solutions while at the same time avoiding to appear as engaging judge-law making.

used often seems still rather unsettled and changing,[19] and one can usually identify as much continuity as there is rupture in the text itself.[20] For example, it is hard to find traces of the "constitutional foundations" of the EU that the ECJ identified in *Van Gend en Loos* when it celebrated its fiftieth anniversary. More often than not, it is only with later decisions that the "spirit" of these cases is eventually manufactured in a clear and stylized manner, leaving aside the many ambiguities and the various possible futures that featured the initial decision.[21]

This difficulty is confirmed by the fact that the list of landmark cases is subject to some degree of change and disagreement over time, depending on the textbook, the institution, etc. While there are certainly some *passages obligés*, scholars, judges, or *jurisconsultes* do not necessarily value the same cases, identify the same turning points, and formalize the same string of cases out of the 9,500 judgments issued by the ECJ over its sixty years of existence. It is not the place here to make a full historical survey of these changes. This would require one to dig into the history of EU law textbooks and track their successive editions as they are among the main ordering devices for the Court's case law. Although this remains pretty much a research program, it may be interesting to mention some of the early formalizations, such as that of ECJ judge and law professor Pescatore in his famous 1979 article on the "jurisprudential *acquis*," who selected only four "constitutional" cases: "everything starts with four cases: *Commission vs. Luxembourg et Belgium (Pain d'Epice)*, *Van Gend en Loos*, *Costa vs. ENEL*, *and Consten Grundig.*"[22] The Court itself has suggested its own string of cases when it translated a selection of cases for the new Member States from Eastern and Central Europe, fifty-seven decisions published and translated on its website that make up its "historical case-law" starting with *Van Gend en Loos*, followed by *Plaumann*, *Costa*, *Grundig*, *AETR*,

19 In the case of Van Gend en Loos, both judges and legal scholars still had a variety of words to label the principle affirmed in the case: effets immédiats, effet direct, self-executing, etc., and it is only later that the notion of "direct effect" emerged as canonical.

20 On the many continuities in the Costa case, see the seminal paper by *Bruno de Witte, Retour à Costa,* La primauté du droit communautaire à la lumière du droit international, Revue trimestrielle de droit européen, 20, 3 (1984), p. 425–454.

21 On this process, see *Antoine Vauchez*, The Transnational Politics of Jurisprudence, op. cit.

22 *Pierre Pescatore,* Aspects judiciaires de l'acquis judiciaire, Revue trimestrielle de droit européen (1981), p. 617–651.

and others.[23] More recently, scholars Loïc Azoulai and Miguel Maduro edited a volume on *The Classics of EU Law* that identified a select group of founding cases starting with *Van Gend en Loos* (1963), *Costa* (1964), *Inter- national Handelsgesellschaft* (1970), *ERTA* (1971), *Defrennes I* (1971), *Dassonville* (1974), and *Cassis de Dijon*, each one of them prompting a number of sequels: *ERTA, Les Verts, Francovich, Sommenthal, and Bosman*, also depending on the various branches of EU law (institutional matters, free movement of goods, competion policy, etc. As the list of landmark cases proves changing, highly contingent historically, and often reversible, there is no possibility of crafting a generalizable concept of what a landmark case ought to look like.

Landmark cases as a genre

Although there is no objective and ahistorical definition of legal greatness, landmark cases can still be recognized sociologically, i.e., not so much for what they are in nature, but for how they are constructed and narrated in situation. Hereafter, I describe two essential features of "judicial classics."

The Matthew Effect

The first specific feature of landmark cases is that they are granted a foundational role in autonomizing new branches of law. Just like the "case-method" famously invented in the late nineteenth century at Harvard Law School is the (oft-mythicized) starting point of US legal academia,[24] the formation of French administrative law is grounded in legal scholars' systematization of what was, up to then, essentially a series of important cases from the *Conseil d'Etat* into one consistent body of *principes généraux du droit*. The existence of landmark cases are somehow proof to the relative autonomy of the law from its initial political creators, be they "constituants," treaty-makers, or legislators. Famously, the rebirth of French constitutional law as a legitimate and authen- tically *legal* domain is in large part due to the 1971 symbolic coup of the Conseil constitutionnel

23 For an interested study of these fifty-seven cases, see *Mikael Madsen, U. Sadl,* Becoming European (Legally), art. cit.

24 *Alfred Konefski and John Schledgel,* Mirror, Mirror on the Wall: Histories of American Law Schools, Harvard Law Review (1982), p. 833–851.

claiming for itself the possibility to review legislation in light of the 1789 *Déclaration des droits de l'homme et du citoyen* and of the 1946 *Préambule*, thereby competing with what had been so far a political stronghold: the interpretation of the Constitution.[25] Similarly, the *Van Gend en Loos* and *Costa* decisions have been integral for the autonomization of the ECJ from the High contracting parties that created it few years earlier in the founding treaties.[26]

As foundational myths for the different branches of the law, landmark cases tend to obscure the rest of the case law. What Robert Merton famously coined as the "Matthew effect"[27] – that is, the propensity of early scientific discoveries to reduce all subsequent innovations to the role of mere specifications or ramifications of the initial finding – can be tracked in case law as well. *Post hoc, ergo propter hoc* aptly summarizes this tendency to turn new cases into late developments of the initial breakthrough. This "Matthew effect" is par- ticularly visible in the case of ECJ jurisprudence that has been shaped consistently as a progressive jurisprudence, which excludes any substantial "*revirement de jurisprudence.*"[28] This sense of progressivity was certainly very strong among the first generations of Euro-lawyers.[29] Suffice it to quote the introduction to the first edition of the *Grands arrêts de la jurisprudence communautaire* (1974), the little brother to the prestigious *Grands arrêts de la jurisprudence administrative*,[30] co-edited

25 *Bastien François*, Le Conseil constitutionnel et la Ve République. Réflexions sur l'émergence et les effets du contrôle de constitutionnalité en France, Revue française de science politique, 47, 3–4 1997, p. 377–404; and *Alec Stone,* The Birth of Judicial Politics, Oxford 1992.

26 *Antoine Vauchez,* Keeping the Dream Alive: The European Court of Justice and the Social Fabric of Integrationist Jurisprudence, European Political Science Review (2012), p. 51–71.

27 The notion was named by Robert Merton after a verset of the biblical Gospel of Matthew that says: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken even that which he hath." Cf. *Robert Merton*, The Matthew Effect, Science 159 (1968), p. 56–63.

28 See *Rostane Mehdi,* Le revirement jurisprudentiel en droit communautaire, dans L'intégration européenne au 21e siècle. Mélanges en hommage à Jacques Bourrinet. Paris: La Documentation française (2004), p. 113–136.

29 Yet it is still very strong today: cf. *Daniel Kelemen and Susan Schmidt*, The European Court of Justice and Legal Integration: a Perpetual Momentum? Journal of European Public Policy, 19, 1 (2012), p. 1–7.

30 First published in the 1950s, the Grands Arrêts de la Jurisprudence Administrative, better known by generations of law students in France as the GAJA, is the legal commentary co- produced by administrative judges and law professors of the most influential cases of the Conseil d'Etat ever since its creation.

by Roger-Michel Chevallier, a long- time clerk of former ECJ president and long-time judge, Robert Lecourt: "Even on the most important matters, the ECJ jurisprudence seems more like a progressive construction, built by touches successives from case to case through which the judge has been able to specify, from detail to detail, most of its doctrine."[31] This progressive narrative of EU case law therefore views subsequent decisions as the mere logical and incremental unfolding that goes from the more general statements of the revolutionary years to the many sector-specific ramifications of the present days. In a sort of retrospective telelology, one narrates the far-reaching consequences of VGL to a point that has become almost impossible to imagine "what EU law would have been without the decisions of 1963 and 1964."[32]

EU Law's Conception of Wealth and Worth

What can also help identify "landmark cases" is the particular way in which these cases are narrated. In other words, they can also be identified as a particular *genre* of legal commentary and a rather stable discursive formation.[33] It might be useful to compare the genre of "legal greatness" to that of artistic greatness. In an interesting study on the "glory of Van Gogh,"[34] Nathalie Hienich shows how the narration of the Dutch painter as "*artiste maudit*" (lost, forgotten, half-mad genius) contributed to define a new model of wealth and worth for artists.[35] Landmark cases are a particular *genre* too that can be traced inter alia in the rich commemorative material produced by the European Court of Justice, from the fifteenth anniversary of the creation of the court in 1968 up to the recent celebration of the sixtieth anniversary of *Van Gend en Loos* in Luxembourg. In EU law,

31 *Jean Boulouis et Roger-Michel Chevallier*, Les grands arrêts de la jurisprudence de la Cour de justice des Communautés européennes, Dalloz 1974, p. xi.

32 *Robert Lecourt*, Qu'eut été le droit des Communautés sans les arrêts de 1963 et 1964?, *Mélanges Jean Boulouis*, L'Europe et le droit, Paris, Dalloz 1991, p. 349–361, p. 351.

33 On modes of narrating the law, see also *Renata Uitz*, Constitutions, Courts and History: Historical Narratives in Constitutional Adjudication, Budapest 2005.

34 *Nathalie Heinich*, The Glory of Van Gogh: An Anthropology of Admiration, Princeton 1996.

35 On the various types of social worth, see *Luc Boltanski and Laurent Thévenot*, On Justification: Economies of Worth, Princeton 2006 (1991).

just like in the Western legal tradition in general,[36] the most established model of *greatness* relates to autonomy and ahistoricity of the law.

This can be traced in three distinctive elements that are considered when it comes to describe how *grands arrêts* differ from the *vulgum pecus* of daily case law. First of all, landmark cases tend to be presented as *turning points* that cut the court off from its prior legal and institutional trajectory, thereby marking a new beginning. This idea of historical bifurcation goes along with a certain *ex post* romanticisation of cases' dramatic and agonistic dynamics that points at the bravery of plaintiffs, the foresight of lawyers, and the audacity of judges. The verdict issued by the court appears like a *judicial fiat*, creating by the very virtue of its delivering a fresh starting point and a new interpretative path.[37] Second, landmark cases are presented as the product of an *isolated author*, thereby viewing "the court" as a sort of self-contained and self-sufficient arena. Third, they are viewed as self-explanatory and self-evident texts whose mean- ing is just waiting to be unearthed on future judicial occasions.

In other words, landmark cases do not merely come to us as raw and genuine judicial material. Typically, they are embedded in a dense web of meanings regarding law's most relevant actors (e.g., the European Court of Justice), most important moments (e.g., *Van Gend en Loos*), and most mean- ingful principles (e.g., "direct effect" and "supremacy"). These rich interpretative stata obscure our understanding of the case as it emerged historically. Worse, they somehow tend to pre-define the research puzzles that we are able to raise. In this light, studying legal change may become merely a matter of identifying the "smoking guns" or "swing judges" behind law's turning points.[38] In the case of EU law, such a positivistic legal history leads to a search for who made the majority in the *Van Gend en Loos* decision (which was famously a tight decision). Against this decisionist historiography, it should be said that the meaning of a "case" is never settled simply by virtue of a judge's decision. The delivering of a

36 On the properties of the legal field, see *Pierre Bourdieu,* The Field of Law: Toward of Sociology of the Juridical Field, Hastings Law Journal 38 (1987), p. 805–853.

37 *Alec Stone,* The Juridical Coup d'État and the Problem of Authority, German Law Review 8, 10 (2007), p. 915–928.

38 This search for the factor or the person that changed the course of history has been famously mocked by US scholars as "breakfast jurisprudence" (where landmark decisions are ultimately a function of what judges had over breakfast), leading to endless speculations about what is really "dans le ventre des juges" that determined one particular judicial outcome. Cf. *Willard King*, A Breakfast Theory of Jurisprudence, Dicta 14 (1936–1937), p. 143–147.

"verdict" does not close down legal and political battles that existed before their issuing; rather, it partly redirects them towards interpretative battles over the nature, meaning, and scope of the said decision. Far from being transparent and self-explanatory, cases form a terrain of contention and trigger a collective, and at times conflictual, process of meaning-building that takes place in a variety of arenas from courts to learned societies, law schools, or EU institutions. The research question therefore changes: rather than considering cases as "events," one should therefore consider them as a continuous process and study *how* specific decisions actually survived and were transformed *into* landmark cases with long-lasting jurisprudential value.

From caseload to case law: the politics of jurisprudence

To fully grasp this transformative process, one therefore needs to suspend the taken-for-granted meaning of landmark cases and track the multifaceted process of selection, aggregation, and canonization. For that matter, we need a sociological understanding of "jurisprudence," not just as the result of a spontaneous process of decantation, but rather as a *social fabric* whereby a particular vision of case law prevails and is maintained over time.

Investigating Hermeneutic Spaces

This process is best grasped through the concept of "hermeneutic space" as it makes justice of the variety of actors and spaces interested in the case as well as of the types of discourses produced around one particular case.[39] This notion allows to build a research program that engages in a *thick description* not just of the cases' legal interactions but also of the multifaceted ways through which jurisprudence is crafted and consolidated. That is what I have being trying to do when studying *Van Gend en Loos* – tracing the collective yet uncoordin- ated process that elevated a specific case to the status of radical break from international law's tradition and

39 The notion was initially developed by Nathalie Heinich for the study of Van Gogh post- mortem glory: *Nathalie Heinich,* The Glory of Van Gogh, op. cit.

starting point of a new legal order.[40] This is what Julie Bailleux did when pointing out the entrepreneurial role of Michel Gaudet, director of the Commission's Legal service from 1952 to 1969, in the formation of ECJ jurisprudence.[41] This is also what Jens Arnoltz did recently, mapping out a variety of trade unionists, legal scholars, and politicians that got involved in the heated political and scholarly debate over the nature of Europe, turning the *Viking*, *Laval*, *and Rueffert* cases into one "Laval quar- tet."[42] And this is what Emmanuel Rosas is currently doing in his PhD on the formation of Brussels' nondiscrimination milieu and the making of the *Defresne* case.[43]

While it may be tempting for the researcher to establish *a priori* boundaries where the "hermeneutic space" of cases starts and ends, it may prove more heuristic to just "follow the actors" as they move across sectors and levels and identify *l'espace social total* in which a case has been debated and framed. Instead of looking at cases as one single and isolated incident, separated from social context, this new research approach allows one to grasp the thick political and legal layers that make up landmark cases via legal commentaries, academic conferences, parliamentary hearings, and public debates. In line with this stream of research, there is no reason to privilege *official* sources of law; all sorts of material including sources to which legal scholars rarely turn to like eulogies, *Festschriften*, but also scholarly conference proceedings, case commentaries, parliamentary debates, parties' submissions, and memos, can be used to establish a web of references to the particular case under study. This means that apocryphal interpretations should be considered with equal inter- est as the canonized ones. Similarly, un-"authentic interpreters" (politicians, high civil servants, litigants, etc.) are to be considered as they are often more influential in meaning-making processes than the courts themselves are, particularly in the initial context of the Rome treaties whereby there was no clear idea as to whom was to become the authentic interpreter of the founding treaties

40 *Antoine Vauchez,* The Transnational Politics of Jurisprudence, Van Gend en Loos and the Making of EU Polity, European Law Journal 16, 1 (2010), p. 1–28.

41 *Julie Bailleux*, Michel Gaudet a law entrepreneur: the role of the legal service of the European executives in the invention of EC Law, Common Market Law Review, Vol. 50, No. 2 (2013), p. 359–367.

42 For very rich sociological perspective on this type, see *Jens Arnholtz*, A 'legal revolution' in the European field of posting? Narratives of uncertainty, politics and extraordinary events, Ph.D. in sociology, Univ. of Copenhagen, Sept. 2013.

43 *Emmanuel Rosas*, Enjeux et formes des lutte de classement entre les causes au sein du champ transnational de l'anti-discrimination et pour l'égalité à Bruxelles, Ph.D. candidate, Université Paris 1-Sorbonne, work in progress.

(heads of state, national supreme courts, the ECJ, the Commission through its legal service, etc.).

Drawing on extensive bibliographical and archival research, one can hope to identify individual or collective entrepreneurs as they produce new rhetorical formulations and seize "windows of opportunities" to forge epistemic alliances around specific cases, thereby bringing together groups of actors (civil servants, diplomats, legal advisors, scholars, etc.) with disparate interests.[44] Such fine-grained qualitative analysis can allow one to grasp the social process through which some exegesis ultimately prevailed – without, however, ignoring the ones that were at some point considered and were ultimately shelved.

A Plea for "Thick Description"

This research program in the making of jurisprudence should also take into consideration the instruments, legal *and* non-legal, that shape cases into lines of cases and ultimately into a consolidated jurisprudence. Too often we concentrate on legal ideas, as if they were free-floating, but underestimate the *constitutive* role of tools that may turn legal theories into standard operat- ing procedures. One could certainly argue that there is no such thing as a "jurisprudence" without equipment that can help the court maintain a stable set of legal principles despite the ever increasing and heterogeneous caseload. At the European Court of Justice, the issue of maintaining "jurisprudence" did not come up as critical until the 1970s when the enlargement to the United Kingdom and the departure of most judges and most *référendaires* from the "revolutionary period" ignited the fear of a dismantling of the judicial *acquis.* Judges such as Monaco, Trabucchi, and former presidents Andreas Donner and Robert Lecourt left, respectively, in 1976 and 1980. Their référendaires Gori, Neri, and Chevallier had also left the court soon after. A new period opens at the Court featured by an increasing turnover of judges and référendaires, after an initial period in which most judges and référendaires stayed for one to two decades (*Lecourt*: 17 ans, Donner, idem, etc.).[45] In reaction to these

44 On the field of EU law, see *Antoine Vauchez and Bruno de Witte*, eds., Lawyering Europe: European Law as a Transnational Social Field, Oxford 2013.

45 Judges such as Monaco, Trabucchi, and former presidents Andreas Donner and Robert Lecourt left, respectively, in 1976 and 1980. Their référendaires Gori, Neri, and Chevallier had also left the court soon after. A new period opens at the Court featured by an increasing turnover of judges and référendaires, after an initial

centrifugal tendencies, a number of instruments were crafted to select, compile, and polish ECJ case law (via textbooks, judicial compendia or databases, *Recueils*, thesaurus, statistical inventories, etc.). From the scholarly point of view, these volumes may be seen as modest pieces, yet they prove to be critical devices in aggregating the several hundreds of decisions produced by the ECJ each year into one consistent legal tradition.In 1974, the first edition of the *Grands arrêts de la Cour de justice des Communautés européennes* was published, co-authored by ECJ *référendaire* Roger-Michel Chevallier and EU law professor Jean Boulouis, and many other similar volumes later emerged in other Community languages, often co- produced by ECJ lawyers.[46] Within the Court, a number of writing devices were edited that pushed for a normalization. A special mention should be made here to Pierre Pescatore who in 1976 wrote a highly important *Judicial Compendia*, an internal document of the Court that has been made public only very recently.[47] The book is intended as a guide to define the Court's judicial style of writing and arguing (preventing "défauts de fabrication" and "dispersion sémantique"). More importantly, he calls for a rational building of "jurisprudence," giving a list of "relevant articles" of the EEC treaty to be quoted when it comes to building "general principles," inciting *référendaires* to use a number of "formules types"[48] and inviting judges to frame their new decisions within the framework of the formerly established principles. Particu- larly interesting is his insistence on the importance creating "chains of deci- sions": "When a decision confirms, specifies or develops a previous jurisprudence, we recommend to always explicitly quote the previous deci- sions to which it refers in order to avoid any rupture in the jurisprudential chain."[49] Beyond these compendia, we still need to understand how the judicial decision-making process became increasingly centralized. From the late 1970s, *greffiers*, ECJ presidents, and a small number of senior judges have felt compelled to address the increas-

period in which most judges and référendaires stayed for one to two decades (*Lecourt*: 17 ans, Donner, idem, etc.).

46 In 2012, ECJ judge Tizzano published: I grands arrêts della giurisprudenza europea, Turin, Giappecchelli.

47 *Pierre Pescatore*, Vade-mecum. Recueil de formules et de conseils pratiques à l'usage des rédacteurs d'arrêts, Bruxelles 2007.

48 For example, Pierre Pescatore indicates the 1974 Dassonville formula on "trade measures or trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, into community trade as measures having and effect equivalent to quantitative restrictions" as I quote – the "clé passé-partout" for judges in their decisions.

49 Ibid.

ing diversity of the Court, in particular in preparation of the periods of enlargement that have raised great fears over the potential weakening of the institution's capacity to maintain both the quality of its decisions and the consistency of its jurisprudence. New instruments have been conceived within the court, such as internal standard operating proced- ures, legal compendia, and decisions' databases that help connect the Court with the keywords of the Celex databases. New structures have been created such as the *Cellule des lecteurs d'arrêts*, whose official role is precisely to polish and discipline the increasing heterogeneity within the court and among judges. One should also mention the documents produced by the translation directorate whose role has increased dramatically over the past two decades and contributes in turn to the stabilization of the Court's lexicon.[50]

On the whole, "case law" cannot be taken as a given, even less as a "primary source"; it is not spontaneously formed and transformed into a "body of law" through a self-sustaining process of accretion and continuous purification (decantation). EU jurisprudence is not just a *surface phenomenon*, or the outcome of a natural and logical accumulation of decisions over time: it is the product of a whole range of people and tools specialized into publicizing, ordering, filing, archiving, and processing "EU case law," thereby delineating a transnational politics of judicial law-making that is still waiting for systematic exploration.

50 [Karen McAuliffe, Behind the Scenes at the Court of Justice: Drafting EU Law Stories, in Fernanda Nicola and Bill Davies (eds.), EU Law Stories, Cambridge 2017.]

Antoine Vauchez

My iCourts experience

The scene takes place in Miami, on a beautifullly sunny day in late May 2000, more than twenty years ago... We are at the foot of the Loews Miami Beach Hotel, South Beach, a few steps from the pool where a bunch of lazy scholars are sipping a cocktail instead of attending panels of the Law and Society association... There, two young Ph.D. candidates from the "old continent", bit lost in the midst of the effervescent US academic crowd, bump into each other, discover surprisingly strong intellectual affinities, and end up spending the whole conference together... A rather banal anecdote of the academic life circuit that risks appearing as a veteran's memory perhaps... But at the same time quite a revealer of a state of a field of research in which apprentice sociologists of law or socio-legal scholars had to go through Miami, Chicago or Berkeley to establish their best European ties... In the years that followed, Mikael and I have wandered around a lot, exploring the rare havens of peace for a sociology of law that never fully institutionalized on the European continent: the European University Institute, the International Institute of Sociology of Law of Onati, and our own caravan of friends and colleagues, under the mentorship of Yves Dezalay, zigzagging across congresses and disciplines in an uninterrupted transnational conversation on the sociology of European legal fields.

Ten years later or so, iCourts research center was born, in a place that appeared (at first sight!) as less warm and festive than Miami beach but which managed in a very short time to become an incredibly welcoming and international home base for all sorts of encounters between law and social sciences, in an old continent that has very few. It certainly took a certain audacity for our young legal sociologist, freshly trained at the Bourdieusian school in Paris, to come back home and build, in the heart of the law faculty, such an academic hub that brings together critical sociology, law in context, political science, legal theory, etc. Yet not everything is down to the talent of one person! Let's remember that iCourts was born at the core of a "Danish zeitgeist" as part of an much-praised ecology of innovation: to a certain extent, iCourts has been to academia what Nordic cuisine and Noma have been to fooding or *Borgen* or *The Killing* to the world of series! Or so it felt at least when the little team of the first iCourt-ians would gather in the charming old building of the law school at the time located in the historical city center… In effect, iCourts did manage to embody in one single place the "polycentric" quality of

Danish academia which, maybe by virtue of having for long renounced to the chimera of autarchy and self-sufficiency, is open to all intellectual winds, whether they come from Germany, France, the United States, or elsewhere etc. And while many academic websites are more Potemkine villages with a lot on the digital façade but little intellectual life on the ground, the long list of men and women who have lent a hand to iCourts (researchers of course but also the administrative team led by Henrik Stampe) have managed to maintain all along the years a surprisingly lively spirit of community. For that special mayonnaise to take off, it certainly took a particularly crafted "double agent", Dezalay-style, capable at one and the same time to convince our fellow lawyers to take an interest in the virtues of historical and sociological investigation, even of the most advanced forms of quantification that were turning the most venerated landmark cases into mere dots and numbers… but also (which is no easier) to persuade sociologists and political scientists to take the autonomy of law and legal reasoning seriously, and engage in reading the austere prose of law journals... For sure, not everything has succeeded at iCourts, but even the setbacks have not had a bitter taste. I don't think Mikael would mind me mentioning this project of article of ours (or was it a book or may two?!) that we have kept taken up, corrected, and crossed out all along the years of iCourts, for almost a decade now... At each of my numerous visits to Copenhagen, we would fill in the Mikael's blackboard with tables, notes, ideas, and people passing by would look intrigued... To no avail! Each time we would start all over the again. And while the bits and pieces of this paper still lie today at the bottom of our computers, they are just in wait, I believe, for our next encounter! Ad multos annos!

Prosecutorial strategies and opening statements

Justifying international prosecutions from the International Military Tribunal at Nuremberg through to the International Criminal Court*

Ron Levi, Sara Dezalay and Michael Amiraslani

I. Introduction

The expansion of a professional field of international criminal law since the 1990s is commonly identified with a trajectory of international justice that gained traction over the course of the twentieth century. This is said to begin at the International Military Tribunal at Nuremberg (IMT) – and to extend to the current International Criminal Court (ICC). This trajectory, thought of by political scientists as a 'justice cascade',[1] is said to have reshaped how atrocities are handled at the international level, by emphasizing individual criminal responsibility as the mode of accountability for war crimes and massive human rights violations.[2] This surge is said to recover the 'legalism' underlying the Nuremberg trials,[3] extending what Sikkink[4] identifies as the 'hard law streambed' of individual criminal accountability globally.

When one contrasts the narrow legal authority of the IMT at Nuremberg with the growth of international criminal law from the 1990s onward, the growth of this field appears, indeed, teleological. Yet as the field of international criminal justice has expanded and solidified, struggles

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* This paper is a slightly expanded version of a paper first published in 26(4) Comparativ: Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung (2016) 58–73.

1 *K. Sikkink,* The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics, Norto 2011.

2 *R. Levi and J. Hagan,* Penser les "Crimes de Guerre", 173 Actes de la recherche en sciences sociales (2008), p. 6–21; *D. Scheffer*, All The Missing Souls. A Personal History of the War Crimes Tribunals, Princeton 2012.

3 *G. Bass,* Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, Princeton 2000.

4 *Sikkink,* fn.1 above.

over the *authority* of these courts have continued to rage. Despite growing attention to international criminal justice as a broad framework, it is not the case that each of these courts has simply gained greater authority over time. This is partly because these courts have been unable to develop routinized legal strategies that can persist over time.[5] Given the atypical political environments in which these courts operate, and the contentious nature of their operations, their authority is instead derived from the relationship between geopolitical contexts and the capacities of their prosecutors to adapt to these demands. The result is that, despite their formal legal authority, gaining authority in fact – that is, the capacity to generate alliances among wider constituencies and thus being able to effectively launch international legal prosecutions – has rested on the ability of prosecutors to detect these demands, to adapt their strategies for collecting evidence, and to calibrate their bureaucratic processes for indictment and prosecution to varying political circumstances.[6]

As a result, it is prosecutors, rather than judges, who have been at the strategic core of how international criminal courts negotiate external geopolitics. Their attempts to build authority for these courts explain, for example, the documentary strategy at Nuremberg, the media relations strategy of the International Criminal Tribunal for the former Yugoslavia, and the hesitation to engage in on the ground investigations by the Office of the Prosecutor at the International Criminal Court.[7] Yet prosecutors do more than engage in investigation and the collection of evidence. They ground their interventions by framing their prosecutions in a language aimed at justifying the decision to pursue individual criminal accountability. Thus, there is a *moral grammar* to these prosecutions, through which international prosecutors work to assure other institutional players and external audiences that these prosecutions are 'worth the candle'.[8] We argue that these legal justifications should form part of a broader sociology of practice and of fields. Our claim is that these justifications are particularly relevant to international legal fields *both* because of the centrality of language as a form of symbolic power for law, *and* because the field

5 *S. Dezalay,* Weakness as Routine in the Operations of the International Criminal Court, International Criminal Law Review (2016), p. 1–21.

6 *R. Levi, J. Hagan and S. Dezalay*, International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority, in International Criminal Law, Law and Contemporary Problems 78, 4 (2016), p. 289–314.

7 *Levi, Hagan and Dezalay,* fn.6 above.

8 *P. Bourdieu*, Practical Reason: On the Theory of Action, Stanford 1998, p. 77.

of international criminal law in particular is a weak and heteronomous field.[9] These justifications are themselves part of the strategic work that prosecutors engage in, with each institution recreating itself and justifying its weak authority rather than relying on a slow accretion of authoritative practice.[10]

In this chapter, we contrast the strategic work of prosecutors at two significant moments of the development of the field of international criminal law: at the stage of the genesis, at the International Military Tribunal at Nuremberg (IMT), and at the International Criminal Court (ICC), the first *permanent* court of international criminal justice. By studying the opening statements in these two instances, our emphasis is on how prosecutors at these two tribunals *justify* these proceedings and the prosecutorial strategies they have elected to pursue. To be sure, the opening statements at Nuremberg reflected the national interests of each of the four states involved.[11] Yet, looking at these statements together is also a way to infer from these justifications the status of the Tribunal more broadly, in its wider context – and we then compare these with the opening statements of the first prosecutions at the ICC. This does not mean that we divorce the study of prosecutors' language from that of context or power. Instead, through an analysis of these justifications we gain insight into the repertoires available to prosecutors and the position-takings of prosecutors in relation to their audiences at both Nuremberg and the ICC. This provides us with a comparative sociology of law in two different eras and geopolitical contexts – the immediate period following World War II on the one hand, and the post-Cold War and post-9/11 context of the creation of the ICC on the other hand – to explain the 'conditions under which different types of evaluation prevail'[12] in international criminal justice, and how legal power is justified in each instance.

In what follows, we expand briefly on our approach to the study of justifications, before turning to our two case studies: the full text of the opening statements of the four different Chief Prosecutors at the IMT at Nuremberg (respectively from the US, France, the UK, and the Soviet Union), and the opening statements for the prosecution in the first three cases of the ICC. In assessing these texts against a range of possible justifi-

9 *Levi, Hagan and Dezalay*, fn.6 above.

10 *Dezalay*, fn.5 above.

11 *M. Marrus,* The Nuremberg War Crimes Trial, 1945–46: A Documentary History, Boston 1997.

12 *M. Lamont and L. Thévenot* (eds), Rethinking Comparative Cultural Sociology. Repertoires of Evaluation in France and the United States, Cambridge 2000, p. 7.

cations, we find narrower appeals over time and less diversity in the orders of worth to which prosecutors appeal to launch cases. We trace this as a shift from a justificatory model of 'organizational hedging'[13] to a model of unhedged bets, in which we see significant investment in a narrower set of justifications and a move away from broad appeals to justify legal intervention. Combining these findings with interviews and archival data, we conclude that this is part of a broader move toward an investment in 'pure law' at the ICC, embedded in a geopolitical context of comparatively weak – if not waning – political support for its operations and prosecutions, and an ongoing competition between law and diplomacy that threatens the supply of cases and situations to the Court.

II. Prosecutorial discourse as practice: studying repertoires, stability, innovation, and change in international legal fields

Perhaps in an effort to distinguish itself from internal and legalistic approaches to studying law, the sociology of international law often defines legal practices as nearly everything *but* the discourse of law itself. Though often decried as an outmoded distinction, this continues to inform polarizing debates in the field. This is illustrated by Bourdieu's view that Latourian research on science (or, presumably, now on law) amounts to mere *textism* because it ignores positions and position-takings, or Latour's opposite response that, for Bourdieu, 'legal form does not add anything, other than the impossibility of criticizing the resources that it hides between its pseudo-rationalizations'.[14] Seeking to go beyond these debates, we combine a focus on prosecutorial opening statements, which we construe, thereby, as themselves a form of *practice*, with parallel attention to the resources and positions available to prosecutors as they develop their strategic statements. In other words, our research strategy relies on an empirical approach to strategic statements that regards international legal practices as themselves embedded within the geopolitical context in which courts operate.[15]

Contrasting how repertoires change over time, and in these two institutional forums, enables us to empirically trace processes of change over time

13 D. *Stark*, The Sense of Dissonance: Accounts of Worth in Economic Life, Princeton 2011.

14 *B. Latour,* The Making of Law: An Ethnography of the Conseil d'Etat, Cambridge 2010.

15 *K.J. Alter, M.R. Madsen and L. Helfer*, How Context Shapes the Authority of International Courts, 79 Law and Contemporary Problems (2016), p. 1–36.

in international legal fields. Focusing on how innovative international legal institutions and processes are justified over time is indeed a way to emphasize processes of stability, innovation, and change in the field of international criminal law.[16] Examining how legal innovation is justified builds on work in comparative sociology and the sociology of culture that examines how, for example, different social groups evaluate 'worth' and 'morality'.[17] The focus is thereby shifted from a sociology exclusively focused on *values* to a sociology of *value* and of *valuation*.[18] To build this approach, we bring together two related conceptual tools. The first, drawn from the literature on practices in international relations and international law, regards discourse as a form of practice itself (with practices themselves understood as a form of speech act[19]). Yet we also suggest that legal discourse does more than this: statements by prosecutors are not only epistemic in the sense of building on a community of practice, they are also fundamentally strategic and justificatory. This echoes Bourdieu's elaboration on law and the state in *Sur l'État*, in which he identified the central importance of the 'capital of words' available to lawyers in the parallel development of legal fields and fields of state power.[20] This capital is what allows lawyers to innovate over time. Thereby, the unique power of jurists to justify is also a power that draws together the political *with* language in order to justify and explain innovative political and social practices.

We rely on these insights to trace change, innovation, and stability over time in international criminal legal institutions, with an emphasis on processes of legitimation and justification. This is particularly critical in the context of international criminal law, given the logic of the 'constant coup' that seems to dominate this field,[21] and the need, therefore, for continued justification and legitimacy. In other words, while the field of international criminal law may appear to have a teleological trajectory from the post-World War II moment through to the present, there is also

16 See generally *J. Brunnée and S. Toope,* Interactional International Law: An Introduction, International Theory 3, 2 (2011), p. 307–318.

17 *Lamont and Thévenot,* fn.12 above.

18 *M. Lamont,* Toward a Comparative Sociology of Valuation and Evaluation, Annual Review of Sociology 38, 1 (2012), p. 201–221.

19 *E. Adler and V. Pouliot, Adler,* International Practices 3(1) International Theory (2011), p. 1–36; *J. Meierhenrich,* The Practice of International Law: A Theoretical Analysis 76(3–4), in: Law & Contemporary Problems (2013), p. 1–83; and see *J. Searle,* Speech Acts: An Essay in the Philosophy of Language, New York 1969.

20 *P. Bourdieu,* Sur l'État. Cours au Collège de France (1989–1992), Paris 2012.

21 *Dezalay,* fn.5 above.

a sense of constant crises in which lawyers must legitimate and justify their intervention at each turn. In the field of international criminal law, this is illustrated by the protracted tension between international criminal justice and its political alternatives, most prominently manifested in the 'peace-justice tradeoff' that pits lawyers against diplomats for the resolution of violent conflict. This is a classic problem for actors in a weak field, making it a struggle to gain and maintain authority.

III. Prosecutorial opening statements: legal innovation in unsettled times

To study how legal innovation is justified, we rely on the regimes of justification distilled by Boltanski and Thévenot in *On Justification*, in which they classify the chief conventions, or 'orders of worth', that individuals rely on to justify their positions in light of disagreements or contention.[22] As they demonstrate, there is a pluralism to how people justify actions: rather than being limited to justifications from a particular social field, individuals may move from one form of justification to another, and rely on moral principles from an array of ethical spheres. These are 'market performance', 'industrial efficiency', 'civic equality', 'domestic relations', 'inspiration', 'renown', and in more recent literature, 'sustainability'.[23]

Table 5.1 Orders of worth[1]

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
Mode of evaluation (worth)	Grace, non-conformity, creativeness	Esteem, reputation	Collective interest	Renown	Price	Productivity
Elementary relation	Passion	Trust	Solidarity	Recognition	Exchange	Functional link

[1] This table is a condensed version of the table in L. Boltanski and L.Thévenot,'The Sociology of Critical Capacity', 2 *European Journal of Social Theory* (1999) 359–377, 368.

Each of these categories provides a moral grammar for justifying action, as summarized in Table 5.1.

This moral grammar can be illustrated with a common situation of justification. In his work applying this sociology of justifications to how

22 *L. Boltanski and L. Thévenot,* On Justification: Economies of Worth, Princeton 2006.

23 *Lamont and Thévenot,* fn.12 above.

changes in the economy were articulated and produced in Eastern Europe, David Stark elegantly relies on the example of a faculty reference letter for an academic job candidate.[24] Such a letter would often rely on multiple justifications for why the candidate deserves the position: it may indicate that the candidate is very creative (thus drawing on the world and language of creativity and 'inspiration'), that they are loyal to students (thus drawing on the language of the 'domestic' order and its elementary relation of trust), that they are a good citizen in engaging with their colleagues (thus drawing on the language of the civic and the collective interest), that they are frequently cited (and thus renowned), that they have a strong record of attracting grant funding (or a market justification), and that they are also highly productive and efficient.

Stark's example not only demonstrates these orders of worth in practice: it also underlines that justifications need not be exclusive of each other. Indeed, this becomes part of Stark's analysis of how justifications can reflect and allow for 'organizational hedging'. If an institution is uncertain about the metrics that will be used to evaluate its success, and/or if an institution is looking for opportunities to gain degrees of freedom by *producing* that very uncertainty so as to allow it to act along different paths and meet a variety of requirements, it will develop justifications for contentious action across multiple registers: as he suggests, '[i]n managing one's portfolio of justifications, one starts from the dictum: diversify your accounts'.[25]

In the context of international criminal law, this is a particularly attractive avenue to examine how courts are positioned over time. It is also especially relevant as a method to study prosecutorial practices, since these reflect both the range of the possible (what can be said) and the appeals that can be made (in Stark's terms, prosecutors must be attendant to their environment to both react to and at times produce uncertainty through their statements), and on the social skill of prosecutors in developing these frames and aligning their institutions around them in order to induce cooperation as needed.[26]

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24 *Stark*, fn.13 above.

25 *D. Stark*, Recombinant Property in East European Capitalism, American Journal of Sociology 101, 4 (1996), p. 993–1027.

26 *J. Barbot and N. Dodier*, Rethinking the Role of Victims in Criminal Prosecution, Revue Française de Science Politique 64, 3 (2014), p. 23–49; *J. Hagan and R. Levi*, Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice, European Journal of Criminology 1 (2004), p. 445–475; *N. Fligstein*, Social Skill and the Theory of Fields, Sociological Theory 19, 2 (2001), p. 105–125.

In this chapter, we focus on the four prosecutorial opening statements at the IMT,[27] and contrast these with the prosecutorial opening statements in the first three cases of the ICC (*Lubanga*,[28] *Katanga*[29] and *Bemba*[30]). We selected these as significant case studies: the ICC's prosecutorial statements in its first three cases provide a current empirical moment for considering the 'Nuremberg legacy', comparing the field's genesis at the IMT with the ICC as the first *permanent* international criminal court.

We coded the prosecutorial statements to identify language, in these prosecutorial statements, that reflected an appeal to the orders of worth distilled by Boltanski and Thévenot: 'industrial', as an appeal to efficiency; 'domestic', as an appeal to domestic practices and national loyalty; 'inspired', as an appeal to humanity; 'opinion', as an appeal to recognition; 'market', as an appeal to economic efficiency; 'civic', as an appeal to collective welfare and society. As we develop below, these empirics across both courts underline clear patterns of position-taking and change in prosecutorial statements between these two institutional settings and over time.

IV. *The International Military Tribunal at Nuremberg: hedging across topics and across time*

In his opening statement to the Nuremberg trial in 1945, the Chief Prosecutor for the United States, Justice Robert Jackson, emphasized documentary proof in the prosecution. 'We will give you undeniable proofs of incredible events', he said, referring among other items to 'hundreds of tons of official German documents', the 'captured orders and captured

27 These are available through Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, The Avalon Project at the Yale Law School. For discussion see *Marrus*, fn.11 above.

28 *Mr Luis Moreno-Ocampo*, *Prosecutor of the International Criminal Court, Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court*, The Case of the Prosecutor v. Thomas Lubanga Dyilo. ICC-01/04-01/06. Opening Statement, The Hague (26 January 2009).

29 *Mr Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Mr Eric MacDonald, Senior Trial Lawyer of the International Criminal Court,* The Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. ICC-01/04-01/07. Opening Statement, The Hague (24 November 2009).

30 *Mr Luis Moreno-Ocampo, Prosecutor of the International Criminal Court,* The Case of the Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08. Opening Statement, The Hague (22 November 2010).

reports' that provide evidence of atrocities, and the violence and criminal enterprise that 'we will prove from their own documents'.[31] 'There is no count in the Indictment that cannot be proved by books and records', Jackson indicated, emphasizing that '[t]he Germans were meticulous record keepers'. Justice Jackson held this position for months leading up to the prosecution: at the International Conference leading to the trials, he insisted that '[w]e must establish incredible events by credible evidence', underlining that the trial would be 'a drab case' based on documentary evidence of Nazi crimes, but that the documents would render it unchallengeable.[32]

In addition to Justice Jackson's documentary-based strategy, each prosecutor of course also sought to represent their country's own national positions in their opening statements. It is thus not surprising that General Rudenko mainly sought to justify the prosecution in light of the Nazis' crimes regarding the Soviet Union (a 'domestic' justification that represents nearly 60 per cent of all justifications he used in his statement). The prosecutors from France and the United Kingdom each relied on domestic justifications in nearly a quarter of all their justificatory statements: and the US prosecutor, hailing from the most distant of the four countries, only relied on domestic justifications in under 7 per cent of his statements. The opposite occurred with respect to industrial justifications speaking, for instance, to a system of international justice. The US prosecutor relied heavily on this industrial logic (nearly 75 per cent of all his justifications reflected the 'industrial' order of worth); the prosecutors from France and the UK each relied on this for just over half of their justificatory statements; and the Soviet prosecutor relied on industrial justifications for just over one quarter of his justificatory claims at Nuremberg. And in contrast, the US prosecutor was the only one of the four to even briefly invoke a 'market'-based justification for the prosecution, in the name of 'the American dream of a peace-and-plenty economy'. Clearly, national positions made a difference in these prosecutors' justifications.

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31 *R. Jackson*, Opening Statement Before the International Military Tribunal (22 November 1945), available at www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international - military-tribunal/ (last accessed 6 June 2017).

32 *S. Breyer*, Crimes Against Humanity: Nuremberg, 1946, New York University Law Review 71, 5 (1996), p. 1161–1164.

Table 5.2 Justifications for the IMT Nuremberg prosecution

IMT Prosecutor	*Inspired*	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
Jackson (US)	4.1 %	6.8 %	10.2 %	3.7 %	1.35 %	73.9 %
Shawcross (UK)	6.5 %	24.1 %	4.3 %	8.6 %	—	56.5 %
de Menthon (France)	7.4 %	22.4 %	9.8 %	5.4 %	—	55 %
Rudenko (USSR)	1.7 %	59.3 %	8.7 %	2.9 %	—	27.3 %

Yet what is most notable is that, throughout the opening statements, all four prosecutors also invoked nearly all of the justifications identified by Boltanski and Thévenot. All prosecutors spoke across a wide array of orders of worth to justify the Nuremberg Trial: in other words, *each and every prosecutor justified the Nuremberg trial by invoking the worlds of inspiration, the domestic, the civic, opinion, and the industrial* (with a market justification, as noted above, also invoked by the US prosecutor). So while each national prosecutor placed different *emphasis* on some orders of worth, each of the prosecutors also relied on a *wide array* of these orders of worth in justifying the Nuremberg prosecution. We demonstrate this in Table 5.2.

These findings are illustrated by the following quotes, which demonstrate appeals to each order of worth by different prosecutors.

The Nuremberg prosecution as an appeal to the world of *inspiration*:

> 'We believe that there can be no lasting peace and no certain progress for humanity, which still today is torn asunder, suffering, and anguished, except through the co-operation of all peoples and through the progressive establishment of a real international society' (de Menthon, France, representing 7.4 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *domestic*:

> 'Now, when as a result of the heroic struggle of the Red Arms and of the Allied forces, Hitlerite Germany is broken and overwhelmed, we have no right to forget the victims who have suffered. We have no right to leave unpunished those who organized and were guilty of monstrous crimes' (Rudenko, USSR, representing 59.3 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *civic*:

> 'The day has come when the peoples of the world demand a just retribution and … when they demand severe punishment of the criminals' (de Menthon, France, representing 9.8 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of *opinion*:

> 'When Belgium and the Low Countries were occupied and France collapsed in June of 1940, England – although with the inestimably valuable moral and economic support of the United States of America – was left alone in the field as the sole representative of democracy in the face of the forces of aggression' (Shawcross, UK, representing 8.6 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *market*:

> 'The American dream of a peace-and-plenty economy, as well as the hopes of other nations, can never be fulfilled if those nations are involved in a war every generation so vast and devastating as to crush the generation that fights and burden the generation that follows' (Jackson, US, representing 1.4 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of *industry, efficiency, and practicality*:

> 'This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war' (Jackson, US, making up 73.9 per cent of his justifications).

How can we understand the wide array of justifications that were deployed by each of the Nuremberg prosecutors? By drawing together the study of justifications with field sociology, we suggest that this wide breadth of justifications can be understood as a strategy of 'organizational hedging' (to use Stark's concept) by Nuremberg prosecutors. This 'hedging' strategy, we suggest, allowed these four prosecutors to shore up the tribunal's authority and legitimacy through the language and moral grammar they deployed. This was particularly important given the skepticism the IMT faced, and the political fields within which the IMT and its prosecutors were embedded.

This was particularly important in the IMT context. First, this was a time- and place-bound tribunal that, while purporting to develop legal rules for possible application to future cases, was more proximately a response to how to deal with Nazi criminality. Yet there was suspicion – both in the US and the UK, and certainly in the USSR – over the very idea of criminal prosecution for Nazi leaders, regarded by many as risky and as an overly soft response by elites and public opinion alike. This was

instantiated in the view of Roosevelt's Secretary of the Treasury Henry Morgenthau, who derided the strategy as 'kindness and Christianity' rather than a strategy to deindustrialize Germany and to 'attack [] the German mind' itself.[33] The IMT's comparative lack of early authority was reflected in the views of elite government lawyers such as Joseph O'Connell, who regarded the Tribunal as a fundamentally 'unlegalistic approach' that applies domestic approaches 'to a world situation which has nothing in common with it';[34] or even the view of Henry Stimson, the leading US government designer and champion of the trial-based approach at Nuremberg, who referred to the 'difficult question' of the Nuremberg trials.[35] It was similarly reflected in the early views of President Roosevelt, who sought to emphasize the collective responsibility of the German people, rather than merely that of 'a few Nazi leaders'.[36] Second, among other segments there was criticism over the tribunal's perceived legitimacy,[37] with the trials often derided as 'victor's justice', and the criminal counts enumerated in the Charter of the IMT characterized as ex post facto charges that undercut legal and political legitimacy.[38] Third, the prosecution was internally embattled: each of the Allies were pursuing different goals, and each articulated the rationale for the prosecution differently depending on the degree to which they regarded themselves as victims of the Nazi regime.[39]

This wider context of contestation over the very standing of the Tribunal helps explain the broad appeals being made at various levels of justification, precisely because the IMT at Nuremberg was *both* understood to be operating within a context of high ambiguity over its degree of authority, *and* because its prosecutors – in the US but also in the UK and France – would be invested in keeping a broad rhetorical framework so as to position themselves broadly in their national jurisdictions (Jackson,

33 *Bass*, fn.3 above, p. 152.
34 *Bass*, fn.3 above, p. 179.
35 *Bass*, fn.3 above, p. 171–172.
36 *Bass*, fn.3 above, p. 154
37 *N. Frei*, Before and After Nuremberg, Journal of Contemporary History 38, 2 (2003) p. 333-343.
38 *M. Minow*, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence, Boston 1998; but see *S. Karstedt*, The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction, in *D.A.B.* and *T.L.H. McCormack* (eds.), The Legacy of Nuremberg. Civilising Influence or Institutionalised Vengeance?, Leiden 2008, p. 13–35
39 *Marrus*, fn.11 above.

for instance, had been identified before his departure as a possible Chief Justice of the US Supreme Court).[40]

This perhaps also explains the degree to which the prosecutors, in particular Hartley Shawcross from the UK, but others as well, sought to downplay the degree to which Nuremberg represented a legal innovation. Shawcross, for instance, explicitly positioned the IMT as 'no more than the logical development of the law' rather than an 'innovation', despite 'some small town lawyers who deny the very existence of any international law'. For his part, while underscoring that the IMT prosecutions were 'novel and experimental', Jackson still emphasized that the Tribunal was not 'created to vindicate legalistic theories' or to advance law and legal developments, but was instead a merely technical, practical way to solve problems. Indeed, this emphasis on continuity was central in Jackson's statements, who thereby underlined a strategy that had already been legitimated among the US legal elite who were enrolled into the prosecution. If junior staff filled the prosecutorial ranks, the most senior of the US lawyers at Nuremberg were those who had been instrumental in US antitrust cases in the 1930s. Robert Jackson himself had played a leading role in these cases, and he was joined at Nuremberg by other prominent New Deal veterans of antitrust litigation: William Donovan of the OSS; John Amen of the US Attorney General's Office, who was New York's 'leading "crime buster"' and son-in-law of President Cleveland; and Henry Stimson, the Secretary of War and the leading proponent in the Roosevelt administration for holding war crimes trials. These lawyers had all invested in antitrust litigation strategies for criminal prosecutions domestically, whether dealing with corporations such as the Sugar Trust, or gangsters in New York. Taking this shared domestic legal experience to the international stage – and to a Tribunal that was considered to be without precedent – was a prosecutorial strategy designed to resonate with the existing practices of a powerful constituency of legal experts in the United States.

Finally, this organizational hedging is also mirrored in how all prosecutors deployed *time* in their justifications. As others working on the sociology of conventions and justifications have noted, strategic actors often deploy time in ways to gain adherents and to build their claims, often with

40 For a discussion see *J. Barrett*, Bringing Nuremberg Home: Justice Jackson's Path Back to Buffalo, October 4, 1946, Buffalo Law Review 60 (2012) p. 295–321.

an orientation to the future in their justifications.[41] We demonstrate this in Table 5.3.

Table 5.3 Temporality at IMT Nuremberg

Prosecutor	*Future*	*Past*	*Neutral/Present*
Jackson (US)	18.5 %	11.3 %	70.2 %
Shawcross (UK)	10.4 %	46.6 %	42.9 %
de Menthon (France)	13.3 %	34.0 %	52.7 %
Rudenko (USSR)	0	69.8 %	30.2 %

Indeed, while the Soviet prosecutor, Rudenko, was least strategic in this regard (since of course he did not regard the case as building a set of future-oriented principles), the other prosecutors invoked the future relatively consistently, if not overwhelmingly so. Indeed, the IMT prosecution sought to build authority for the Nuremberg trials – in light of these legal concerns and the wider geopolitical context – by looking to the future and the anticipated legacy of the trial. Notably, Jackson sought to do so by building an external constituency for the Tribunal by emphasizing the momentum it could spur historically. As Jackson wrote to Henry Stimson, his evidentiary strategy was to produce a case that would be perceived as sound, 'particularly when the record is examined by the historian'. This aimed at bolstering the authority of the IMTs toward the community of elite US lawyers and deflect potential resistance from the start – but this future orientation also appealed to a wider spectrum of constituencies among audiences in the US, and Europe.

As we will see below, on both of these dimensions – organizational hedging and future orientation – the IMT prosecutors stand in stark contrast to the justifications of the first three prosecutions at the ICC.

V. *The International Criminal Court: investing in technicality and law as an unhedged bet*

The most notable institution in international criminal justice currently is the International Criminal Court. With the ICC being restricted by its own statute to cases where countries are unwilling or unable to conduct their own investigations, and limited to those countries which have joined the Court as States Parties (absent a Security Council referral) – and with

41 *N Dodier*, Les appuis conventionnels de l'action: Eléments de pragmatique sociologique, Réseaux 11, 62 (1993) p. 63–85.

atrocities occurring in some African states – the ICC's docket quickly became focused on African conflicts.[42] In light of this, the authority of the ICC has become deeply at stake with the potential withdrawal of African Union states from the Rome Statute, with the African Union expressing concern over the 'politicization and the misuse of indictments against African leaders by the ICC'.[43] As a result, though the ICC enjoys a professionalized base of legal scholarship and practitioners on which to draw – compared to the IMT at Nuremberg – it is also faced with persistent challenges to authority along with charges of politicization.

At one level, the resulting crisis of authority lies in the very mandate of the Court, since the situations and often real-time crimes that the ICC is seized with are deeply enmeshed within ongoing diplomatic, political, and economic struggles. As Alex Whiting, who earlier served in the International Criminal Tribunal for the former Yugoslavia (ICTY) and then as both Investigation and Prosecution Coordinator with the ICC notes, in the ICC 'each investigation is largely shaped by the constraints and opportunities peculiar to the situation at hand'.[44] Commentators also increasingly wonder whether the 1990s which built the momentum for the creation of the ICC represented a high-water mark that was unlikely to be sustained, in the post-9/11 era, pointing to perceived bias in prosecutions, and to the failure to deal with the protracted conflict in Syria.[45] The ICC thus finds itself in a paradoxical position in which there is a seemingly strong 'common sense'[46] over international criminal justice as a legitimate response to mass violence – indeed reinforced by the professionalization of the field – but a protracted fragility of the ICC as the institutional forum for this response.[47]

In this context it is perhaps not surprising that the prosecutorial strategy, as illustrated in the first three cases of the ICC, appears to turn more

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42 See *A. Branch,* Neither Liberal nor Peaceful? Practices of "Global Justice" by the ICC, in *S. Campbell*, *D. Chandler* and *M. Sabaratnam* (eds.), A Liberal Peace? The Problems and Practice of Peacebuilding, London 2011, p. 121-137.

43 Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Ext/Assembly/AU/Dev.1-2 (Oct. 2013).

44 *A. Whiting,* Dynamic investigative practice at the International Criminal Court, Law and Contemporary Problems 76, 3–4 (2013) p. 163.

45 *D. Bosco*, Rough Justice: The International Criminal Court in a World of Power Politics, New York 2014.

46 *C. Topalov* (ed.), Laboratoires du nouveau siècle. La nébuleuse réformatrice et ses réseaux en France (1880–1914), Paris 1999.

47 *Dezalay*, fn.5 above.

adamantly on a legal framework, with an appeal to 'pure law'[48] that draws on the now more elaborate doctrine of international criminal legal and increasing legal profession- alization within the field. This interview with a senior ICC prosecution lawyer adeptly caps this turn to a 'pure law' strategy:

> We have always followed a policy where we do not want to have ICTY type of investigations where we charge basically the history of the Balkans in one case, so that is an attempt to write history in criminal proceedings … *So what we do is we focus our investigations on a very limited number of crimes, we also focus our investigations on those persons whom we believe bear the greatest responsibility* [49]

This focus on pure law was stressed by the first Prosecutor himself: 'International criminal law is so primitive that for us, it's law, but for others, it is just one political option among others.'[50]

This turn to a legal framing can partly be seen as a strategy to deflect criticisms of the politicization of the ICC.[51] It is also likely an outgrowth of the increasing legal professionalization of the field of international criminal law, with new young legal personnel coming through the ICC with academic training and detailed knowledge of international criminal law. This growing expertise is seen – as just one example – in Figure 5.1, which provides a count of the number of faculty members listed as specializing in international criminal law in law schools across the US.

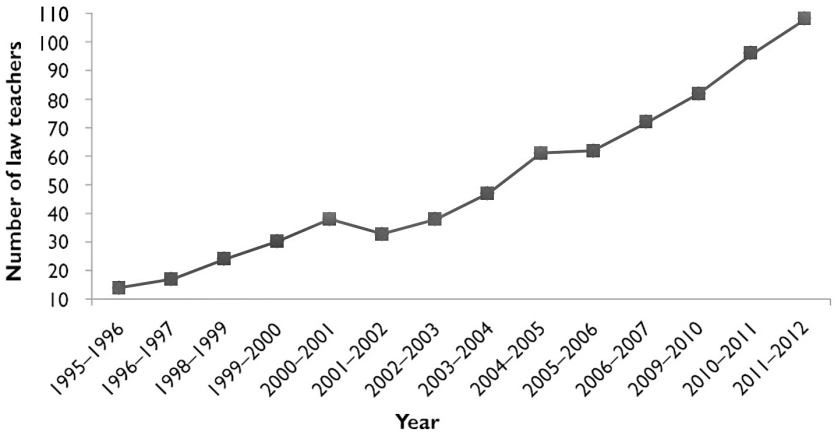
48 *Y. Dezalay*, From Mediation to Pure Law: Practice and Scholarly Representation in the Legal Sphere, International Journal of the Sociology of Law 14 (1986), p. 89–107.

49 Authors' interview with legal officer at the OTP, The Hague, 22 August 2012. Emphasis added.

50 Authors' interview with Luis Moreno Ocampo, Toronto, 8 November 2012.

51 *J. Meierhenrich*, The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory, in: *M. Minow, C. True-Frost and A. Whiting* (eds.), The First Global Prosecutor: Promise and Constraints, Ann Arbor 2015, p. 97–127.

Figure 5.1: Number of law teachers in US law schools specializing in international criminal law.[52]



Note: data unavailable for 1997–1998, 2007–2008, 2008–2009.

This legalization turn has also been reflected in an explicit strategy of the ICC prosecutor, both for the conduct of investigations, and in the professional profiles among the staff at Office of the prosecutor.[53] By 2009, prosecutions were largely overseen from the ICC Office of the Prosecutor in The Hague, with few if any on-the-ground investigations, and by professionals with backgrounds in law more than in police investigation (in contrast to previous tribunals, such as the ICTY). This offshore investigation strategy was driven in part by the difficulty of conducting on-site investigations, compounded by the lack of US support in the first years of operation of the ICC. But it also responded to the prosecutor's strategy of developing cases against top political and military figures, with the stake of establishing the responsibility for command authority over crimes, rather than proving the occurrence of the crimes themselves.

This approach has led to direct criticism of the ICC Prosecutor's Office, thought to unduly rely on investigatory materials and evidence provided by secondary actors, such as pre-positioned NGOs on the ground such

52 These data come from the American Association of Law Schools' directory of law teachers for each of the relevant years: AALS. The AALS Directory of Law Teachers, Washington, D.C.: AALS.

53 *Dezalay*, fn.5 above.

as Avocats Sans Frontières.[54] But it has also, indirectly, narrowed the spectrum of possible justifications once evidence is marshaled, downstream, into the Court, notably regarding the position of victims in prosecutorial justifications. As one interviewee indicated, at the ICC 'they don't see any problem in defending, in given trials, one group and another in another trial, even though they massacred each other. In any case they are victims … it is a depoliticization of the court …'[55]

This context of constraint and constant external pressure to not be identified as 'political', along with this prosecutorial strategy of offshore investigations, is directly reflected in the prosecutorial opening statements in the first three cases of the ICC. Indeed, in stark contrast to the organizational hedging model of the IMT prosecutors at Nuremberg, these underline a turn to an unhedged bet of law and legal expertise. There is thus a concentration of justifications across three orders of worth: the 'civic', the 'inspired', and the 'industrial' – and no invocation at all of the 'domestic', 'opinion', or the 'market'. Further, not only is there a substantial growth of appeals to the 'industrial' – but the 'industrial' is also the primary justification – making up over 70 per cent of justifications in all three cases, reaching 84 per cent in the *Bemba* case. While hinging on an appeal to professionalism and efficiency, this further reflects what Bourdieu described as an 'organizational capital with a legal basis',[56] whereby prosecutions are justified on the basis of a legal form of expertise. This is particularly well illustrated in the opening statement in *Bemba*:

> The Rome Statute consolidated customary international law on the topic and specified its dimensions. It does not introduce a new and separate liability of the superior into international law […] In accordance with this principle and the Pre-Trial Chamber III's decision confirming the charges for trial, the Prosecution will prove the elements required by the law in this specific case.[57]

54 Notably in the Lubanga case, in which, among the 624 pages of the decision, more than 200 focus on evidence-related issues – not only the investigation strategy, but also a central issue pertaining to this case – and others: that of the selection and roles played by 'intermediaries' on the ground to gather evidence or identify (and vet) witnesses and victims.

55 Authors' interview with victims' lawyer, Brussels, 13 December 2012.

56 Bourdieu, Sur l'État, fn.20 above, p. 524-525.

57 Bemba, fn.30 above.

This turn to 'pure law' is further reflected by the relative change of other orders of worth invoked by prosecutors over the ICC's first three cases. We demonstrate this shift in Table 5.4.

Table 5.4 Orders of worth in ICC prosecutions

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
ICC Lubanga	21.2 %	—	5.8 %	—	—	73 %
ICC Katanga	13 %	—	9.8 %	—	—	77.2 %
ICC Bemba	4 %	—	12 %	—	—	84 %
IMT at Nuremberg (all four prosecutors)	5.2 %	29.0 %	8.4 %	5.2 %	<1 %	52.3 %

As prosecutors relied ever more heavily on 'industrial' justifications that reflect legal professionalism, expertise, and efficiency, they relied ever less on appeals to the order of 'inspiration'. In the *Lubanga* case, the very first prosecution of the ICC, prosecutors placed significant weight on inspiration in the opening statements. For example: 'The children still suffer the consequences of Lubanga's crimes. They cannot forget what they suffered, what they saw, what they did […] They will tell the Court what happened to them. They will speak or themselves and for all the other, for those who could not overcome the past or face the present.'[58] Yet over the course of the next two cases, prosecutorial appeals to inspiration fell dramatically, from 21 per cent of all justifications in *Lubanga*, to 13 per cent in the following case of *Katanga*, and down to merely 4 per cent of all prosecutorial justifications in the *Bemba* opening statements. And on the flip side, justifications based on a 'civic' order of worth were deployed by ICC prosecutors to emphasize solidarity with victims and a global community that is built, in the main, through law and legal tools – and these doubled in prominence, from 6 per cent of justifications in *Lubanga*, to 10 per cent in *Katanga*, and 12 per cent of all justifications in the ICC's third case in *Bemba*. Take for example the prosecutorial opening statement in *Katanga*:

> The people from such places as Bogoro, Bunia, Aveba and Zumbe must know that they are not alone, they do not need to resort to violence again … the people from Ituri, have to feel they are part of a global community, that we are their brothers and sisters. The

58 Lubanga, fn.28 above, 2.

> Rome Statute is building one global community to protect the right of victims all over the world.[59]

In parallel to this narrowing in orders of worth, prosecutorial statements in the ICC have also used ever less of the future tense in their justifications. While more prevalent in the ICC's first case in *Lubanga*, by the ICC's third case in *Bemba*, only the 'industrial' order of worth relies on some future-orientation in its language (at just 5 per cent of these justifications), and the use of future-statements in the context of inspiration and civic orders of worth falls to zero in the prosecutorial statements. This is also in contrast with the opening statements at Nuremberg, where some use of the future appeared across all orders of worth. ICC prosecutors are thus relying both on a narrower set of justifications over time, and on an increasingly presentist (rather than a future-oriented) language. This shift in the use of time is demonstrated in Table 5.5.

Taken together, this evidence suggests that in the ICC there is a growing segmentation of law from diplomacy and from the national context of state politics. This is in favor of an unhedged bet on legalization and professionalism, aimed at insulating the ICC from criticism and wider contextual constraints – be it a result of being shunned by states, or the difficulties of conducting investigations on the ground.

Table 5.5 Future-orientation of orders of worth

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
ICC: Lubanga	37.90 %	—	12.50 %	—	—	5 %
ICC: Katanga	50 %	—	0 %	—	—	1.40 %
ICC: Bemba	0 %	—	0 %	—	—	4.80 %
IMT at Nuremberg (all four prosecutors)	64.70 %	3.10 %	15.80 %	11.10 %	50 %	8.20 %

VI. Conclusion

The moral grammar of international criminal prosecution is, we argue, deeply connected to the position-takings of prosecutors and the geopolitical contexts in which courts are embedded. At any given time, prosecutors are engaging in a strategic approach that engages with the opportunities and constraints of the field: both to deflect concerns over the cases they are prosecuting, and to afford themselves opportunities to recast the debate.

59 Katanga, fn.29 above, 3.

Comparing the IMT at Nuremberg and the ICC along these lines, we find markedly different approaches. For a Tribunal in the post World War II context in which there was skepticism over even its *de jure* authority and over the capacity of law to respond adequately to Nazi crimes, IMT prosecutors responded to that uncertainty through organizational hedging that drew on the widest array of justifications available. In contrast, the ICC finds itself on the other end of the continuum: faced with persistent charges of politicization and now beyond the peak of international social movement support, ICC prosecutors have instead invested in an unhedged bet that increasingly privileges a single justificatory language – a technical, legal, and institutional approach – while also refraining from a future-orientation to its prosecutorial claims.

It is here that the focus on prosecutorial statements is brought together with a field theory of international law. Paralleling the professionalization of international criminal law over time, interview evidence suggests that the decision to invest more heavily in a legalization that seeks to deflect politics is as much a reaction to the political context in which the ICC finds itself as it reflects the availability of a professionally and increasingly specialized staff. As Bourdieu's work on the state and the role of jurists indicates, juridical capital here relies on the capacity to rely on words and meaning to both advance the legal cause – both in the IMT and in the ICC – and to legitimate the role of legal institutions as a response to atrocity. This further serves to legitimate the professional expertise and domain of lawyers operating within the ICC. In this way, prosecutors in both eras are seeking to position the courts vis-à-vis its critics, real or anticipated. The entrepreneurial work of prosecutors in these statements is thus to mediate and to present the innovations of these courts – and their own positions within the field as a result – in ways that respond to and shift the terrain to accommodate the dominant values of the field at a given moment in time. This combination of language and rhetorical appeals as both responsive to constraints and an attempt to recast the terrain is, we suggest, core to understanding the juridical capital of prosecutors in international legal fields.

Ron Levi, Sara Dezalay and Michael Amiraslani

My iCourts experience

My earliest recollection of iCourts is of Mikael Madsen, during an event at the American Bar Foundation in Chicago, pulling me aside to the library. We sat at two chairs, in between bookcases housing some of the classic work at the intersection of law and social science, with a focus on access to justice, on the legal profession, and on legal decision-making. Swearing me to secrecy (at least this is how I remember it!), he shows me a proposal to the Danish National Research Foundation.

Mikael's idea? A scholarly centre to draw together researchers from *across disciplines* on international courts. *All* international courts, over time and in the present. And they'd be studied *empirically*, without geographic constraint. In the process, the Centre would build a *basic social science* of how to study legal institutions and international legal elites. I remember being stunned! I also don't remember being of much help. I think my only question, which Mikael wisely ignored, was about the name. Mikael soon launched iCourts, in the University of Copenhagen's Faculty of Law, to global scholarly success.

But in a homologous way to how Bourdieu thinks of the State, I quickly learned that iCourts is not just where you look for it! Rather, iCourts provided me with a community of new connections, scholarly and more importantly personal, across the globe. And iCourts offered many of us the belief, and with it the relief, that what we were studying was part of a common project. And iCourts would, of course, bring us back to recharge those connections and to build new projects: at one stage my own visits to Copenhagen occurred so often that the Danish National Police seemed to take notice too, and I'd vanish for some hours at a time! And while I never did figure out where to find the coffee pods, it has struck me that the fact that iCourts could feel like home in such different physical spaces – from Studiegården to the modern design of Karen Blixens Plads – is further proof that iCourts is an ethos and a way of working together, which has also been sure to refresh its own driving questions over time.

For me, iCourts also served as inspiration, where I could launch the wildest ideas for articles and meet students and colleagues from across the globe. In my case, it allowed me to produce new work on international criminal courts and on legal fields, to host workshops, and to experiment with new empirics and new concepts (to give a sense, I think I once presented it to the Summer Institute on studying international courts as akin

to how physicists search for neutrinos. *This* is the kind of open intellectual space Mikael fostered).

I add that this iCourts of the mind also had personal effects. Northern European television gained global reach over this time, and on Netflix I'd notice myself, late night in Toronto, watching The Bridge, or then Borgen, while ignoring the subtitles. I don't know if I thought I could understand Danish, or if I was just willing myself to believe I could! But iCourts was in my head, even if I couldn't understand a word. And I don't think Mikael knows this, but my son also wore, for at least a couple of years, an F.C. Copenhagen shirt here in Toronto, I'd bring home grounds from Coffee Collective, and above our dining room table is a small version of the round pendants from one of the dining halls. So yes, Mikael may have given me an identity crisis.

I have many friends that came through iCourts and the workshops that we held. But in the same spirit, iCourts was also on the road. This included an all too merry band of sociologists of law searching for late night crabcakes in Baltimore, and somewhere there is a guest registry with a lengthy inscription by Mikael about distinction in crabcakes. These excursions included what remain my most special memories of the Law & Society meetings when, in the early years of iCourts, panels on international courts were new and drew ever more people into conversations. And then there were the trips I meant to join but could not, which Mikael would send me by WhatsApp: his teaching in Jerusalem would also bring his academic advice to others in the late-night jazz venues in the city! His text messages from then include three important data points: a first notes that he is "just done with the conference"; the second is "Have you looked into where we are going to retire?"; and the third is, in quick succession, a legal document he found from the British Foreign Office. Look at these three texts as data: Mikael's first act on landing was to engage in rigorous scholarly engagement by delivering a paper; he remained throughout dedicated to friendships and planning with close colleagues and friends; and he always remained on the lookout for new empirics, for new ways to learn about international law; and he was always sure to share any new scholarly insights with a team. The iCourts ethos is, in my experience, embedded in these three little texts.

And if the story of iCourts, for me, is that it isn't just where you look for it, then it is because the iCourts that Mikael built cut across generations. I remember when, as junior academics, several of us sat around a large table, noting Bryant and Yves heading off to their own table! We were taken with the fun they were having, and I know that I wanted the same. Mikael and the group he assembled at iCourts harnessed that sort of scholarly

engagement, and fun, into building an entire scholarly field. And just today, a Zoom call to launch a new collaboration on global crimes and courts with a friend, met through iCourts, and students working with me at Toronto. We did it across continents, across courts, across generations, and across law and social science, in classic iCourts style. We worked on some of the most challenging courts and trials of our time. We thought about our own roles as researchers. And we had loads of fun on the call today too. iCourts isn't where you might think to look for it!

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Theorizing the Judicialization of International Relations

Karen J. Alter, Emilie M. Hafner-Burton and Laurence R. Helfer[*]

This article theorizes the multiple ways that judicializing international relations shifts power away from national executives and legislatures toward litigants, judges, arbitrators, and other nonstate decision-makers. We identify two preconditions for judicialization to occur—(1) delegation to an adjudicatory body charged with applying designated legal rules, and (2) legal rights-claiming by actors who bring – or threaten to bring – a complaint to one or more of these bodies. We classify the adjudicatory bodies that do and do not contribute to judicializing international relations, including but not limited to international courts. We then explain how rights-claiming initiates a process for authoritatively determining past violations of the law, identifying remedies for those violations, and preventing future violations. Because judicializing international relations occurs in multiple phases, in multiple locations, and involves multiple actors as decision-makers, governments often do not control the timing, nature, or extent to which political and policy decisions are adjudicated. Delegation – and the associated choice of institutional design features – is thus only the first step in a chain of processes that determine how a diverse array of nonstate actors influence politically consequential decisions.

International relations (IR) are now experiencing what has become the norm in many domestic systems: the judicialization of politics. International rules have long regulated a range of important topics – how and when war is waged, what barriers to imported goods states can impose,

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which nation owns islands and rocks in the sea, when and how borders shift, and how governments treat their own citizens. The extent to which these rules can be challenged in court, however, and the diversity of actors that can invoke and influence adjudication processes and outcomes, are novel, wide-ranging, and underspecified both theoretically and empirically.

Judicialization is the process by which courts and judges increasingly dominate politics and policy-making (Tate 1995, 28). At the international level, judicialization – where it exists – can diminish the sovereignty of states and the autonomy of their leaders.

Judicialization also creates a "profound shift in power away from legislatures [and executives] and toward courts and other legal institutions around the world." (Ferejohn 2002, 41) To be sure, this shift does not mean that officials cannot flout law – whether domestic or international. Rather, where government actions are subject to judicial review, the ability to label an act as a legal violation may mobilize rights-claiming and a turn to courts, producing outcomes that may be quite different from what the absence of judicialized politics would otherwise have engendered.

While judicialization has upsides, the loss of state control over political processes and outcomes may or may not be normatively desirable. The intervention of judges and arbitrators can foster neutral decision-making, help states to send credible signals, and help to resolve collective problems. Expanding venues for nonstate actors to influence politics can generate a sense of inclusion, fairness, and transparency. Yet, judicialized international relations can also be politics by other means, privileging well-resourced and law-savvy actors (Galanter 1974). It can thwart policies that have popular support and create legitimacy problems when judges and arbitrators cannot be held accountable for their actions. Under some conditions, judicialization can augment rather than diminish state power. And precisely because judicialization limits executive and legislative power and constrains domestic policies, it may contribute to backlashes against international regimes.

Whatever its normative valence, the judicialization of international relations has two institutional preconditions. The first is delegation. Scholars have thus far mainly analyzed the existence and forms of state delegation to international courts or arbitral bodies. We focus instead on the conditions under which adjudicatory institutions can shape real world political and policy decisions, demonstrating that treaty-based delegations are but one way to empower adjudicators and that states alone do not determine the content and scope of delegations.

A second, less studied, precondition for judicializing international relations is legal rights-claiming. One or more actors with standing must bring – or threaten to bring – a complaint to an adjudicatory body. The filing of such suits initiates a process for authoritatively naming legal violations, identifying remedies for those violations, and preventing future violations. We thus show that delegation alone is insufficient to explain whether and how adjudication influences domestic politics and international relations.

This excerpt of a longer article defines the theoretical and empirical elements of judicialization. We begin by identifying the defining features and range of adjudicatory institutions – including but not limited to courts— that contribute to judicializing international relations. We then theorize the effects of judicialization, identifying four phases of judicialization, and we classify the key strategies and decision-makers in each phase. We conclude by explaining how the overarching inights of this framework – *that states do not fully determine the content, scope, or impact of delegation or adjudication and that legal processes can diminish the role of executives and legislatures*— has important implications for the study of international relations and world order.

Judicializing Politics: A Trend (with an End?)

International law has long been relevant to international relations, even though international enforcement mechanisms are often lacking and international rules are sometimes violated. For example, Isabel Hull (2014) reveals that international legality concerns factored into British decision-making during WWI – long before the creation of most international judicial bodies. Abraham Chayes (1974) documents how, in the 1960s, when adjudication of US foreign policy decisions was an unlikely prospect, international law factored into the Kennedy Administration's closed-door strategic decisions during the Cuban Missile Crisis. Judicialized politics differs from these examples in that governments anticipate that international law violations will give rise to external review by an adjudicatory body.

Most of the comparative judicialization literature is court-focused. As the next section explains, in the international realm a broader array of adjudicatory bodies contribute to judicializing politics. In addition, these bodies often span institutions and borders, making it harder for the executive or legislative branch in any one state to control legal processes that they oppose.

Although judicialization is a global phenomenon, it is neither uniform nor static. There are issue areas where judicialization efforts were never tried or failed (Katzenstein 2014; Romano 2014b) and geographic zones where international judicialization is all but absent (Romano 2014a; Romano 2019). Moreover, we are witnessing a period of backlash against these trends. Political resistance to assertions of legal authority – both domestic and international – is hardly new (Alter 2000, 2018a; Helfer 2002; Greenhouse and Siegel 2011). But the current nationalist-populist backlash arguably has a broader resonance and impact than the reactions that preceded it. A strength of our framework is that it incorporates backlash as a type of feedback politics and explores its varied outcomes.

The scope conditions we define below allow us to observe the number and type of adjudicatory bodies, and the four-phase framework we develop helps to conceptualize the political dynamics that drive an expansion or decrease in judicialization. If the conditions for judicializing politics substantially change, we would expect judicialization to also change. The larger framework, described below, identifies the conditions that contribute to judicializing and dejudicializing international relations.

Scope Conditions for Judicialized Politics

The existence of adjudicatory bodies that can issue authoritative legal rulings is a necessary condition for politics to become judicialized. A central contribution of our project is to define the types of bodies that can produce this result. We identify four cumulative criteria, summarized in Table 1.

Table 1. Four criteria of adjudicatory bodies that can judicialize politics

1. Formal authority to decide concrete legal dispute between contesting parties
2. Independent decision-makers that apply preexisting rules and procedures to review facts, evidence, and legal claims
3. Reaches authoritative determinations of violations of law (binding or nonbinding)
4. Orders or suggests actions to remedy legal violations and prevent their recurrence

Any adjudicatory body that meets these four criteria is a potential venue for judicializing politics. Together, these four criteria establish decision-making dynamics that differ from political processes. Adjudicatory bodies

that meet these criteria can incentivize potential litigants to raise legal arguments, making their demands for policy change more credible and specific and generating additional pressures on states and national decision-makers to change their policies.

Since this definition includes national courts that hear cases with international law or transborder dimensions, as well as quasi-judicial bodies that do not issue legally binding rulings, our definition substantially broadens the number and range of actors and institutions that scholars have traditionally recognized as influencing politically consequential outcomes. The definition also helps to identify institutions that fall outside of these criteria – as might occur, for example, if the second element (independent decision-makers) is compromised – and issue areas, such as arms control, that are unlikely to be judicialized because no adjudicatory body fulfilling all four criteria exists.

Table 2 categorizes the types of institutions that do and do not satisfy the four criteria, describes their attributes, and provides additional examples. We emphasize that many familiar international institutions fall outside of this definition or occupy grey areas that meet some but not all of the four criteria.

International courts (ICs) are the most obvious and among the most studied institutions that fulfil the four criteria. The decision of states to delegate adjudicatory powers to ICs brings with it important and consequential design choices, such as which actors can file complaints, the criteria for electing or selecting judges, which international law violations judges can review, and the kinds of remedies they award. These design decisions affect whether and how the existence of an IC motivates rights-claiming for a particular issue. For example, if a court lacks compulsory jurisdiction or can only award limited remedies, this may inhibit whether the threat of litigation is credible and thus, in turn, whether actors mobilize to assert legal rights and judicialize the issue.

While states define key elements of an IC's jurisdiction and access rules, international judges have themselves expanded their reach by broadly interpreting these rules, enhancing their remedial powers, and diminishing the discretion of states and their officials (Weiler 1991; Burley and Mattli 1993; Alter and Helfer 2010; Huneeus 2013).

An often-overlooked category of adjudicators are national courts that hear cases involving violations of international law and transborder legal issues, such as the extraterritorial application of US securities or antitrust statutes, suits challenging Argentina's failure to repay its sovereign debt, or the enforcement of foreign judgments and international arbitral awards, including against states. In countries in which ratified treaties have auto-

matic domestic effect, national courts can review international law claims directly. In others, judges interpret treaties indirectly via implement ing legislation and by interpreting domestic statutes consi tently with international law.

International arbitral bodies are a third type of adjudicatory institution. Individuals, corporations, and governments often prefer private decision-makers to handle legal disputes, choosing arbitration over judicial venues. Some treaties make arbitration the default mode of dispute resolution. Many bilateral investment treaties, for example, authorize foreign firms to use international arbitration to challenge host-state regulations. Investment arbitration has been increasingly criticized, and Gins burg and Abebe identify states that have refused to consent to investor-state dispute settlement (Ginsburg and Abebe2019). Yet, there is an entire world of international commercial arbitration beyond the realm of investment disputes.

A fourth category comprises quasi-judicial bodies that are similar to ICs with one exception – they do not issue legally binding rulings. For example, the ten United Nations (UN) human rights treaty bodies review complaints against states by individuals and NGOs, issue reasoned decisions identifying violations, and recommend remedies (Hafner-Burton 2013). Although nonbinding, these decisions and recommendations can mobilize actors and influence political out- comes in much the same way as judicial rulings. A further expansion of quasi-judicial bodies, and of rights- claiming, has occurred at the domestic level via a network of National Human Rights Institutions, many of which allow individuals to file complaints challenging human rights violations committed by government agencies or officials (Linos and Pegram 2016; 2017). Quasi-judicial bodies are also found in other issue areas of international law, including environmental protection, finance, labor, and trade (Tignino 2016; Chiara 2017).

Table 2. Types of institutions that contribute to judicialized politics

Category	*Attributes*	*Examples*
Adjudicatory bodies		
International courts and tribunals	◦ Created mainly by state delegations in treaties ◦ Adjudicate complaints in disputes alleging violations of international law ◦ Issue legally binding rulings and advisory opinions ◦ May indicate remedies for violations	◦ International Criminal Court ◦ International Court of Justice ◦ International Criminal Tribunal for the Former Yugoslavia ◦ Appellate Body of the World Trade Organization ◦ Appellate Body of the World Trade Organization European Court of Human Rights ◦ East African Court of Justice
National courts	◦ Preexisting judicial institutions within a national legal system ◦ Adjudicate complaints in disputes alleging violations of international law, extraterritorial application of domestic law, or transnational contracts or torts ◦ Issue legally binding rulings ◦ Order remedies for violations	◦ National trial or appellate courts with jurisdiction over violations of international law or disputes raising ◦ transborder legal issues ◦ Specialized national courts with jurisdiction over international law or transborder legal issues (e.g., US Court of International Trade, criminal courts of East Timor and Kosovo, China's Belt and Road courts)
International arbitration	◦ Established by arbitral institutions or ad hoc ◦ Reviews disputes involving violations of international law or contracts with transborder aspects ◦ Issue legally binding awards ◦ Remedy for violations is usually monetary damages	◦ International Center for the Settlement of Investment Disputes ◦ Permanent Court of Arbitration ◦ Hong Kong International Arbitration Centre ◦ Ad hoc arbitration under the UN Commission on International Trade Law (UNCITRAL) Rules
Quasi-judicial bodies	◦ Created by treaties or Ios ◦ May perform both judicial and nonjudicial functions ◦ For judicial functions, review communications in disputes alleging violations of international law ◦ Issue nonbinding decisions identifying legal violations ◦ May recommend remedies for violations	◦ UN human rights treaty bodies ◦ NAFTA binational panels ◦ Complaint procedures of national human rights institutions ◦ Implementation Committee of Montreal Protocol on Substances that Deplete the Ozone Layer ◦ World Bank inspection panels ◦ Eritrea-Ethiopia Claims Commission ◦ ILO Committee on Freedom of Association
Non-adjudicatory institutions		
International political bodies	◦ Established by treaty or international organization ◦ Adopt resolutions and decisions applicable to member states	◦ UN Security Council ◦ UN General Assembly ◦ UN Human Rights Council ◦ Council of the European Union ◦ ECOWAS Council of Ministers

International investigation, compliance, and norm-development institutions	◦ Established by a treaty ◦ Review state party reports ◦ Document patterns of international law violations ◦ Investigate possible violations of international law ◦ Suggest new international legal norms	◦ International Atomic Energy Agency ◦ Conference of the Parties (CoP) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) ◦ International Law Commission's preparation of draft treaties
Mediation and conciliation bodies	◦ Assist states and private actors in amicably resolving disputes ◦ Do not issue a decision identifying legal violations	◦ WIPO Arbitration & Mediation Center ◦ Singapore International Mediation Centre ◦ Mediation and conciliation by National Human Rights ◦ Institutions, such as the South African Human Rights Commission
Administrative review bodies	◦ Created by a treaty or international organization ◦ Receive and review requests from nonstate actors ◦ Forward factual findings to other bodies for further review	◦ Prepare factual findings Do not identify legal violations ◦ Ombudsperson reviews of requests for removal from lists adopted by UN Security Council Sanctions Committees ◦ Factual records prepared by the commissions of NAFTA labor and

Table 2 illustrates several core insights of the judicialization framework. First, although some adjudicatory bodies are created by state delegations, many are not. Agreements to arbitrate, for example, may be the result of private contracting, and national court litigation of international or transborder suits often occurs without explicit state autho rization. Moreover, national courts and arbitral bodies may also apply domestic law or private contacts, diminishing the role of executives or legislatures in making decisions relevant to international affairs (Büthe and Mattli 2011).

Second, states do not fully determine the content and scope of the delegation. While states sometimes augment or shrink an IC's jurisdiction (such as by adding the crime of aggression to the Rome Statute), adjudicatory bodies themselves can extend a body's reach in ways that states neither intended nor anticipated. For example, many national legal systems, national courts may apply international law directly and give it primacy over domestic laws, a broad delegation that gives these courts considerable discretion (Verdier and Versteeg 2015). The existence of multiple venues also introduces an iterative dynamic to judicialized politics. Litigants can shift adjudication across venues, such as from ICs to arbitration, or quasi-judicial bodies to national courts, and litigants and judges may adjust their legal interpretations and strategies in response to the decisions of other

adjudicatory bodies (Helfer 1999; Hafner-Burton 2005a). This is another way in which judicialization can diminish state influence.

Third, the criteria and the list of nonjudicial bodies underscores the ways in which adjudication, and the politics it inspires, can be degraded. States can sometimes reassert control by tasking political bodies to make factual determinations about violations of international agreements or by creating specialized review mechanisms to siphon a class of cases away from existing international review bodies. In addition, mediation, conciliation, and internal administrative processes provide alternative approaches to resolve disputes that may not apply preexisting rules and procedures or may not be politically independent. These qualities contribute to the sense that politics, rather than law, shapes these processes.

Phases of Judicialized Politics

The two necessary conditions for judicializing international politics involve delegation to an adjudicatory institution and legal rights-claiming. Here, we focus on rights-claiming and the politics it engenders, analyzing and illustrating four phases of the process. As we explain, each phase turns on the decisions of different key actors, such as adjudicators, winning and losing parties, potential litigants, interest groups, and collectivities of states. Executives and legislators cannot determine when potential litigants engage in legal rights-claiming or how judges respond to their arguments because these actions, as well as compliance and feedback politics, can be affected by multiple factors beyond their control. The full length version of this article links each phase discussion to literature.

The transnational nature of adjudication involving international law illustrates why the judicialization of international relations is a different phenomenon than the judicialization of domestic politics. At the domestic level, executive and legislative branches can more easily reclaim a central, if not exclusive, role in politics. Populist leaders in Venezuela, Poland, Hungry, Turkey, and Russia have developed many techniques for doing so (Scheppele 2018). Yet, because the adjudicatory bodies we discuss exist outside of national legal orders, these strategies are more difficult to execute. This is in large part because other states, which are themselves often pressured by nonstate actors, may reject efforts to undermine international adjudicatory bodies.

In what follows we focus on politics within each phase. But we also explain the interactive effects across phases. Table 3 previews the four

phases and the key actors, strategies, and outcomes associated with each phase.

Shadow politics – the first phase – refers to mobilization, bargaining, negotiations, and responses generated by a plausible threat of adjudication. Such threats empower potential litigants and increase the risks associated with arguably illegal behavior, thereby shaping the incentives of actors and the voices of those with the law on their side. The primary actors involved in shadow politics include government agencies or officials that are potential targets of lawsuits or arbitration, as well as individuals, interest groups, firms, and states that assert legal claims, issue formal demands for policy changes, and engage in out-of-court negotiations.

The strategies that these actors deploy include framing rights-claims in legal terms, threatening adjudication, identifying adverse policy consequences linked to law violations, and offering settlements or adjusting policies to ward off litigation. For example, in Colombia both proponents and opponents of the peace accord between the government and the Revolutionary Armed Forces of Colombia – People's Army (FARC) rebels have used litigation threats and court challenges to bolster their respective arguments, mobilize supporters, and sway referenda on the peace agreement. The strategies, terms, and viability of recent peace accords in Colombia have also been shaped by the prospect of an investigation by the International Criminal Court (ICC), by litigation threats before the Inter-American Court of Human Rights, and by suits in Colombian courts alleging violations of international and domestic law (Huneeus 2018).

A different aspect of shadow politics involves efforts to avoid adjudication. Settlement may well be the most common – yet one of the least studied – manifestation of judicialized politics (Such bargaining can be akin to diplomacy and negotiation, occurring outside of public view, ever, in that a third-party adjudicator stands ready to review claims that the parties cannot resolve themselves. Politics may become judicialized even if the defendant does not recognize a legal threat as such; authoritarian leaders, for example, often dismiss the relevance of legal claims and adverse court rulings. But where international law violations can be adjudicated, even recalcitrant defendants often respond with a counter strategy designed to avoid, derail, or blunt the impact of adjudication.

Table 3. Four phases of judicialized politics

Phase	*Key actors*	*Strategies*
Shadow politics individuals, firms	◦ Litigants with legal standing (states, and/or NGOs or interest groups) ◦ Government agencies or officials ◦ Legal and other representatives of these actors	◦ Mobilize and frame claims and arguments using legal language and rights-claiming ◦ Engage in out-of-court negotiations with the threat of adjudication in the background ◦ Defensive actions to avoid or improve litigation outcomes
Adjudication politics	◦ Parties to the dispute ◦ Third-party interveners (e.g., amicus briefs) ◦ Adjudicators (judges, arbitrators, or members of quasi-judicial bodies)	◦ Litigants select cases, venues, evidence, and legal arguments ◦ Out-of-court defensive actions to influence adjudicators and shape adjudication outcomes ◦ Adjudicators choose interpretive rules, determine legal violations, and indicate potential remedies
Compliance politics	◦ Parties to the dispute ◦ Interest groups that favor or oppose compliance ◦ Government agencies or officials asked to comply with rulings	◦ Post-litigation bargaining ◦ Public amplification strategies (e.g., media campaigns, follow-on investigations, copycat suits) ◦ Follow-on enforcement proceedings before national and international courts ◦ Retaliation and issue linkages if noncompliance persists
Feedback politics	◦ Parties to the dispute ◦ Politicians and interest groups that want to expand or undercut future litigation ◦ Adjudicators in parallel legal bodies (judges, arbitrators, or members of quasi-judicial bodies)	◦ Spillover to issues presenting similar legal violations ◦ Modification of laws and institutions to generalize, preempt, hinder or weaken future litigation. ◦ Backlash: reframing and organizing countermobilizations against unwanted legal rulings ◦ Dejudicialization: states withdraw from or terminate a treaty or strip jurisdiction

Shadow politics raises important questions for international relations scholars: What makes some legal threats more plausible than others? Which actors seize on opportunities to press their legal claims out of court? Perhaps most importantly, when and how is the threat of adjudication enough to influence the behavior of powerful actors, such as multinational corporations, heads of state, or militaries?

Adjudication politics – the legal phase of judicialization— encompasses the factors, strategies, and consequences associated with the decision to adjudicate, including which suits are filed, the selection of venue, the gathering of evidence and presentation of arguments, and the decisions

of judges, arbitrators, and other adjudicatory bodies. Adjudicators become the dominant actors at this phase, and their independence becomes especially relevant (Brinks and Blass 2017). Because adjudicators determine the outcome of disputes, states must draw on discursive arguments, legal interpretations to shape judicial rulings, and out-of-court maneuvering, which may change the facts on the ground. Such arguments, and the interpretations they generate, can produce politically consequential and enduring outcomes.

We are only beginning to understand the reasons motivating the initial decision to adjudicate. Studies of specific systems and litigants are helpful beginnings, but we still lack systematic studies of adjudication strategies by the contesting parties. We also need greater clarity about whether these insights hold across different types of cases, litigants, and issue areas, as well as how the parties select among available venues, including less visible modes of dispute resolution.

Compliance politics – the third phase – refers to the strategies and actions of the litigants or other actors who press for or against adherence to legal rulings. Decisions by governments about whether, when, and how to comply with the law often shift once an IC or other third-party adjudicator has issued a ruling. By naming a certain policy or action as a violation, such rulings undercut the legitimacy of the condemned action. By specifying what compliance with the law requires, adjudication narrows the plausible arguments for maintaining a policy and creates a focal point for pressuring respondents (often states) to change their behavior.

Pundits often suggest that major policy changes necessarily – or likely – follow an adverse legal ruling. Scholars of judicial politics, however, know that the impact of legal rulings can be nonexistent, indirect, unintended, delayed, or difficult to discern (Rosenberg 1993). Numerous factors influence how post-litigation compliance politics unfolds. The key actors in this phase shift back to the litigants. Immediately following a ruling, losing defendants have a choice. They may accept the financial or political costs of continued noncompliance, agree to only symbolic concessions, or seek more time by creating an inadequate or feigned implementation response, as Japan did when it initially sought to define itself out of complying with an ICJ ruling (Butler-Stroud 2016). The choice among these decisions can trigger further litigation in which adjudicators are asked to declare additional remedies or to moderate the remedies they previously demanded.

Should the state fall short, a broader set of actors may mobilize to push for full compliance. States that did not participate in the litigation may retaliate, apply preexisting domestic provision that withdraw benefits (such as aid, market access, new agreements or political exchanges) so long

as the violation persists. NGOs can use the violation for mobilization and political leverage (e.g., with legislators and local officials). International institutions can factor the violation into their decision-making. Legal rulings may also be enforced in different venues, including domestic courts in countries where assets are held. All of these actions can increase the costs of flouting a ruling.

As this discussion reveals, compliance politics are much larger than the question of whether or not a state follows a particular ruling. This binary question is often far too simplistic, especially because compliance is often partial. The key analytical inquiry of this phase is whether, when, and how adjudication becomes a useful tool to promote respect for the law. Examining compliance may require that scholars recognize that the preferences of governments and other powerful actors are not always the only, or even the primary, factors shaping compliance politics and compliance decisions. Studying compliance politics helps to explain why judicialization shifts power away from executives and why political leaders respond to adjudication by making arguments and policy decisions that can have unintended or unanticipated consequences.

Feedback politics – the strategies and actions that follow from a legal victory or loss – reflect the fact that adjudication generates a precedent that can create a new political status quo. There are two forms of feedback politics. *Positive feedback* seeks to amplify a legal ruling applicable only to the parties into a larger policy change or to new legal obligation that is owed to all. *Backlash politics* tries to overturn a precedent, abrogate or circumvent a ruling, or avert future losses in similar cases. Although contestations over compliance may take months or even years to play out, feedback politics can take even longer, becoming fully evident only when publics inculcate a legal ruling, new actors enter the political arena, or legal entrepreneurs attempt to broaden the impact of a precedent (Alter, Gathii, and Helfer (2016); Madsen, Cebulak, and Wiebush (2018))

An example of feedback politics that includes both positive and backlash elements is the landmark 1980 decision of the US court of appeals in *Filártiga v. Peña-Irala*. That ruling included two provocative findings. First, the court revived a seemingly dead letter of American law, the Alien Tort Statute, to adjudicate human rights claims by foreigners. Second, the court held that the ban on torture was part of customary international law. The case laid the ground- work for the Torture Victim Protection Act, a 1991 statute that codifies the right to sue foreign officials who torture foreigners or US citizens and extends *Filártiga* to extrajudicial killings.[4]

Positive feedback and backlash effects may arise during other phases of judicialization, regardless of whether a complaint results in a final legal

ruling. For example, bargaining in the shadow of adjudication may lead to out-of-court settlements that enhance respect for the law or, alternatively, create new policies that eliminate the ability to file complaints. Adjudication politics may spread a single legal victory across a class of similarly situated actors or engender new complaints that elicit more expansive legal rulings. Conversely, such follow-on processes may lead adjudicators to narrow prior findings, limit remedies, or discourage future litigation.

Politics between and across the Four Phases

Studying the individual phases of judicialization sheds light on several understudied issues – how nonstate actors as well as states deploy international legal claims to bargain out of court, how adjudicators rule, and whether and how the parties comply with or resist new legal interpretations that international adjudication generates. While venues, actors, and politics at each phase differ, actors may attempt to build connections across the phases to achieve their goals. Since cases can settle at any time, there is no necessary progression from one phase to the next. But there are interactive effects based on expectations of events later in the process (Alter 2014, 59–60).

This discussion highlights a more basic point: decisions at any point in the adjudication process – from delegation, to the choice of whether to sue, and how, if at all, to comply with a ruling – can have effects that are neither direct nor immediate nor fully under the control of governments. Adjudication can shift the meaning of legal rules, providing a mode of policy and institutional change that may be easier to orchestrate because it does not require multilateral agreement. Legal rights-claiming and participation in adjudication can also deepen political commitments and lead to more fundamental changes in how actors conceive of their rights and interests (Goodman, Jinks, and Woods 2012; Goodman and Jinks 2013).

Transnational litigation of LGBT rights illustrates this point. The last two decades have seen numerous domes tic and international court rulings decriminalizing same-sex relations and requiring governments to recognize same- sex marriages. In addition to changing national policies in individual countries, the shadow of adjudication has shaped transborder strategies to promote LGBT rights. Helfer and Voeten (2014) document the effect of ECtHR rulings on LGBT rights in countries across Europe, including those whose laws were not subject to judicial challenge. LGBT advocacy is spreading to other regions. A 2018 Inter-American Court of Human Rights advisory opinion on gender identity and same-sex marriage

is already being implemented by national judges in Latin America(Contesse 2018; Thapa, Saurav Jung 2018), and a groundbreaking unanimous judgment of the Supreme Court of India cites to earlier pro-LGBT rulings to invalidate the country's colonial- era sodomy law, emboldening litigants to challenge similar laws across Asia and Africa (Suri 2018).

These examples of politics inspired or shaped by adjudication highlight how judicialization makes law a distinct kind of norm. Knowing more about the influence of these processes and nonstate actors, as well as how adjudicators navigate the discretion available to them, can help to better understand how ju dicialized outcomes differ from political bargains not refracted through the legal process. For example, does participation in legal rights-claiming and adjudication, and the results it generates, influence how state and nonstate actors frame and articulate preferences both inside and outside of court? When is framing a state action as a violation of international law (e.g., as a war crime or a human rights abuse) helpful and when is this framing counterproducive? Answering such questions may also contribute to scholarship on the spread of norms, knowledge, and ideas through legal processes, as well as to emerging behavioral studies that examine how the personal traits of individual political leaders, officials, and judges shape international relations.

When Judicialized Politics Matter

In the past, states relied on their own assessments of what actions international law requires. These assessments tended to be shaped by each government's material, political, and strategic interests, leading to self-serving interpretations that privileged national sovereignty. In contrast, where international politics is judicialized, litigation and litigation threats become tools of influence. Political leaders must factor in (1) how adjudicators may rule and (2) the material and legitimacy costs should their policies be found illegal.

The relevance of judicialization to international relations stems from its potential to empower new actors, to shift political disputes into legal venues, and to generate discursive and extralegal strategies to influence legal processes, and thereby to affect outcomes of high political salience—such as armed conflicts, territorial disputes, trade and investment, human rights, and societal well-being and development. Such influence does not require litigants to pass through all phases of judicialization or any particular phase, such as compliance with a legal ruling. To the contrary, it is possible for international relations to become judicialized in a meaningful

way – that is, for adjudicatory bodies to change politics and outcomes in ways that shift away from the preferences of states and their officials – at any phase. However, judicialization is not necessarily limited to particular issue areas, although it is more prevalent and more advanced in some policy spaces than others.

The importance of judicialization for international relations is a matter of degree. The phenomenon becomes potentially important when any phase of the process contributes to a shift in political dialogue, processes, or outcomes over which governments once had exclusive or primary control. Judicialization becomes increasingly politically salient as greater numbers and types of actors enter into the process at different phases, increasing legal rights-claiming and pressure for policy reforms – as has occurred, for example, when women successfully pressed for the prosecution of rape during wartime (Askin 2003) and for the investigation of mass rape by police(Ahmed 2018). It takes on greater importance when states or other powerful actors respond to rulings by paying compensation or providing other remedies. And it is most consequential when these actors adopt long-term changes on "matters of outright and utmost political significance that often define and divide whole polities" (Hirschl 2008, 94) —such as Brexit and the Colombian government's peace agreement with the FARC.

We stress, however, that judicialization is not a one-way phenomenon. To the contrary, politics can become dejudicialized. Ginsburg and Abebe (2019) focus on when states remove adjudicatory bodies from the political equation, but politics can also become dejudicialized when adjudicators lose their independence (Brinks and Blass 2017) and, more generally, when "legality" becomes less normatively or politically salient, leading governments to worry less about flouting law or legal rulings (Brunnée and Toope 2017). Meanwhile, dejudicialization may occur alongside rejudicialization. For example, several developing countries have recently withdrawn from treaties that allow foreign corporations to seek international arbitration to challenge domestic policies as violating international investment law (Peinhardt and Wellhausen 2016). But this trend has also contributed to new judicialization proposals, including the European Union's push to create a Multilateral Investment Court and China's Belt and Road Initiative to create new judicial mechanisms for adjudicating commercial disputes relating to Chinese investments. Similarly, frustration by African political leaders with the International Criminal Court has generated exit threats and actual withdrawals from the Rome Statute, but it has also led to the Malabo Protocol, which will create a criminal law chamber for the

proposed African Court of Justice and Human Rights, and it may spur national judges to launch their own war crimes prosecutions.

Conclusion

The advent of judicialization beyond national borders marks a fundamental shift in international relations. Whereas in the past foreign ministries may have decided whether and how to advance the legal claims of their nationals, today firms, citizens, and countries are increasingly turning directly to adjudicatory bodies in the hopes of eliciting a legal ruling that vindicates their position. Although some have argued that this shift is permanent, recent events reveal that some governments have responded by mobilizing political resources and strategies to defend their interests. In addition, populist revolts against European integration and globalization more generally may have been exacerbated by the strength of the courts associated with the EU and the WTO and the international arbitral tribunals that hear investor- state disputes by foreign corporations.

These politics may take a long time to fully play out, so that the ultimate impact of international adjudication may not be immediately apparent. For example, China's entry into the WTO and its acceptance of the obligation to adjudicate trade disputes has had many downstream political effects. The United States no longer uses the threat of withdrawing most favored nation market access because China disrespects the human rights of its citizens. The binding and legally enforceable nature of WTO trade rules has constrained responses to increased Chinese imports, contributing to the US and European strategy of negotiating new trade agreements outside of the WTO framework (Dür and Elsig 2015), to the invocation of national security as a justification for limiting imports, to the current US policy of blocking appointments to the WTO Appellate Body (Shaffer, Elsig, and Pollack 2017), and to a populist backlash against trade liberalization. In 2018, the United States announced its withdrawal from a 144-year-old postal union treaty, because this treaty provides discounted small package shipping rates for Chinese goods sent to the United States(Thrush 2018). The WTO also creates a potential platform for China to take up the mantle of multilateralism that the Trump administration is shedding. These events are not wholly determined by the judicialization processes we discuss. Yet, it is nonetheless the case that the legal rights and obligations associated with China's WTO membership – and the fact that these rights can be judicially enforced – have been a global political game changer.

The overarching insights of the judicialization framework – that states do not fully determine the content, scope, or impact of delegation or adjudication and that legal process can diminish the role of executives and legislatures – has impor tant implications for the study of international relations. A key implication is that some of what the law actually does takes place in the shadows. The mere threat of adjudication can prompt mobilization, bargains, and negotiations in ways that shape political decisions without any formal legal actions – a fact that has gone largely unnoticed by traditional international relations theory, which tends to focus on actual disputes and their settlements. This Thematic Section thus opens up a whole new range for the study of legal influence.

Moreover, the adjudication process itself, once it has kicked in, brings a range of new actors that have not traditionally been the focus of international relations theorists. Alongside states and their well-studied branches of government are many other actors, such as judges and arbitrators, that interject themselves into what traditionally have been considered state matters. Thus, for debates over compliance, looking simply to immediate state-driven out- comes may miss an essential element of law's influence. Legal scholars have long understood that law is a process; interjecting this insight into the study of international politics can – and should – change the way we study what legal institutions actually do and how they help or hinder different actors and actions.

Adjudication – and its very possibility – shapes legal discourse and state and international decision-making. More broadly, the "practice of legality" imparts a stability and a universality to international law that, at least in some circumstances, limits the extent to which the whims of executives are accepted within a single society or diffused around the world (Brunnée and Toope 2018). The constraints of this stability may be limited, as, for example, when President Trump follows prescribed legal steps to execute decisions to withdraw from international agreements or to levy tariffs, thereby avoiding litigation over alleged abuses of presidential authority (Nexon and Cooley, forthcoming). Yet, the "stickiness" of legal processes may also mean that, in the long run, Trump will fail to change the international institutions or laws he dislikes, avoiding a major disruption of the existing multilateral order.

We do not dispute that power undergirds laws and legal practices, such as those concerning the use of force and the pursuit of vital national interests. But the interests of great powers cannot explain all externally oriented national and international behaviors. It cannot explain why international laws do not maximally advantage hegemonic interests, why human rights advocacy has developed specific understandings of legal rights-claiming,

why firms and bankers worry about and respond to legal regulations, or why national judges decide cases by applying settled principles of legal interpretation that ignore guidance from political actors.

This does not mean that state interests no longer matter; indeed, the more powerful a state is, the better it may be able to deflect legal processes or harness law as another tool in its arsenal (Kittrie 2016). But it does mean that state interests may be shaped, limited, and channeled by adjudicatory bodies and nonstate actors in ways not yet fully understood. This Thematic Section sets the stage for future research by theorizing the concept of judicialization as broader than adjudication by international courts and as beyond the control of executives and legislatures and by introducing some of the mechanisms and modalities by which judicialization can shift power away from states in ways that may – or may not – be reversible.

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Our iCourts experience

Karen J. Alter

Reflections on my collaboration with iCourts

Working with iCourts has become one of my greatest professional joys. Mikael and I had started to collaborate before iCourts was created. Our first pre-iCourts collaborative effort was actually a Bourdieu focused project (no surprise for Mikael, of course), focused on the separated-at-birth founding of Europe's Court of Justice and Court of Human Rights. Although that project collapsed, the founding of iCourts took our collaboration to a whole new level.

Mikael's original plan was that I would move to Copenhagen. Because of this plan, I was added to the initial application and thus I was part of iCourts from the very beginning. Shortly after receiving the Danish National Research Centre award, Mikael met me in Berlin to brainstorm iCourts and my involvement. I was at the first staff meeting with the Danish National Research Council, 7 December 2011, where we discussed how important it would be to have a permanent staff that set a tone, and many ideas that were later implemented were envisioned at that meeting, including interdisciplinary collaborations, a working paper series, retreats, the science b-b-q, the summer Phd institute, an inter-disciplinary dual Phd degree, and collaborative projects that draw scholars from around the world.

Imagining is one thing. Realizing something that depends on collaboration is something else entirely. Mikael wanted iCourts to be a physical space where everyone who studies international courts would pass through and spend some time. He had the energy, vision, wisdom, temperament, and political skills to build a supportive and productive intellectual community. There were bumps along the way, but each time the iCourts family pulled together, finding workarounds and informal solutions for every problem that arose.

iCourts has always been an out of the box place, and this helped me to imagine bigger. Sometimes Mikael would creatively interpret the rules to work around blockages, but mostly iCourts took full advantage of creative license. For example, when researching backlash politics in Africa, we knew that no one would speak to us directly about backlash efforts.

Mikael supported our idea to hold a workshop in South Africa with practitioners, no papers, and a rather fuzzy list of topics, all focused on the value added of African regional courts. The idea was research in the form of a conference, with a dual mission of bringing the people we wanted to interview to us, while introducing iCourts to African lawyers, scholars, and key regional and governmental officials.

Another out-of-the-box experiment involved hiring an in-house data-guy (Yoannis) to make iCourts a data resource center, even if all involved were not yet sure of how the data might later be useful. Yoannis assembled an amazing collection, including scraping a set of legal rulings that came complete with information about lawyers and the filing process. I could then ask for every ruling that mentioned a complicated cigarette litigation. This data will be a gift that keeps on giving. Someday, someone could even trace the legal advisors if they so wished.

The good will that iCourts built within and outside has made iCourts a destination for scholars working on international courts. The plan was always to be committed to methodological innovation, to empirical and fact-driven research, and to mixing research with good food and fun. This mixture is a key attraction. Once you become part of the iCourts family, you stay a part. The many inventive titles (the oxymoronic title of a "permanent visiting professor" was Northwestern's unfortunate contribution), and the various types of affiliations (professors with special responsibilities, and global research fellows), were Mikael's way of keeping people attached to iCourts. More fundamentally, however, iCourts realized its vision of becoming an interdisciplinary research institute with open-minded scholarly objectives.

iCourts has run multiple collaborative projects. Whereas many edited volumes feature faculty presenting work they are already doing, we could get people to play in our sandbox, drawing on their backpack of knowledge. By collectively theorizing, by being responsive to the feedback we received, and by being open to findings that cut against our theory, we generated a collective stake in figuring out if and how the theoretical ideas provided new insights on topics the many collaborators already knew. This collective theorizing inevitably spurred an additional search for data that might confirm or disconfirm our hunches. The result was true original interdisciplinary collaborative research.

Many people have pitched in to make iCourts what it is. Part of Mikael's genius is that everyone is tasked with helping the Center work. Phd students and visitors have been called upon to make sure that future visitors did not face the challenges that the first international visitors faced. The Dean's office provided crucial support, as did a small team of collab-

orators inside and outside of the University of Copenhagen, all sharing our most scarce and sacred resource- our time and energy. Collaborative projects were always treated as incubation exercises that should involve junior scholars and doctoral students. Senior scholars who visited and engaged were later asked to sit on Phd committees or Phd defenses. This spirit of collaboration and giving has a multiplier effect. Many visitors and judges have spent time helping others on the assumption that everyone who we help will some day do the same for others. Students benefited, but so did all of us who have been part of iCourts. Creating the many means for practitioners and senior scholars from around the world to help improve the research of an extremely international group of young scholars been a gift that iCourts has given to mentors and to students.

All of this is adding up to the same rather simple but not all that common observation. iCourts is fundamentally productive. Mikael and the team of full-time staff keep the administrative part in the background, so that the foreground is always focused on research in a real way. Scoring points, bashing others, pieties to this or that scholar (ourselves included), and the 50th study on topic X are a waste of time and energy. Let's get to the real stuff, and be willing to go wherever our interest and creativity can take us. This focus on productive innovation is why senior scholars devote their time, repeatedly. Every visit energizes me, and I know that others agree. I am energized because at iCourts I learn new things, I meet people who are unafraid to take risks or to try new things, and I can encourage and help others to reach higher and to make their research better.

I know that I am not supposed to write a tribute to Mikael, yet I can't help but do so. I too have research, language, collaboration, and project management skills. But Mikael's management and mentoring skills are simply exceptional. The positivity, the productivity, and the commitment to excellence attracts and builds success to the point that iCourts is almost too productive. iCourts is almost too productive and successful insofar as there are only so many hours in a day, and Mikael is also a father and an active researcher in addition to being Centre director. Yet too much success, and the pressures and challenges this engenders, are truly gourmet problems.

My scholarly goal when I started studying comparative international courts was to elevate the debate while leaping over and moving beyond unproductive eddies. Mikael helped to achieve this goal through his generous engagement with scholars. Students, visitors and junior faculty sense that iCourts leaders want everyone to succeed, and that they know how to generate success. Mikael's track record of helping others publish, win grants and find jobs, and thus build their own success, is truly impressive.

iCourts mainly builds and succeeds through the attraction of new empirics, persuasive arguments, and fresh thinking. Alone none of us could have generated the success that is iCourts. But together, especially with Mikael's exceptional management and leadership, the Centre has managed the all-to-rare feat of becoming greater than the sum of its parts.

As Larry Helfer writes, iCourts emerged perhaps when the proliferation and influence of international courts was at a peak. For scholars, studying a rise and a decline can both be of interest. In this sense, the perception that IC influence is diminishing, a view proffered by skeptics, nationalists and sovereigntists to generate a self-fulfilling prophesy, has never per se been a problem for the iCourts research enterprise. Yet given that iCourts scholars have also invested in historical analysis, we have a long memory. We remember that we have been here before, which is to day ICs and international institutions have weathered political storms and battles of political titans before. That said, nothing attracts scholarly attention or funders like political success. So it is surely true that to some extent the success of iCourts is related to the visible success of international courts as they adjudicate important issues and produce high stakes rulings. Since student interest, research funds, the allocation of scarce publishing space tend to follow whatever seems to be news-worthy and important, we can expect the size of iCourts to decline as interest in ICs declines. Given what I wrote above, a modest reduction of interest in being and working with iCourts will mean that iCourts does not have to make breadth versus depth trade-offs where scarce time is spread thin.

Institutions are hard to kill off, and ideas never die. The idea of using international courts to develop international law, and the resource that international adjudication provides as a slow-time-release capsule for international law with a built in safeguard (a state's ability to ignore an IC ruling) may become less relevant in the moment, but it remains a background condition of international law and politics. The analogy I use is sleeping beauty. We have learned a lot about what happens with politics and international adjudication push in the same direction, and what happens when they do not. Ebbs and flow are a natural part of politics, which in some respects is inevitably cyclical. After all, change requires viewing the past as a not so nice place to be, and imagining a future that is more desirable. We happen to think that the contribution of international courts is to this day underappreciated. The politics will change, at which point the many insights iCourts has created will provide valuable material, even if it is both historical and future-oriented material.

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Laurence R. Helfer

It's hard to believe that nearly a decade has passed since my friend and coauthor Karen Alter told me about a new center in Copenhagen devoted to the study of international courts. I was unsure what to expect when I first visited iCourts, then comprised of a few sparse offices clustered around a large white conference table on the second floor of an old university building in the Latin quarter. But even a brief meeting with Mikael Madsen made two things clear to me: Mikael had big, bold plans for the center and I wanted to be part of them.

So began one of the most productive and enjoyable collaborations of my academic career. iCourts has been my second professional home and it has supported and enriched my scholarship in innumerable ways: conferences of academics, judges, and attorneys; field research to understand the origins and evolution of lesser-known courts in Africa and South America; co-editing *International Court Authority* with Mikael and Karen, and co-authoring *Transplanting International Courts* with Karen; teaching in the Summer School; and serving on hiring and PhD committees. I was also proud and humbled to receive an honorary doctorate in law from the University of Copenhagen in 2014.

Perhaps more than all of these, the most rewarding part of being a permanent visiting professor at iCourts has been the ongoing conversations with faculty, post-docs, PhD students, and staff. For many visits, I came to the Center directly from the airport after a long flight from the U.S., happy to spend the day (fortified by numerous cups of capsule espresso) discussing research agendas and draft papers with colleagues, to be followed – in typical Danish style – by an excellent dinner and drinks! The hard stop on travel that COVID-19 imposed in March 2020 came, disappointingly, just days before a workshop in Copenhagen. But even a global pandemic could only delay the completion of a second iCourts symposium in Duke University's *Law and Contemporary Problems* journal.

The Center has helped to launch the careers of many academics in law, political science, and sociology. Its network of collaborators and alumni is extensive, and its intellectual footprint is broad and deep. It has been a privilege for me to serve as a mentor to several of these scholars and to assist in advancing their careers, both at iCourts and other universities.

The environment in which international courts operate has shifted dramatically over the last decade. The judicialization of international relations was central to the post-Cold War Zeitgeist – part of a commitment to building the international rule of law and peacefully settling disputes. Although no one knew it at the time, iCourts was born just as that hopeful

era was coming to a close. Today, international adjudication is far more politically contentious. Even judicial stalwarts such as the European Court of Human Rights and the Court of Justice of the European Union face significant challenges. Mikael and the scholars he has brought into the Center have documented, analyzed, and publicized those threats and suggested strategies for international courts to pursue as they navigate this fraught and unstable terrain.

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The Rise of the Neo-Hobbesian Age: Thirty Years Since the Fall of the Berlin Wall

Achilles Skordas

"Die Heimatlosigkeit wird ein Weltschicksal"
Martin Heidegger, Brief über den Humanismus

I. The Age

In the night of 9. November 1989, history was reset. But none of those who have kept these moments in their memory could have imagined how the 21st century would look like.

Thirty years later, the world is an unfamiliar and uncanny place. Unlike the Cold War, no global dividing line between States exists, but the prospect that major and bloody conflicts may occur is not a fantasy, but a real possibility; still, this is not the main feature of the time. The multitude of conflicts obscure the clarity of view towards the greatest political and social dilemmas of our Age, just as the visibility of distant parts of the Universe is distorted by the cosmic dust. It is worth making an effort to reconstruct this question.

When the "real socialism" was overwhelmed by the irresistible forces of functional differentiation,[1] the abrupt end of the *Hobbesian* "short 20th Century" created a temporary euphoria and elation that obscured the slow and silent rise of a darker reality. The liberation from the intellectual and psychological constraints of the Cold War obfuscated the clarity of observation and interpretation of events. Many initially mistook the new world order as an enlightened *Kantian* era of human rights, then as a global market *Lockean* style. In the 1990s, most did not notice the disturbing signs, even though the conflicts in Yugoslavia and Rwanda created a sense of foreboding for things to come.

The new millennium started in the shadows of the "war on terror", but the overall picture of the world is far more complex. The 21st century

1 See the excellent monograph by *N. Hayoz*, L' étreinte soviétique, 1997.

is not a *Hobbesian* era dominated by the friend/foe distinction. The ideological, bifurcated, and totalizing character of the Cold War corresponded to that model. The confrontation between East and West constituted a state system defined by the struggle and enmity between the two incompatible models of world society, which is not the case in our time.[2]

The Neo-*Hobbesian* Age rose gradually from the backstage, before the public could see its broad contours. As to its character and code(s), it still eschews a precise definition and understanding. Instead, there is a plurality of deep and fragmentary antagonisms and enmities of geopolitical, geo-economic, geo-religious, racial, and sectarian order that keep the world in a constant state of irritation. Systemic forces and interests occupied the space creating an idiosyncratic mix of global order and global disorder. Existential risks and environmental anxieties add to the feelings of abandonment and alienation. Instead of the fear of total annihilation of the Cold War, angst and demand for human security are nowadays the new normal. Systems and bureaucracies, complexities and contingencies, add to the picture and make it even more unintelligible. But there are also normative projects, technological advancement, and multiple processes of deep integration and governance on a planetary scale that offer hope that things are not as bad as we think.

A final battle between good and evil is not on the agenda, even in our conflict-laden world society. What defines the Neo-*Hobbesian* Age is rather the uneasy and occasionally messy symbiosis between the two faces of a *Janus*-like reality. The first is about persons: perceptions, ideas, feelings, existential dilemmas, unpredictability, spontaneity, angst, as expressions of the cycle of life and destruction. The second is about systems and structures: cyberspace, social media, big data, Great Powers, global surveillance, algorithms; this is the contemporary Leviathan.

II. Conflicts and Normative Projects

The categorization of contemporary sites of tension or conflicts is necessarily fuzzy. We can distinguish at least six categories: (i) geopolitics in broad sense,[3] (ii) international and non-international armed conflicts,[4] terrorism,

2 See generally *O. A. Westad*, The Cold War – A World History, 2017.
3 See IISS, Strategic Survey 2018 – The Annual Assessment of Geopolitics, 2018.
4 See IISS, The Armed Conflict Survey 2019, 2019.

and political Islam,[5] (iii) anti-globalization conflicts between winners and losers in the transition from Fordism to the New Economy",[6] taking the form of the so-called "populist movements",[7] (iv) identity clashes linked to gender and race,[8] and (v) controversies between Global North and Global South. A sixth set of conflicts are innate to social systems, whose rationalities deviate from, and collide with, each other.[9]

Resentment and *thymos*,[10] risk,[11] and angst are key components of the Neo-*Hobbesian* Age and, combined together, they foment conflict and maximize their scope. However, none of these forms of conflicts has been able to dominate and draw the others within its orbit, as it had happened during the Cold War. The rise of China and the formation of a new variation of capitalism "with Chinese characteristics" has led to harsh and intensified antagonism with the West, but so far has not been able to create a global model. A strong international followship is not on the horizon, at least for the time being.

Social norms positively mark a possibility that should be realized.[12] This is why a normative project as a system of norms with a purpose emerges in connection with existing political and economic structures, and marks a path of action in a certain direction. The Cold War offers again the model for normative mega-projects: the choice between liberal democracy and communism has been the archetype of competing projects with global ambition.

In the Neo-*Hobbesian* Age, equivalent projects appear to be lacking. This is not only a matter of intellectual scope and construction, but equally an issue of social dynamic. The civil rights and human rights movements

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5 See recently *S. Schröter*, Politischer Islam – Stresstest für Deutschland, 2019.

6 *T. Iversen/D. Soskice*, Democracy and Prosperity – Reinventing Capitalism through a Turbulent Century, 2019.

7 *C. Koppetsch*, Die Gesellschaft des Zorns – Rechtspopulismus im globalen Zeitalter, 2019.

8 *F. Fukuyama*, Identity – Contemporary Identity Politics and the Struggle for Recognition, 2018; see also *F. Fukuyama*, Against Identity Politics – The New Tribalism and the Crisis of Democracy, Foreign Affairs 97 (2018), 90 et seq., and the relevant discussion by *S. Y. Abrams/J. Sides/M. Tesler/L. Vavreck/J. A. Richeson/F. Fukuyama*, E Pluribus Unum? The Fight over Identity Politics, Foreign Affairs 98 No. 2 (2019), 160 et seq.

9 From the area of international law, see *A. Fischer-Lescano/G. Teubner*, Regime-Kollisionen – Zur Fragmentierung des globalen Rechts, 2006.

10 *P. Sloterdijk*, Zorn und Zeit, 4. Aufl. 2016.

11 *U. Beck*, World at Risk, 2009; *N. Luhmann*, Risk: A Sociological Theory, 1993.

12 *Möllers*, Die Möglichkeit der Normen – Über eine Praxis jenseits von Moralität und Kausalität, 2018, 13 et seq., 131 et seq., 155 et seq.

flourished in the context of the Cold War, creating in the 1960s and 1970s the intellectual and social foundations for the democratization of West and the bankruptcy of the communist project. The peace movement, the free speech, the sexual revolution, and the civil rights movement subverted the foundations of deeply conservative societies and rocked the world.[13]

Prima facie, these movements have declined, if we judge them with the criteria of the Cold War. The human rights movement is less successful as a normative project for the democratization of contemporary autocracies, as long as such regimes enjoy a significant degree of popular support. Peoples and individuals continue to fight for human rights and democracy around the world, but it is a trench warfare rather than a social and political revolution.

However, the ideas of human rights and equality are far more successful, seen from a perspective more apposite to our era. In the shortest possible of historical times, they succeeded in revolutionizing the culture of mutual recognition of human beings and in redefining the social system of interpersonal relations and private life, including marriage. So perhaps it is not only about the classical idea of "revolution" and subversion, but also, and primarily, about the relationship of human beings among themselves and with the world. This turn shows the path towards the idea of destiny and the normative projects associated with it.

III. Destiny

Indeed, there is something bigger happening in our time, whose significance exceeds by far the developments and struggles in previous moments of modernity. As the question of climate progressively dominates the political agendas and the public discourse, a new generation of normative projects is emerging, and they are linked to the destiny of humankind.

The question of destiny was framed in a unique way by *Martin Heidegger* in his "Letter on Humanism", addressed originally to the French philosopher *Jean Beaufret* right after the War (1946).[14] This is not the place for a discussion of the complex concepts of *Heidegger's* philosophy, but some aspects of his thought can elucidate, even metaphorically, the questions dealt with here. In the Letter, *Heidegger* de- and reconstructed the idea

13 See, for instance, *P. Berman*, A Tale of Two Utopias, 1996. See also *S. Moyn*, The Last Utopia – Human Rights in History, 2012.

14 *M. Heidegger*, Über den Humanismus, 10. Aufl. 2000.

of humanism, by reinterpreting his previous work, in particular "*Sein und Zeit*".[15] In his paradoxical rejection of metaphysics but acceptance of "transcendence", he recreates a new form of humanism in big format. In his understanding, destiny (*Geschick* or *Schicksal*) features the extraordinary moments of history, and is linked with the idea of *Sein* (Being).

Heidegger distinguishes between *Sein* and *Seiendes* (entities, including human beings). His main line of critique is that humanism has focused almost exclusively on the metaphysics of *Seiendes*, and ignored the big question of the meaning of *Sein*. *Sein* (or *Seyn*) is for *Heidegger* the great primeval and impersonal force, which awakens humans through the clearing of the view (*Lichtung*).[16] Thus, he makes a fundamental distinction by separating humans from nature – a point of major significance for environmental policies. *Heidegger* rejects the idea of a human being as an *animal rationale*, stating that humans exist in the world (*in-der-Welt-sein*) as *Dasein* (being-there), whilst animals are "tied up" (*verspannt*) to their surroundings (*Umgebung*).[17] By "being-in-the-world", *Heidegger* meant "a self-reflective consciousness even of a rather primitive awareness", which is enlarged as humans extend their horizon.[18] Humanity is "ek-statically" open to *Sein* and to the clearing by *Sein*.[19] *Sein* is "*transcendens* par excellence (*schlechthin*)", because it extends to, and enlightens humans.[20]

As humans are "thrown in the world" and *Sein* has been falling into oblivion, homelessness has become a world destiny.[21] Homelessness and alienation are features of modernity and post-modernity. *Heidegger* rejects the existing versions of humanism, because, in his perspective, none of them highlighted the real dignity of humanity.[22] Humanity is for *Heidegger* "the shepherd of Being"[23] and the language is "the House of Being".[24]

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15 For an analysis of the Letter see *D. Mende*, Brief über den Humanismus. Zu den Metaphern der späten Seinsphilosophie, in: D. Thomä (Hrsg.), Heidegger Handbuch, 2nd ed. 2013, 216 et seq.

16 On the meaning of the bifurcation "Lichtung/Verbergung", see *A. Kern*, Der Ursprung des Kunstwerkes – Kunst und Wahrheit zwischen Stiftung und Streit, in: D. Thomä (note 15), 134 et seq.

17 *M. Heidegger* (note 14), 18.

18 *M. Gelven*, A Commentary on Heidegger's Being and Time, Rev. Edition, 1989, 57.

19 *M. Heidegger* (note 14), 42.

20 *M. Heidegger* (note 14), 29.

21 *M. Heidegger* (note 14), 31.

22 *M. Heidegger* (note 14), 22.

23 "Der Mensch ist der Hirt des Seins", *M. Heidegger* (note 14), 23.

24 "Die Sprache ist das Haus des Seins", *M. Heidegger* (note 14), 5.

Humanity's ek-static ek-sistence[25] is open to *Sein* and is experienced as "care" (*Sorge*).[26] Instead of history as sequence of events and developments, destiny indicates the moments of epochal change and great decisions.[27]

Heidegger has been considered as a technology sceptic, but his standpoint is more nuanced. In his lecture "*Der Satz der Identität*" (1957) he described the momentous historical rupture (*Ereignis*), where technology (*Ge-Stell*) embodies the "belonging-together" (*Zusammengehören*) of humanity and *Sein*.[28] This is a core element of some of the thoughts to be further presented.

Heidegger's thinking can serve as the point of departure for reformulating the two great normative projects of the Neo-*Hobbesian* Age in terms of human destiny. First, human dignity is not limited to respect for the human person and his rights, but is also a reference to human destiny. Destiny is visible in the great historical turns, such as the Axial Time, postulated by *Karl Jaspers*,[29] the post-medieval Enlightenment and, in our Age, possibly of new Enlightenment whose message is yet to be felt. *Heidegger* calls us not to focus on the ephemeral, but to observe the marks and paths witnessing the presence of humanity in history. Therefore, normative projects defining our time cannot be based on legitimate, but fragmentary, issues, demands, or claims, but on themes affecting the humanity as a whole. Thinking only in terms of interstate conflicts, nationalisms of all kinds, Great Power antagonisms, or civil society entitlements, leads to forgetfulness and distraction from the even bigger themes of our time. The Neo-*Hobbesian* Age marks the irreversibility of homelessness as a world destiny. Humanity is separating itself painfully, but almost imperceptibly, from the familiarities and safe routines of fixed historical existentials.

Second, humans exist "in the world", where all meaning is articulated, without being necessarily constructed as rational thinking. According to *Luhmann*, the "world" draws the horizon of all meaning, and

25 "Ek-statische Ek-sistenz" is a neologism of *Heidegger*, indicating the links between ecstatic openness, existence, and clearing.

26 *M. Heidegger* (note 14), 23.

27 "Daher die Rede von Epochen des Seinsgeschicks. Epoche meint hier nicht einen Zeitabschnitt im Geschehen, sondern den Grundzug des Schickens": *M. Heidegger*, Zur Sache des Denkens, cited by *R. Lüfter*, Heidegger und die Frage nach der Geschichte, 2012, 194 et seq.

28 Cited by *S. Münker*, Die Postmoderne – Lyotard, Vattimo und die Idee der "Verwindung der Moderne", in: D. Thomä (note 15), 467. For the meaning of "Ereignis", see *G. Seubold/T. Schmaus*, Ereignis – Was immer schon geschehen ist, bevor wir etwas tun, in: D. Thomä (note 15), 335 et seq.

29 *K. Jaspers*, Von Ursprung und Ziel der Geschichte, Gesamtausgabe Bd. I/10, 2017.

enables specific selections in view of other possibilities.[30] Or, for *Rossbach*, "world" is an almost "mystical" and unmarked space, representing the "one-ness", before any distinctions through social communication were made.[31] Notwithstanding the conceptual differentiations, there are two alternatives available: one based on the nature of humanity as an ultimately "earthly" being, growing in the "world", but always remaining within the bounds of territorial space, and another one where humans are defined by a "world" that opens an unlimited horizon within which they can evolve and deploy their communicative capacity, their ambition and ability to survive in artificial environments of any kind.

There are two corresponding normative mega-projects: For the first, we can use the term Mother Earth and for the second, Cosmos.

IV. Project 1: Mother Earth

"Mother Earth" is a term used already by *Michel Serres* in 1992,[32] but has become a major point of reference in the recent Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Report on Biodiversity.[33] The Report develops a concept for the restoration and conservation of nature, along with transformative social changes, including issues of inequality and justice.[34] It links the core concept of Mother Earth with comparable concepts of indigenous peoples, by stating, for instance, that

> "Aymara and Quechua communities in the Andes, as groups elsewhere using this or other terms, conceptualize Mother Earth as a self-regulatory organism representing the totality of time and space and integrating the many relationships among all the living beings".[35]

Mother Earth is the opposite of perceptions linking territory with nationalism or resource exploitation. This is a project of global society and regional spaces, aiming to redefine freedom in asceticism.

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30 *N. Luhmann*, Systemtheorie der Gesellschaft, 2017, 631 et seq.
31 *S. Rossbach*, "Corpus mysticum" – Niklas Luhmann's Evocation of World Society, in: M. Albert/L. Hilkermeier (eds.), Observing International Relations – Niklas Luhmann and World Politics, 2004, 44 et seq.
32 *M. Serres*, The Natural Contract, 1995, 122.
33 IPBES/7/10/Add. 1, 29.5.2019.
34 IPBES (note 33), Summary for Policymakers, para. D3.
35 IPBES (note 33), Chapter 2.1, 35.

There are other related concepts in a variety of academic fields and policy discussions, including in law, such as Anthropocene,[36] Gaia,[37] Contract with Nature,[38] or Earth jurisprudence.[39] The underlying commonality of these views and constructions is an explicit critique of industrial society. These opinions are often supported by official reports of international organizations, demands of political parties, and governmental action. The activism of radical lifestyle changes propagates restrictions on free trade, consumption, travel, flying, or driving,[40] and the creation of a "green economy". For instance, in its latest report, the Intergovernmental Panel on Climate Change (IPCC) considered the positive effects of reducing the consumption of meat, dairy products and eggs in the European Union by 50 %.[41] These are parts and parcels of a comprehensive normative project for the radical transformation of contemporary society.

Religious, moral, and ethical points of view,[42] but also animist conceptions,[43] and the idea of "good life", play an important part in this project. Moral communication leads to strong disputes, because it brings respect and disrespect into expression, and can therefore augment the potential for strong polarization and perhaps violence. Moreover if this project ever takes a clear anti-modernist turn, which is by no means unavoidable, and acquires the necessary legitimacy to implement the relevant policies, then moral communication may probably assume a strengthened position in society. This may lead to increased tensions with other social systems, which are defined by their own codes and not by the code of morality.[44]

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36 *L. J. Kotzé*, Global Environmental Constitutionalism in the Anthropocene, 2016; *J. Kersten*, Das Anthropozän-Konzept, 2014.

37 *B. Latour*, Facing Gaia – Eight Lectures on the New Climatic Regime, 2017; *B. Latour*, An Attempt at a "Compositionist Manifesto", New Literary History 41 (2010), 471 et seq.

38 *M. Serres* (note 32).

39 *J. Koons*, What Is Earth Jurisprudence?, Key Principles to Transform Law for the Health of the Planet, Penn State Environment Law Review 18 (2009), 47 et seq.

40 See the critical comments by *R. Hank*, Du musst Dein Leben ändern, FAZ, 18.8.2019, 18.

41 IPCC Report on "Climate Change and Land", 7.8.2019, chap. 5, 89, at: <www.ipcc.ch>.

42 See *R. J. Berry*, Environment Stewardship – Critical Perspectives – Past and Present, 2006.

43 For the last point, see *J. Kersten* (note 36), 60 (relating to *Latour*).

44 *N. Luhmann*, Paradigm Lost: Über die ethische Reflexion der Moral, in: N. Luhmann, Die Moral der Gesellschaft, 2008, 259 et seq.

V. Project 2: Cosmos

The competing normative project (Project 2) can be called "Cosmos" and is symmetrically antithetical to Mother Earth. Cosmos attempts to offer answers to the great questions of our time and has also utopian elements. The theoretical foundation of this project is less elaborate than Project 1, but is far stronger in terms of systemic power. For Cosmos, individuals can be freed from the constraints of everydayness through the expansion of systems, in particular of economy, science, and technology. Its normative basis is not the morality or ethics – these are its moving limits –, but rather the general idea of freedom, human creativity, and uninhibited communication. Instead of religion, this normative project is inspired by a pagan, *Promethean* ethos.

Cosmos is a project in progress. The cyberspace and the social media have already transformed the way people behave, and have changed the forms they communicate, by channeling, for instance, their feelings and very personal thoughts in the global marketplace via the Machine. Furthermore, there are ongoing plans for the commercial exploitation in outer space, including the Moon and Mars.[45] The United Nations General Assembly has acknowledged the interest of governments, industry, and the private sector to engage in activities in the outer space and called for the development of global governance regimes for these activities.[46] Social communication and business activities extend beyond the range of Earth towards the planetary system. Technology promises solutions to the environmental problems via geoengineering and innovation, conducted within the related legal framework,[47] but without painful lifestyle changes.[48]

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45 See NASA, National Space Exploration Campaign Report (Pursuant to Section 432(b) of the NASA Transition Authorization Act of 2017 [P.L. 115-10]), September 2018, <www.nasa.gov>.

46 See, for instance, UNGA Res. of 26.10.2018 on "space as a driver of sustainable development", A/RES/73/6, 31.10.2018.

47 *H. Du*, An International Legal Framework for Geoengineering – Managing the Risks of an Emerging Technology, 2018. See also *N. E. Vaughan/T. M. Lenton*, A Review of Climate Geoengineering Proposals, Climatic Change 109 (2011), 745 et seq., *D. Keith*, Geoengineering the Climate: History and Prospect, Annual Review of Energy and the Environment 25 (2000), 245 et seq.

48 For a spirited response to eco-pessimism, see *S. Pinker*, Enlightenment Now – The Case for Reason, Science, Humanism, and Progress, 2019, 142 et seq.

The meaning of governance is changing through artificial intelligence, and this has serious repercussions on geopolitics.[49] Furthermore, human beings are "under further construction" through bioengineering and genome editing (Clustered Regularly Interspaced Short Palindromic Repeats [CRISPR] project),[50] reshaping of the mind,[51] redesigning of human body,[52] or adapting humans to the Cosmos through artificial intelligence.[53] Still, there is an apparent disjunction between capabilities and expectations, on the one hand, and possible time frames, on the other.

Twenty years ago, when *Peter Sloterdijk* proposed "rules for the human park" in a response to *Heidegger's* Letter on Humanism,[54] he was derided as devising the "*Zarathustra* project".[55] Even if this discussion has meanwhile lost its pointe, it offers an excellent example of "Big Thinking". Ultimately, the Cosmos project aims at the acceleration of systemic operations and at the transformation of the technological capacities of our civilization *ad infinitum*, with minimal regulation and external control. This normative project still needs a solid foundation on how it distinguishes itself from domination by technocracy devoid of telos.

VI. The New Tale of Two Utopias

Thirty years since the fall of the Berlin Wall, world society has formed itself and has framed its existential themes. The Neo-*Hobbesian* Age is defined by a plurality of conflicts with strong background in global social forces. There is no end in sight for these conflicts, which bear high levels of risk for the security of humankind. Nonetheless, they are carried out within the bigger context of the centennial struggle between Earth and Cosmos, as the two competing normative mega-projects that are attempting to reshape the course of history. The aporia, whether humans are destined to orient themselves to "Earth" as world and horizon, or whether

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49 *H. Kissinger*, How the Enlightenment Ends, The Atlantic, June 2018 issue, at: <www.theatlantic.com>.

50 *J. Doudna/S. Sternberg*, A Crack in Creation – The New Power to Control Evolution, 2017.

51 *R. Kurzweil*, How to Create a Mind – The Secret of Human Thought Revealed, 2017.

52 *R. Kurzweil*, The Singularity Is Near, 2005.

53 *M. Tegmark*, Life 3.0 – Being Human in the Age of Artificial Intelligence, 2017.

54 *P. Sloterdijk*, Regeln für den Menschenpark – Ein Antwortschreiben zu Heideggers Brief über den Humanismus, 1999.

55 *T. Assheuer*, Das Zarathustra-Projekt, Die Zeit, 2.9.1999, at: <www.zeit.de>.

the technological era will irreversibly convert humanity by reserving for them a privileged dwelling in Cosmos, can be met only with silence. "Care" as responsibility of the "shepherd" is another philosophical concept in need of understanding: Caring *for* Mother Earth is not identical with caring *in* Cosmos.

The battle between the two Utopias will be long, with many twists and turns, and will be fought on many fronts: on the preferable way of life, on the geopolitical arena, including the North-South relations, within the social systems that will have to decide on future policies and on the distribution of resources, on the cyberspace, on climate policies, on the construction of identities and beliefs, on the meaning of prosperity and property, on human rights, on equality in terms of class, race, and gender, and on the fight against poverty.

Domestic and international courts and tribunals constitute a major theater of operations of the struggles for semantic authority over the interpretation and further development of law related to the two projects. Law and the courts will play a major role in steering this process, by creating the framework for the conduct of the respective activities, integrating international practice in a system of fundamental rules, rights, and limits, by responding to the multitude of disputes that will arise, and by creating dispute settlement institutions. The notions of democracy, rule of law, global governance and international public authority will have to be repositioned within the rationalities of the century.

The normative mega-projects of Mother Earth and Cosmos are putting into question the fundamentals of history and power, and they hold the promise of a New Beginning. Whether this is Enlightenment 3.0 or Dark Ages 2.0, is a question that cannot be answered yet.

Achilles Skordas

Achilles Skordas

My iCourts experience

The Elephant in the Room

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I am one of those who had heard of the iCourts before its actual 'birth-in-law', in the early 2010s, as I was asked by the funding institution to write an assessment of the project. From the very first moment, I found the idea exciting, because such a project would offer the possibility of a holistic exploration of international courts and tribunals (ICs) and their contribution to dispute settlement and peace. Indeed, the iCourts would become a truly global institution, attracting researchers and scholars from all over the world. Its success demonstrates the capacity of countries that have successfully shielded their academic institutions from iconomachies to become leaders in science and research.

I have stayed for two years at the iCourts (2016-2018) through a Marie-Curie Fellowship, to work on my larger project on the International Court of Justice (ICJ) and its contribution to the preservation of international peace and security in the 21st century. My choice of the iCourts was the correct one, for several reasons.

First, because I could see the qualitative differences between the ICJ and the other ICs. In this sense, the fact that the iCourts had been only marginally involved with that court was a research advantage, as there were no ICJ biases (pro or contra) in the system. Second, the analytical categories of the iCourts research can serve as useful starting points for the analysis of the ICJ: so for instance the approach of the iCourts to the de facto authority of ICs (see infra). Third, the discussion culture at the iCourts is a core strength of the institution. The pressures of teaching and administration in academia have narrowed the space for regular research-related meetings. However, the iCourts succeeded in maintaining its focus on the exchange of ideas, discussion, and critique.

One of my vivid memories shows the benefits from being in a place where new ideas and perspectives are tested and debated. Stimulations that can help one's own research may arise from unexpected corners and from academics with little direct contact to legal research. I recall an event, in which the historian Marco Duranti presented his book on The Conserva-

tive Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention (OUP 2017). I was impressed by the author and by his extraordinary book challenging stereotypical preconceptions on the European human rights system. It should be read by everybody working on human rights courts and on international law.

Since 2018, I have been Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Until 2020, I was also the holder of the Chair of International Law at the University of Bristol, but I retired in order to concentrate on my Heidelberg research and expand the project I had started at the iCourts.

I will not end this brief paper before going back to research and, more specifically, to the iCourts approach on the authority of ICs (Alter/Helfer/Madsen, International Court Authority, OUP 2018). The authors distinguish among various categories of that kind of authority (narrow, intermediate, extensive, popular), which are useful as points of departure for an empirical analysis of the ICs, including the ICJ.

Nonetheless, these categories establish in principle a unidirectional approach between courts and actors, but do not consider the two-way relationship between legal interpretation and identity construction of actors and systems. Jurisprudential critique does not play a role in the iCourts world. However, here lies, in my view, the real authority of the ICJ: how to interpret international law in view of shaping the order of the time. This authority does not depend only on the successful judicial settlement of disputes between the parties and the response of the Court's constituencies, but also on how the Court conceptualizes the acts of other organs in the UN system, on how it contributes to their identity and mutual recognition, on its willingness and capacity to translate geopolitical and geo-economic issues into legal categories, on its handling of the relationship between diplomacy and international law, and on the internalization of its jurisprudence by international and domestic courts.

The ICJ as the Omphalos of the international legal system has authority only if its jurisprudence is characterized by complex rationality that keeps the requisite distance from the narratives and anger of zeitgeist, demonstrates the capacity to support the 'health of the systems', and facilitates crisis management and preservation of peace and security by States and other world societal actors. Seen from the outside of the legal system, the ICJ is a cautious normative actor with the power to frame and convince.

The Court's authority depends on how it navigates the spheres of international law, geopolitics, and world order. This is the systemic authority of the ICJ that overcomes the idea of de facto authority by complementing

it. From this vantage point, the iCourts' concept needs to be re-viewed through the perspective of the Elephant in the Room.

Emergence of network effects and predictability in the judicial system*

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As courts strive to simultaneously remain self-consistent and adapt to new legal challenges, a complex network of citations between decided cases is established. Using network science methods to analyze the underlying patterns of citations between cases can help us understand the large-scale mechanisms which shape the judicial system. Here, we use the case-to-case citation structure of the Court of Justice of the European Union to examine this question. Using a link-prediction model, we show that over time the complex network of citations evolves in a way which improves our ability to predict new citations. Investigating the factors which enable prediction over time, we find that the content of the case documents plays a decreasing role, whereas both the predictive power and significance of the citation network structure itself show a consistent increase over time. Finally, our analysis enables us to validate existing citations and recommend potential citations for future cases within the court.

As systems of human knowledge grow, networks grow from lists of references which attribute credit to prior work. There are many examples of

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* Originally published as: Mones, E., Sapieżyński, P., Thordal, S. *et al.* Emergence of network effects and predictability in the judicial system. *Sci Rep* **11,** 2740 (2021). https://doi.org/10.1038/s41598-021-82430-x
This version incorporates the correction published as Mones, E., Sapieżyński, P., Thordal, S. *et al.* Author Correction: Emergence of network effects and predictability in the judicial system. *Sci Rep* **11,** 11945 (2021). https://doi.org/10.1038/s41598-021-91556-x

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such networks in the complex systems literature, for example academic citations[1, 2], the world-wide web[3], and citations between patents[4]. Here, we focus on the network of citations between court cases[5]. These networks are interesting because case law is where abstractly formulated statutory law meets the world of facts, events, and social practices. In this sense, case law is the frontier of law, where it is decided how statutory law should be interpreted. Sometimes case law even supplements the law, when no statutes apply immediately. Citing previous cases is a sign of legal precedent. Legal precedent function as a source of law for the court. By relying on precedent (i.e. it's decisions in previous cases) the court seeks to uphold consistency in its case law. Identifying what previous cases the court cites in new decisions is a way of grasping what cases the court considers important for the decision of new cases.

In this work we use the fact that the citation graph is a complex network and draw on network science methods[6, 7]to investigate the development of case law through the citation patterns of The Court of Justice of the European Union (CJEU) in order to illuminate underlying factors which shape the Court's case law[8, 9].

Specifically, we consider the citations occurring in the period between 1955 and 2014. These form a network of individual cases (nodes) connected by citations (directed links). As time goes by, new cases become part of the network citation structure grows while its complexity increases. In a technical sense, our question is to what extent the (existing) observed structure of the citation network can explain the outgoing citations of new cases. We pose the question as a link prediction problem. Specifically, we

1 *S. Redner,* How popular is your paper? An empirical study of the citation distribution, Eur. Phys. J. B Condens. Matter Complex Syst. 4 (1998), p. 131–134.
2 *S. Lehmann, B. Lautrup* & *A.D. Jackson,* Citation networks in high energy physics. Phys. Rev. E 68, 026113 (2003).
3 *R. Albert, H. Jeong* & *A.L Barabási,* Diameter of the world-wide web 401 (1999), p. 130–131.
4 *B. Yoon,* & *Y. Park,* A text-mining-based patent network: analytical tool for high-technology trend, J. High Technol, Manag. Res. 15 (2004), p. 37–50.
5 *S. M. Marx,* Citation networks in the law, Jurimetr. J. 10 (1970), p. 121–137.
6 *A. L. Barabási,* Network Science, 1st ed., Cambridge 2016.
7 *M. Newman,* Networks, Oxford 2018.
8 *J. H. Fowler* & *S. Jeon,* The authority of supreme court precedent. Soc. Netw. 30, 16–30 (2008).
9 *Y. Lupu* & *E. Voeten,* Precedent in international courts: a network analysis of case citations by the European court of human rights, Br. J. Polit. Sci. 42 (2012), p. 413–439.

define six quantities, or *features*, pertaining to the content of cases and the structure of citations and use them as input variables to predict the existence of each link in the network separately. The prediction is implemented as a recommender system: for a single link, we assign a score to all possible links and determine the rank of the original link in the sorted predictions. Our model provides a measure of the level of predictability of the Court itself.

We begin by providing an overview of the network structure observed in the CJEU, and show that the Court's citation network develops a non-trivial structure, characteristic of complex networks[10]. Based on these observations, we define the six features of the Court's citations, designed to measure aspects of both content and structure, each feature extracted from case documents or meta-data available in the CJEU database (we provide an example of a case document in the Supplementary Information). We find that the Court's citations are highly predictable. Moreover, as the Court's case law develops over time, we find that our predictions become more accurate. Therefore, we investigate the temporal changes in performance and importance of single features. We show that certain properties of cases, for example the similarity between their content or their age, have decreasing significance in describing the observed citations. As a counterpoint, we see an increasing predictive power of features based on the networks structural, such as common citations.

Thus, as we analyze the changes in predictability over time, we are able to form a picture of which mechanisms characterize the Court's citations by interpreting the importance and the predictive power of the six quantities. In this sense our methodological work enables us to provide new insight into the legal system and its evolution toward greater predictability.

Results

As the number of references within the court continues to grow, the structure of the citations becomes more complex: we observe a steady increase of the clustering coefficient (defined as the fraction of triangles in the network) after 1980, while the average shortest path between cases (number of references one needs in order to construct a path from one case to another) remains roughly constant over time (in a wide range of simple networks, e.g. randomly connected or regular graphs, the shortest path is expected to

10 *M. E. J. Newman*, Networks: An Introduction, 1st ed., Oxford 2010.

grow as the logarithm of the size of the network[11, 12]). The network also develops a broad degree distribution, with few very highly cited cases and most cases attracting no or only a few citations. Small values for the shortest path, high clustering, and broad degree distributions are considered hallmarks of complex networks[13, 14, 15] (see Fig. S1 in the Supplementary Information for basic characteristics of the citation network).

The fact that the network develops a complex structure, suggests that neighboring citations might be useful with respect to predicting the citations made as part of cases. The court grows slowly in the early decades (between 1950 and 1980) resulting in fewer than 1000 cases. Furthermore, the CJEU has not established a canonical way to cite prior decisions until the late 1970's. To minimize the effect of these inconsistencies and ensure the court has a number of citations sufficient to train a recommender system, we start with the network aggregated up to 1978. As we wish to use network structure for the link prediction, we restrict our calculations to the *weakly connected giant component*, that is, we only consider cases that are connected to the largest component of the network (resulting in 8574 cases, 89 % of the entire network).

Link prediction.

We train a Random Forest classifier using six features: TF-IDF (term frequency–inverse document frequency), time difference, preferential attachment, Adamic-Adar, common neighbors, and common referrers (see Fig. 1 for an illustration of each feature). The features can be categorized into *nodal* (pertaining to the content of the cases represented as nodes in the graph, Fig. 1a) and *structural* (Fig. 1b). Full information regarding the features and details of the classifier are provided in the Materials and Methods.

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11 *B. Bollobás* & *W. F. de la Vega*, The diameter of random regular graphs. Combinatorica 2 (1982), p. 125–134.

12 *A. Fronczak*, *P. Fronczak*, *P.* & *J. A. Hołyst*, Average path length in random networks, Phys. Rev. E 70, 056110 (2004).

13 *D. J. Watts* & *S. H. Strogatz*, Collective dynamics of 'small-world' networks, Nature 393 (1998), p. 440–442.

14 *R. Albert* & *A.-L. Barabási*, Statistical mechanics of complex networks, Rev. Mod. Phys. 74 (2002), p. 47.

15 *M. E. J. Newman*, *A.-L. Barabási*, & *D. J. Watts*, The Structure and Dynamics of Networks, 1st ed., Princeton 2006.

Our link prediction method is similar to a recommendation system. That is, we retain all but one of the links of a given case and aim to predict the missing link. Further, we evaluate the prediction at the level of individual links: for each link *i*, emanating from node *A*, we remove link *i* and then calculate the score of all non-existent links originating from node *A* (including link *i*) and find the rank of link *i*. This way, we do not evaluate the performance of predicting the original link, but we also obtain a *rank* of that link which characterizes how close is our prediction to the observed real link. We expect existing links to have a higher rank than the majority of non-existing links (see fig.2).

The aim of our study is to use this machine learning method in order to understand which aspects of the citation network and which nodal properties contain information about the real-world citations. In this sense, we use prediction as a tool to describe each real-world property as a feature in our machine learning algorithm. Hence, we see machine learning as a way to learn about the significance of content and structure; not necessarily as as an actual recommender system to be used in practice. Using our method to recommend possible citations to the court requires careful considerations, as we discuss below.

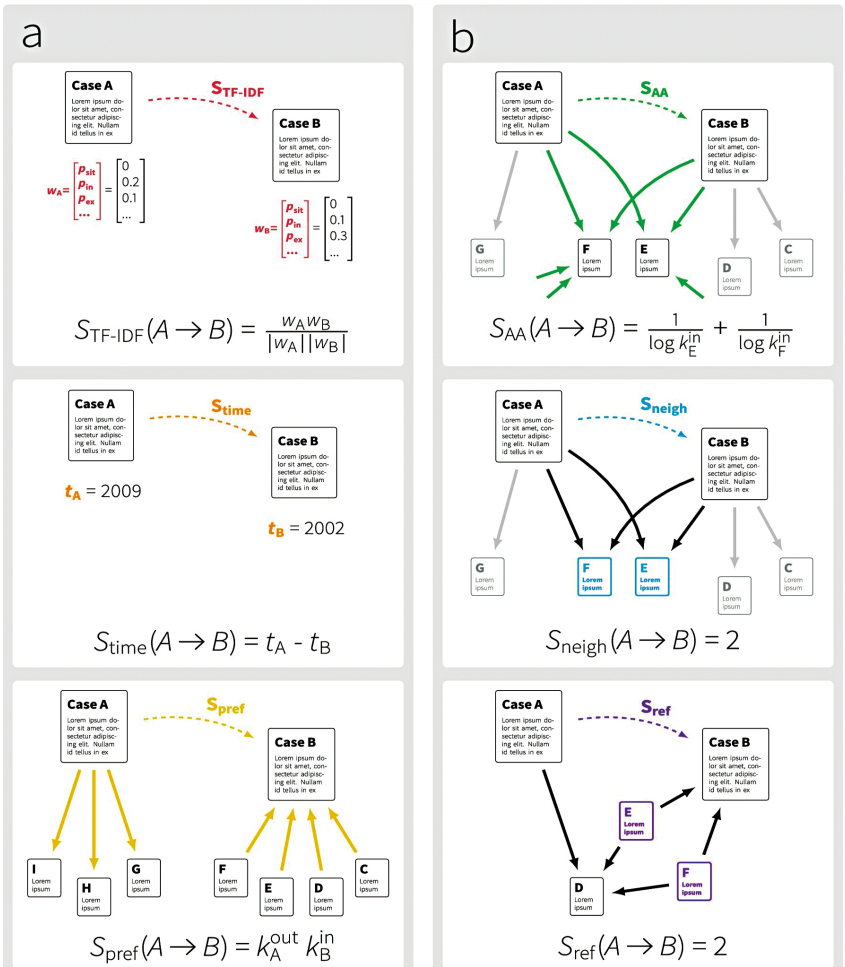

Figure 1. Features used in the inspection of the CJEU court. (a) Nodal features: TF-IDF ($S_{TF\text{-}IDF}$) reflects similarity of content, time difference (S_{time}) identifies how contemporary the two cases are; and preferential attachment (S_{pref}) quantifies how many other cases refer to a candidate case. (b) Structural features: Adamic-Adar (S_{AA}), common neighbors (S_{neigh}), common referrers (S_{ref}), all of which are inspired by features used in recommender systems and quantify the similarity between network "neighborhoods" of the cases.

The general performance of the classifier is quantified in Fig. 2, where we plot the distribution of the *median prediction ranks* over the whole net-

work. The upper panel illustrates how the median prediction rank for a single case is calculated. For each case, we iterate over all links. For each link, we determine the rank of that link when compared against all (non-existent) links emanating from the source case of the link in question, providing the link level ranks. For each case, we determine the median rank measured across its outgoing links. Low rank values imply high performance. The plot in Fig. 2 shows the probability mass function of median ranks. Prediction of the links is surprisingly efficient, and the probability in Fig. 2 (lower panel) drops exponentially beyond low values (for degrees above 5). This effect is even more clearly shown in the cumulative distribution (cdf): 95 % of the cases have a median rank below 292 and 99 % of the cases exhibit ranks below 1335. Ranks of this magnitude are surprisingly low considering that the vast majority of links are ranked against thousands of non-existent links, suggesting that references in the court are highly predictable even using this small set of simple features.

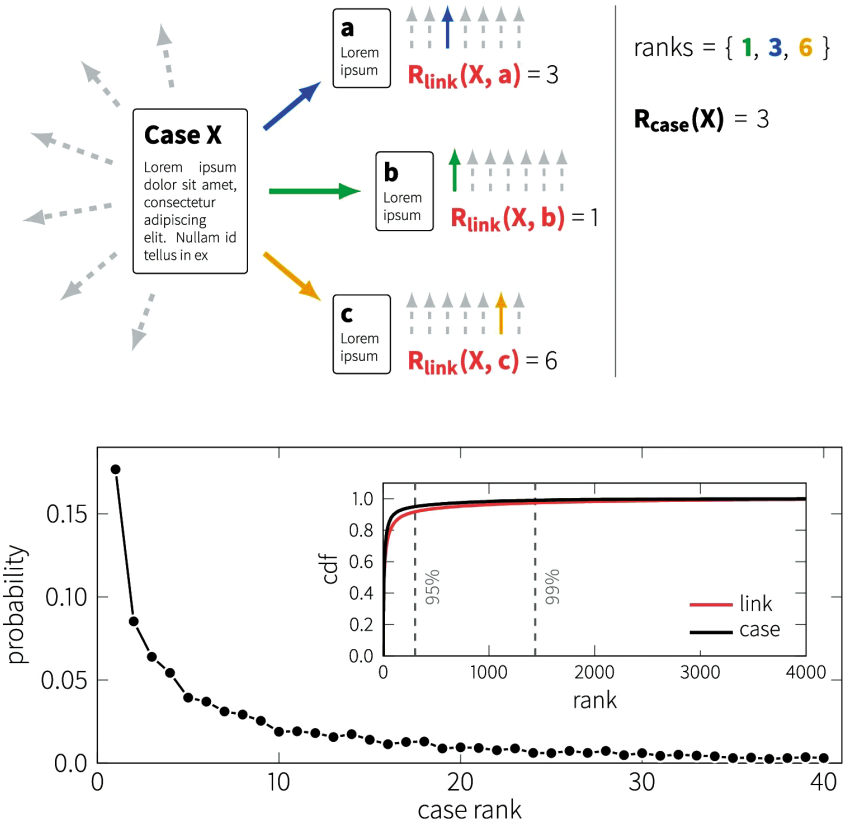

Figure 2. Global performance of the link prediction. Top: definition of the median prediction rank performance measure: each link of a case (colored arrows) is compared against all non-existent links (dashed gray) providing the link ranks (bold red). The full median prediction rank (calculated for each case) is defined as the median rank of outward links corresponding to the case (bold black). Main plot shows the probability mass function of low case ranks, inset shows the cumulative distribution function of the link (red) and case ranks (black). Dashed lines mark the 95 % and 99 % percentage of the total number of cases.

How the model identifies individual cases.

In order to better understand how the random forest algorithm identifies which cases to cite, we now describe the underlying mechanics of the clas-

sification in detail. In our case, the goal of the algorithm is to decide if a link exists or not. The random forest classifier is an ensemble of individual decision trees trained slightly differently.

A single decision tree is a binary structure where each node embodies a binary decision based on the value of a single feature. These binary decisions are, in most cases, comparisons against a reference value that is adjusted during the algorithm's training phase. For instance, a node may represent the question "Does this case have at least 4 citations in common with the index case?". If the answer is 'yes', the case is sent down one branch, if not it is sent along the other branch. In this way, the prediction process is a sequence of such consecutive comparative binary questions. The bottom most nodes (the *leaves*) of the tree then assign a class to the case at hand: is it a possible reference or not?

Individual trees are prone to various problems, most importantly over-fitting. Over-fitting can be avoided a by using a so-called 'random forest' approach, where we introduce many decision trees that are grown in a stochastic way, e.g., by using a subset of data points and limiting trees to rely on only a subset of features. Once all training data are considered and all trees have been fitted, the score assigned to a specific case is based on the fraction of trees that assigned the link as a real reference.

To understand the algorithm's decision-pipeline, we study how often the trees use a feature at different stages of the prediction. More precisely, we ask how frequently a feature is used in the different levels of the decision trees. Comparison of the features and our main results are discussed in details in the Supplementary Information. This exercise is interesting because the features that tend to be used early in the tree (near the root) have larger discriminatory power; these features allow the algorithm to label the largest possible fraction of cases as *not relevant*. Features used late in the tree (near the leaves), help to refine the decision, separating the right case from others that are similar to it.

As a measure of which level in the trees a feature is typically used, we compute the relative frequency of features aggregated over the entire forest. For a feature f and a level l of the trees, we define $p_f(l)$ as:

$$p_f(l) = \frac{\sum_t n_t^f(l)}{\sum_t n_t(l)}, \tag{1}$$

where $n_t^f(l)$ is the number of split (decision) nodes using feature f in level l of tree t, and $n_t(l)$ is the width level l of tree t (total number of nodes in that level). The values of $p_f(l)$ are averaged over five different realizations of a random forest and shown in Fig. 3. Each line in the figure represents results for the citation network aggregated up to a specific year, corresponding to the same years as in Fig. 4. Black lines in the stacked histograms distinguish between nodal (lower) and structural (upper) features and indicate the overall trend of feature usage between the two categories.

Overall it is clear that nodal features (TF-IDF, time difference, and preferential attachment) and structural features (Adamic–Adar, common neighbors, and common referrals) are used differently by the algorithm over time. In the most recent network (incorporating all data), classification at the root level is based solely on structural features; the large splits of data are based on network structure. As we move closer to the leaf nodes, refining the decision among groups of similar cases, the nodal features dominate the decisions. As we move backwards in time, incorporating less and less data, this trend is less strong and nodal features (especially the textual similarity encoded through the TF-IDF feature) play a significant role.

This means that when identifying the references in the full network data, the classifier treats nodal and structural features in a fundamentally different manner than in the early court. First the algorithm uses network structure to finds the right network neighborhood. Then nodal features are used for fine-tuning the decision.

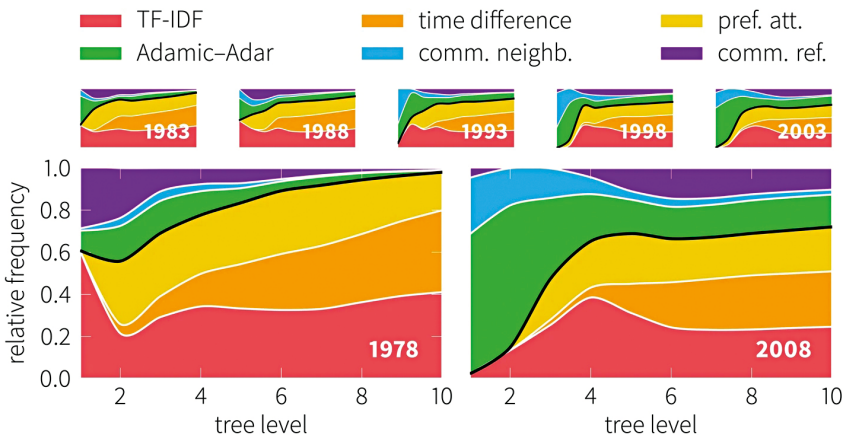

Figure 3. Details of feature usage inside the decision trees. The curves show the fraction of decision nodes in the decision trees that use a specific feature in different levels of the trees (they add up to one). For each feature, we calculate the number of (internal) decision nodes that make the split based on the value of that feature, normalized by the total number of nodes in that level. Results are averaged over all trees in a random forest and over 5 independent forests. Black lines indicate the boundary between nodal (lower) and structural (upper) features.

Evolution of feature importances.

Having discussed the recommendation mechanism in detail, we are now able to use these methodological considerations to analyze the mechanisms that are at play in the court. To do so, we study how the feature importances change over time. Studying how the model identifies individual cases pointed us to interesting patterns in predictability over time as the network of cases grows. In this section we analyze the performance of the model by explicitly assessing the predictability of incoming citations as a function of time. Consistent with our analysis of the random forest, we find that the importance of features changes as the citation network grows in size and becomes increasingly complex over time. As we show in 'Network growth' in Supplementary Information, these changes are not a trivial consequence of the network growth, but instead they characterize a particular behavior of the Court over time.

To understand which mechanisms most influence the observed performance, we first analyze the features individually. Specifically, we calculate

ROC-AUC for each feature alone, using the raw feature values (see Materials and Methods for details). Fig. 4 shows time evolution of ROC-AUC of the classifiers by each individual feature, based on 5-year periods. The nodal features, shown in the top three panels of Fig. 4 (TF-IDF, time difference and preferential attachment) show mostly decreasing trends, with only time difference indicating a slight increase. However, the corresponding value of ROC-AUC for time difference is close to that of a random classifier (an ROC-AUC of 0.5). All of the structural properties, shown in the bottom three panels of the figure, display a significant increase of predictive power. This development explicitly shows that the case-to-case network structure allows us to infer the links with growing accuracy and precision. Further analysis with point-biserial correlation[16] confirms these observations: nodal features show limited and vanishing correlation, whereas structural features exhibit a steady improvement in terms of performance. Note that in case of time difference, we used the negative of the feature to obtain a positive correlation between the feature and the predicted observable. Beyond feature ROC-AUC and correlation, we investigated the predictive power of features by training a classifier using a single feature and then measuring its performance; results using this method remain consistent. Furthermore, to assess the extent to which much the model draws on each feature, we also measure feature importance and its change over time. Detailed analyses on the features support the above observation (see Fig. S8 of the Supplementary Information for details).

16 *G. V. Glass* & *K. D. Hopkins*, Statistical Methods in Education and Psychology, 3rd ed., Boston 1995.

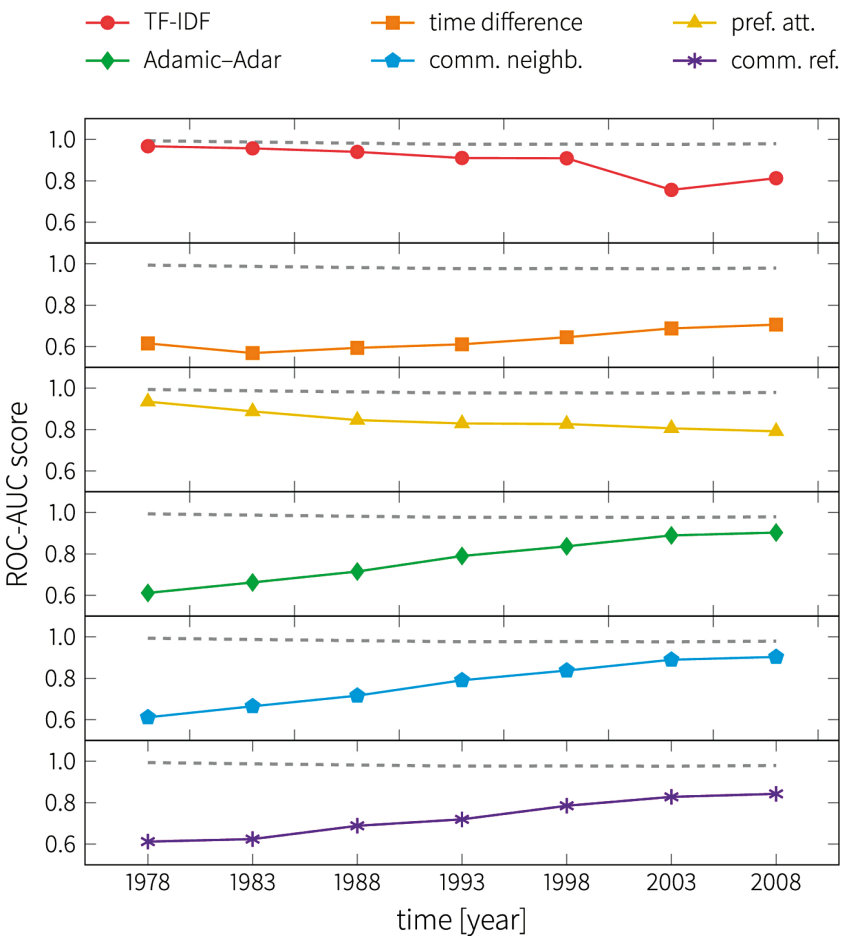

Figure 4. Predictive power of individual features. Lines show the change in ROC-AUC for each feature calculated from the raw feature values. The dashed gray lines show the value 1.0 as a guide to the eye.

Both the changes in predictive power and development of feature importance suggest that the relative usefulness of the content of individual cases, i.e., the nodal characteristics, decreases over time. At the same time, we observe the emergence of complex network structure among the court's judgments, allowing for more accurate predictions. A possible explanation of these observations is that the content of the documented cases

does not change significantly over time: there are strict rules of the content generation when a case is represented in the database. However, this is not the case with the network structure as this structure is not controlled by any regulation, it is only affected by the citation culture developed within the court. In this sense, the network structure of citations is an emergent property of the court. Our results show that this network is becoming increasingly informative of the actual references.

Interpreting model errors.

Continuing the analysis of the legal system through the lens of link prediction, we note that from a legal perspective, it is interesting to study the situations where the model makes mistakes. Here we focus on false positives and false negatives. In the case of false positives, our model recommends a reference between two cases, which in turn does not exist in the citation network of the court. Empirically, these are cases that, according to the algorithm, are 'supposed' to be cited. These cases discuss similar legal topics, but with subtle differences in the specific details of the legal issues (see Supplementary Information for details). An illustrative example is the suggested citation of Case C-412/05 P in Case C-304/06 P. Both of these cases deal with Community Trade Mark Law, including the distinctive characteristics of the mark. However, the suggested citation is concerned with the procedural issue of appeal (in a trademark law case) whereas the citing case in concerned with substantive trademark law. It is this difference in the particular focus of the cases which the algorithm was not able to discover.

On the other hand, false negatives are the references that were not found by our model but are observed in the court. There are several reasons for false negatives. First, it is common to cite previous cases to provide an example for a type of argument even though the example itself is not about the same legal topic in which the argument is used. A legal principle which is used across many different legal topics then leads our algorithm to generate false negatives. An example is Case 124/83 citing joined cases 94–63 and 96–63. The citation emerged as evidence of a general principle that an authority which adopts measures affecting the persons concerned or which withdrawn a favorable decision must bear the burden of proof itself. An interesting avenue for future work would be to employ more sophisticated natural language processing methods to detect situations where similar legal principles are at play. Second, false negatives also include clerical errors – the citations are mistakes as another

case should have been cited. For more details, see Tables S1–S3. in the Supplementary Information.

Discussion

In this paper, we have shown that network science methods and machine learning techniques can be useful tools for understanding the patterns of how case law is applied in a rapidly growing corpus of of legal decisions.

Importance of understanding empirical patterns of case law usage.

A deeper understanding of the principles that shape the application of statutory law is key, since consistency in how cases are treated, not only supports equality before the law, but also enhances predictability and effectiveness. Predictability is desirable because when those who are subject to the law know that new cases will be treated consistently with previous cases, they can use those earlier cases as a legal compass, to navigate their behavior in accordance with the law. Currently, maintaining consistency and predictability is expensive. It requires an insight into and overview of previous case law, which is increasingly difficult for a single human being to achieve.

Moreover, while many cases have little general relevance (e.g. regarding uncommon scenarios, or trivial repeat cases) a few key cases have proven cardinal in understanding unwritten legal principles and explaining statutory law, and others are important for very specific situations[17]. Important cases are currently identified by scholars and lawyers simply reading court cases. We posit that it may be helpful to introduce tools for information management based on methods such as the ones proposed here in order to help individuals to navigate the case law. Case law databases make it possible to index cases by specific categories, but the cases in the database must first be categorized in a way that supports legal reasoning. Improvements in search engines have made it possible to do full text search, making the job of finding applicable case law considerably easier. However, knowing what to look for, given a particular problem, remains a skill reserved for

17 *U. Sadl* & *M.R. Madsen*, A selfie from Luxembourg: the court of justice's self-image and the fabrication of pre-accession case-law dossiers, Colum. J. Eur. L. 22 (2015), p. 327.

legal professionals and is susceptible to these professionals' own biases and other human limitations18.

Applications.

This paper shows that there is a possibility of predicting which cases are applicable as precedent given the content (text and citations) of an already existing case. While it has been argued that computerized recommender systems cannot supplant 'lawyer's craft'[18], we argue that algorithmically identifying relevant cases may have several advantages, for example improving the reproducibility of doctrinal legal studies and reducing individual bias. Introducing a technology that is capable of interacting with the insight of expert humans has potential to bring several advantages to the legal sector overall. In the following we list the most obvious applications of our link prediction system (see SI for full discussion). *First*, transferring information from CJEU to domestic settings. E.g. making it easier for administrative agencies to make informed decisions about rights of citizens. *Second*, supporting legal service providers in finding relevant CJEU case law to support arguments made for clients. *Third*, support to the CJEU itself. A link prediction system could help the court navigate its own case law when preparing new cases and may even be used to check whether a new case decided by the court sufficiently cites relevant former cases. *Finally*, the link prediction system could be implemented in legal research and teaching settings. Allowing students and legal scholars to navigate case law in more advanced ways could potentially allow for new insights by legal scholars and law students.

Risks and limitations.

One of the proposed applications of our findings would be to translate them into a recommender system for use in legal practice. Before doing so, one must consider the risk of adverse effects. Here, we highlight what we consider to be the most important issues: automation bias, the cold start problem, and citation specificity.

18 *M. L., Koenig, J. A. Oseid* & *A. Vorenberg,* Ok google, will artificial intelligence replace human lawyering, Marq. L. Rev. 102 (2018), p. 1269.

Automation bias is the tendency towards favoring machine-generated suggestions or decisions, often despite opposing information that did not come from an automated system[19]. This bias exists in at least three versions: commission (relying on wrong information), omission (relying on incomplete information) and complacency (insufficient attention to and monitoring of automation output). Introducing an automated recommender system to the process of legal research is likely to also bring about automation bias in legal behavior, especially in the form of omission and complacency. Omitting relevant precedent as a result of automation bias is doubly problematic. First, the omitted precedent might turn out to be more relevant to the specific case at hand than those recommended by the system. Second, relying only on recommended cases will produce a feedback loop to the recommender system that will further increase the weight of the precedents being recommended (if, as we presume, the new decision will be fed into the network that is used for recommendation). In order to overcome the problems associated with automation bias, we would suggest that a recommender system be modified in ways that can counteract the issues described above. It must provide enough variation in presented cases and their ordering in an attempt to mitigate complacency[20, 21, 22].

Recommendation systems also suffer what is known as the 'cold start problem', where a new piece of content (here: a new case) does not have enough information associated with it, since it has not yet been used (here: cited). A recommender system could therefore stifle jurisprudential development by not recommending newer cases. Although several features of our model (TF-IDF, common neighbors, Adamic-Adar), do not rely on existing citations of a decision to start recommending that decision, we still believe there is a need to consider and counteract the cold start problem. We suggest that new cases must be given more visibility in the recommender system. This can be done by backward linking: the previous

19 *M. Cummings,* Automation bias in intelligent time critical decision support systems, AIAA 1st Intelligent Systems Technical Conference (2004), p. 6313.

20 *A. J. Biega, K. P. Gummadi,* & *G. Weikum,* Equity of attention: Amortizing individual fairness in rankings, The 41st International ACM SIGIR Conference on Research & Development in Information Retrieval, 405–414 (ACM) (2018).

21 *A. Singh* & *T. Joachims,* Fairness of exposure in rankings, Proceedings of the 24th ACM SIGKDD International Conference on Knowledge Discovery & Data Mining (ACM) (2018), p. 2219–2228.

22 *P. Sapiezynski, W. Zeng, R. E Robertson, A. Mislove* & *C. Wilson*, Quantifying the impact of user attentionon fair group representation in ranked lists, Companion Proceedings of The 2019 World Wide Web Conference (ACM) (2019), p. 553–562.

cases cited by a new case, may be used as an indication of the relevance of the new case in the context of what those cited cases represent in the network. The recommender system could also be constructed in a way that it assigns more weight to recent cases than to old cases. It could also be built in such a way that it always shows the most recent cases of a similar kind along with those cases that carry the best predictive values for a given situation.

Furthermore, we note that in law, one does not refer to entire cases but to the specific part (paragraph) of a case which is relevant to one's argument[23]. In this sense our recommendations – which refer to entire cases – are not specific enough. We expect that our methods that rely on citation structure and the content comparison can be extended to recommend case paragraphs rather than entire cases, however due to non-uniform paragraph labeling in the dataset, the transition to paragraphs falls outside of the scope of this article.

Finally, it should be noted that what we observe in this paper is the fact of citations existing from one case to another (previous) cases. These citations occur in the text of the published case documents as found in the publicly available EUR-LEX database. It is generally accepted that courts rely on their own previous case law when they decide new cases. How those case are reflected in the reasoning of the individual judges that participate in making the decision is, however, hidden from view. All we can access are the exterior signs of that reasoning as found in the published text of the decided cases. Since these decision texts are generally relied upon by lawyers when making legal arguments in new cases, we assume these texts to be the most objective and representative source in regard to the legal reasoning underlying the case decisions. From this assumption follows that we take the fact of citation to reflect the role of the cited case in the reasoning of the citing case.

Conclusion.

In this paper, we have investigated the predictability of citations in the CJEU. Using a recommender system based on three node-related features and three network dependent system, we offer a number of findings. *First*,

23 *K. Raghav, P. K. Reddy* & *V. B. Reddy*, Analyzing the extraction of relevant legal judgments using paragraph-level and citation information, AI4JCArtificial Intelligence for Justice 30 (2016).

the court's citations are highly predictable, with predictability increasing over time. *Second*, we developed an analysis of the model to let us understand how it reaches decisions. Based on this analysis, we found that the factors which enable us to predict change over time, with network features gaining importance as we get closer to the present. *Third*, when we investigated errors made by our model, we discussed how these errors can help us both 'debug' the court itself by identifying omissions and clerical errors, as well as the algorithm, highlighting subtleties and nuances not incorporated in the current features. *Finally*, we discussed the ways in which our findings are likely to impact how courts function in the future, across a number of dimensions. We also discussed potential problems associated with using automated citations in the legal process, analyzing the key issues of cold-start and automation bias.

Model.

We used a Random Forest classifier in the link prediction task due to its ability to capture non-linear relationships and it also provides a built-in means for measuring the importance of different features[24]. Here, we use link prediction to inspect two different aspects of the court: predictability and the importance of the features. We calculated six features that can be categorized as nodal and structural properties of the cases. Here we give a short summary of the definition of features and the motivation behind each.

TF-IDF – TF-IDF is used to estimate the similarity of two cases based on whether they use the same terminology. This feature first builds a vector of words in each case document, and then calculates the cosine similarity between two judgments[25, 26]. This feature assumes a high value when two cases are similar w.r.t. their content. Mechanism: quantifies the tendency to cite cases that are relevant to the legal field of the current case.

Time difference – is the difference in the years between the cases. Mechanism: encodes the tendency to cite recent, up-to-date rulings.

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24 *F. Pedregosa et al*, Scikit-learn: machine learning in Python. J. Mach. Learn, Res. 12 (2011), p. 2825–2830.

25 *J. Beel, B. Gipp, S. Langer,* & *C. Breitinger,* Research-paper recommender systems: a literature survey, Int. J. Digit. Libr. 17 (2016), p. 305–338.

26 N. Shibata, Y. Kajikawa & I. Sakata, Link prediction in citation networks, J. Am. Soc. Inform. Sci. Technol. 63 (2012), p. 78–85.

Preferential attachment – This feature is based on the phenomenon observed in many human-made networks that grow over time: as the network evolves in time, nodes having a large number of links tend to collect links more rapidly than those having a few links. This is due to the underlying preferential attaching mechanism that connects new nodes to existing ones with a probability proportional to their number of links. The corresponding feature is calculated simply as the product of the degrees:

$$S_{\text{pref}}(A \to B) = k_{\text{A}}^{\text{out}} k_{\text{B}}^{\text{in}}, \tag{2}$$

where k is the number of inward/outward citations of the node. We consider S_{pref} as a nodal feature, since the driving mechanism that enables judges referring to cases that are already highly cited is rather a social phenomena (and how information spreads in the community of the judges) than a strongly structural one. Mechanism: highly cited cases tend to have high visibility that attracts further citations, and the longer a reference list is, the more likely to cite any other specific case.

Common neighbors – The number of other cases both cases cite. Mechanism: the tendency to cite a case that has much in common (that cites the same set of other cases).

Adamic–Adar – This feature was developed by Adamic and Adar in[27], to mine relationships on the web and has since been re-purposed by several studies as a general tool for predicting links. The feature value for a citation from case A to case B is

$$S_{\text{AA}}(A \to B) = \sum_{c \in \Gamma(A) \cap \Gamma(B)} \frac{1}{\log|\Gamma(c)|}, \tag{3}$$

where $\Gamma(\cdot)$ denotes all citations (inward/outward) of the case, that is, the set of cases it is citing/cited by. Mechanism: similar to common neighbors, but corrects for the bias caused by highly cited hubs, that is, a commonly cited case with few incoming citations is more valuable than a hub following the intuition that it represents a more unique relationship between the two cases citing it.

27 *L. A. Adamic* & *E. Adar*, Friends and neighbors on the web, Soc. Netw. 25 (2003), p. 211–230.

Common referrers – The common referrers feature is an extension of the common neighbors which assumes if case A shares some citations with case c, then the remaining citations of c are also good candidates to cite by case A. That is, with high overlap of citations can lend potential citations from each other. In mathematical terms, it is formulated as the overlap between the outward citations of case A and the inward citations of case B:

$$S_{\text{ref}}(A \to B) = |\{\Gamma_{\text{in}}(B) \cap \Gamma_{\text{in}}(c)\, \forall c \in \Gamma_{\text{out}}(A)\}|. \tag{4}$$

Mechanism: the citees of other rulings that refer to the same cases are potential candidates for citations.

Predictability.

When predicting a single link of a specific judgment, a prediction trial assigns a score to all links defined by the probability to be a real link, and then ranks them according to their score. Each link is predicted separately, using information available from the rest of the links, that is, we keep all links but the one we predict and then perform the calculations with the random forest. The predictability of a case is defined as the median rank of its true links when all of its connections are probed. If a case is highly predictable, we expect its links to appear at the top of all the ranked links resulting in a low median rank. For a community, we simply define its predictability by the median predictability of its member cases. To measure the predictability of the entire network, we also calculate the ROC-AUC (area under the receiver-operator curve), as it is insensitive to class imbalance and due to its intuitive interpretation: it is the probability that a randomly selected existing link is ranked better than a non-existing link. Alternatively, ROC-AUC is shows explicitly how much better the classifier performs compared to a random guess.

Received: 27 October 2020; Accepted: 13 January 2021
Published online: 02 February 2021

Acknowledgements

This work was supported a Young Investigator Grant (High Resolution Networks) and a Synergy Grant (Nation Scale Social Networks) from the Villum Foundation.

Author contributions

E.M., P.S., and S.L. designed the research. E.M. and S.T. collected the data and trained the models; E.M., P.S., H.P.O., and S.L. wrote the main manuscript text; E.M. prepared the figures. All authors reviewed the manuscript.

Competing interest

The authors declare no competing interests.

My iCourts experience

I have been part of iCourts right from the get-go. Before actually. As outlined in the introduction to this book, I worked with Mikael from early on and worked closely with him in writing the application to DNRF. What I would like to focus on as my iCourts experience is the story of how my interest in computational legal studies came about in the early days of iCourts.

One of the three dimensions of the original iCourts research plan was *autonomisation*: That is how international courts constructed a unique and autonomous form of law through their case law. In some ways this was – and remains – a classical study in the evolution of legal doctrine: How did specific concepts, distinctions and forms of legal reasoning emerge out of adjudication in international courts? For some courts, this could be studied without much methodological innovation. Cases were only a couple of handfuls and could easily be read and analyzed using generally accepted forms of legal analysis. To some extent knowledge of this could be found in the existing literature. For other courts however, this was a real challenge. The European Court of Human Rights and the Court of Justice of the European Union has handed down thousands of judgments since they became active in the 1950's. While studies of their case law existed, they were – and to some extent still is – published in textbooks that are built around selected cases that are taken to be representative of the courts case law as a whole. No complete studies with robust data existed however, and the selection of "representative cases" was – and is – often not built from a commitment to a transparent methodology, but instead relies on discretionary judgements about what cases are considered legally important. Could there be another way of studying the development of the case law of these courts?

One important source of inspiration for me, in conceptualizing a new approach to legal studies was Anne-Lise Kjær. Her background in linguistics and corpus analysis was effective in nudging me towards a more mathematical approach. Also, some of the early visitors to iCourts, Eric Voeten and Yonatan Lupu, and especially their article *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights* has been a key reference point for developing a computational approach to legal analysis. Moving beyond the established doctrinal thinking allowed for a more data-driven approach. Anne-Lise was helpful in connecting me with Anders Soegaard, a linguist and language technology researcher who was moving into the field of Natural Language Processing

(NLP). Together we applied for a new grant, which would support the development of a network analysis and NLP approach to computationally chart the development of the ECtHR's and CJEU's case law. Soon other iCourts researchers joined this approach and helped me to become part of a larger network. Urska Sadl joined iCourts and put me in touch with Fabien Tarrisan, a great data scientist, CNRS scholar and wonderful collaborator. Ioannis Panagis was hired as iCourts data science specialist, helping to scrape and clean data, write scripts, develop visualisation techniques etc., and soon became one of the most sought after colleagues at iCourts: An amazing force of nature and a fantastic colleague. I would also like to mention the many brilliant master and phd students I have worked with over the years: in the early days: Aysel Kücuksu, Martin Christensen, Amalie Frese, all of whom are now young scholars in their own right; and further down the line: Magnus Esmark, William Byrne and Matthias (with double t (!)) Smed Larsen. It has been an interesting journey to see how the shift from traditional and individual textbook writing to a more data-driven and machine leaning oriented approach has brought people and competences together in the same room to explore interdisciplinary approaches to the study of law. As the case law expands way beyond the reading capacity of an individual researcher a new symbiosis between machines and research collectives is needed: a symbiosis that is also reflected in many other areas of social and work life.

The co-authored paper, that is included here, is based on a long term collaboration with physicist Sune Lehmann (prof. of networks and complexity science at DTU). Sune has also worked with Urska and Anders, and Enys has previously worked with Amalie. Simon and Piotr joined the paper via Sune. Published in one of Nature's journals (Scientific Reports), the paper illustrates how case citation analysis can reveals network effects in CJEU's citation practice. The paper also shows that it is possible to train an algorithm to predict citations, which in turn could used to build a recommender system for case citations thereby supporting practicing lawyers in their work with legal information retrieval and analysis.

I could mention many more collaborations, including with the omnipresent center leader, Mikael, but my point is not to highlight individual people. My point is that I wish to celebrate the positive collaborative spirit in iCourts: a spirit I have been extremely grateful for over the years, and which I hope I will be able to continue to contribute to in the years to come.

Henrik Palmer Olsen
Professor, Associate Dean for Research, iCourts – Centre of Excellence for International Courts, Faculty of Law, University of Copenhagen

III. Contributions from Guest researchers

Translating Ambiguity

Karen McAuliffe[*]

University of Birmingham

INTRODUCTION

The object of this paper is to demonstrate that language plays a key role in the development of a unique method of reasoning used by the Court of Justice of the European Union (CJEU), which has impacted on the development of EU law. The paper forms part of a larger study in which the author aims, through interdisciplinary research, to introduce a new facet to the current thinking on the development of the European Union (EU) legal order.[1]

In order to understand how EU law is made, how it is received in the member states and how it works therein, one needs an understanding of different legal orders, some from very different legal families, and the ways in which they interact with the supranational normative order which is EU law. The study and analysis of EU law is, therefore, at some level comparative law. However, the range of tools provided by comparative law, and by legal studies generally, is necessarily somewhat limited. In order to achieve a more holistic and nuanced understanding of the topic, one therefore also

* I would like to thank in particular Professor Robert Harmsen of the University of Luxembourg, Professor Lawrence Solan of the Center for Law, Language and Cognition at Brooklyn Law School Professor Chantal Stebbings and Dr Mitchell Travis of Exeter Law School, as well as Nick Foster, Dr Maria-Federica Moscati and the anonymous reviewers of this essay for their constructive criticism. Thanks to Laura Rehbach for assistance with German translation. I would also like to thank my former colleagues at the Court of Justice in Luxembourg for their assistance with this research, in particular Mr Alfredo Calot-Escobar and Ms Susan Wright. Any errors are mine alone.

1 This study, entitled 'Law and Language at the European Court of Justice', has been funded by the European Research Council (ERC). The project, which examines the process behind the production of the CJEU's multilingual jurisprudence, runs from 2013–2018.

needs to use the tools provided by other disciplines. This paper approaches the study of EU law through the lens of the CJEU's multilingual 'jurisprudence' (case law).[2] To fully understand that jurisprudence one needs to take account of the linguistic and cultural compromises involved in its making. The only way to fully investigate the role played by language in the development of EU law is through interdisciplinary research.

The judgments of the CJEU exist in 24 languages.[3] It is obvious to anyone that translation is very important for the dissemination and application of that body of case law. However, the role of translation at the CJEU goes deeper than 'simply' converting judgments from the working language of that Court[4] into the other 23 EU official languages. Translation is, in fact, embedded in the process of drafting, reasoning and deciding a case before the CJEU. The translation of ambiguity between different legal cultures and types of legal reasoning, carried out in a multicultural and multilingual setting, is reflected in the CJEU's method of reasoning and consequently in its multilingual jurisprudence.

Achieving the object of this paper involves analysing the relationship between law, language and translation in the production of the multilingual jurisprudence of the CJEU. Such analysis is inherently interdisciplinary. Thus this paper, and the study of which it forms a part, is of considerable interest in terms of the use of interdisciplinarity in comparative law. It uses a range of methodological tools borrowed from disciplines outside of law, such as linguistics and anthropology. These disciplines traditionally pay little attention to each other but each can offer new ways of understanding how a multilingual, multicultural organisation works.

By providing a better understanding of the inner workings of the environment in which a significant part of EU law is created, this paper provides a starting point to allow scholars across disciplines to work towards delimiting the inconsistencies that inevitably arise in this distinctive,

2 In common law parlance, 'jurisprudence' generally refers to 'legal theory'. In this paper, however, 'jurisprudence' is used in the EU law sense (deriving from the French *jurisprudence*) to refer to the case law of the CJEU, including the non-binding opinions delivered by Advocates General.

3 The 24 EU official languages. These are, in English alphabetical order: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish and Swedish. The official order of these languages is to list them according to the way they are spelled each in their own language.

4 The working language of the Court is French. For details of the Court's language policy see below.

multilingual legal system. More generally, the larger study of which this paper forms a part will develop a better, more nuanced understanding of EU law.

WHAT CAN INTERDISCIPLINARY RESEARCH BRING TO THE STUDY OF EU LAW?

Historically, the EU constitutional narrative centred on harmonisation (if not unification) and uniformity, for the sole purpose of serving the European *integrationist* cause.[5] Differences and diversity in the integration process were perceived as obstacles 'originally to free trade and then to [...] integration as such'.[6]

For many reasons, this constitutional vision became increasingly inadequate as a model.[7] Gradually, the EU constitutional narrative has been reworked and developed and today centres on *constitutional pluralism*. However, the meaning of that term has yet to be fully elaborated and clearly defined. In fact, it appears to mean different things to different scholars, from Kumm's theory of 'best-fit universal constitutionalism',[8] to the 'harmonious-discursive constitutionalism' developed by Maduro,[9] and Walker's theory of epistemic meta-constitutionalism.[10] Nonetheless, all of these concepts of constitutional pluralism share an important quality: they each present a theoretical take on EU integration based on analysis of the

5 Cf Avbelj, M (2008) 'Questioning EU Constitutionalisms' (9) *German Law Journal* 1.

6 Avbelj, M and Komarek, J (2008) 'Spaces of Normativity: Four Visions of Constitutional Pluralism' (2) *European Journal of Legal Studies* 325 at 326.

7 Cf Avbelj 'Questioning EU Constitutionalisms' supra note 5 at 2.

8 Kumm, M (1999) 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (2) *Common Market Law Review* 351; Kumm, M (2005) 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (12) *European Law Journal* 262.

9 Maduro, MP (2003) 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker, N (ed) *Sovereignty in Transition* Hart 501.

10 Walker, N (2002) 'The Idea of Constitutional Pluralism' (65) *Modern Law Review* 317. For further elaboration of this discussion see also Baquero Cruz, J (2008) 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (14) *European Law Journal* 389; Maduro, MP (2003) 'Europe and the Constitution: What If This Is as Good as It Gets?' in Weiler, JHH and Wind, M (eds) *European Constitutionalism Beyond the State* Cambridge University Press 74.

development of a European rule of law, drawing on theories of law and judicial reasoning.

Much of that analysis focuses, of course, on the decisions of the CJEU, since it is generally accepted that much of the 'constitutional' law of the EU has been developed through the jurisprudence of that Court. The extensive bodies of literature on the CJEU (notably the political science and legal bodies of literature) focus on its role in developing the EU legal order. The legal literature is generally concerned with analysing the legal logic behind the CJEU's rulings and discussing the ways in which the CJEU can affect policy changes in the EU, insofar as practice may have to change to comply with a particular ruling. The political science literature, on the other hand, is interested in 'judicial politics', the policy dynamics that can be inferred from the CJEU's decisions and in examining the political context and consequences of those decisions.[11]

However, each of these bodies of literature remain predominantly focused on the decisions of the CJEU and on judicial reasoning/investigating the reasons or motivation behind those decisions.[12] In other words, much has been written on *why* the Court makes certain decisions and the effects of those decisions, but there has been very little research into *how* its multilingual jurisprudence is produced.[13]

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11 Cf Harmsen, R and McAuliffe, K (forthcoming 2014) 'The European Courts' in Magone, JM (ed) *Routledge Handbook on European Politics* Routledge.

12 Ibid.

13 With the exception of work by the present author. See, in particular: McAuliffe, K (2011) Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union (24) *International Journal for the Semiotics of Law* 97; McAuliffe, K (2012) 'Language and Law in the European Union' in Solan, L and Tiersma, P (eds) *The Oxford Handbook of Language and Law* Oxford University Press; McAuliffe, K (2010) 'Language and the Institutional Dynamics of the Court of Justice of the European Communities: Lawyer-Linguists and the Production of a Multilingual Jurisprudence' in Gueldry, M (ed) *How Globalizing Professions Deal with National Languages: Studies in Cultural Conflict and Cooperation* The Edwin Mellen Press 239; McAuliffe, K (2009) 'La traduction dans l'office des juges européens' [Translation at the European Court of Justice] in Ost, F and Bailleux, A (eds) *La construction des droits européens et le paradigme de la traduction: Enjeux d'une rencontre* [Constructing EU Law and the Translation Paradigm] Facultés Universitaires Saint Louis 39; McAuliffe, K (2009) 'Translation at the Court of Justice of the European Communities' in Oslen, F and Stein, D *Translation Issues in Language and Law* New York: Palgrave Macmillan; McAuliffe, K (2008) 'Enlargement at the Court of Justice of the European Communities: Law, Language and Translation' (14) *European Law Journal* 806; McAuliffe, K (2013) 'The Limitations of a Multilingual Legal Order' (26) *International Journal for the Semiotics of Law* 861.

If we step away from legal scholarship and look to other disciplines, we can begin to understand that the question of '*how*'—the process of producing the Court's jurisprudence – is a very relevant concern. And that process of looking at other disciplines also helps us to understand why it is relevant.

In recent years anthropologists and sociologists have shown a great interest in EU institutions, in particular the European Parliament and Commission.[14] Various studies and ethnographies of those institutions have been carried out.[15] Such studies, many based on periods of fieldwork research in the services of the European Parliament and Commission, provide a valuable insight into the workings of those institutions. While the activities of those European institutions in Brussels demonstrate that people of many different nationalities, languages and cultures can work together, anthropological studies show *how* they work together. As Bellier and Wilson point out: 'Anthropological methods and practice offer insights into the ways in which culture and identity are problematized within EU institutions, and they clarify how EU institutions, policies and agendas produce new forms of European culture and identity, as well as affect some old ones.'[16]

Although a notion of a common 'European' culture has not (yet) been successfully cultivated in the hearts and minds of EU citizens,[17] perceptions of the EU institutions are entirely different. There exists the idea that the EU institutions create spaces of identity that transcend the logic of nationalism, and that Europe's de-territorialized and de-nationalised supranational civil servants embody a distinctly 'European' ethos and

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14 In particular work by Irène Bellier and Marc Abélès, see below at note 21.

15 Indeed, the European Commission even employed a team of anthropologists to complete a year-long study of that institution in the early 1990s: Abélès, M, Bellier, I and McDonald, M (1993) 'Approche anthropologique de la Commission européenne' [An Anthropological Approach to the European Commission] *Brussels: Commisison Européenne*.

16 Bellier, I and Wilson, TM (2000) 'Building, Imagining and Experiencing Europe: Institutions and Identities in the European Union' in Bellier, I and Wilson TM (eds) *An Anthropology of the European Union: Building, Imagining and Experiencing the New Europe* Berg 1 at 3–4.

17 See for example: Shore, C (1998) 'Creating Europeans: The Politicization of "Culture" in the European Union' *Anthropology in Action* 5 at 11; Shore, C (2001) 'European Union and the Politics of Culture' *The Bruges Group Occasional Papers*; Shore, C (2000) 'Forging a European *Nation*-state? The European Union and Questions of Culture' in Shore, C (ed) *Building Europe: The Cultural Politics of European Integration* Routeledge..

morality. Indeed, the EU civil service presents itself as a cosmopolitan, multilingual and multicultural organisation that has succeeded in creating 'an organisational culture that harmoniously blends together the different administrative traditions of its member states to form a 'European' model of civil service with its own distinctive identity and ethos.'[18] The 'culture' literature that has developed on the European Parliament and Commission investigates the extent to which those EU civil servants embody the kind of 'Europeanist' ethos and identity espoused in their own official documents and proclamations. The general consensus in that literature is that, although they present themselves as unique and unitary, the European Union institutions are, in fact, 'riddled with many different currents deriving from outside [those institutions] and reflecting the national origins, ideologies, and politics of individuals within [them]'.[19]

Those working in EU institutions appear to be engaged in a process of 'translating' cultural and professional norms from their own backgrounds and national environments, which in turn allows those multilingual, multicultural organisations to function relatively efficiently. The resulting mixture of professional norms and cultures thus 'translated', together with the internal dynamics of the institutions, contributes to the development of particular methods of working within those institutions. The norms and conventions that have emerged from such methods of working have formed the basis for the development of what is arguably a new professional culture: '*les métiers de l'Europe*' (professions of Europe).[20]

It is interesting to note the significance of culture, identity and language in the policies, actions and day-to-day life of the institutions. Much has been written about the impact of those factors on the organisation and activities of those institutions.[21] In spite of the fact that EU institutions are

18 Shore 'European Union and the Politics of Culture' supra note 17 at 10.

19 Bellier, I (1997) 'The Commission as an Actor: An Anthropologist's View' in Wallace, H and Young, AR (eds) *Participation and Policy-Making in the European Union* Clarendon Press 91 at 93.

20 Cf. Georgakakis, D (2002) *Les métiers de l'Europe politique: Acteurs et professionnalisations de l'Union européenne* Collection sociologie politique européenne Strasbourg: Presses universitaires de Strasbourg.

21 Bellier, I and Wilson, TM (2000) 'Building, Imagining and Experiencing Europe: Institutions and Identities in the European Union' in Bellier, I and Wilson TM (eds) *An Anthropology of the European Union: Building, Imagining and Experiencing the New Europe* Berg; Bellier, I (2000) 'A Europeanized Elite? An Anthropology of European Commission Officials' (14) *Yearbook of European Studies* 135; Bellier I (1997) 'The Commission as an Actor: An Anthropologist's View' in Wallace, H and Young, A (eds) *Participation and Policy-Making in the European Union* Claren-

staffed by individuals from member states with diverse social and educational backgrounds, languages and cultures, each institution is, by its very nature, 'obliged to express itself with a single voice'.[22] This obligation presupposes that it has resolved any internal conflicts deriving from technical considerations and differing political approaches to similar phenomena.[23]

The question for anthropologists is: how exactly do the EU institutions resolve those conflicts? Abélès and Bellier make the point that *process* necessarily affects *output*.

In the context of the European Parliament and Commission the process involves a cultural compromise, through which European civil servants are able to work together in the unique hybrid environment of those institutions. The output necessarily affected by that cultural compromise relates to the resulting culture of compromise visible in the policies and actions of those institutions.

Those anthropological studies also note the development of a hybrid 'eurolanguage' within the institutions, which is the linguistic manifestation of the cultural compromise by which the institution works. In her work on the European Commission, Bellier points out that this 'eurolanguage' functions perfectly well within that institution but can create problems when the Commission engages in discourse with the outside world.[24]

The literature on the CJEU focuses on its output: its decisions, and what those decisions themselves tell us about the CJEU's reasoning and motivation. However, that literature largely ignores the process through which actors at the CJEU produce those decisions. While there have been some attempts to discuss the cultural aspects of life at the CJEU,[25] such works have been few and far between, and generally deal with culture and language in an incidental manner only. However, since much of the EU's 'consitutional' law was developed through decisions of the CJEU, and

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don Press; Abélès, M (2004) 'Identity and Borders: An Anthropological Approach to EU Institutions' (2) *Twenty-First Century Papers: Online Working Papers from the Center for 21st Century Studies* 1; Abélès, M; Bellier, I and McDonald, M (1993) *Approche anthropologique de la Commission européenne [An Anthropological Approach to the European Commission]* Commission européenne.

22 Bellier, I (2000) 'A Europeanized Elite? An Anthropology of European Commission Officials' (14) *Yearbook of European Studies* 135 at137.

23 Ibid.

24 Bellier 'The Commission as an Actor' supra note 19 at 12.

25 See, for example, Edward, DAO (1995) 'How the Court of Justice Works' (6) *European Law Review* 539; Mancini, GF and Keeling, DT (1995) 'Language, Culture and Politics in the Life of the European Court of Justice' (1) *Columbia Journal of European Law* 397.

in light of the anthropological literature briefly discussed here, it is reasonable to presume that the process behind the production of that Court's multilingual jurisprudence could have implications for the development of EU law. Understanding the situational factors of, and compromises involved in, the production of such jurisprudence could therefore aid our understanding of EU law.

The Need to Consider Language

While interdisciplinary work using methodological tools borrowed from disciplines such as anthropology may allow the operation of the CJEU to be investigated in cultural terms, the question of *language* is particularly relevant in the CJEU.

Reality, of course, exists independently of language, but the description and 'truth' of that reality are properties of language. Language does not automatically mirror reality. To put it another way, there are no core features of language that refer to the essence of entities that exist in reality.[26] 'To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations'.[27]

Linguistic theory claims that languages constitute cultures. Often, the same communicative systems exist across cultures, but the form and content of those systems are not identical, because different languages represent reality in different ways.

Law can be considered a culture-specific communicative system.[28] Legal concepts and legal language arise from the application of the linguistic resources of the legal communicative system to real life situations. In that process certain areas of life are 'juridified', i.e. they are described in terms of words used in the law, and turned into legal concepts.[29] Those legal concepts are usually specific to a particular legal culture.[30]

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26 Busse, B (2010) 'Recent Trends in New Historical Stylistics' in McIntyre, D and Busse, B (eds) *Language and Style: In Honour of Mick Short* Palgrave Macmillan 32.

27 Rorty, R (1989) *Contingency, Irony and Solidarity* Cambridge University Press at 5.

28 Vermeer, HJ (2006) *Luhmann's 'Social Systems' Theory: Preliminary Fragments for a Theory of Translation* Frank & Timme.

29 Ibid., 38.

30 Much has been written about the concept of legal culture. Credit is generally given to Lawrence Friedman for coining the term in the mid-1970s. Cf Friedman, L (1975) *The Legal System: A Social Science Perspective* Russell Sage Foundation.

Therefore, when comparing communicative systems, or legal cultures, it is not enough to engage in a comparison of legal theories without taking account of the significant role that language plays in the development of law. For that reason, in the context of comparative law, an engagement with translation theories, and legal translation in particular, is important, since the flow of information between legal systems takes place through translation.

In translation theory a distinction exists between translation through 'domestication' and 'foreignisation'.[31] The former refers to conforming to the conventions of the target language, whereas the latter refers to departing from those conventions and following the conventions of the source language. However, whichever strategy is used, translation is almost invariably 'into the internal language' of a target system.[32] In other words, in legal translation, expressions from a foreign legal system are almost always interpreted in terms of expressions that exist in the target legal system.

Problems in legal translation generally arise because legal systems conceptualise reality in different ways. Legal translators do not translate *words*. They translate terms embedded in specific cultural models. Legal systems reflect principles and values that underlie the organisation of a society. This is why the translation of legal rules is considered not as a translation of words or ideas but as an import of foreign methods of organisation of a society.[33]

Legal translation is thus concerned with comparative law and the incongruency of legal systems: elements of one legal system cannot simply be transposed into another legal system.[34] In legal translation the comparison of legal terms precedes their translation. Legal translators must compare the meaning of terms in the source and target legal systems, which will

31 Venuti, L (1995) *The Translator's Invisibility: A History of Translation* Routledge.

32 Lotman, YM (2005) 'On the Semiosphere' *Sign Systems Studies* 205 at 210.

33 Kjaer, AL (1994) 'Zur kontrastiven Analyse von Nominationsstereotypen der Rechtssprache deutsch – dänisch' [Contrastive Analysis of Nomination Stereotypes in Legal Language: German-Danish] in Sandig, B (ed) *Tendenzen der Phraseologieforschung* [Phraseology Research Trends] Universitätsverlag Brockmeyer 317 at 321.

34 Sarčević, S (1997) *New Approach to Legal Translation* Kluwer Law International at 12–14.

make them aware of similarities and differences in their use across languages.[35]

It would seem therefore that legal translation is, at best, an approximation. Indeed, many lawyers acknowledge that this is so and that equal meaning and exact translations between legal texts are illusions that cannot be achieved in practice.[36] Thus, many claim that the task of the legal translator is 'to make the foreign legal text accessible for recipients with a different (legal) background'.[37] However, that claim only works with regard to texts that do not have force of law in the target language. It is certainly not true in the case of multilingual supranational law, and EU law in particular. In the context of EU law 'the ultimate goal of legal translation is to produce parallel texts that will be interpreted and applied uniformly by the courts'.[38] The CJEU, therefore, aims to produce statements of law that *will have the same effect* throughout all EU member states, in every language in which they are published, and through such statements to ensure the uniform application of EU law. So the CJEU considers that there is one 'communicative system' within the EU, albeit expressed in 24 linguistic forms, across 28 different legal cultures.

> It must be borne in mind that [EU] legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that [EU] law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States.[39]

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35 Sandrini, P (2009) 'The Parameters of Multilingual Legal Communication in a Globalized World' (1) *Comparative Legilinguistics. International Journal for Legal Communication* 39.

36 Didier, E (1990) *Langues et langages de droit: etude comparative des modes d'expression de la common law et du droit civil, en français et en anglais* [Languages and Legal Languages: A Comparative Study of Common and Civil Law Modes of Expression, in French and English] Montreal: Wilson & Lafleur Itée at 154. See also below.

37 Pommer, SE (2012) 'The Hermeneutic Approach in Legal Translation' in Cercel, L and Stanley, J *Unterwegs zu einer hermeneutischen Übersetzungswissenschaft. Radegundis Stolze zu ihrem 60. Geburtstag* [Towards Hermeneutic Translation. Radegundis Stolze on her 60th Birthday] Tübingen: Narr 274 at 283.

38 Šarčević, S *New Approach to Legal Translation* at 1.

39 Case 23/81 *CILFIT* [1982] ECR 3415.

Although the relationship between semiotics, translation and linguistic theories and their interaction with the law has recently been the subject of important research and academic debate, the linguistic perspectives of supranational adjudication in the European context is a relatively new field of research. While much scholarship on language and EU law has focused on the CJEU, it tends to mainly involve questions of language policy and regime, interpretation of multilingual legislation and pragmatic or logistical concerns.[40] To date there has been no systematic study which has taken account of the fact that the jurisprudence of the ECJ consists primarily of collegiate judgments drafted by jurists in a language that is generally not their mother tongue, undergoes many permutations of translation into and out of up to 24 different languages, and is necessarily shaped by the way in which that Court functions as a multilingual, multicultural

40 Some examples of the existing literature concerning language and the Court of Justice include: Legal, H (2005) 'Le contentieux communautaire de la concurrence entre contrôle restraint et pleine jurisdiction' [Community Competition Litigation Between Limited and Full Review] (2) *Concurrence*; Mancini, GF (1995) 'Crosscurrents and the Tide at the European Court of Justice' (2) *Irish Journal of European Law* 120; Mancini and Keeling 'Language, Culture and Politics in the Life of the European Court of Justice' supra note 23 at 16; Barents, R (1997) 'Law and Language in the European Union' (1) *EC Tax Review* 49; Boulouis, J (1991) 'Quelques réflexions à propos du langage juridique communautaire' [Some Reflections on the Community Legal Language] (14) *Droits: Revue française de théorie juridique* 97; Usher, JA (1998) 'Languages and the European Union' in Anderson, M and Bort, E (eds) *The Frontiers of Europe* Pinter 222; Wainwright, R (2002) 'Drafting and Interpretation of Multilingual Texts of the European Community in Sacco, R (ed) *L'interprétation des textes juridiques rédigés dans plus d'une langue* [Interpreting Legal Texts Drafted in More than One Language] L'Harmattan Italia and Isaidat 320; Berteloot, P (1988) 'Babylone à Luxembourg: Jurilinguistique à la Cour de Justice des Communautés Européennes' [Babylon in Luxembourg: Lawyer-linguists at the Court of Justice of the European Communities] (136) *Vorträge, Reden und Berichte aus dem Europa-Institut* [Lectures, Speeches and Reports from the European Institute] 3; Gallo, G (1999) 'Les juristes linguistes de la Court de Justice des Communautés européennes. Quelques aspects de leurs activities' [Lawyer-linguists at the Court of Justice of the European Communities] in Sacco, R and Castellani, L (eds) *Les multiples langues du droit européen uniforme* [The Many Languages of Uniform European Law] 71; Mullen, PF (2000) 'Do You Hear What I Hear? Translation, Expansion and Crisis in the European Court of Justice' in Green Cowles, M and Smith, M (eds) *The State of the European Union: Risks, Reform, Resistance, and Revival* Oxford University Press 246; Sevón, L (1998) 'Languages in the Court of Justice of the European Communities' in *Scritti in onore di Giuseppe Federico Mancini* [Essays in Honour of Giuseppe Federico Mancini] Giuffré 933.

organisation, as well as the fact that its 'authentic' judgments, as presented to the outside world, are for the most part *translations*.[41]

Taking account of all of those factors requires a level of interdisciplinary research not often seen in legal scholarship on EU law. However, through such research we can gain a more nuanced understanding of the development of that law.

METHODOLOGY

One inherent problem with interdisciplinarity is that there are no clear boundaries delineating separate fields (the 'boundary problem'). Designing an interdisciplinary research methodology can, therefore, be challenging.

The debate about what it means to be 'interdisciplinary' is an ongoing one, with many conflicting definitions and descriptions. One interesting metaphor by which 'interdisciplinary research' has been described relates to food. One may prefer a salad, or soup.

In the salad metaphor, that salad is made up of data from different disciplines. Research is carried out within separate disciplines and each discipline remains independent and autonomous. The data from all of the research is then brought together in a final analysis, but each element can be identified and relatively easily separated from the rest – like the ingredients in a salad.

In the soup metaphor, the basic ingredients, in the form of different disciplines, are the same as those in the salad. However, the way in which they are mixed together is very different. Methodologies borrowed from one field are used in the same or in a different way in another. Different types of analysis come together across disciplines. In that case, the elements in the final analysis cannot be so easily identified or separated.

Both methods can produce a delicious meal, and one cannot claim that either is 'better' than the other. They are merely different.[42]

In spite of the boundary problem and other difficulties, many scholars agree that interdisciplinary research adds something to the various relevant fields. Staying with the soup/salad metaphor: the individual ingredients

41 The ERC-funded project *Law and Language at the ECJ* (supra note 1) carries out such a systematic study.

42 This colourful and insightful description of interdisciplinary research was excellently articulated by Joxerramon Bengoetxea during a workshop on European Case Law Methods 'In Action', hosted by the iCourts Centre of Excellence and the Faculty of Law at Copenhagen University in April 2013.

taste well on their own (are interesting, insightful, analytical), and, when those ingredients are combined, whether in soup or a salad, they produce something new and completely different. So many scholars continue to do interdisciplinary work. However, choosing the disciplines to use in such work, and which methods to employ when using those disciplines, is not always easy.

Various considerations determined the methods chosen for this paper. The choices were premised on the notion that the dynamics within the CJEU, and the perceptions of those who work there of their own professional environment, shape the culture of that institution. In order to understand and analyse such an institutional culture, one must understand the priorities and preoccupations of those who work there.

This paper presents an analysis of cultural compromises and translation of norms within the CJEU, which is similar in many ways to the anthropological research carried out by Marc Abélès and Irène Bellier. However, it differs from that work in a number of respects. Abélès and Bellier investigated the significance of culture, identity and language in the policies, actors and day-to-day life of the European Parliament and Commission. Their focus was on the extent to which EU institutions create spaces of identity that transcend the logic of nationalism and the extent to which EU civil servants (in the European Commission in particular) embody a kind of 'Europeanist' ethos and identity. In that respect they were concerned specifically with Members of the European Parliament (in the case of Abélès) and EU civil servants (in the case of Bellier). This paper, however, concerns the CJEU from an overall standpoint, with a focus on those responsible for drafting and translating the jurisprudence of that Court. More specifically, the paper investigates how and by whom the CJEU's multilingual jurisprudence is produced and developed and the impact that language may have on that jurisprudence.

The following analysis is based on participant observation and interviews with actors at the CJEU.[43] Participant observation involved observing the interactions among lawyer-linguists, and between those lawyer-linguists and members of the Court and their référendaires, both in professional contexts such as meetings, seminars, as well as in more informal contexts such as Court social functions, coffee breaks, lunchtimes; engaging to some extent in those activities; interacting with participants socially;

43 The interview sample consisted of 78 interviewees in total (56 lawyer-linguists; 5 judges; 3 advocates general and 14 référendaires).

and identifying and developing relationships with key stakeholders and gatekeepers.

To overcome any inherent bias in the data obtained though participant observation, the findings were triangulated with existing literature concerning the CJEU, concepts developed in translation theory literature and with the findings of comparable studies carried out in other EU institutions.[44]

This interdisciplinary research adds a new dimension to the literature on EU institutions, and in particular the CJEU, by highlighting the contribution made to the institutional culture of that Court by those who draft and translate its jurisprudence and effectively give that Court its 'voice'.[45]

MULTI-LAYERED LINGUISTIC CULTURAL COMPROMISES IN EU LAW?

Unlike the other EU institutions, the CJEU operates using a single internal working language – French. For every action before the CJEU there is a language of procedure (which can be any one of the 24 official EU languages). The language of procedure must be used in the written submissions or observations submitted for all oral submissions in the action. The language of procedure must also be used by the CJEU in any correspondence, report, or decision addressed to the parties in the case. Only the texts in the language of procedure are authentic, which means that, in most cases, the 'authentic' version of a judgment will be a translation of the original judgment, which was drafted and deliberated on in French.[46]

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44 In particular those carried out by Marc Abélès and Irène Bellier, on the European Parliament and Commission, see supra at 21.

45 The ERC-funded project, of which this paper forms a part, borrows methodologies and different types of analysis from diverse fields. It combines reviews of existing literature (in law, political science, linguistics, translation and cognitive psychology) with linguistic analysis of texts such as judgments and opinions (in particular, concordance analysis using KWIC coding; syntactic and cognitive linguistic analysis; and comparative semantic analysis). Furthermore, over a period of 5 years, participant observation with those responsible for drafting and translating those documents, together with in-depth interviews with actors at the CJEU as well as with national judges, lawyers and EU commentators, will inform a comprehensive analysis of how the CJEU works as a multilingual, multicultural organisation.

46 *Cf.* McAuliffe, K (2012) 'Language and Law in the European Union' in Solan, L and Tiersma, P (eds) *The Oxford Handbook of Language and Law* Oxford University Press.

The following analysis deals first with the drafting of judgments in the internal language of the CJEU and then goes on to consider the translation of those judgments. The institutional dynamics of the CJEU, relationships between its actors and any 'cultural compromises' that may exist within that multilingual, multicultural organisation all affect the way in which that Court functions and consequently affect its 'output'.

Linguistic Cultural Compromises in Drafting

Each judge and advocate general of the CJEU has a '*cabinet*',[47] a small team of personal legal assistants and secretaries working exclusively for him or her. The legal assistants are known as *référendaires*,[48] and they work very closely with the individual judge or advocate general by whom they have been employed, carrying out preliminary research on a case, drawing up procedural documents, preparing first drafts of judgments, and so on. The role of the *référendaire* at the CJEU has been compared with that of the *Conseiller-référendaire* of the French *Cour de Cassation* (a judge attached to that court to assist its senior members)[49] and with the law clerk of the American judicial system.[50]

There are currently 37 cabinets at the CJEU (28 judges' *cabinets* and 9 advocates general's *cabinets*) and 28 *cabinets* at the General Court. The role of the *référendaire* is principally to assist the judge or advocate general in drafting documents such as reports, judgments, opinions and, in the case of the Presidents of the CJEU and the General Court, orders.

However, that role differs to a considerable degree depending on whether the référendaire in question works for the President, another

47 While '*cabinet*' may be translated into English as 'chambers', the French term is used throughout this paper for two reasons: first, to avoid confusion with the use of the word 'Chamber' for a subdivision of the CJEU; secondly, unlike the English word 'chambers', '*cabinet*' in the context of the CJEU is used to refer both to the judge's or advocate general's suite of rooms and to the staff working there.

48 The personal legal assistants who work for the judges and advocates general at the CJEU. Again, the French word '*référendaire*' is used throughout this paper instead of the English translation 'legal secretary', since it is by that title that those assistants are known within the Court, the working language being French.

49 See Brown, N and Kennedy, T (2000) *The Court of Justice of the European Communities* (5th ed) Sweet & Maxwell at 23.

50 See Kenney, SJ (2000) 'Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the US Supreme Court' (33) *Comparative Political Studies* 593.

judge or an advocate general. The analysis in the present paper focuses only on the production of judgments by the 28 judges cabinets at the CJEU.

Once a case has been assigned to a judge (the judge rapporteur), the *référendaire* dealing with that case will open a file and wait for the submissions to be lodged at the registry of the Court and, where necessary, translated into French. Following the delivery of the advocate general's opinion (where relevant),[51] the judge rapporteur may then begin to draft the judgment. In reality, it is the *référendaire* assigned to the case who drafts, at least the first version, of that judgment.[52] All of the *référendaires* interviewed for the present paper claimed that they had to be 'generalists' who are 'knowledgeable about every area of EU law'. In addition, they have to be able to understand and use their EU law knowledge in French, a language that may not be (and in most cases is not) their mother tongue.

Although the majority of *référendaires* interviewed claimed to find it relatively non-problematic to draft in French, it nonetheless has an impact on the linguistic development of the CJEU's case law in a number of ways.[53]

First, while they certainly draft in French the *thinking process* behind that drafting, for many référendaires, is done in their own mother tongue. Consequently the legal reasoning applied by those *référendaires* is based on the legal reasoning embedded in their national legal systems:

> REFERENDAIRE: all of my own reasoning and thinking about the case is done in my own language and then put into French when I come to the writing stage.
> REFERENDAIRE: I cannot apply legal reasoning from outside of my own legal system because I am of course thinking in my own language. I suppose that this can be seen if you look closely at the judgments that I have written.

Such legal reasoning and its associated concepts are developed through intellectual reasoning processes in a particular cultural context, and then expressed in a legal language that develops along with a particular legal order. Language plays a significant role in Friedman's concept of law as

51 An opinion is not given in every case before the CJEU. Since 2004, if a case raises no new questions of law, then an advocate general's opinion is not necessary.

52 In many *cabinets* the preliminary report, and sometimes even the judgment, begin to be drafted as soon as all of the parties' submissions have been lodged, i.e. without waiting for translation of the relevant documents.

53 Cf McAuliffe 'The Limitations of a Multilingual Legal Order' supra note 13.

a system or product of social forces. In his view of legal culture, the law is itself a conduit of those same forces and can be expressed only through the language bound to a particular legal order.[54] It is almost impossible to separate a particular type of legal reasoning from the legal language in which that reasoning is embedded. As Barbara Pozzo points out: a legal scholar is 'reined in' by his or her own legal language.[55]

In addition to that, however, many of the référendaires interviewed reported working from glossaries that they had constructed themselves on the basis of 'the settled case law of the Court':

> REFERENDAIRE: as a starting point […] I scan my glossary of French terms and phrases frequently used by the Court and find something that covers the gist of what I want to say.
> REFERENDAIRE: I will usually have a basic idea in my head of the direction I want to go in and what I want to say and then I use the set phrases that I have collated in my glossary to start me off and shape what I write.

Working in French thus has a clear impact on the linguistic development of the CJEU's case law. On the one hand, although the *référendaires* are working in French and applying EU law, they are reined in by their own legal language and the legal reasoning embedded therein. On the other hand, however, it is clear that the legal reasoning they employ at the CJEU is not fully transposed from their respective national legal systems. Indeed, it would be simplistic to suggest that individual CJEU judgments follow and reflect clear differences between the various legal families and systems that make up the EU member states. As Bengoetxea points out, the CJEU rarely explicitly engages in comparative legal analysis.[56] However, as a number of référendaires explained:

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54 Cf supra note 30.

55 Pozzo, B (2006) 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law' in Pozzo, B and Jacometti, V (eds) *Multilingualism and the Harmonisation of European Law* Kluwer Law International 3 at 9.

56 Bengoetxea, J (2011) 'Multilingual and Multicultural Legal Reasoning: The European Court of Justice' in Kjær, AL and Adamo, S (eds) *Linguistic Diversity and European Democracy* Ashgate 97 at 108. The fact that judgments of the CJEU rarely show a trace of comparative reasoning does not mean that no such reasoning has been employed. The CJEU's Research and Documentation Service often produces comparative reports on specific points of law on the request of the Members of the CJEU (Ibid at 109 footnote 29).

> REFERENDAIRE: the various different legal systems and cultures of those drafting the judgments […] have enriched the case law of the Court and contributed to the development of that case law.

The data presented here supports Bengoetxea's submission that the reasoning employed in those judgments is monolingual, but multicultural, and unique to an autonomous supranational EU legal culture.

Another impact on the linguistic development of the CJEU's case law brought about because those drafting the judgments are generally not of French mother tongue, is that: there is (and always has been) a tendency to use the same expressions over and again.

> REFERENDAIRE: because we are writing in a foreign language there is a tendency to do a lot of 'cutting and pasting' and so the style [in which the Court's judgments etc are written] reproduces itself.
> REFERENDAIRE: if something along the lines of what I want to say has been said before by the Court, then I will just use that same expression – I'll 'cut and paste' it.

There are a number of other reasons for that tendency towards repetition of phrases. Some argue that since the CJEU is building up an EU rule of law, it is necessary to use the same terminology consistently throughout that case law:

> REFERENDAIRE: what you are dealing with is the rule of law in a legal system that is still developing, therefore it is important to use the same terminology and phrases all of the time, in particular because that legal system is expressed in many different languages.
> REFERENDAIRE: We *must* draft using the language that has been used by the Court for over 50 years (interviewee's emphasis).

Also, the *référendaires* are encouraged to use the same terminology and to cite phrases from previous cases in their entirety in order to speed up the translation process. Sentences and phrases taken directly from previous judgments will already have been translated and those translations can be retrieved by computer software.[57] That reduces the number of words

57 That software, known as 'Generic Text Interface' (GTI), simply searches for words or phrases. It cannot identify context. (Note: at the time of publication the CJEU is developing its own translation software).

that must be translated in a given judgment and consequently reduces the turnover time for that judgment.[58]

> REFERENDAIRE: it has become important to cite entire phrases from previous judgments or even from preliminary reports instead of merely referring to them or paraphrasing. Then that phrase will be translated sentence-for-sentence since there is the danger that the text 'pulled up' by the [computer software] might not fit into the context of the case in hand unless every single word is exactly the same. There is a huge pressure for one single word to be translatable into another single word.

One interesting result of *référendaires* feeling bound by the language previously used by the CJEU is that a type of precedent is developing in judgments of that Court, in spite of the fact that no such rule actually exists within the EU court system:[59]

> REFERENDAIRE: On paper the decisions [of the CJEU] are not binding on future decisions, but because there is so much repetition between cases and because we are under pressure to cite entire phrases from previous judgments, it seems that precedent [in CJEU judgments] is sometimes more binding than in common law countries!

Another factor that affects the way in which CJEU judgments are drafted, and thus impacts on the linguistic development of the CJEU's case law, is the collegiate nature of those judgments. Because a final judgment is a collegiate document, there are often compromises embedded in it. However, because the deliberations of the CJEU are secret and no dissenting opinions are published, it is impossible for anyone other than the judges involved in those deliberations to know where such compromises lie in the text. As many of the *référendaires* interviewed commented:

> REFERENDAIRE: you don't always know which have been the 'contentious' points in the deliberation […] or how important a specific wording of a particular phrase may be […] therefore it is safer just to stick with phrases that may sound awkward or badly-worded instead of changing them to sound better or more clear.

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58 One of the most significant challenges faced by the CJEU today is that of its increased workload. See Harmsen and McAuliffe 'The European Courts' supra note 11 at 8.

59 Cf McAuliffe, K (2013) 'Precedent at the ECJ: The Linguistic Aspect' (15) *Current Legal Issues* 483.

It is thus clear that, regardless of the level of fluency in, or command of the French language of, those drafting the judgments of the CJEU, the fact that they are working in a language that is not their mother tongue has an effect on the linguistic development of that court's case law. In fact *all* of those interviewed for the present paper commented that the CJEU's judgments are 'shaped by the fact that the working language at the Court is French'. That 'French' is not quite the language of the French *Cour de Cassation*, nor the French legal language as used in France, Belgium or Luxembourg. The many cultural compromises involved in the drafting process and the multlicultural reasoning employed in producing the case law are reflected in a French unique to the CJEU:

> JUDGE: The status of French at the Court has forced it to become more supple, leading to the development of 'Court French'.
> REFERENDAIRE: 'Court French' is its own unique language! For example, the phrase '*prester un service*' is used by the Court [instead of, eg '*executer*' or '*fournir*'] but it is used on its own – there is no explanation as to *where* or *how* – it just happens: you work. The phrase exists in the case law of the Court of Justice but will not be found in a French dictionary – in 'real' French you cannot use the verb '*prester*' in this way.[60]

That new legal language demonstrates elements of 'hybridisation'.[61] In addition to the language impacts briefly described above, those drafting the texts that make up the case law of the CJEU are constrained by the very formulaic style the CJEU uses. That distinctive style is then repeated over and again, contributing to the development of a new 'hybrid' text type:

> REFERENDAIRE: as the judgments and reports etc. are so formulaic, they have gradually created a new kind of "mixed" text.[62]

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60 Interviewee's emphasis. However, it should be noted that this *référendaire* is a French national, and that the expression '*prester un service*' is in fact commonly used in Belgium, both in legal and everyday language. It is likely that the phrase came into use as a result of a 'Netherlandic corruption'. The verb '*presteren*' and the noun '*prestatie*' are used in this way in Dutch.

61 Since the mid 1990s translation theorist have been exploring the concept of hybridization. It is generally accepted that texts produced within multilingual/multicultural settings show elements of hybridization. For a discussion of this concept in the context of the CJEU see McAuliffe 'Hybrid Texts and Uniform Law?' supra note 11.

62 This interviewee is a judge.

The question then arises whether language is therefore a constraint on the development of EU law. Does the formulaic style that constrains the *référendaires* in what they can write actually constrain the development of the jurisprudence? The members of the CJEU interviewed for the present paper were of the opinion that, to a certain extent, that is indeed the case:

> JUDGE: It is surprising how much the French language influences how the judges deliberate and draft judgments – the fact that French is used as the language of the deliberations and is the language in which the very formulaic judgments are drafted forces [the CJEU] to speak or rule in a certain way.
> JUDGE: It is often difficult to say exactly what you want to say in a judgment […] often the Court will want to say X but in the very rigid French of the Court that is used in the judgments you have to get around to X by saying that it is not Y! [...] such use of language necessarily has implications for the way in which the case law develops.

The cultural compromises involved in manipulating a language that is not one's own, applying a distinct type of multi-layered legal reasoning, constraints due to a formulaic style and pressures due to the translation process and the fact that judgments are collegiate documents are all reflected in the 'output' of the CJEU. However, for that 'output' to resonate outside of that Court and be applied throughout the EU it must first be translated. According to Bengoetxea, it is at the translation stage that 'genuine multilingual legal reasoning occurs'.[63]

Linguistic Cultural Compromises in Translation

The translation directorate at the CJEU is the largest directorate within that Court, employing almost half of the entire staff of the Court.[64] Most of that number are lawyer-linguists, who are responsible for the translation of judgments, all of the various other internal and outgoing documents and all the documents received by the CJEU.[65]

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63 Bengoetxea 'Multilingual and Multicultural Legal Reasoning' supra note 56 at 118.

64 In 2013 the staff of the Translation Directorate numbered 924, or 44.7 % of the Court's total staff, 610 of whom were lawyer-linguists. Available at: <http://curia.europa.eu/jcms/jcms/P_80908>.

65 Such as orders, opinions of the Court and of advocates general in particular cases, references for preliminary rulings and other notices for actions submitted to the

The title 'lawyer-linguist' brings to mind two very different professions, lawyers and translators. There exists a vast literature on the subject of lawyers – who they are, what they do, their role definitions, as well as on the concept of the legal profession. While such role definitions and concepts of legal profession may differ between states and legal orders, those legal orders nonetheless have many legal professional norms in common.[66] Such norms relate to the need to remain faithful to 'the law', or the effort to avoid an uncertain rule of law,[67] and are referents for lawyers' behaviour.[68] In order for 'the law' to function it has to be considered definite, precise and deliberate. Lawyers' role definitions are thus grounded in a specific, positive concept.

A similar literature exists concerning the profession of translators.[69] That literature focuses on concepts such as the translator as author and the

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CJEU and press releases. Sometimes, owing to time pressures, the CJEU's press and information division will produce their own translations.

66 Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Civil Law World* Vol II University of California Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Common Law World* Vol I University of California Press.

67 This notion of an obligation on the part of 'lawyers' to be faithful to 'the law' is an underlying theme in much of the literature concerning the sociology of legal professions. See, for example, Abel, RL (1988) *The Legal Profession in England and Wales* Blackwell; Abel, RL (1997) *Lawyers: A Critical Reader* The New Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Civil Law World* Vol II University of California Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Common Law World* Vol I University of California Press; Flood, JA (1983) *Barristers' Clerks: The Law's Middlemen* Manchester: Manchester University Press; Heinz, JP et al (2005) *Urban Lawyers: The New Social Structure of the Bar* University of Chicago Press; Huyse, L (1995) 'Legal Experts in Belgium' in Abel, RA and Lewis, PSC (eds) *Lawyers in Society: An Overview* University of California Press 168; Kelly, MJ (1994) *Lives of Lawyers: Journeys into the Organization of Practice* University of Michigan Press; Kritzer, HM (1999) 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World' 33 *Law and Society Review* 713; Morison, J and Leith, P (1992) *The Barrister's World and the Nature of Law* OUP; Cownie, F (2004) *Legal Academics: Culture and Identities* Hart.

68 For a discussion of the relationship between the concept of professional norms and cultures and the behaviour of lawyers see: Rosen RE (2001) *What Motivates Lawyers* (paper presented at the Socio-Legal Studies Association Conference, University of Bristol April 4–6).

69 See, for example: Fraser, B and Titchen Beeth, H (1999) 'The Quest for the Roots of Quality' (2) *Terminology et Traduction* 76; Goulet, D (1966) 'Le cas du traducteur fonctionnaire' [The Case of the Public/Civil Service Translator] (11) *Meta* 127; Martin, T (1993) 'Image and Self Image: Public and Private Perceptions of the Translator' (paper presented at the VIII Fédération Internationale de Traducteurs World Congress: Translation – The Vital Link, London 1993);

power, limitations or constraints of the translator. Underlying those role perceptions is the implicit (and in many cases explicit) acknowledgement of the indeterminate nature of translation. Translation is considered a process of negotiation, and translators are considered as mediators. Their work is, at best, a compromise. As discussed above, legal translation is concerned with the effect of the translated text. While legal translation may involve approximation on a linguistic and/or cultural level, it is possible, in theory, for a legal translator to produce a target text which expresses the meaning and achieves the legal effects intended by the author of the source text. In practice, however, that is extremely difficult to achieve, as it is largely dependent on the rules and methods of interpretation applied by the receiver of the target text.[70] The role of the legal translator is thus also defined by the indeterminate act of translation.

The contradictions between those two professions are significant. On the one hand, lawyers are defined relative to a definite and determinate concept of 'the law'. On the other hand, translators' role definitions are based on the acceptance of the indeterminate nature of language and translation. So the two professions, and their respective norms, appear to be incompatible. Yet, in the context of the lawyer-linguists at the CJEU, they are brought together. While dealing with the classic problems of translation on a daily basis, the lawyer-linguists at the CJEU also appear to be trying to balance a dual professional identity – that of lawyer *and* linguist. Among the lawyer-linguists interviewed for the present paper, ten feel very strongly that they are lawyers:

> LAWYER-LINGUIST: lawyer-linguists are simply lawyers who work exclusively with a particular sphere of law.

Mossop, B (1983) 'The Translator as Rapporteur: A Concept for Training and Self-Improvement' (28) *Meta* 244; Round, NG (1996) 'Interlocking the Voids: The Knowledges of the Translator' in Coulthard, M and Odber de Baubeta, PA (eds) *The Knowledges of the Translator from Literary Interpretation to Machine Classification* Edwin Mellen Press 1; Wolf, M (2002) 'Culture as Translation – and Beyond: Ethnographic Models of Representation in Translation Studies' in Hermans, T (ed) *Crosscultural Transgressions: Research Models in Translation Studies II: Historical and Ideological Issues* St Jerome Publishing 180.

70 Cf. McAuliffe, K (2006) *Law in Translation* PhD Thesis, The Queen's University of Belfast at 53–57.

Many feel that the work of lawyer-linguists at the CJEU is actually an exercise in comparative law:

> LAWYER-LINGUIST: In order to be able to translate a legal term from one language to another in which that translation will also have force of law the lawyer-linguist must be able to understand both the concept in the source language and the meaning of that concept within the relevant legal system as well as the legal system of the country in which the target language is spoken.

Those who disagree with that notion (that the work is an exercise in comparative law) nonetheless agree that some form of legal training is necessary in order to be able to grasp a concept from a legal system other than one's own and subsequently express that concept in another language:

> LAWYER-LINGUIST: someone might be able to explain a legal concept to you, but without legal training you would not be able to subsequently translate that concept into the relevant legal language.

As proof of their lawyer status, many point to the control function fulfilled by lawyer-linguists in the production of judgments/statements of law:

> LAWYER-LINGUIST: Lawyer-linguists […] have a different view of the judgment from the référendaires or judges – lawyer-linguists are much more focused on specific things which the cabinets don't focus on – for example, making sure sound terminology is used and not just any old words – *référendaires* are sometimes afraid of over-using a word and so will use a different one without realising that there may be subtle or even not so subtle legal differences between the words.

Thus, lawyer-linguists are responsible for dealing with legal issues that arise because of linguistic ambiguities. In the eyes of those lawyer-linguists:

> LAWYER-LINGUIST: Our job is not so much a linguistic one, and certainly not mere translation, but is a *legal* one.[71]

Of those interviewed 19 asserted that they are *not* lawyers but *translators*. Interestingly however, each and every one of them immediately qualified their statement by pointing out that as translators of judicial texts, with law degrees, they are 'much more than simply translators'. All but one insisted that they could not do their job to a sufficiently high standard without having a legal qualification and that 'that sets us apart from

71 Interviewee's emphasis.

"mere" translators'. They feel that the job would hold no interest for them 'if the law element wasn't there as well as the translation element', that they would not enjoy being 'just a translator'. The majority feel that 'mere' translators (i.e. translators who do not have a legal qualification) would not be able to follow the line of (legal) argument of a judicial document:

> LAWYER-LINGUIST: In order to be able to translate a judgment you have to be able to understand and follow the legal reasoning [of that judgment]—otherwise how can you possibly even begin to attempt to translate it? Mere translators, those without any legal qualifications, experience or training, are unlikely to be able to do this.

The remainder of the lawyer-linguists interviewed feel that a lawyer-linguist is something distinct from both a lawyer and a translator, a sort of hybrid between the two, or, as one put it: 'a perfect synthesis of a lawyer and a linguist'. The job requires expertise in law *and* expertise in translation, and most find it very satisfying to be able to 'tie-up' their interest in law and their love of languages. Some feel that the law *is* a language, that it is an expression of a society, and that those who become lawyer-linguists:

> LAWYER-LINGUIST: are lawyers who are more interested in the *theoretical* aspect of law than in the practice of law. Those who practice law actually deal less with concepts of law and more with business and administration – in applying the rules – and rarely deal with any [theoretical] legal problems.[72]

They feel that the work of a lawyer-linguist involves 'working at a deep level of understanding of legal concepts' and that it is much more than translation:

> LAWYER-LINGUIST: in short, it is the manipulation of law as language and language as law.

From the interviews carried out it became clear that, while the lawyer-linguists at the CJEU take their responsibilities as translators very seriously, they also feel responsibility as lawyers since they are effectively giving the Court its 'voice'. The struggle to merge those two professions successfully sets those who work in the CJEU's translation service apart from both lawyers and translators. As one lawyer-linguist pointed out:

72 Interviewee's emphasis.

> LAWYER-LINGUIST: [the lawyer-linguists at the CJEU] are walking a tightrope, continuously trying to balance their responsibilities as linguists with their responsibilities as lawyers.

There appears to be two approaches to the attempt to balance that dual professional identity. Some lawyer-linguists see themselves primarily as lawyers, and they have a different approach to the role from those who consider themselves primarily linguists.

> LAWYER-LINGUIST: Those who are primarily linguists sometimes overlook or fail to appreciate legal issues and those who are primarily lawyer can often make crass linguistic mistakes but they better see the relevant legal issues.

With careful management, those two approaches adopted by the lawyer-linguists can actually complement each other. One failing that both approaches have, however, is the unwillingness on the part of some lawyer-linguists to translate very literally in certain cases. Those who consider themselves primarily linguists tend to object to producing texts that do not read well, that 'read as translations', while those who deem themselves primarily lawyers find it difficult not to use the obvious or closest legal equivalent in the target language.

However, it is sometimes very important to produce a literal translation, for example, so as not to resolve an ambiguity where the Court has wanted to preserve one. Ultimately it is the revisers who decide what approach is best in a particular case. If, for example, the problem concerns a point that has been settled long ago in the case-law of the CJEU and there are no new legal terms to deal with, then the lawyer-linguist can generally translate it in any way he or she wishes. However, if it concerns an important new point then great care must be taken. In such cases it is the reviser who decides what approach is best.[73] As one reviser stated:

> LAWYER-LINGUIST: If you've been here long enough you'll see your chickens coming home to roost! Often you see a word or phrase that sounds very clumsy and you translate it using something that's not quite literal but sounds neater in [the target language] and then a few years later the phrase comes back to you in another case and

73 Experienced lawyer-linguists may be promoted to the role of reviser. Revisers are responsible for checking the translations of less experienced lawyer-linguists. Most revisers also continue to translate and so split their role between translating themselves and revising the work of others.

> you realise you shouldn't have translated it the way you did in the first place because you've resolved an issue that shouldn't have been resolved at that time. That is why we tend to translate very literally at the Court even though the translation may sound very awkward – the idea is to preserve ambiguity where [the members of the Court] want it. Often the wording of a judgment is a compromise formula as a result of disagreement in the deliberations and must therefore be translated very literally.

There are, however, also instances where conceptual translation is more important. Joserramon Bengoetxea uses the example of the translation of 'direct applicability' in Advocate General Kokott's opinion in the *Mikelsson*[74] case to highlight the importance of conceptual translation and the role that translation plays in the CJEU's 'genuine multilingual reasoning'.[75] In the different translations of the relevant point, there appears to be confusion as to whether the advocate general is referring to *direct applicability* (a literal translation followed in the English, Dutch, Swedish and Danish texts) or *direct effect* (a more 'conceptual' translation, followed in the French, Spanish, Portuguese and Polish translations).[76] Bengoetxea asks: 'Have the translators or the reviewers confused the concepts, have they corrected the confusion of the AG, is there a distinction without a difference after all?'[77]

Whatever the answer, those types of difficulty represent the issue at the very core of the lawyer-linguists' role: the reconciliation of the notions of 'law' and 'translation'. As noted above, it is generally accepted that translation of any kind, including legal translation, involves some measure of approximation, but this concept of approximation in translation does not sit easily with traditional notions of law – an authoritative force, necessarily uniform throughout the jurisdiction within which it applies, in particular the EU legal order where the principle of uniformity has formed the basis for the most important doctrines of EU law introduced

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74 Case C-142/05 *Åklagaren* v*Mickelsson and Roos* [2009] ECR I-4273.

75 Bengoetxea 'Multilingual and Multicultural Legal Reasoning' supra note 56 at 118.

76 A significant point since the concepts of direct applicability and direct effect mean different things in EU law. Direct applicability is where a provision has immediate legal effect in member states' legal systems with no need for any further implementation. Direct effect is where an individual can rely on a provision of EU law before a member state national court.

77 Bengoetxea 'Multilingual and Multicultural Reasoning' supra note 56 at 119.

by the CJEU. All of the lawyer-linguists interviewed agreed that translation necessarily involves some degree of approximation, and that:

> LAWYER-LINGUIST: as in any kind of translation, it is impossible to transpose exact equivalents when translating legal texts from one language to another.

They all also agreed that the approximation inherent in translation has a significant impact when it comes to translating ambiguity. Maintaining the ambiguity (intentional or not) of a text is not always an easy exercise due to the characteristics of different languages and language families. It is relatively easy, for example, to render ambiguity in Italian, Spanish or Portuguese when the source language is another Latin language such as French. However, it is far more difficult to render such ambiguity in a language such as English or German, simply because of the different nature of those languages. When questioned about the difficulty of knowing how to deal with such ambiguity, the Portuguese, Italian, Spanish and Greek lawyer-linguists claimed to have no problem whatsoever. However, without having been asked, all of the English, German, Finnish and Swedish lawyer-linguists interviewed noted that difficulty as a major hurdle of their job. Without exception, those lawyer-linguists felt that translation from French (or indeed any similarly Latin-based language) into their language(s) results in a final text that is in some ways more clear and precise than the original:

> LAWYER-LINGUIST: Translating ambiguity is a real problem because in some cases in some languages you *have* to be more precise and therefore will lose some or all of the ambiguity […] in other languages you may even increase the ambiguity.[78]

Such divergences in the relative ambiguity of texts are particularly significant in the case of judgments the authentic version of which is in a language other than French. An authentic version of a judgment that is less ambiguous or more precise than the original language version that has been deliberated over by the relevant chamber could have widespread legal implications:[79]

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78 Interviewee's emphasis.

79 Although the precaution is usually taken to sent the authentic (translated) version of a judgment for review to the member of the CJEU whose native tongue is that of the language of the case, that member may not necessarily have been in the Chamber of judges that decided the particular case, and therefore could not be aware of the deliberations in that case.

> LAWYER-LINGUIST: if the translation of a judgment ends up more precise than the French original, and that translation is the authentic language version of the judgment, then presumably lawyers and courts in the relevant Member State (and perhaps even in other Member States) will follow the authentic language version assuming that that is the correct version.[80]

From the data gathered through the interdisciplinary research methods described above it seems, therefore, that there are two types of linguistic cultural compromise at play in the working of the CJEU.

First, the linguistic cultural compromise involved in *producing* the Court's case law. As we have seen, the factors involved in that first linguistic cultural compromise have led to the development of a 'Court French', which necessarily shapes the case law produced and has implications for its development.

Secondly, the case law of the CJEU is 'filtered out' through the linguistic cultural compromises involved in translation. Translation itself is a 'linguistic cultural compromise' and all translation, including legal translation, involves an element of approximation. In addition, the necessary compromise resulting from the struggle to reconcile the notions of 'law' and 'translation' is reflected in the process of filtering out that case law to the wider EU.

The resultant texts that make up the case law of the CJEU are hybrid in nature – consisting of a blend of cultural and linguistic patterns, constrained by a rigid formulistic drafting style and put through many permutations of translation. Maintaining that hybrid character through translation can arguably help to ensure the uniform application of EU law by alerting those applying that law to the fact that they are dealing not with their own language, but with a new and distinct EU legal language.[81] But it is only through understanding the multi-layered linguistic cultural compromises involved in the production of that case law that one can fully understand how this multilingual legal system has evolved.

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80 For a recent example of this precise scenario occurring before the UK Competition Appeal Tribunal see McAuliffe 'The Limitations of a Multilingual Legal Order' supra note 13.

81 Cf McAuliffe 'Hybrid Texts and Uniform Law' supra note 11.

CONCLUSION

The interdisciplinary work set out in this paper makes an original contribution to the bodies of literature on the CJEU. Whereas those bodies of literature generally tend to focus on judicial reasoning or on investigating the motivation behind the CJEU's decisions, the analysis in this paper goes beyond that. Borrowing methodological tools from disciplines outside of law allows us to gain an in-depth understanding of how the multilingual jurisprudence of the CJEU is produced. More specifically, we can investigate the impact that language has on the CJEU's jurisprudence and the limitations of that jurisprudence.

In her work in anthropology, Irène Bellier analyses the development of a 'eurolanguage' within the European Commission. However, the texts produced by the CJEU also have to resonate comprehensively outside of that institution in terms of an EU legal language that is applicable throughout all 28 member states. That legal language, which is expressed in 24 linguistic variations has shaped the development of the CJEU's case law, which has in turn developed the unique and supranational EU legal order. Developing a better understanding of the inner workings of the environment in which a significant part of EU law is created allows us to work towards delimiting the inconsistencies that inevitably arise in this evolving multilingual system.

The CJEU's jurisprudence is not created and translated by machines, but by individuals of many mother tongues, from many different legal cultures, and is necessarily shaped by the dynamics of that institution. The translation of ambiguity embedded in the process – from drafting, to reasoning, to deciding a case before the CJEU, as well as the many layers of translation involved at different stages of that process – highlights an inherent approximation in that jurisprudence. However, the question is whether that approximation, which is necessary for a multilingual jurisprudence, produces a satisfactorily unambiguous jurisprudence. Moreover, does that approximation, and the notion of a 'new' EU legal language, allow for unproblematic 'mediation' at national member state level?

This paper is thus illustrative of the limitations of a multilingual legal system. Accordingly, an awareness of issues of language and translation should condition our understanding of such a system. The EU legal order functions precisely because of the implicit understanding among those who work at EU level of the indeterminate and imprecise nature of language and law. That legal order, its expression and application throughout

the EU is thus based on a legal linguistic fiction, which, while it may be a workable one, is nonetheless a fiction.

The paper also demonstrates how interdisciplinary study can introduce a new dimension to established sub-fields of EU law. The paper and the study of which it forms a part are relevant in particular to the constitutional pluralism debate. In order to gain a true understanding of the EU constitutional narrative and current theories of constitutional pluralism in the EU context, we should not ignore those linguistic cultural compromises involved in the production of the CJEU's case law. Indeed, the issue of approximation in translation and the hybrid nature of EU law seem to reinforce the pluralist argument.

Conducting interdisciplinary research can be difficult in terms of research design, methodology and analysis. Often the most difficult part is convincing others in the relevant field(s) that such methods are appropriate and valuable. Good quality interdisciplinary research will contribute not just to one particular field but will make a valuable contribution across a number of, often disparate, fields. That is the case with this paper, which contributes not only to the literature on the CJEU and theories of EU constitutional pluralism, but also to fields such as sociology and translation theory. With regard to sociology, by problematizing the CJEU in a way in which other EU institutions have been problematized – focusing on how it operates as a multilingual, multicultural institution – the paper addresses a gap in the literature on how EU institutions function. Furthermore, the analysis of the linguistic cultural compromises involved in producing the CJEU's case law contributes in particular to the emerging concept of 'professions of Europe'. In terms of translation theory, the Study supports the work of Susan Šarčević by highlighting why legal translation, in the context of supranational law, should be about more than making a foreign legal text accessible or understandable in the target language. The linguistic cultural compromises involved in the translation processes at the CJEU epitomise the relationship between law and language in a system in which translated texts are expected to produce the same legal effects across jurisdictions.

This paper also demonstrates that interdisciplinary research can be invaluable in comparative law or legal studies more generally. Stepping away from legal scholarship and looking to other disciplines allows us to develop a fuller understanding of not only the topic being studied but also the field itself. The inherent interdisciplinarity involved in analysing the relationship between law, language and translation in the production of the CJEU's multilingual jurisprudence is thus particularly relevant for comparative law. In legal studies, as mentioned above, the focus tends to

be on the '*why*' and comparing legal systems focuses on differences. Social Science research methods require the researcher to take a step back from that focus on difference and to instead look at the '*how*'. Understanding the situational factors of, and compromises involved in, the production of supranational law can provide a fuller insight into how such law has evolved. Finally, by focusing on language, this paper sets out a level of interdisciplinary research not often seen in comparative law research. Legal cultures are of interest, not only to legal scholars, but also to scholars of other disciplines. In particular, as set out above, linguistic theorists and translation theorists are interested in the relationship between law, language and culture. Moreover, the flow of information between legal systems takes place through translation. It follows therefore that engaging with translation theories, and legal translation in particular, can bring a new aspect to our understanding of comparative law.

Comparative law research would appear to be an inherently multilingual and interdisciplinary exercise. However, all too often the range of tools provided by legal studies is limited and scholars approach such research through a monolingual and monocultural lens. Without being interdisciplinary we cannot hope to gain a 'holistic' understanding of the development of certain concepts and theories across a number of fields and disciplines. Interdisciplinary research can allow us to make connections between ideas and ultimately lead us to a more nuanced understanding of the law.

My iCourts experience

In 2011, Anne Lise Kjær invited me to Copenhagen, to participate in a RELINE workshop on Language and Law. At the time, I was a lecturer in law at the University of Exeter in the UK, and, since completing my PhD at the Queen's University of Belfast in 2007, had yet to really find my research community. Having entered academia with lofty ambitions to challenge EU scholarship by highlighting the importance of language in the production and application of multilingual EU law, I had found those early years, without a real research community and support, challenging. Needless to say, I jumped at the chance to participate in that workshop, which was held in the building that would become iCourts' first home. It was my first visit to Copenhagen, and I fell in love with the city (yes, even in winter!) but more importantly, I met colleagues with similar research interests, and, while chatting with a new acquaintance, Mikael Rask Madsen, learned of a potential future interdisciplinary centre for the study of international courts. One thing that struck me during that conversation was the value that Mikael placed on people and space in order to cultivate innovative and truly collaborative work. And a year later, he was able to bring together an outstanding group of people, in a space that facilitated collaboration and the organic building of relationships in order to develop original and impactful work.

I've made many visits to iCourts over the past ten years, for workshops, short research visits, and to teach on the excellent PhD summer school. iCourts provided an important space for me to think and develop some of my ideas in my *Law and Language at the European Court of Justice* project. In 2014 I spent a semester there as a visiting researcher, and also brought one of my postdoctoral researchers, Aleks Trklja, with me for part of that time. During that research visit, I wrote my paper *Translating Ambiguity*, which is republished in this volume, and Aleks and I developed the models and theories which would form the basis of future publications on language and superdiversity, and on a corpus-based model for studying discourse relations of legal texts. The interdisciplinary team at iCourts challenged me intellectually, providing robust critiques of theory, method, and the interpretation of results, all in a supportive and collegial environment (and usually accompanied by kanelsnegle!). Moreover, that support didn't vanish once my visit was complete – over the years colleagues at iCourts have provided me with valuable feedback on writing, grant applications,

and even career development. In fact, I've received some of the most valuable mentoring of my career to date from iCourts colleagues. During my 2014 research visit, Mikael took the time to talk to me about career development, and urged me to consider moving to an institution that would offer a more appropriate intellectual home for my work than the one I was at. It was directly as a result of that mentoring and advice from Mikael that, in 2015, I applied for, and got, a prestigious fellowship at the University of Birmingham, the Birmingham Fellowship. I am still based at the University of Birmingham, where I now hold a Chair in Law and Language, and am a Professorial Birmingham Fellow. iCourts has played a significant role in getting me to where I am today.

For me, the most special thing about iCourts is its people. By cultivating a genuinely collegial space in which intellectual relationships can flourish, acquaintances become colleagues, who become friends. One thing that iCourts does really well, is to value the 'downtime' as much as the academic endeavours. This is what really sparks the creativity and innovation that is the hallmark of much of the work coming out of the centre. The importance of the extra-curricular can be seen right across the board – from the social programme of the PhD summer school, to the thought put into workshop coffee breaks and dinners, to the impromptu after-work get-togethers, often instigated by Juan Mayoral! Where else would a Culture Night visit to a museum with colleagues end up with you all performing on the stage of the Danish Concert Hall (perhaps a story for another time!)? Does any other Centre of Excellence boast its own house jazz band? I have yet to encounter a research centre or institute quite like iCourts – it is a truly special and inspiring place, and I look forward to many more years of collaboration and friendship there. Thank you all.

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The African Court on Human and Peoples' Rights: mapping resistance against a young court

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Abstract

At first glance, it appears that the African Court on Human and Peoples' Rights – the first pan-continental court of the African Union (AU) for human rights protection – epitomises the advances made by international courts in Africa in the past decade. Since its first judgment in 2009, the Court has taken a robust approach to its mandate and its docket is growing apace. However, a closer look at the overall context in which the Court operates reveals that it is susceptible to many of the patterns of resistance that have hampered other international courts in the region, which cut across the development of its authority and impact. This paper analyses the forms and patterns of resistance against the African Court and the actors involved, emphasising the additional difficulties entailed in mapping resistance to a young court compared to long-established courts, such as the European and Inter-American human rights courts.

Keywords: international human rights law; sociology of law; African Union; African Court on Human and Peoples' Rights; backlash against international courts

1. Introduction

This paper examines resistance to the African Court on Human and Peoples' Rights (hereinafter, 'the African Court') based in Arusha, Tanzania, which has been in operation since 2006. Although the African Court is still a young court, it has energetically seized its mandate and has found a raft of rights violations in the limited number of cases before it to date, which has been met with clear resistance and which is likely to generate further resistance given the regional context in which the Court operates.

In a continent notorious for upholding state sovereignty and the principles of non-interference even in the face of grave human rights violations (Cole, 2010), and where other human rights protection bodies such as the African Commission on Human and Peoples' Rights have struggled to have an impact (Bekker, 2013), resistance to the Court has taken a variety of forms, some of which are dissimilar to those found in other regions. So far, no major or significant forms of resistance, in the form of 'backlash', have occurred in response to the Court's jurisprudence that would fundamentally undermine its functioning. However, other forms of resistance have appeared, such as Rwanda's withdrawal of its declaration permitting individuals and qualified NGOs to petition the Court and early signs of resistance by Tanzania (the host state) in the form of non-compliance with key judgments of the Court. Considering earlier backlash against other regional courts in Africa such as the Southern African Development Community (SADC) tribunal (Alter et al., 2016a), it is possible that, at this point in time, we can identify the beginnings of distinct patterns of resistance that might start out as reactions to a particular judgment or a set of judgments (or even cases pending before the Court) and that may eventually escalate into a more systemic and even transnational critique of the court, resulting in either changes to the system, rendering it defunct by starving it of resources, or even shutting it down entirely.

The introduction to this special issue on resistance against international courts (ICs) sets out a useful framework for analysing the forms and patterns of resistance to such courts, which has become an increasingly common global phenomenon (Madsen et al., 2018). While resistance to the African Court is a theme running through much of the literature on the Court, the varieties, patterns and processes of resistance to the Court have not been systematically studied. The aim of this paper is therefore to map the way in which the Court and its jurisprudence have developed and to analyse the forms and patterns of resistance to the Court generated by its case-law. In doing so, the paper pays attention to the contextual factors that influence the nature, scope and intensity of these processes of resistance.

Applying the theoretical framework concerning resistance to ICs developed by Madsen et al. to the African Court as a case-study provides useful additional insights. Most importantly, it emphasises that charting resistance against a young court can be more difficult than charting resistance against a long-established court, given that what looks like resistance may in fact relate to difficulties in building the Court's de facto authority (Alter et al., 2016b). This poses the question of where and how the two analytical frameworks, related to resistance and authority-building, overlap. Indeed,

although some reactions against the African Court follow familiar forms and patterns of resistance against IC jurisprudence in other world regions, some of the resistance discussed below is hard to categorise as 'pushback' or 'backlash', but rather reflects attempts to hinder the minimum development of an IC towards becoming an effective institution in the first place. In a sense, this places young courts such as the African Court in an intermediate category lying somewhere between 'paper courts' established by treaty but that never become operational, and long-established ICs that have developed an appreciable level of de facto authority. As such, the term 'young court' here does not denote a rigid conceptual category, but rather a broad rubric for ICs lying in this ill-defined area of the spectrum. Second, the youth of the African Court, and autocratic governance in key states under its purview, affects the configuration and interaction of resistance actors, with national governments and NGOs playing a more central role as sites of resistance, and other actors that are central elsewhere – chiefly national courts and the media – featuring far less prominently.

The paper contains four sections. Section 2 briefly addresses the analytical framework for resistance set out by Madsen, Cebulak and Wiebusch (2018). Section 3 sets out fundamental contextual factors that affect the overall operation of the African Court. Section 4 analyses the African Court's design and development, and how resistance has hindered its development to date. Section 5 addresses the evolution of the Court's case-law to date and discusses resistance to its case-law, focusing on two key respondent states: Tanzania, the Court's host state and subject of six of its twelve merits judgments to date; and Rwanda, which has expressed the strongest negative reaction to the Court's case-law. The conclusion summarises the key insights gleaned from the case-study as a whole.

2. *Forms and patterns of resistance*

This section builds on the analytical framework developed by Madsen, Cebulak and Wiebusch in this issue (2018). We focus here on the categorisation of different forms of resistance, the general approach of studying resistance and the relationship between different actors in producing patterns of resistance.

As discussed by Madsen et al., resistance can take different forms, and the core distinction made here is between 'pushback' and 'backlash'. Pushback is used to denote resistance within the established rules of the game (ordinary critique), with the aim of reverting developments in the jurisprudence of an IC in specific areas of law. By contrast, backlash denotes

resistance that is not based on acceptance of the rules of the game (extra-ordinary critique), challenges the authority and institutional set-up of an IC and tends to involve collective action by Member States (Madsen et al., 2018).

The organising concept of 'resistance' used in this special issue relates primarily to the process, and not the outcome, of resistance. In contrast to Alter, Gathii and Helfer (2016a), who analyse resistance mostly as something that is successful or unsuccessful, the framework disaggregates backlash and considers it as a process which can lead to an outcome, but which does not necessarily have a discernible impact. This focus on process allows us to analyse dynamics of resistance even where it has no concrete consequences for the Court's case-law or structure.

The framework also makes clear that resistance can proceed according to different patterns depending on the actors involved. As emphasised by Madsen et al., it is important to disaggregate the term 'resistance' by moving from general references to 'Member States' and identifying instead specific governance and civil society actors that play key roles in the different forms of resistance faced by an IC. This is especially the case since resistance at one site can be expressed in different ways, founded on different premises and of varying levels of intensity, but can become mutually reinforcing where a dominant narrative of resistance, or points of consensus, emerge. Resistance can emanate from a single actor (e.g. national government) or, more commonly, a constellation of different actors within the governance system (e.g. courts, political parties) and civil society (NGOs, media, academics). This analysis follows this emphasis on specific actors. However, as the analysis below indicates, resistance to the African Court to date appears to have emanated from smaller constellations of actors, and is affected by the system of governance in different states.

As explained by the Madsen et al., to fully understand the rationale and development of resistance as expressed by these actors, it is crucial to consider the wider context in which the African Court operates, and fundamental contextual factors that influence the emergence and direction of resistance against the African Court. These are addressed in the following section.

3. *The context of resistance against the African Court*

Resistance against the African Court is considerably influenced by a variety of factors relating to the socio-political, historical and institutional context

in which it operates. Aligned with the model developed by Madsen et al., this section highlights these fundamental contextual factors for understanding such resistance, which are essential to the analysis of the constellation of actors evincing resistance to the African Court in the following sections. In order to better convey the unique context of the African Court, the paper engages in limited comparison with the longer-established European and Inter-American human rights courts.

The most fundamental contextual factor to appreciate when analysing resistance against the African Court is that it operates in a continent where a variety of governance systems exist, ranging from authoritarian states to well-established democracies. Many African states are still faced with massive governance challenges and systematic violations of human rights, relating to ongoing conflict, humanitarian crises, internal displacement of peoples, terrorist attacks, political instability, widespread use of torture and ill-treatment by law-enforcement and security forces, arbitrary arrest and detention, abduction and killing of human rights defenders and political opponents, restrictions on freedom of expression and limitations on access to information.[1] As discussed below in the context of Tanzania, democratic progress in some states has stalled or reversed. Although various states in Europe and Latin America also suffer serious problems, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) operate in regional contexts where the overwhelming majority of states under their purview are democratic systems (albeit of varying quality). The different socio-political context of the African Court has clear ramifications for the nature and intensity of resistance it faces, as discussed below.

Second, the historical experience of ICs and quasi-judicial bodies with human rights protection mandates in Africa is important. The African Commission on Human and Peoples' Rights (hereinafter 'the African Commission'), created as a stand-alone institution in 1987, is the key pre-existing institution with a pan-continental human rights protection mandate (and which continues to function in tandem with the African Court, as set out below). The Commission from the outset faced serious resistance and found little room to manoeuvre. Although the Commission has alternated between a deferential posture, seen in its focus on 'positive

1 See The Human Rights Situation on the Continent described in the 40th, 41st and 42nd Activity Reports of the African Commission on Human and Peoples' Rights covering the period from December 2015 to May 2017, http://www.achpr.org/activity-reports/ (last accessed 19 February 2018).

dialogue', and more assertive stances on key issues including the use of secret military trials, and rights to free speech and fair trial (Bekker, 2013), the one thread running through its thirty years of existence is that states have generally refused to implement its recommendations (Murray and Long, 2015).

Alongside this generalised resistance against the authority of the African Commission, other ICs on the continent that have adopted assertive stances on human rights have met with significant resistance. For instance, the tribunal of the fifteen-member SADC, established in 1992, was effectively 'dismantled' in 2012 due to opposition to its judgments challenging expropriation of land from White settlers in Zimbabwe, after a campaign spearheaded by Zimbabwe. Initially suspended, the tribunal returned in 2014 with its jurisdiction reduced to interstate disputes and individual petitions prohibited (Alter et al., 2016a, pp. 306–314). The East African Court of Justice (EACJ) and the ECOWAS Court have also been targets of backlash (spearheaded by Kenya and Gambia, respectively) when they have attempted to address human rights violations and electoral matters, which in the latter case has led to caution regarding expansive interpretation of its mandate (Alter et al., 2016a, p. 300). However, it is important to emphasise that these are all courts of Regional Economic Communities (RECs). It may be easier, for instance, for a national government to organise a campaign of resistance among a smaller group of states against a REC court than against an IC such as the African Court, whose jurisdiction (potentially) extends across the fifty-five Member States of the African Union (AU).

Such backlash also mirrors developments at the national level where, in many states, the authority and independence of domestic courts is regularly challenged. A recent example is the strong political reaction against the Supreme Court of Kenya's annulment of the results of the August 2017 presidential election in which incumbent President Kenyatta had been declared the winner, denounced by the president as a 'judicial coup' (Gebre, 2017). Another example is found in the vocal denunciations of the Constitutional Court of South Africa by ANC party members including former President Zuma.[2] These experiences underscore that, in a region where non-intervention and sovereignty remain central pillars of interstate

2 See the speech by the South African journalist Raymond Louw to the 2012 Rhodes University graduation, Meddling with Constitutional Court Powers a Threat to All (22 April 2012) www.ru.ac.za/media/rhodesuniversity/content/communications documents/Raymond_Louw%20Grad%20Address.pdf (last accessed 19 February 2018).

relations, and where even domestic judicial authority is resisted in many states, an IC with human rights jurisdiction will likely face significant challenges in achieving acceptance of its authority, especially when addressing highly sensitive questions of law and policy.

Third, it is important to bear in mind the institutional novelty of the African Court. It is the first and only IC in the AU with human rights jurisdiction at the pan-continental level. The Court has been fully operational for only a decade: although its founding Protocol was adopted in 1998, it was not ratified until 2004 and the first judges were not appointed until 2006. The Court still faces a significant 'ratification gap', with twenty-five of the fifty-five AU Member States yet to ratify its founding Protocol. In addition, the Court already faces two processes of institutional reform that may see it either replaced by a 'successor' court with much wider jurisdiction (including international criminal jurisdiction) or its jurisdiction narrowed or altered to render it less effective. These are all discussed below.

In terms of its jurisprudence, the Court issued its first interim judgment in 2009 but did not issue a full merits judgment until 2013. To date, the Court has handed down twelve merits judgments. However, this is a significantly larger number than the five merits judgments issued by the ECtHR[3] and the three merits judgments issued by the IACtHR[4] in their first decade, and, importantly, the African Court has found rights violations in every merits judgment issued, unlike its European and Inter-American counterparts' first-decade jurisprudence. Crucially, as discussed in Section 4, many of the Court's judgments have struck at highly sensitive areas of public policy, the constitutional order and state power, such as the Rwandan government's approach to the 1994 genocide and key aspects of Tanzania's electoral and criminal justice systems. Seen in this light, it is unsurprising that the Court has faced resistance to its case-law to date, discussed below.

The following section briefly describes the Court's structure and evolution since 2006 and how various factors have hindered its development as an effective institution.

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3 Lawless v. Ireland (1979–80) 1 EHRR 1 (1 July 1961); De Becker v. Belgium App. No. 214/56 (27 March 1962); Wemhoff v. Germany App. No. 2122/64 (27 June 168); Neumeister v. Austria (27 June 1968); and 'Belgian linguistics' Case App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (23 July 1968).

4 Velásquez-Rodriguez (Ser. C) No. 4 (29 July 1988); Godínez-Cruz v. Honduras (Ser. C) No. 10 (20 January 1989); and Fairén-Garbi and Solís-Corrales v. Honduras (Ser. C) No. 6 (15 March 1989).

4. Development of the court: forms and patterns of resistance

This section provides a brief overview of the evolution of the African Court as an institution, focusing not only on its formal or de jure authority (i.e. the legal powers ascribed to the Court by its founding treaty, including the binding nature of its judgments), but also on its de facto authority (i.e. its authority as a sociological reality, which for many courts is often weaker than its formal authority suggests). Building on the framework developed by Alter, Helfer and Madsen, de facto authority ranges across a spectrum from 'narrow authority' to 'public authority', which relates to the kind and number of actors who act on the Court's judgments, and the overall impact of the Court's judgments on litigants, government and other state actors, civil society actors such as NGOs and businesses, and the general public, which may vary from state to state and from time to time (2016b).

Appreciation of the Court's overall institutional and regional setting, its development since 2006 and how its development has been hindered and challenged by various actors is essential to understanding the patterns of resistance against the Court to date and a useful background for discussion of the Court's case-law in the following section. Again, the African Court as a case-study underscores the different nature and forms of resistance against a young court, in contrast to a long-established court.

4.1 Resistance and ambivalence reflected in the Court's design

The decades-long movement towards establishment of the African Court perhaps tells its own story of resistance, or at least ambivalence, to an effective continental IC devoted to human rights protection, as do the structure, powers and access to the Court. Mooted as early as 1961 at a conference of African jurists (Cole, 2010, p. 24), the African Court did not come into being until 2006. Mirroring to some extent the slow institutional evolution of the Inter-American system, where the Court was established thirty years after adoption of the American Declaration of Human Rights of 1948, the African Court was a late arrival, coming twenty-five years after adoption of the African Charter of Human and Peoples' Rights in 1981. Foot-dragging by AU states meant that, although the Court's founding Protocol was adopted in 1998, the slow rate of ratifications meant that it did not come into effect until 2004, and the first judges were not appointed until 2006.

Given that the Court's formal authority and structure are described in detail in a number of key publications (e.g. Viljoen, 2012; Cole, 2010; FIDH, 2010), here it suffices to set out the basics. The Court's powers are set out in the Additional Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter, 'the founding Protocol'). These powers are broadly similar to those of its counterparts in Europe and the Americas: the Court has contentious jurisdiction, advisory jurisdiction, the power to order relief where a rights violation is found or even provisional measures where necessary. Judgments of the Court are binding: the founding Protocol expressly enjoins states parties to comply (Article 30). However, as discussed below, in practice, enforcement is far from guaranteed and no dedicated body was established by the founding Protocol to monitor enforcement of the Court's judgments. Instead, the Court is required to submit to the Assembly of Heads and Government a report on its work in which it 'shall specify, in particular, the cases in which a State has not complied with the Court's judgment' (Article 31 founding Protocol).

The Executive Council will assist the Assembly by monitoring the execution of the Court's judgments on its behalf (Article 29 founding Protocol).

Access to the Court is limited. States parties, the African Commission and African inter-governmental organisations have standing in contentious cases. Individuals and NGOs may directly petition the Court solely where a state has made an optional declaration recognising such petitions, under Article 34(6) of the founding Protocol. This is a form of via media between the European Court, where access is open to states, individuals, NGOs and groups of individuals, and the Inter-American system, where solely states and the Inter-American Commission on Human Rights have standing (however, NGOs may represent individual petitioners before the Inter-American Commission on Human Rights, and before the Court if the case is referred for judgment). Advisory opinions may be sought from the Court by any AU Member State, the AU or any of its organs, or 'any African organization recognized by the [AU]', although the last category has been restrictively interpreted in the Court's landmark SERAP Advisory Opinion of May 2017, as discussed below.[5]

Regarding structure, the African Court is composed of eleven judges, all serving part time except for the President of the Court, who serves

5 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), ACHPR, App. No. 001/2013 (26 May 2017).

full time. This, and the quorum requirement of seven judges to render judgment, means sessions are intense, tending to last for four weeks, with sittings from 9 a.m. until 7 p.m. in the evening, which presents a limiting factor for the Court's work. All judges are nationals of AU Member States, on the basis of selection criteria similar to the European and Inter-American systems, emphasising high moral character and human rights expertise (Article 11 founding Protocol). Like the Inter-American system, and unlike the European system, each member of the fifty-five-state AU is not represented on the Court: the judges at the time of writing are nationals of Côte d'Ivoire, Kenya, Burundi, Senegal, Tunisia, Uganda, Mozambique, Cameroon, Rwanda, Malawi and Algeria. The founding Protocol does, however, seek to ensure a broadly representative membership reflecting the main regions and legal traditions of Africa and that 'due regard' is given to adequate gender representation in the nomination process (Articles 12 and 14).

The institutional setting of the African court most closely resembles the Inter-American system and the original European system, with a quasi-judicial commission on human rights operating alongside the judicial institution of the Court. The African Court's formal relationship with the Commission, set out in various primary and secondary instruments, envisages it as complementing the Commission's mandate to protect human rights. This is reflected in various aspects, including: the Commission's power to refer, inter alia, cases concerning massive human rights violations and non-compliance with its provisional measures orders to the Court before the case has concluded; and the Court's power to transfer matters to the Commission and to consult it when deciding on issues of admissibility.[6] While the Commission's perceived reluctance to refer cases in the early years was viewed as hindering the Court's development – the Commission referred only two cases to the Court before 2012 (Ssenyonjo, 2013, pp. 51–54) – the relationship between the two organs appears to have improved.

Like the European and Inter-American human rights courts, the African Court's principal role is to act as the definitive interpreter and guardian of the rights guaranteed in a continental human rights treaty: the African Charter. The African Charter is similar in many respects to the American and European human rights conventions. However, some key differences

6 See Article 2 of the Court Protocol, Rule 29 of the Court's Interim Rules of Procedure 2010 and Part IV of the Rules of Procedures of the Commission 2010. To date, four cases have been transferred to the African Commission (Report on the Activities of the African Court on Human and Peoples' Rights (2017), EX.CL/999(XXX), p. 5).

should be noted, some of which indicate states' reticence regarding human rights protection. Most importantly, rights are guaranteed in less robust language, with many 'clawback clauses' permitting restrictions on rights if they are provided for by the law or guaranteeing exercise of the right 'within the law' or provided that the individual complies with the law: see Article 9 (freedom of expression), Article 11 (freedom of assembly) and Article 12 (freedom of assembly).

That said, two other factors open the door to more expansive adjudication by the Court. First, the Charter also guarantees collective social and economic rights (e.g. the rights to economic, social and cultural development and to a general satisfactory environment in Articles 22 and 24), although it must be emphasised that the Court's establishment was not a concrete possibility when the Charter was adopted. In addition, the African Court's subject matter jurisdiction is more expansive than that of the ECtHR and IACtHR in that it is also empowered to interpret 'any other relevant human rights instruments' that have been ratified by the respondent state (e.g. the International Covenant on Civil and Political Rights (ICCPR)[7] and regional instruments such as the African Charter on Democracy, Elections and Governance and the ECOWAS Democracy Protocol[8]). As pointed out by Madsen, Cebulak and Wiebusch, such institutional factors concerning subject matter jurisdiction can be influential in the context of possible pushback and backlash against the Court. Although the jurisdiction of the Court is formally restricted to a human rights mandate, the Court's power to consider other relevant human rights instruments, and the wide or narrow interpretation it gives to the understanding of what counts as a 'human rights' instrument, evidently has the potential to expand the extent of its jurisdiction, as discussed in the analysis of the Court's jurisprudence, discussed below.

7 See e.g. App. 009/2011 and 011/2011 Mtikila et al. v. Tanzania (14 June 2013).

8 See e.g. App. 001/2014 Actions Pour La Protection des Droits de l'Homme (APDH) v. The Republic of Côte d'Ivoire (18 November 2016), paragraph 65. The full title of the 'ECOWAS Democracy Protocol' is Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001).

4.2 Resistance hampering the Court's development: key actors

The Court's overall development has been hampered by a variety of factors, some of which are evidence of clear resistance to the Court, while others reflect a more ambiguous picture that may indicate resistance or simply the Court's low visibility among key audiences (e.g. national courts). Reflecting the focus in the framework developed by Madsen, Cebulak and Wiebusch (2018) on an actor constellation comprising Member States, the rest of this section analyses the various forms of resistance to the African Court, centred on (1) national governments, which represent and shape the Member State's overall relationship with the Court; (2) national courts as core actors in the legal system, in their role as 'gatekeepers' for the penetration of IC jurisprudence in national law; and (3) NGOs, which are key civil society actors. This helps to provide context for more detailed discussion of resistance against the Court's case-law, discussed in Section 5.

4.2.1 National governments

The positions taken by national governments, as primary actors in resistance patterns against the African Court, evince a significant level of resistance to the Court's authority, which takes a variety of forms.

The first and most basic form of resistance concerns refusal to ratify the Court's founding Protocol. To date, thirty of the AU's fifty-five Member States have accepted the jurisdiction of the Court by ratifying the Protocol. The Court and other AU institutions have raised serious concerns about this 'ratification gap' – the low level of ratification has repeatedly been raised in each activity report of the Court and at the level of the AU Executive Council, for instance. Many states have also declined to make the special declaration required to permit petitions by individuals and recognised NGOs to the Court. To date, only nine of the thirty existing Member States have made this declaration,[9] although others have undertaken to make the declaration soon (e.g. Guinea Bissau, following a visit by the African Court in August 2017).[10] As regional human rights adjudication

9 The Member States who have made this special declaration are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda (* withdrawal), Tanzania and Tunisia.

10 President of Republic of Guinea Bissau Pledges to Ratify African Court Protocol, ACtHPR website (16 August 2017), http://bit.ly/2yKdsS1 (last accessed 19 February 2018).

experience has demonstrated, interstate complaints tend to be rare. Individual petitions are, in this sense, the lifeblood of an effective institution and vital to an IC's development of a significant corpus of jurisprudence.

Member States also delayed in nominating judges to the Court after its founding Protocol was ratified in 2004. The initial plan to elect judges to the African Court in July 2004 failed, as too few candidates had been nominated (Amnesty International, 2016), and it was not until July 2006 that the first eleven judges were sworn in before a summit meeting of African leaders in the Gambian capital, Banjul. In addition, Member States have not provided adequate funding and resources to the Court to date. As indicated above, ten of the eleven judges work part time in the Court and the Court pursues its work with a rather small staff. The Court currently draws some of its funding from the AU as well as other international donors (e.g. the EU, GIZ and Macarthur Foundation). This inadequacy of the Court's material and human resources has systematically been raised in its annual activity reports.

The above forms of resistance might be seen as hindering development of the Court's authority in general through the withholding of meaningful political, institutional, moral and material support. A separate form of resistance is found in targeted reactions to the Court's development of its case-law, which is discussed in the following section.

Finally, existing instruments geared towards institutional reform have cast a shadow over the African Court. The Malabo Protocol adopted in 2014, if ratified, would merge the Court with the AU's (as yet not established) Court of Justice to create an African Court of Justice and Human Rights, and expand the new court's remit to international criminal jurisdiction. While the Protocol has not yet secured any of the fifteen ratifications necessary to enter into force, two recent developments may drive an increase in ratification rates: the Kenyan government's announcement that it will ratify the instrument before 25 March 2018 (Musau, 2018) and the AU's announcement urging Member States to withdraw from the International Criminal Court (ICC).[11] This possibility has left the Court in a position of institutional insecurity. It cannot be certain that it will remain in its current form in the near future, which affects its ability to build itself as an institution. As Nmehielle noted in 2014, the AU appears quite serious about the Protocol but adequate thought has not been given to its implications and the prospect that it could 'suffer from neglect, lack

11 AU Assembly, Decision on the International Criminal Court, AU Doc. Assembly/AU/Dec. 622 (xxviii) (31 January 2017).

of political and practical commitment from member states, and lack of the adequate resources required to make it effective', especially in the context of the meagre resources provided to African Court since its establishment (Nmehielle, 2014, p. 41).

4.2.2 National courts

As the framework set out by Madsen, Cebulak and Wiebusch emphasises, the attitudes of national courts towards an IC are highly significant, and it may be said that they are the most consequential actors beyond national governments. Clear instances of domestic courts actively resisting the European and Inter-American human rights courts have been charted, such as the Russian Constitutional Court recent decision that the state can refuse to comply with judgments handed down by the ECtHR in certain cases (Mälksoo, 2016) or the Costa Rican Supreme Court's insistence that it has the final say concerning constitutional meaning (Sandoval and Veçoso, 2017). Further, as Madsen, Cebulak and Wiebusch argue, resistance can be passive:

> 'National courts and institutions can simply ignore relevant judgements of ICs or relevant provi-sions of international or regional law. Even though this might happen for a host of different rea-sons, including lack of knowledge of international and regional law, its systemic occurrence can be qualified as a form of resistance.' (Madsen et al., 2018, pp. 5–28)

Again, a systemic tendency of national courts to ignore an IC's case-law is much easier to qualify as resistance in the case of a long-established IC compared to a young IC. In the context of the African Court, it is not yet possible to say that national courts have resisted the Court, in the form of 'pushback' or 'backlash'. It appears more accurate to say that, at present, the relationship between national courts and the African Court is underdeveloped, for a variety of reasons.

First, unlike Europe, where incorporation of the ECHR into domestic law has become universal (although with varying levels of intensity and supremacy), references to the African Charter in domestic constitutions is rare (examples include the constitutions of Angola, Guinea and Benin). In addition, unlike the strong and region-wide domestic judicial practice of referring to international human rights law, in both Latin America and Europe, the highest domestic courts across AU Member States refer relatively rarely to international law. Although common-law courts appear to

show a greater openness than courts in civil-law systems (e.g. Chad, Senegal), even within the common-law category, there is wide diversity: for instance, the courts of Ghana and Botswana have made use of international law in adjudication, while Zambian courts tend to avoid it (Killander and Adjolohoun, 2010). Of most relevance here, domestic courts tend not to refer to the jurisprudence of the African Court (or other ICs in the AU). As one scholar has observed (Dinokopila, 2017, p. 236), despite increasing reference to the decisions of the African Commission by national courts, there is

> 'little evidence of the use of the jurisprudence of other regional and sub-regional courts or bodies such as the African Court and the African Children's Committee. This is perhaps owing to the fact Africa's supranational courts and tribunals, apart from the African Commission, are relatively young compared to their European counterparts.'

The growing tendency of national courts to cite African Commission's recommendations suggests that a lack of reference to African Court jurisprudence might not reflect resistance, but a lack of familiarity, although there are clearly insufficient data to draw any clear conclusions and the reasons may differ from state to state and even between different courts in the same state. There is also recent evidence that counsel at the domestic level are starting to cite African Court case-law, as seen in a February 2017 High Court of Kenya judgment holding the law on criminal defamation to be unconstitutional, which noted the petitioner's reference to the African Court's judgment on criminal defamation in Konaté v. Burkina Faso (discussed in Section 5).[12]

4.2.3 NGOs

NGOs have been essential in developing the African human rights system through, for instance, raising public awareness, assisting the African Commission through information gathering and parallel monitoring of rights violations, and submitting petitions to the Commission (Mbelle, 2009). NGOs have also played a major role in the establishment and operationalisation of the African Court. Almost every Court instrument was heavily influenced by NGO input or even had an NGO as lead drafter: the found-

12 Jacqueline Okuta & another v. Attorney General & 2 others [2017] eKLR, at p. 3.

ing Protocol (International Commission of Jurists); the Protocol intending to merge the African courts of justice and human rights (Coalition for an Effective African Court on Human and Peoples' Rights'); and the Malabo Protocol to extend the Court's jurisdiction to international crimes (Pan African Lawyers Union) (Viljoen, 2012; Kane and Motala, 2009; Amnesty International, 2016). In addition, 'concerted advocacy efforts of the African Court Coalition' prevented the possibility, at one point, that the Court would not be operationalised while another protocol to merge the African courts of justice and human rights was being discussed (Kane and Motala, 2009, p. 418). NGOs are also key litigants before the Court, as seen in the Mtikila, APDH and Jonas cases, discussed below, and have regularly intervened as amicus curiae in cases before the Court.

These various roles have given NGOs significant influence in shaping the jurisprudence of the African Court. However, the relationship between NGOs and the Court has been strained by two important factors. First, as discussed above, NGOs can only have access to the Court once the respective state has made a special declaration. But, even when the declaration has been made, direct access is strictly limited to NGOs with observer status before the African Commission. Although, as of May 2017, the number of NGOs with observer status stood at 511, this number is spread across fifty-five Member States and includes various international NGOs based outside the continent.

The second factor that has impeded the relationship between NGOs and the Court has been its restrictive interpretation of the rules concerning standing when requesting an advisory opinion. This has excluded many NGOs (including those with observer status before the Commission) from access to the Court and has led to the Court's refusal to deal with various NGO requests for Advisory Opinions on matters including the Women's Rights Protocol in relation to marriage registration[13] and the meaning of 'serious and massive violations of human and peoples' rights' as mentioned in the African Charter.[14] It is worth noting, in this connection, that a number of Member States, including Ethiopia, Nigeria and Côte

13 See Advisory Opinion – The Centre for Human Rights, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association, No. 001/2016 (28 September 2017).

14 See Advisory Opinion – Rencontre Africain pour la défense des droits de l'homme, No. 002/2014 (28 September 2017).

d'Ivoire,[15] had expressed concern that a more liberal interpretation would permit NGOs to circumvent the Article 34(6) declaration requirement and 'target states' through the Court's advisory proceedings, as Ivorian representatives put it.[16] These concerns again reveal the hesitance from states about an effective role for NGOs in the continental judicial system.

As a consequence, while NGOs are engaging to a certain extent with the African Court, the Court does not provide an avenue for a large number of human rights and civil liberties NGOs across Africa to challenge rights violations. This may have two effects: first, NGOs may be less motivated to defend the Court against attacks from other actors (in a context where many NGOs must choose their battles with state actors carefully); and, second, NGOs excluded from direct access at present may come to support institutional reform that installs a 'successor' court, which may be viewed as a new opportunity to gain direct access.

5 Development of the Court's case-law

Understanding of the Court's case-law is key to appreciating the processes of resistance to date from national governments and other actors, but also how the Court has used its case-law to mitigate design flaws hampering its effectiveness and to expand its mandate. This section starts with a brief overview of the Court's jurisprudence, and then moves to analysis of the resistance sparked by its case-law, with a specific focus on two states: Tanzania and Rwanda.

5.1 Overview of the Court's case-law

That the Court has experienced resistance to its judgments is unsurprising. From the outset, the Court has grappled with difficult issues. The Court's first judgment in 2009 concerned an individual application aimed at halting prosecution of Chad's exiled dictator, Hissène Habré, in Senegal, which the Court deemed to be inadmissible on the basis that Senegal

15 Advisory Opinion, SERAP (2017), paragraphs 28–29; Advisory Opinion, The Centre for Human Rights, University of Pretoria (CHR) and the Coalition of African Lesbians (CAL) (2017), paragraphs 32–45.

16 Advisory Opinion, The Centre for Human Rights, University of Pretoria (CHR) and the Coalition of African Lesbians (CAL), paragraph 44.

had not made the special declaration required to permit individual and NGO petitions.[17] The Court's second judgment in 2011 revealed an audacious institution: requested by the Commission to make provisional orders to protect civilians in the context of the uprising against the Gaddafi regime in Libya, the Court ordered Libya to 'refrain from any action that would result in loss of life or violation of physical integrity of persons' and to report to the Court within fifteen days on the measures taken to implement the order.[18] The order was ignored by the respondent, which offered no reasons or engagement due to the crisis in the state.[19] This summary focuses mainly on the twelve merits judgments issued to date. In its first merits judgment, issued in June 2013 in Mtikila v. Tanzania,[20] the Court unanimously found the ban on independent electoral candidacies in Tanzania's national Constitution to constitute a violation of the African Charter. In March and December 2014, the Court found two violations of the Charter in cases against Burkina Faso. In Zongo v. Burkina Faso,[21] the Court found the state in violation of rights to judicial protection and free speech for failing to investigate and prosecute the killers of a journalist and his companions in 1998. In Konaté v. Burkina Faso,[22] the Court unanimously ruled a twelve-month sentence of imprisonment for criminal defamation imposed on the applicant journalist in 2012 (for having accused a public prosecutor of corruption) to be a violation of the Charter right to freedom of expression. In Thomas v. Tanzania,[23] Onyango v. Tanzania[24] and Abubakari v. Tanzania,[25] decided in 2015 and 2016, the Court found the state in violation of the right to a fair trial in Article 7 of the African Charter in each case.

In June 2016, the Court delivered its first merits judgment in a case brought by the African Commission. In the Saif Al-Islam Gaddafi[26] case, the Court found the secret detention and criminal proceedings against the second son of former Libyan President Gaddafi in violation of Articles 6

17 Yogogombaye v. Senegal ACHPR App. No. 001/2008 (15 December 2009).
18 African Commission on Human and Peoples' Rights v. Libya, Order for Provisional Measures, ACHPR, App. No. 004/ 2011 (25 March 2011), para. 25.
19 See Polymenopoulou (2012, pp. 767–775).
20 ACHPR, App. 009/2011 and 011/2011 (14 June 2013).
21 ACHPR, App. No. 013/2011 (28 March 2014).
22 ACHPR, App. No. 004/2013 (5 December 2014).
23 ACHPR, App. No. 005/2013 (20 November 2015).
24 ACHPR, App. No. 006/2013 (18 March 2016).
25 ACHPR, App. No. 007/2013 (3 June 2016).
26 African Commission on Human and Peoples' Rights v. Libya, ACHPR, App. No. 002/2013 (03 June 2016).

(right to personal liberty, security and protection from arbitrary arrest) and 7 (right to fair trial). Later that year, the Court delivered another strong judgment on an electoral matter, ruling in APDH v. Côte d'Ivoire[27] that a new law on the Electoral Commission violated both the right to equal protection of the law in Article 3(2) of the African Charter on Human and Peoples' Rights and Article 10(3) of the African Charter on Democracy, Elections and Governance for placing opposition electoral candidates at a disadvantage by packing the body with representatives of the president, government ministers and the president of the National Assembly (parliament).

2017 saw the flow of judgments speed up and the pattern of expansive decision-making in sensitive policy areas continue. In the landmark Ogiek[28] case against Kenya in May 2017 – referred to the Court by the Commission on the basis that it concerned serious and massive rights violations – the Court held that the Kenyan government had violated no fewer than seven articles of the African Charter, including collective rights, in a far-reaching dispute concerning the ancestral lands of the Ogiek community. Building on, and largely agreeing with, previous African Commission decisions in similar cases, the Court found violations of the rights to non-discrimination (Article 2), culture (Article 17 (2) and (3)), religion (Article 8), property (Article 14), natural resources (Article 21) and development (Article 22). The judgment has been interpreted as recognising, in practical terms, a right to land, a right to food and, potentially, a right to free prior and informed consent regarding state interference with ancestral lands (Roesch, 2017).

In late 2017, the Court issued three further merits decisions. In Jonas v. Tanzania[29] and Onyachi v. Tanzania,[30] the Court again found the state in violation of the rights to, respectively, fair trial (Article 7 of the African Charter) and liberty (Article 6). Adding to its previous judgments in the Thomas, Abubakari and Onyango cases, the Court's case-law has developed a pattern of sustained criticism of the deficiencies its host state's criminal justice system, concerning free legal aid, timely issuance of trial judgments, organisation of identification parades and appropriate consideration of defences forwarded by the defendant (Possi, 2017; Windridge, 2017).

27 ACHPR, App. No. 001/2014 (18 November 2016).
28 African Commission on Human and Peoples' Rights v. Kenya, ACHPR, App. No. 006/2012 (26 May 2017).
29 ACHPR, App. No. 011/2015 (28 September 2015).
30 ACHPR, App. No. 003/2015 (28 September 2017).

These were closely followed by the November 2017 judgment in Ingabire v. Rwanda,[31] which concerned a fifteen-year sentence of imprisonment imposed on the applicant, Victoire Ingabire, leader of the unregistered opposition FDU Inkingi party, for crimes including spreading genocide ideology, complicity in acts of terrorism, sectarianism and terrorism in order to undermine the authority of the state. The applicant had been arrested after publicly speaking at the Genocide Memorial Centre on reconciliation and ethnic violence. In its judgment, the Court found Rwanda in violation of the free-speech rights in the African Charter (Article 9(2)) and the ICCPR (Article 19) and rights to an adequate defence under Article 7 of the African Charter. In the Court's view, although the law against minimising the genocide has a legitimate purpose and does not in itself breach the Charter or other rights, the state's action constituted a disproportionate and unnecessary restriction on Ingabire's free-speech rights, as the applicant's speech had not minimised the 1994 genocide. As the Ingabire case was pending, and underscoring the political and historical sensitivity of the case, Rwanda announced its intention to withdraw its special declaration permitting individuals to directly petition the Court, as discussed below.

The Court's judgments are notable for more than the number of violations found. For instance, through its case-law, the Court has mitigated some of the starker deficiencies of the African Charter (compared to the American and European human rights conventions). Most notably, beginning with its first merits judgment in Mtikila, the Court has softened the impact of so-called 'clawback clauses' in the African Charter through recourse to proportionality analysis – effectively establishing a 'restriction on restrictions'. The Court has also clearly stated its power to order damages and order investigations where necessary. The Court has interpreted treaties including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Democracy, Elections and Good Governance, as well as recognised the democracy Charter as a justiciable human rights instrument, which has amplified the Court's capacity to address sensitive electoral and governance issues in respondent states.

The African Court's website lists 100 cases pending before the Court, which suggests that its case-law is set to expand significantly in the coming years, although, as discussed below, eighty of these applications concern Tanzania.

31 ACHPR, App. No. 003/2014 (24 November 2017).

5.2 Resistance against the Court's case-law

It is clear from the above that the Court has energetically seized its mandate and has not shied away from finding violations of the African Charter and other human rights treaties, even where cases have struck at highly sensitive legal, political and social questions at the domestic level. Despite having issued its first merits judgment a mere five years ago, the Court has already engendered resistance from Member States, which has taken a variety of forms. Some states have resisted Court proceedings, through overly late filing of responses. This resulted in the Court either extending its deadlines for submission of briefs or accepting late submissions 'in the interest of justice'.[32] This forgiving stance may be explained by the Court's eagerness not to frustrate states over rigorous proceduralism, especially when it is still developing its authority. In the Saif Al-Islam Gaddafi case, Libya blatantly failed to comply with the Court's orders for provisional measures and refused to participate in the proceedings, which led to the Court's first judgment in default. This is not to say that the level of co-operation with the Court is uniform. Burkina Faso, for example, largely complied with the Court's order in the Zongo case to pay compensation to the victim's family and to reopen an investigation into the death of a Burkinabé journalist in 1998.

Due to spatial constraints, this section focuses on clear resistance to the Court's decisions in two states: Tanzania, which is both the Court's host state and the subject of six of its twelve merits judgments to date; and Rwanda, which has had the strongest negative reaction to the Court's case-law to date. In line with the analytical framework set out by Madsen, Cebulak and Wiebusch, the analysis seeks to identify specific actors engaged in resistance, rather than analysing Member States as monolithic entities, and to appreciate the wider context in which such resistance has occurred.

5.2.1 Tanzania

The relationship between a human rights IC and its host state is not always easy. For example, it is not unusual for the IC to receive more complaints against its host state than other states under its purview (e.g. petitions against France to the ECtHR). However, while both the ECtHR and

32 See APDH v. Côte D'Ivoire (2016), paragraphs 26, 31.

IACtHR developed for years without having to issue a merits judgment in a contentious case against their respective host states, the African Court has already issued six judgments against Tanzania, including its first merits judgment.

In its first landmark Mtikila judgment, the Court unanimously found the constitutional and legislative bans on independent candidacy in elections to constitute violations of freedom of association and the right to participate in public and governmental affairs, and a violation of the non-discrimination provisions of the Charter (by a 7–2 majority). In doing so, the Court expressly held that a provision of the Tanzanian Constitution contravened the African Charter and ordered the state to take all 'constitutional, legislative and all other necessary measures within a reasonable time' to remedy the violations found' (paragraph 126.3). The Court was unmoved by the state's argument that local remedies had not been exhausted due to a constitutional reform process – initiated while the issue was before the Tanzanian courts – that would leave the question of independent candidacies to the Tanzanian people. The state was also unsuccessful in its secondary arguments on the merits, based on the social needs, historical reality of a one-party state, security concerns, federal structure of the state and the need to avoid tribalism in the political system, which would require 'a gradual construction of a pluralist democracy in unity' (paragraphs 119, 51).

Interestingly, the applicants before the African Court included two NGOs – the Tanganyika Law Society and the Human Rights Centre – and an individual – Reverend Christopher Mtikila – the latter having already challenged the ban on independent candidates twice before the domestic courts in a decades-long campaign to open up the political system. While the African Court's judgment marked an expansive approach to its mandate, the NGOs had urged the Court to go even further, by adjudicating on whether the state had 'violated the rule of law by initiating a constitutional review process to settle an issue pending before the courts of Tanzania' (paragraph 4) – an argument the Court declined to address.

Although Tanzania had engaged fully with the Court during the entire process (unlike other states before the Court, such as Libya), at the reparations stage of the proceedings, the Court expressed concern at the government's continued position that the judgment was incorrect, on the basis that the law in Tanzania prohibited independent candidates from running for election (Windridge, 2015). The government has continued to refuse to comply with the judgment or to report to the Court on any measures it has taken to implement the judgment: the section on implementation of the Court's judgments in its mid-term activity report for 2017 indicates

that, while the Tanzanian government has published the judgment on an official government website and a summary in its Official Gazette and a daily newspaper with wide circulation, the government has not taken any constitutional, legislative or other measures required to remedy the violations found (Mid-Term Activity Report, 2017, p. 12).

Tanzania's reaction to the other four judgments against it suggests a broader stance of non-compliance. While implementation of the Thomas and Abubakari judgments has been delayed by the state's requests for interpretations of the judgments (provided in late 2017), the state has provided no report to the Court on implementation of the Court's decision in the Onyango case (Mid-Term Activity Report, 2017, pp. 15–16). Beyond the claims that the African Court's judgments are wrong, it is hard to find any more detailed position on the Court articulated by government actors. The pattern of resistance, if there is one, is of stubborn refusal by the government to abide by the Court's judgments or engage with its orders. As one scholar put it in an analysis of the Court's fair trial judgments against Tanzania:

> 'As of June 2017, there is yet to be any compliance by Tanzania to the decisions rendered by the African Court. As if that is not worrying enough, Tanzania has also in no uncertain terms reported that it is unable to implement some of the orders on provisional measure [sic] pronounced by the Court [ordering stays on application of the death penalty]. If the Court would condone noncompliance at this early stage, the African Court risks losing its relevance, and, thus, also its legitimacy.' (Possi, 2017, p. 335)

Nevertheless, alongside such resistance, there is a growing tendency for individuals and NGOs to petition the Court (Tanzania has made the special declaration allowing such petitions): of the 100 pending cases listed on the Court's website that are again heavily weighted towards the host state, eighty are against Tanzania – the remainder are Rwanda (twelve, although seven relate to the same applicant), Mali (four), Benin (one), Côte d'Ivoire (one) and Ghana (one). NGOs have also called on the government to take concrete action to implement the Court's judgments, such as the Legal and Human Rights Centre (LHRC) and the Tanzania Civil Society Consortium on Election Observation (TACCEO), which has urged the government to undertake 'necessary reforms' to abide by the Mtikila judg-

ment.[33] As such, the constellation of actors involved in resistance to the Court is largely reduced to a binary opposition between the government and NGOs.

The resistance of the Tanzanian government to the African Court's judgments has been clear, but has not led to any broader campaign to withdraw from the Court or to seek reform of its jurisdiction to render it less effective, which is possibly due to civil society support for the institution, but which may also relate to its delicate relationship with Court as its host state. It is also important to acknowledge that the government has not evinced uniform opposition to the Court: in 2015, for instance, outgoing Prime Minister Mizengo Pinda expressed support for the Court at the second African Judicial Dialogue (hosted by the Court in Arusha), urging Tanzanians to capitalise on the presence of the Court in the state and praising the Mtikila case as an example of how rights could be vindicated.[34] However, the preponderance of Tanzanian cases in the Court's docket raises the prospect that, should the contumacy of the Tanzanian government remain uniform, this will affect the majority of the Court's jurisprudence and could lead to an institutional crisis equivalent to a backlash crisis.

5.2.2 Rwanda

By contrast, the Court's judgment in Ingabire v. Rwanda has prompted a serious, vocal and concrete reaction from the government of Rwanda (the central actor, for reasons discussed below), which has taken a number of forms. The case essentially posed the question of the extent to which the African Court could adjudicate on how the Rwandan state treats those it views as perpetrators of, or complicit in, the genocide of 1994. The issue could hardly be more contentious. Since the genocide of 1994, in which more than 800,000 Tutsis and moderate Hutus were killed by Hutu extremists, the government has enacted a raft of legislation aimed not only at addressing denial or minimisation of the genocide, but to quell speech

33 See Legal and Human Rights Centre (LHRC) & Tanzania Civil Society Consortium for Election Observation (TACCEO), Report on the United Republic of Tanzania General Elections of 2015 (March 2016), p. 42. https://www.humanrights.or.tz/assets/attachments/1504100983.pdf (last accessed 19 February 2018).

34 See 'Pinda Urges Tanzanians to Capitalise on African Rights Court', Africatime.com. http://en.africatime.com/tanzanie/articles/pinda-urges-%20tanzanians-capitalise-african-rights-court (last accessed 19 February 2018).

more generally that may inflame ethnic tensions. Since Paul Kagame's election as president (by parliament) in 2000, governance has focused on economic progress, with an increasing tendency to stamp out dissent and, specifically, discussion of the genocide that departs from the official account (Reyntjens, 2013). In the government's view, the Ingabire case appeared to raise the prospect that the lid it has carefully maintained on what it perceives as a potential powder keg could be tampered with by the African Court.

The government did not wait for the Court's decision before it took action. On 24 February 2016, days before the hearing before the Court on 4 March 2016, the Rwandan government announced its intention to withdraw its acceptance of direct individual applications to the Court, which it had deposited in June 2013. The government's note verbale communicating its decision set out its concerns in four terse paragraphs:

> 'CONSIDERING the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in a hundred days;
> CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for re-invention and sanitization, in the guise of defending the human rights of the Rwandan citizens;
> CONSIDERING that the Republic of Rwanda, in making the 22nd January 2013 Declaration never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;
> CONSIDERING that Rwanda has set up strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;
> NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court on Human and Peoples' Rights to receive cases under article 5(3) of the Protocol and shall make it afresh after a comprehensive review.'[35]

35 Centre for Human Rights University of Pretoria (2016) 'Report: Rwanda's Withdrawal of Its Acceptance of Direct Individual Access to the African Human Rights Court' (22 March) http://bit.ly/2nS61kp (last accessed 19 February 2018).

The Rwandan government essentially contended that the African Court was being manipulated by perpetrators of the 1994 genocide, who have since fled Rwanda, to advance their interests. In response to concerns voiced by the African Commission at the AU summit in July 2016, Rwanda's ambassador to the AU laid out the reasons for withdrawal in even starker terms: 'We quickly realised that it is being abused by the judges on absence of a clear position of the court vis-à-vis genocide convicts and fugitives, and that is why we withdrew.'[36] At the same time, the ambassador insisted that Rwanda remains a strong supporter of the Court.

Initially, despite using the language of 'withdrawal' in its communication, the Rwandan government suggested that it merely wished to have all cases against Rwanda suspended to facilitate a review by the government of how access by NGOs and individuals was being used, and sought to be heard on this matter by the Court, while arguing that any decision on the withdrawal was for the AU Commission and not the Court.[37] However, no government representative appeared at the hearing of the Ingabire case, and the idea of suspension was dropped in later communications. Although the Court subsequently avoided other highly sensitive cases against Rwanda – notably a petition seeking interim measures against the 2015 referendum that permitted Kagame to run for re-election, on the basis that it had been 'overtaken by events'[38] – the Rwandan government in October 2017 confirmed that the withdrawal would not be rescinded (Ageno, 2017).

The withdrawal decision, as such, presents a curious case of resistance. From one angle, it can look like pushback, given that it is focused on disagreement with a specific case before the Court. However, examined in detail – and considering that the government's reaction pre-empted the judgment in the case – the decision more closely resembles a form of backlash. Backlash may be perceived insofar as partial withdrawal from the Court's jurisdiction carried not only the express charge of illegitimate use of the Court, but also an implicit attack on the Court's legitimacy overall (notwithstanding diplomatic statements indicating continuing commitment to the Court).

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36 See Rwanda Rejects Calls to Endorse African Rights Court, The Citizen (13 July 2016) http://www.thecitizen.co.tz/News/Rwanda-rejects-calls-to-endorse-African-rights-court/1840340-3292644-1hos0yz/index.html (last accessed 19 February 2018).

37 App. No. 004/2013, Ingabire v. Rwanda, Ruling on Jurisdiction (3 June 2016), paragraphs 36–38.

38 App. No. 016/2015, Nyamwasa and Others v. Rwanda, Order on request for interim measures (24 March 2017).

To some extent, the hybrid nature of this instance of resistance relates to the sui generis nature of access to the Court, where full access is dependent on an additional declaration by the state. In the European system, for instance, actors disagreeing with the ECtHR have broadly three options: disagreement with the Court's case-law (which can be expressed through a variety of channels), the difficult and work-intensive option of marshalling consensus for institutional change, or the 'nuclear option' of full withdrawal (which would have much wider ramifications for that state's membership of the Council of Europe, and of the EU where applicable). 'Rwexit', as Rwanda's special declaration withdrawal has been called, has demonstrated that the institutional structure of the African Court more easily lends itself to forms of resistance that have lower political, reputational and organisational costs for the state, while achieving the goal of neutering the Court's impact on the state. As Rwanda emphasised in its note verbale, it was not leaving the Court, and only seven other states (at the time) had made the special declaration to extend access.

That said, the declaration of withdrawal has not ended the prospect of further conflict between the Rwandan government and the African Court. In its ruling on the withdrawal, the Court agreed that such a withdrawal was valid (based, inter alia, on rules governing recognition of jurisdiction and the principle of state sovereignty), but emphasised that all cases taken pursuant to the special declaration, before its withdrawal, would still be heard by the Court. This included a one-year period before the withdrawal became effective, on 1 March 2017. As the Court observed at paragraph 62, a sudden withdrawal without prior notice 'has the potential to weaken the protection regime provided for in the Charter'. This approach, though entirely understandable on its own merits, clearly has the potential to raise further serious tensions between the Court and the Rwandan government given the nature of key pending cases against the state.

For instance, one of the pending applications against Rwanda relates to the ousting of the executive committee of a leading human rights NGO, the Rwandan League for the Promotion and Defense of Human Rights (LIPRODHOR), allegedly to silence its vocal criticism of the government.[39] The application at paragraph 17 not only requests the Court, among other things, to publicly condemn intimidation against independent human rights defenders and recognise the importance of their work and to reform domestic legislation restricting NGOs' activities. It also asks the Court to order the state to take 'immediate and all necessary steps to

39 ACHPR, App. No. 023/2015 Laurent Munyandilikirwa v. Republic of Rwanda.

strengthening independence of the judiciary', 'to initiate a broader legal reform process with the purpose of creating an enabling environment for civil society in the country' and 'to take all other necessary steps to redress the alleged human rights violations'. Depending on how the Court approaches the case, this could easily become an additional flash-point for criticism of the Court by the Rwandan government.

An important point should be made here, which returns to one of the fundamental contextual factors discussed in Section 3, namely the wide variety of governance systems in states that have acceded to the African Court's jurisdiction. Although assessments of which states are democratic or not are perennially contested, Rwanda under President Kagame has long been considered by leading indices to be an authoritarian regime (Freedom House, 2018; Economist Intelligence Unit (EIU), 2017, p. 33). Indeed, the government's response to the Ingabire judgment must be viewed in the context of significant repression of domestic critics: as Freedom House noted in 2016, President Kagame 'has efficiently closed the space for political opposition or critical viewpoints' (2016, p. 11), including suppression of NGOs through onerous registration procedures (Amnesty International, 2017). International NGOs such as Human Rights Watch have documented intensifying repression since the August 2017 presidential elections, through arrests, torture, forced disappearance and intimidation of political opponents, and intimidation of and interference with the media (Human Rights Watch, 2018; Amnesty International, 2017).

A broader insight can also be made with regard to the resistance framework set out by Madsen, Cebulak and Wiebusch. In democratic states, different sites of authority operate with considerable independence, and significant resistance tends to depend on a sufficient level of consensus emerging among multiple actors. In authoritarian regimes, by contrast, one can expect the national government to take the leading role in resistance against an IC and – depending on the extent to which they have been 'captured' by the government – national courts and the media might be considered as 'national government' actors rather than separate actors in the constellation of resistance actors. As the Rwexit experience indicates, such governance systems also permit rapid reactions against an IC, which differs starkly from the slow building of a broad-based 'resistance consensus' seen in states such as the UK, which itself resonated with resistance actors in states including the Netherlands and Russia.

Moreover, civil society actors, especially human rights NGOs, tend to be more active and numerous in a democratic regime than an authoritarian regime, with the result that their role in resistance processes will be

affected by the nature of the state in which they operate. As the Rwandan context demonstrates, autocratic government can leave little space for any discussion of human rights issues, which limits any open discussion (whether negative or positive) of the African Court. NGO criticism of Rwexit has largely come from transnational coalitions of African NGOs and global NGOs (e.g. African Court coalition, Amnesty International), with limited involvement of Rwandan organisations (such as the Association rwandaise pour la Défense des droits de la personne et des libertés publiques (ADL) and the Ligue des Droits de la Personne dans la région des Grands Lacs (LDGL)).[40] In addition, Rwandan human rights scholars have not appeared to criticise the withdrawal. Some scholars, such as Innocent Musonera, Head of Public Law at the University of Rwanda, have defended the government's action in the press, in terms closely aligned with the government position:

> 'Rwanda's concerns are genuine. You have Genocide convicts who have not showed up to serve their sentences and Genocide suspects or other criminal suspects who are fugitives and they are given a platform to bring up new cases that have nothing to do with their criminal charges.' (Kwibuka, 2017)

This contrasts with the Tanzanian context, discussed above, where various NGOs have shown support for the Court and called on the government to implement its rulings. That said, Tanzania has also been criticised for significant democratic backsliding in recent years. Freedom House's report for 2017 noted that the government of President Magufuli 'has stepped up repression of dissent, detaining opposition politicians, shuttering media outlets, and arresting citizens for posting critical views on social media' (Freedom House, 2018, p. 18). This clearly has the capacity to affect how the state, and civil society actors, will relate to the Court in the near future, and may be a significant explanatory factor for the state's inaction regarding implementation of judgments to date.

The position of the Rwandan government towards the Court has recently increased in importance, and comes into play in an emerging process

40 'Joint Civil Society Statement on Rwanda's Withdrawal of Its Article 34(6) Declaration from the Protocol on the African Court on Human and Peoples' Rights' (17 March 2016) http://rfkhumanrights.org/news/news/leading-african-and-international- rights-groups-criticize-rwanda-restricting-access-african-human-rights-court-march-17-2016-today-rob-ert-f-kennedy-human-rights- joined-group-40-leading-african-and-international-human-rights-organization/ (last accessed 20 February 2018).

of potential institutional reform of the Court that may also become a vector for weakening of the Court. In particular, the AU has mandated President Kagame (who is chairperson of the AU for 2018) to lead a committee charged with examining institutional reform options for the AU, including reviewing and clarifying the roles of its courts (Kagame, 2017). Considering that the Rwandan government has already signalled resistance to the Court through the withdrawal of its special declaration in 2016, this reform process raises concerns. Although no concrete proposals have been made at the time of writing, and this process cannot be described as a clear form of backlash, the Kagame recommendations could mirror the Inter-American context, where resistance to the human rights Commission and Court by neo-Bolivarian states such as Venezuela, Bolivia and Ecuador has led to (as yet unsuccessful) proposals to reform the Commission that would significantly weaken the operation of both organs.[41]

Even if such reform comes to nothing, the precedent alone set by Rwanda as the first state to withdraw its special declaration may have made this option more politically acceptable to some states than it previously appeared, and may have also rendered full withdrawal more palatable.

6 *Conclusion*

As suggested in the introduction to this piece, the African Court as a case-study of resistance against ICs offers a number of key insights. It suggests that understanding resistance against a young court requires a form of double analysis, employing analytical frameworks for understanding both resistance and authority-building. So far in the African context, resistance has remained at the level of pushback, in the sense that it generally emanated from single states without collective ambition to engage in institutional reform as a reaction to the Court's case-law. However, this case-study underscores that institutional structure has path-dependent effects and can shape the form in which resistance is expressed. In particular, the two-tier nature of access to the Court, requiring a specific state declaration to expand access to individuals and qualified NGOs, provides an additional avenue for resistance by states, whether by refusing to make the declaration (as two-thirds of the current thirty states have done) or,

41 OAS Concludes Formal Inter-American Human Rights "Strengthening" Process, but Dialogue Continues on Contentious Reforms, International Justice Resource Center (24 March 2013) http://bit.ly/2BLdNWA (last accessed 20 February 2018).

in the Rwexit scenario, withdrawing the declaration in retaliation to judgments against the state. The African Court case-study also highlights the importance of the overall political context in which an IC functions: resistance emanating from authoritarian regimes can differ from resistance emanating from more democratic regimes (although all exist on a spectrum, and this is not to say that resistance strategies from authoritarian and democratic states will necessarily differ). Resistance can come about more swiftly and national governments tend to take on a more central role in authoritarian states than in the slow consensus-building required within democratic states. Overall, the single most important form of resistance to a young court is the strategy of ignoring the court by not allowing it to exercise the full de jure authority and jurisdiction accorded to it by its founding treaty. Patterns of resistance in the African Court context also appear to involve smaller constellations of actors, with national courts and the media in particular playing little role in resistance against the Court to date. Specific reasons for resistance can be difficult to discern, as seen in the terseness and taciturnity of the Tanzanian government, or can hinge on one central issue, as seen in the Rwandan context. With most analyses of the Court's case-law focusing on description and discrete legal areas rather than the broad picture, this analysis highlights the need for further work in understanding the specific audi-ences, resistance constellations and dynamics of resistance in the African context.

Acknowledgements. The authors wish to thank Mikael Rask Madsen (iCourts Centre of Excellence for International Courts, Copenhagen), Pola Cebulak (University of Amsterdam) and the external reviewers for their valuable comments on earlier versions of this paper. The authors also benefited from discussions at the Regional and Constitutional Structures in Tension (RCST) workshop hosted at the University of São Paulo (USP) Faculty of Law on 8–12 January 2018. All errors remain the sole responsibility of the authors.

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My iCourts experience

I first heard of iCourts in late 2015, in the latter stages of my PhD at the University of Edinburgh, from Prof. Stephen Tierney. From the first description of the Centre's work, and looking at the Centre's research profile, I knew I had to apply for a visit. Conducting doctoral research focused on both national constitutional courts and international human rights courts as democracy-builders in post-authoritarian states, I was centrally focused on Brazil and the Inter-American Court of Human Rights. In Edinburgh I was surrounded by expertise on the European judicial space, and working in an intellectually rich setting, including my role as Associate Director of the Edinburgh Centre for Constitutional Law. Yet, I still lacked an intellectual community and network focused on international courts in all of their variety worldwide.

iCourts was, from my first day, that home I needed. After tramping through snowy Copenhagen on a cold Monday morning in late January 2016 – and getting lost along the way – I found a warm and welcoming community, ready-made, the moment I entered the old iCourts facility on Studiestræde. Originally accepted for a 3-month stay, from 23 January until 23 April 2016, I ended up staying an additional 4 months, only finally departing on 19 August.

My time at iCourts enriched my academic career, and my life, in so many ways. On the academic side, the Centre was the perfect place to transition from doctoral researcher to fully-fledged scholar. The combination of an intellectually stimulating and open environment, encompassing such a diversity of disciplinary backgrounds, research interests, and methodologies, challenged me and spurred me to be even more ambitious in my own research. Weekly seminars and morning meetings made for a lively atmosphere of exchange and connection, and I also had the good luck to share offices with scholars such as Barrie Sander and Juanan Mayoral, with every chat a mixture of laughs and learning.

I made some landmark career steps at the Centre. I finished my book *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, submitted to Cambridge University Press in July 2016, as well as a working paper on 'Human Rights Courts, Democratisation and Social Justice'. iCourts ended up spurring a host of publications in the subsequent years, including articles and book chapters on relationships between apex courts in Brazil and South Africa with international human rights courts, back-

lash against the African Court on Human and Peoples' Rights (with Micha Wiebusch), an entry on national courts and the Inter-American Court for the *Max Planck Encyclopedia on Constitutional Law* (MPECCoL), and a book chapter on cross-border judicial dialogue in Latin America and Africa in the forthcoming *Cambridge Handbook on Comparative Law*.

My time at iCourts also greatly expanded my horizons as a consultant. Directly after my time at the Centre I worked in Turkey managing a large Council of Europe project to draft and implement a Code of Ethics for judges and prosecutors, in light of European standards – leaving early for Australia and recommending closure of the project due to the fraught macro-political climate of growing authoritarianism. In late 2017 I won a consultant contract to design an African Judicial Network for the African Court on Human and Peoples' Rights, to link the Court with international courts and apex national courts across the African Union. It is now being implemented.

Once you've become part of the iCourts family, you remain part of it. Collaborations include: panels at the annual conference of the International Society of Public Law (ICON-S) in Berlin in 2016 (organised by Pola Cebulak and Micha Wiebusch) and hosted by iCourts in 2017; time in Rio de Janeiro in January 2018 as part of the Denmark-Brazil Network on Regional and Constitutional Structures in Tension (RCST); returning to Copenhagen in May 2019 for the iCourts conference on 'The Power of International Courts'; and working on the AfCite project with Misha Plagis, focused on national court citations of the African Court on Human and Peoples' Rights.

Yet, for all the important academic and career advances, the most positive legacy of my time at iCourts is the friendships that I made – too many to enumerate here! It is easy to forget that I was only in Copenhagen for seven months. Just thinking of iCourts brings a flood of memories: it is too hard to pick just one. Lunch-time debates and Friday drinks. Biting into my first Fastelavnsboller and getting covered in icing sugar. Cycling to work on bright summer mornings. Mikael's dry sense of humour. Consoling the one British student at the iCourts Summer School on the morning the Brexit vote was announced.

Sitting here in Melbourne, almost five years after I first arrived at iCourts, I am so grateful that I got to spend time in Copenhagen. As Deputy Director of the School of Government at the University of Melbourne I am now more acutely aware of just how much goes into fostering academic excellence and creating a vibrant and long-lasting community. The Centre is a testament to Mikael Rask Madsen's vision for a genuine-

ly international and interdisciplinary network of scholars and shared purpose, and his creativity in making it happen. Takker, Mikael!

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Cambodians await crucial tribunal finding into 1970s brutal Khmer Rouge regime

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Originally published at The Conversation (https://theconversation.com/) *on November 15, 2018*

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A day of judgement is fast approaching for two now-elderly central figures in the Khmer Rouge regime of the 1970s. But part of the judgement due on Friday, a legal finding on genocide, also has the potential to unsettle understandings of the past in current-day Cambodia.

Those in the tribunal dock are Nuon Chea, 92, a man known as Brother Number Two (second in command to Pol Pot, who died in 1998) and Khieu Samphan, 87, the former head of state. The pair, the last survivors of the top Khmer Rouge leadership, are already serving life jail terms after being convicted of crimes against humanity at the same tribunal in 2014.

Khmer Rouge rule, which aimed to turn Cambodia into a back-to-basics, agrarian state, resulted in the deaths of an estimated 1.7 to 2.2 million Cambodians through execution, starvation and disease.

The Khmer Rouge were ousted in 1979 by anti-Khmer Rouge Cambodian "Renakse" forces that were supported by Vietnam. However, their role as liberators was lost on many outside Cambodia, and the new socialist nation was ostracised by Western nations and regional groupings such as ASEAN.

Cambodians now await the latest findings.

Sovannarom, 50, works as an interpreter and taxi driver in Phnom Penh. He lost his brother during the Khmer Rouge regime and while he is in favour of the United Nations-supported Khmer Rouge Tribunal, he wishes more people other than the former senior leaders of the Khmer Rouge were being put on trial.

University-graduate Rotanak, 32, was born after the regime but has closely monitored the tribunal's progress. She is confident it will satisfy many demands for justice, but worried that the expectations of victims who have participated in the current case, known as Case 002/02, may not be fully met.

On Friday, the Khmer Rouge Tribunal (KRT), officially known as the Extraordinary Chambers in the Courts of Cambodia (ECCC), will issue a summary of its judgement in the second trial against the two former senior Khmer Rouge leaders, who stand accused of genocide, crimes against humanity, and war crimes. Whether or not the specific charge of genocide is upheld, many Cambodians may be surprised or confused by this part of the judgement given the legal complexities. In short, genocide in international law is more narrowly defined than the popular understanding of the concept.

The current case includes charges covering acts at work sites, cooperatives and security centres, as well as internal purges and the regulation of marriage. But these are being prosecuted as crimes against humanity and war crimes, not as genocide. The only charges of genocide in the case relate to crimes against two ethnic minorities in Cambodia, the Cham (a Muslim minority) and ethnic Vietnamese.

Under international law, genocide occurs where there has been a "special intent […] to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such". For the most part, there were no national, ethnic, racial, or religious distinctions between the victims and the alleged perpetrators. Thus, the experiences of suffering of the wider Cambodian population do not formally meet the legal criteria for genocide.

But references to genocide appeared soon after 1979 in expert and mass media accounts of Khmer Rouge rule of Cambodia. Most famously in the English-speaking world, journalist John Pilger's articles and documentaries drew explicit parallels between the crimes of Hitler in mid-century Europe and those of Pol Pot in 1970s Cambodia: a genocide in which infamous security centre S-21 was a "Cambodian Auschwitz".

Within Cambodia, one of the early priorities of the government that replaced the Khmer Rouge regime was to convene a tribunal. Only months after Phnom Penh was liberated, the People's Revolutionary Tribunal found Khmer Rouge leaders Pol Pot and Ieng Sary (tried in absentia) guilty of genocide. Ieng Sary was also charged in the same case as Nuon Chea and Khieu Samphan but died in 2013. The 1979 tribunal proceedings were broadcast in Cambodia, helping to entrench a popular understanding of Khmer Rouge rule as genocidal.

The legacy of this trial is contested. Some authors argue that it was the first attempt globally to bring the specific charge of genocide. International opinion, however, was stacked against the new Phnom Penh government. In the wake of the Vietnam War, Western nations and groupings publicly opposed Vietnam's actions in Cambodia, seen as an invasion and occupation. In addition to these Cold War complexities, there are those who argue the trial simply failed to meet due process standards.

But there is more to the wider contestation than Cold War politics or due process concerns. John Quigley, a young American expert in international law, was invited to Cambodia to address the 1979 tribunal. His opinion was, and remains, that genocide against the broader population did occur.

The problem with most legal interpretations of the Genocide Convention, he argues, is a confusion of intent and motive, the view that an actor "must proceed out of hatred for the target group". But "a person who kills members of a group from which he is not distinguished by religion, nationality, or ethnicity, with intent to destroy at least a part of that group, would seem to commit the act of genocide as defined by the Genocide Convention", he writes.

In contrast, Marcel Lemonde, in his capacity as Co-Investigating Judge at the ECCC has explained in an interview published in 2014:

> *To establish that a genocide occurred, a group needs to have been identified […] and that group cannot be the quasi entirety of the population – otherwise the notion no longer makes sense.*

How to judge what happened in Cambodia from 1975 to 1979 thus goes to the heart of how genocide is defined and understood.

The finding in relation to genocide this Friday is thus likely to provoke debate and confusion. If genocide is not found, the two minority groups in question, and especially the civil parties (participating victims in the case) among them, will be bitterly disappointed. Yet, if genocide is found to have been committed against them, the exclusivity of the finding is likely to jar with understandings held by the majority ethnic Khmer population.

The confusion is compounded by further complexity in relation to the status of ethnic Vietnamese in contemporary Cambodia. Ethnic Vietnamese in Cambodia are among the most precarious groups in the country, and have recently had new state measures applied against them.

How might a genocide ruling that foregrounds the experience of this group affect their current political status? In an increasingly xenophobic political climate, a genocide finding that appears to grant special status has the potential to be politicised with the aim of provoking hostility.

If genocide is not found, these groups and many other Cambodians will be left wondering why the legal reckoning does not accord with long standing popular discourse.

While the trials were intended to bring legal clarity into the debate about the Khmer Rouge crimes, confusion around the genocide ruling is likely to affect the ongoing legacies of this significant tribunal.

And after the dismissal of the charges against another suspect, it seems more likely this Friday's judgement hearing will be the last of the trial chamber.

My iCourts experience

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I was fortunate enough to experience iCourts twice as a visitor. Back then I was a PhD scholar at the Australian National University, thirsty for socio-legal perspectives on international courts. I had previously worked for more than ten years in a professional capacity on human rights and rule of law programs in Southeast Asia. This included more than four years in Cambodia, where I had served as an advisor with the German development cooperation to various NGOs as well as the Extraordinary Chambers in the Courts of Cambodia (ECCC). These experiences have triggered an interest to look beyond the written law and understand the socio-political contexts in which law and human rights operate. This perspective very much resonated with the work and research I found at iCourts. My visits and the enriching exchanges with the interdisciplinary scholarly community at iCourts shaped not only my PhD research in so many ways, but also gave me a new intellectual outlook more generally.

My first visit happened early in my PhD, in June/July 2015. At that time, I tried to make sense of my thesis project, which examined reparations in international criminal justice, with a specific focus on the International Criminal Court (ICC) and the ECCC. In my first lunchtime seminar at iCourts, on 17 June 2015, I got a taste of the calibre of the scholars working at iCourts and the intellectual leadership of its Director, Mikael Madsen. My visit coincided with the Centre's annual PhD Summer School, which not only provided fruitful feedback on my early thesis outline but also gave me an insight into the extent of the wider iCourts family. My interactions with Anne Lise Kjær, Jakob Holtermann, Marlene Wind, Shai Dothan, Andreas Føllesdal, as well as iCourts' international affiliates, including Ron Levi, Cesare Romano, Laurence Helfer and Gunther Teubner proved rewarding in so many ways. I stayed connected with many of

the participants, demonstrating the kind of scholarly networks constantly woven at and around iCourts.

There was no question: I had to come back. In September 2017, I returned for a second visit. Some things had changed, others remained the same. iCourts had moved from its old premises in the city to the shiny building of the new law school. While it had lost some of its old charm, more spacious and light-flooded rooms, as well as a fancy new coffee machine and an endless supply of fresh fruits made up for it. Old and new faces welcomed me. By then, I had completed my fieldwork and was eager to share my preliminary findings and analysis. My second lunchtime seminar, on 6 September 2017, turned into a stimulating discussion about the effects of international criminal justice in different contexts and locations. My PhD thesis no doubt benefitted from these inputs – a fact that I acknowledge in the book that will emerge from this research, soon to be published in the *Cambridge Studies in Law and Society* series. While I subsequently switched from international courts to help build the world's first university-based centre dedicated to researching statelessness – the Peter McMullin Centre on Statelessness at Melbourne Law School – I continue to engage with the ever expanding and changing world of international courts.

I hold fond memories of my iCourts visit. This is above all due to its people. Mikael always made time to discuss my research. Most research overlap existed with Mikkel Jarle Christensen, who I stayed in touch with and connected with many people in Cambodia, when he was preparing for his *JustSites* ECR Starting Grant. Corridor discussions with Astrid Kjeldgaard-Pedersen, Shai Dothan, Anne Lise Kjær, Jakob Holtermann and others were just as enriching. I had always fun hanging out and exploring Copenhagen with iCourts' many junior researchers, PhDs and postdocs at the time, among them Juan Mayoral, Günes Ünüvar, Caroline de Lima e Silvia, Marina Aksenova, Pola Cebulak and so many more. Visiting iCourts would not have been so easy were it not for its excellent professional staff, especially Henrik Palmer Olsen. Thank you all for making iCourts what it has become!

When you leave iCourts, it does not necessarily leave you. I am guilty of recommending a visit to at least half a dozen subsequent iCourts visitors. I run into iCourts people throughout the world, meeting Mikael again at ISA in San Francisco, getting an invitation from Kerstin Bree Carlson to contribute to her book on the Habré trial, or just having a conversation with Nora Stappert about legitimisation practices in international criminal justice. It is these connections and the intellectual stimulations they produce that are a hallmark of iCourts' legacy – a legacy that resulted in

no small part from the dedication and vision of its founder and director, Mikael Madsen.

Ruling through the International Criminal Court's rules: legalized hegemony, sovereign (in)equality, and the Al Bashir Case

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Abstract

This article investigates sovereign (in)equality as a phenomenon that is manifested in the different levels of international institutions. The analysis is developed from the process against Omar Al Bashir, Sudan's President-in-Office, at the International Criminal Court. Considering that norms and rules have a social role in the multiple relations existing between agents and structures, that is, they transform relations in the international system, the article investigates the dispositions and principles present within the scope of the International Criminal Court that authorize a discrimination between States. This distinction implies the imposition of international rules for some actors and the maintenance of certain sovereign prerogatives for others. More specifically, international criminal justice is characterized by selectivity in judgments, as some countries are given certain authority over the regime. In this sense, it is argued that the sovereign (in)equality that is present in international criminal law is simultaneously a manifestation and condition of possibility for the hierarchy in the social, and therefore institutional normative, and political architecture of the international system.

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1 Article originally published in Carta Internacional, Vol. 14, No. 1, pp. 177–201. https://doi.org/10.21530/ci.v14n1.2019.841.

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It is argued that the presence of this sovereign (in)equality can be identified at the different levels of the institutions of international society, insofar as they influence one another.

Keywords: International Criminal Court; Al Bashir Case; Norms; United Nations Security Council; Sovereign (in)equality.

Introduction

During the drafting process of the Rome Statute of the International Criminal Court (ICC), there was a tension between two principles: sovereign autonomy and inequality (SIMPSON, 2004). One of the important topics discussed at the Plenipotentiary Conference in 1998 concerned the role of major powers in the functioning of the ICC. It was intended that the Court's jurisdiction could be triggered in two ways: the first, through a self-referral by sovereign states that autonomously ratified the Rome Statute; and, the second, following the referral of a case by the United Nations Security Council (UNSC). There was, however, a concern that this second triggering mechanism would establish a power prerogative of certain states over the regime of international criminal law. This aspect marks all institutional building enterprise and negotiation internationally, especially because it is intimately connected to a consequent increase in the production of unequal international orders while establishing international institutions and not undermining them as some enthusiasts would advocate.

In the final document of the Rome Statute, Article 13(b) established that the UNSC would have the power to refer cases to the Court due to its authority on matters relating to Chapter VII of the UN Charter. This section of the Charter famously establishes that it is for the UNSC to determine "the existence of any threat to peace, breach of peace or act of aggression" and, in such situations, it must take appropriate measures in order to "maintain or re-establish peace and security" (UNITED NATIONS, 1945, art. 39). Mirroring UN Charter's article 2(6), the prerogative of the UNSC under Article 13(b) authorizes the initiation of a procedure by the ICC against any UN member-State – even if it is a *non*-signatory country of the Rome Statute. In other words, it makes possible for the UNSC to go beyond the sovereign prerogative of States – in voluntarily binding themselves to a treaty (or not) – by giving it the authority to ground universal jurisdiction, and, hence, *internationally* trumping the

non-signatory State's sovereign will and decision to – *not* – ratify the Rome Statute.[4]

Considering the UNSC's institutional architecture and (great) power composition, and, most specially (or exceptionally), the position occupied therein by the five (extra)sovereign states with permanent seats and veto powers, the ICC's jurisdictional (infra)structures institutionally express an – (*un*)equal – order and ordering (LINDAHL, 2013). While some States are structurally (self-)immunizable, the rest – signatories or *not* to the Rome treaty – are *subject*able, that is, *not* (self-)immunizable to the *ad hoc* (or *exceptional*) universal jurisdiction of (the UNSC through) the ICC. This legal-political, institutional arrangement reflects, we argue, what Simpson (2004) calls "legalized hegemony," that is, a condition in which the privileges of certain states are not only legitimized, but also legalized through legal rules and institutions such as the UN Charter and the UN, and the Rome Statute and the ICC.

The UNSC made use of this "hegemonic imperative" for the first time in its referral of the Darfur case to the ICC. After the UNSC referral and the ICCs preliminary investigations, the ICC issued in 2009 an international arrest warrant against Omar Al Bashir, the acting Head of the Sudanese sovereign state. Al Bashir was the first acting Head of State to be indicted by the ICC (and through the UNSC). This case points to two controversial issues in the ICC regime. The first concerns the UNSC's authority to refer or defer a case from the ICC's jurisdiction. The second regards the capacity of the UNSC to waive an acting head of state's immunity.[5] The case against Al Bashir at the ICC is relevant and essential because it points not only

4 The activation of a third-party jurisdiction – meaning that the Court could initiate an investigation over situations involving states that are not party to the Rome Statute – deserves to be mentioned as a complement of our argument. Morris (2000) argues, for instance, that the activation of the powers of ICC towards nationals of States that are not party to the Rome Statute has to do with two main patterns: "There will be cases involving strictly a determination of individual culpability and cases that will focus on the lawfulness of the official acts of states" (MORRIS, 2000, p. 364). This typology allows us to point to the fact that Sudan, our case study, lies in this second category of cases in which States do not opt, at any time, to have their nationals under the individual criminal accountability regime established by the Court.

5 If the state has signed the Rome Statute, the Court itself has the capacity to overthrow the immunity of the Head of State. According to Article 27(1) and 27(2) that official capacity is irrelevant when it comes to the individual criminal accountability established the Court and consent to the Rome Statute formally affirms this irrelevance of official capacity.

to disputes within the framework of international criminal law, but also to constitutive tensions or aporias of the modern international order more broadly. In this case, questions about the power of the UNSC to submit a non-signatory state to the Court's jurisdiction and the prerogative to remove the immunity of an incumbent head of state touches upon the sovereign (in)equality between the state actors in this international regime.

It is meaningful the fact that the Al Bashir Case has already been set as a precedent for a subsequent situation in Libya, involving the referral of Mr. Muammar al-Gadaffi by the same UNSC to the Office of the Prosecutor (OTP) at ICC's headquarters. As a sort of path-dependent trajectory, Libya is also not a State Party to the Rome Statute and Muammar al-Gadaffi was also a serving head of state when targeted by the Court.

From this, it is understood that the political matters of the Al Bashir Case are associated not only with the more immediate issues of the regime, but also with the fundamental institutions and the political-legal order and ordering of international society. In order to establish such a relationship, the model of hierarchy of international institutions developed by Christian Reus-Smit (1999), which divides international institutions into three groups, is used as a theoretical framework. In general, the hierarchy to which the author refers recognizes the constitutional structure as the deepest level of values that constitute the international society. It conditions the fundamental institutions that, in turn, influence specific regimes. A study of the sovereign inequality manifested in the ICC regime is therefore necessary. The same goes to its manifestations in two other instances: the fundamental institutions and constitutional structure of the international order. Through the study of the Al Bashir Case, this paper questions the legalized hegemony crystallized in the rules of the ICC's institutional framework. In addition to the specific problems of the institutions, these controversies present in international criminal law point to other more fundamental questions of international relations, in the sense that it shows how justice can be used as a mechanism for ordering the international society.

If this is true, there would not be necessary to deal with the ICC framework in terms of a permanent *trade-off* between order and justice, sovereignty and (the enforcement of) human rights (YAMATO, 2014). For justice would be subordinated to the interests of those who claim the responsibility for the maintenance of international society and its (or their) 'law and order': the great powers. Agreeing with Cui and Buzan (2016, p. 183), who have recently affirmed, "We are particularly interested in uncovering whether and how particular conditions in international systems/societies facilitate or obstruct the operation of GPM [Great Power

Management]", our contribution does not maintain ICC as a judicialized international institution that entails a universal justice and constrains international order, but as a secondary institution that kept a primary international society institution untouched, that is: the great power management.[6]

In this sense, the Al Bashir Case is important because it raises questions about the authority exercised by the five permanent UNSC members and their capacity to act on issues concerning international criminal law. Cases such as these, which point to problematic issues in the structure of international criminal law, allow for discussions about the very foundations underlying international society. In this sense, it can be seen that broader problems, often identified with the architecture of international relations, such as inequality among states, are also manifested in specific structures, such as the international criminal justice system. However, these are not a mere expression of a global phenomenon. The more specific international institutional practices and arrangements are embedded in a context of mutual constitution in which, in addition to reproducing a hierarchical logic that is manifested in the structure of international society, they also allow this structure to be maintained and reproduced. From this arises the need for problematization of the normative-institutional apparatus within which these situations are inserted.

In order to analyse these problems, we can also draw on Nicholas Onuf's proposal to think of social arrangements as indissociably related to the (re)production of three conditions of rule: hierarchy, hegemony, and heteronomy. Hence, the theoretical positioning adopted is, in some sense, plural, seeking to depart from the thought of Reus-Smit and Onuf, with influences of certain critical readings not only from International Relations, but also from International Law. In this sense, this paper seeks to establish a dialogue between the International Relations and International Law literatures, especially because it seeks to study the institutions of international law and international criminal law. Such interdisciplinary enterprise allows raising questions concerning international institutions that would otherwise not be possible.

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6 The concepts of primary and secondary institutions are connected to an English School theoretical tradition of IR (see, for instance, BULL, 2002; BUZAN, 2004; HOLSTI, 2004). While the former are connected to patterned international behaviours of states, the latter are a deliberate choice of states which design these formal institutions in a coherent manner, since they would allow for the maintenance and even naturalization of previously installed behaviours.

Moreover, it is worth saying that there are different positions in the literature on the implementation of interdisciplinarity between International Law and International Relations. It includes debates on whether or not it is possible to establish a relationship between the two disciplines, the problems and advantages of adopting an interdisciplinary methodology, the boundaries established in each discipline, and the constant (re)definition of each discipline's identities that result from these efforts (LEANDER; WERNER, 2016; YAMATO; HOFFMANN, 2018).

Therefore, this paper seeks to engage with the critical literature of International Law and International Relations in order to analyse the problem of sovereign (in)equality in the regime of international criminal law and its relationship with the architecture of international society.[7] For this, we begin with the conceptual basis of the paper, with the formulations of Christian Reus-Smit and Nicholas Onuf about the working of rules and institutions in international society. Then, we go into the case study,[8] explaining the most important aspects of the Al Bashir Case that help to point out the manifestation of sovereign inequality in the ICC's regime. In the following section, we focus on the literature that point this problem – sovereign inequality -exemplified by the case in the previous section. Finally, we draw our concluding notes, pointing to how the sovereign inequality highlighted in the Al Bashir Case can be seen, at the same time, as a manifestation and a condition of possibility of a phenomenon that is entrenched in the social architecture of international society.

From international rules to the ruling of the international

Christian Reus-Smit (1999) draws a distinction between the institutions that compose the international order in three sets, which would be, from top to bottom, respectively: specific regimes; fundamental institutions;

7 This paper is heavily influenced by certain critical literature in both fields of International Relations and International Law, even though it does no engages directly with it. The paper pays significantly attention to an IR literature, but we have been paying attention specially to TWAIL scholars and critical readings of International Law, such as Martti Koskenniemi. In particular, see Koskenniemi (2011), mainly chapter 7, which speaks directly with the topic addressed in this paper.

8 Although we work with a case study, as was highlighted in a comment by one of the anonymous referees – which we are very grateful for – it is important to clarify that this article follows a more theoretical-interpretive line of argument instead of an empirical one.

and constitutional structures. These institutions would be hierarchically ordered, in a way that a higher level would be influenced by that which represents its basis.

At the first level, are regimes dealing with specific areas. Under this category are the arrangements of rules built directly by the actors. The specific regimes are based on fundamental institutions which, in turn, are "the elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy" (REUS-SMIT, 1999, p. 14). They make up what Reus-Smit (1999) calls the "basic framework" for cooperation between states. Their existence is fundamental so that the regimes can be established, because they are the fundamental institutions. These institutions, unlike specific regimes, are not altered simply by a change in actor's interests and they transcend changes in the balance of power in the international system. In the society of states, we can identify a series of fundamental institutions, among them diplomacy, international (criminal) law, multilateralism etc.

Finally, the basis is the constitutional structure, which influence the nature of fundamental institutions. These are "foundational institutions," the deepest socio-normative level (REUS-SMIT, 1999). They represent

> [C]oherent ensembles of intersubjective beliefs, principles, and norms that perform two functions in ordering international societies: they define what constitutes a legitimate actor, entitles to all the rights and privileges of statehood; and they define the basic parameters of rightful state action (REUS-SMIT, 1999, p. 30).

Constitutional structures, therefore, are so named because they incorporate the basic principles that, in turn, will produce and shape practices within international society. Thus, they restrict actors' actions by establishing guidelines for conduct. Three normative components allow constitutional structures to play this role: (1) a hegemonic idea about the moral purpose of the state; (2) the ordering principle of sovereignty; and (3) a rule of procedural justice (REUS-SMIT, 1999).

These elements operate in a way that the moral purpose represents the central part of this normative complex, since it provides the basis to justify the other components. The moral purpose of the state represents the reason to ensure the ordering of political life in communities that have autonomy in relation to the others and a centralized authority. It is characterized as moral by the fact that it establishes rules from a conception of what would be the best form of organization for political units. In addition, the existence of a hegemonic notion of a moral purpose of the state does not mean that this is the only one, but that this belief was

socially approved to dictate the political principles of political life. This foundation establishes the rules of entry and for institutional practices. The ordering principle defines how the differentiation of units will be made. In the society of states, it is the principle of sovereignty that plays this role. However, it must be pointed out that the claims of sovereign authority in international society can take various forms. The norms of procedural justice are the last element that composes this complex. They determine the proper conduct taken by legitimate actors. However, they do not prescribe principles, just precepts about what would be right or fair behaviour within the international environment (REUS-SMIT, 1999).

However, this model is only partially of use in this paper. Reus-Smit (1999) attributes to the constitutional structure the function of conditioning the other international institutions. In this sense, he establishes a hierarchy between them according to their character of influence and consolidates the normative foundations of international society in the constitutional structure, attributing to it a character of foundational institution of the international order. His reading is, however, restricted, since it does not consider the social character of norms and rules in international society. The key to this understanding lies in the idea that these are neither situated in the agents nor in the structure.

Nicholas Onuf's (1998a, 1998b, 2002, 2013a, 2013b, 2016) reading allows us to escape from the foundational character present in Reus-Smit's formulation, through an understanding of the international as a social order. In this conception, the rules receive the status of a third element that lies amidst agents and structure. From this place, rules participate in the process of constitution of both, while it is also constructed in the process. Thus, "[t]hrough rules people constitute the multiple structures of society, and societies constitute people the agents" (ONUF, 1998b, p. 172), that is, the definition of agents by rules is made in relation to institutional arrangements and the same applies to institutions, which are defined by the rules in relation to agents. Many institutions play the role of agents, made possible by their rules.

With this understanding, it cannot be said that the conditioning of other institutions happens in only one sense, as proposed by Reus-Smit's scheme. As much as there are rules that have a distinct status, such as the ability to give some actors the power to introduce or end certain rules, Onuf's approach does not have a hierarchically superior rule structure. The author's reading points to a scenario in which the most important rules would not be crystallized in a structure, but would be determined by the agents themselves in the process of interaction.

In addition to helping to overcome some problems in Reus-Smit's approach to international institutions, Onuf's reading also makes it possible to understand the manifestation of sovereign inequality in the rules and institutions of international society. For Onuf, "[e]very society is saturated in rules" (ONUF, 2016, p. 4) and "where there are rules (and thus institutions) there is rule – a condition where agents use rules to exercise control and obtain advantages over other agents" (ONUF, 1998a, p. 63).

Rules, once they allow this unequal political and social interaction, possibly result in three conditions of rule, classified according to their function. The hegemonic rule would correspond to the use of assertive discourses that inform the state of something and determine the agent's action in relation to it. A second form would be the hierarchy, which is associated with rules of direction, that is, imperative norms in which orders are implicit and results in its obedience and acceptance. Finally, the third type of rule is heteronomy, which is associated with the notion of an absence of (absolute, complete) autonomy. This form of rule is related to the rules of commitment which are carried out in the form of an agreement (ONUF, 1998b, 2013b; NOGUEIRA; MESSARI, 2005).

Even though agents are constituted from these forms of rule, they also participate in their constitution, since they have the capacity to act and change their social reality. Thereby, taking social arrangements as constituted from social relations allows us to understand the process of co-constitution between agents-society-rules. From this, we can understand that the analysis of social relations should take rules as its departing point.

Onuf's formulation of rules allows us to overcome the problem identified in Reus-Smit's model of crystallization of the meta-values of the constitutional structure:

> With the concept of rules, Onuf doesn't admit anything as previously determined and provides instruments endogenous to his own theoretical contribution to analyse the diversity of social events. In this sense, the permanent construction and reconstruction of social life in general – and of international relations in particular – opens the door, indefinitely, for transformation, change or continuity. The world is truly 'a world that we make' (NOGUEIRA; MESSARI, 2005, p. 174, our translation[9]).

9 Translated from the original: Com o conceito de regras, Onuf não admite nada como previamente determinado e providencia instrumentos endógenos à sua própria contribuição teórica para. analisar a diversidade dos eventos sociais. Nesse sentido, a permanente construção e reconstrução da vida social em geral – e das relações

Moreover, with this conception, it becomes possible to account for the presence of sovereign inequality in the institutions of international society. Once it is understood that the power arrangement in the system has an impact on the formulation of new rules, this model allows us to study the phenomenon of sovereign inequality, and even legalized hegemony, a situation in which great powers use their position of superiority in resources to transform privileges – often already existing – into norms.

The Al Bashir Case: (re)reading the relationship between the ICC and the UNSC

The Al Bashir Case is revealing as it was the first case of the ICC in which its jurisdiction was based on article 13 of the Rome Statute – and, as previously stated, served as precedent for the Libyan situation. In other words, the UNSC made unprecedented use of its prerogative under Chapter VII of the United Nations' Charter to initiate an investigation by the ICC. This case points to a central problem that is present in different spheres of international relations: the existence of rules that affirm *sovereign inequality*. The term describes the condition of a society of states in which some of them, in addition to their sovereign prerogatives, enjoy exclusive rights. From this privileged position, they have the capacity to restrict the sovereign rights of other states (SIMPSON, 2004).

The Al Bashir Case[10] began as of Security Council Resolution 1593 and is held by some authors as a milestone for international justice, for

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internacionais em particular – abre a porta, de maneira indeterminada, para. a transformação, a mudança ou continuidade. O mundo é verdadeiramente 'um mundo que nós fazemos.'.

10 In the face of continued reports of massive human rights violations in the Darfur region, UNSC Resolution 1564 of 18 September 2004, made the following requests: (1) that an international commission be established by the UNSC to investigate allegations of violations of international humanitarian and human rights law in Darfur; (2) to ascertain whether acts of genocide had been perpetrated; and (3) that the perpetrators of these violations were identified in order to be held accountable (UNITED NATIONS SECURITY COUNCIL, 2004, para. 12).
In accordance with Resolution 1564, the then UN Secretary General, Kofi Annan, established the International Commission of Inquiry on Darfur (ICID). The ICID report, which visited the country at the end of 2004, alluded to the practices employed by the Janjaweed militias, the Sudanese government and, to a lesser extent, by the rebels who, according to the rapporteurs, constituted crimes against humanity and war crimes (INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR, 2005; OETTE, 2010, p. 374). In addition, it was stated that there were no indications of genocide, although acts of individuals with intent to

being the first time the UNSC triggered its jurisdiction over the ICC (BÖCKENFÖRD, 2010). However, the authority conferred on the UNSC by the Rome Statute is still a controversial topic, since the independence of the Court is considered to be an important institutional aspect that distinguishes ICC from its predecessor courts.

Since the establishment of the Al Bashir Case at the ICC, two arrest warrants have been issued against the acting head of state: the first on 4 March 2009 and the second on 3 February 2010.[11] The first warrant was sent to all States Parties to the ICC and to UNSC members who are not signatories to the Statute of the Court (AKANDE, 2009a, 2009b). Although the request for the arrest and surrender of Al Bashir was addressed to each of the States mentioned, Resolution 1593 made a request for States and regional organizations to cooperate with the Court's requests (UNITED NATIONS SECURITY COUNCIL, 2005). In face of this situation, the Sudanese government refuses to cooperate with the ICC. Officials in the country claim that the Sudanese judicial system has already dealt with the crimes committed on its territory against the civilian population.[12] On the basis of the principle of complementarity,[13] provided for in the

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genocide have been identified. Finally, the document further recommended that the UNSC refer the case to the ICC (OETTE, 2010, p. 347).
The UNSC accepted the recommendation of ICID, in accordance with its prerogative based on article 13 of the Rome Statute, and indicated that the case of Darfur should be investigated by the Office of the Prosecutor (OTP) of the ICC, through Resolution 1593, on 31 March 2005.

11 Despite the issuance of arrest warrants, Omar Al Bashir remains at large, since he did not surrender – and was neither arrested nor surrendered – to the Court.

12 In response to the indictment of Darfur's situation with the ICC, the Sudanese government established the Special Criminal Court for Darfur (SCCD) in June 2005. However, the defendants brought to SCCD were few and far from the country's high political leadership. In addition, crimes covered by internal trials were restricted, and cases of common offenses committed in isolated incidents were often brought to court (OETTE, 2010, p. 347).

13 The principle of complementarity regulates the relationship between domestic and international criminal jurisdictions. It is provided for in the Rome Statute both in its tenth preambular paragraph and in Article 1. In the latter, it is defined that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions" (ROME STATUTE, 1998, art. 1). This means that the Court functions as a supplementary mechanism and should not overlap with investigations and prosecutions of domestic crimes as long as they are in accordance with international law. The ICC must therefore operate in a way that complements those judgments, being an "additional concurrent jurisdictional layer that can intervene if and when domestic jurisdictions fail to bring genuinely to justice those suspected of having committed **genocide, crimes against humanity, war**

Rome Statute, this would remove the competence of the ICC –, which means, therefore, that it is not necessary for the case to be addressed in international bodies. In addition, Sudan claims that it has no obligation to the ICC since it is not a State Party to the Court's constitutive instrument (OETTE, 2010).

The Sudanese President, since the issuance of the first arrest warrant by the ICC, has carried out more than 60 official trips. Among the countries that have received Al Bashir, there are members and non-members of the ICC. In many cases, the failure to surrender Al Bashir to the Court resulted from a deliberate choice of those States.

With regard to the Rome Statute signatories that received the Sudanese President – as Chad, Djibouti, Malawi, Kenya, DRC and South Africa, for example – the Court requested the presence of their representatives, demanding explanations for non-cooperation in prison and handing over Al Bashir to the ICC (CRYER, 2015). Nevertheless, no concrete action was taken by the ICC against those States. This has to do with the fact that only the Assembly of States Parties of the ICC (ASP) and the UNSC (in cases initiated by UNSC resolutions) have the power to implement decisions in the event of non-compliance with arrest warrants.

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crimes and – once the ICC may exercise its jurisdiction in this respect – the crimes of **aggression**" (NERLICH, 2009, p. 346, emphasis in original). In theory, the ICC should give priority to the trial in a national forum, as established in article 17 (1) of the Rome Statute. It establishes that the Court must render inadmissible to try a case before the ICC in the following situations: (1) whether the case is being investigated or judged by the State that has jurisdiction over it (ROME STATUTE, 1998). However, in order to be considered inadmissible, there should be tried in the domestic proceedings the same individuals and crimes as in the ICC situation/case (PTC, 2006, para. 31). Moreover, it is possible that a case is admissible to the ICC once it considers that it is not being genuinely investigated and tried by the State; (2) if the State having jurisdiction over the case decides, after investigation, not to judge the individual, unless it is considered that the decision was taken by the inability or unwillingness of the State to judge; (3) if the individual has already been tried for the conduct for which he is accused in the complaint (ROME STATUTE, 1998, article 17). However, the principle *non bis in idem* – which establishes that an individual will not be tried more than once for the same fact – will not be applied, as stated in article 20 (3) of the Rome Statute, in cases in which the domestic trial happened "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" or when the proceeding is not considered impartial or independent in accordance with the rules of international law, so that there is no intention to bring the individual tried the Justice; and (4) if the seriousness of the case does not justify interference by the ICC, even in the absence of a domestic proceeding (ROME STATUTE, 1998, art. 17).

In July 2009, at a regular meeting of the African States Parties to the Rome Statute of the International Criminal Court, which took place within the framework of the African Union (AU), members expressed great concern about the implications of the arrest warrant issued by PTC against Omar Al Bashir for the ongoing peace process in the country (AFRICAN UNION, 2009, para. 2). The Decision called for a number of issues to be discussed at the ASP meeting in Kampala, Uganda, in May 2010, of which the most relevant were: (1) the existence of Articles 13 and 16 in the Rome Statute, which provides the UNSC with the ability to initiate or discontinue cases at the ICC; (2) a need for clarification by the Court the question of immunities of officers whose States are not parties to the Rome Statute; and (3) the implications of the practical application of articles 27 and 98 of the Rome Statute (AFRICAN UNION, 2009, para. 8).

In addition, the Decision expressed the frustration of African States with the fact that the request of the AU to the UNSC – asking it to defer proceedings against Omar Al Bashir in the ICC – in line with the prerogative conferred on that body by article 16 of Rome Statute – had not been even heard. The request was thus reiterated. Lastly, the most striking aspect in the decision of the African States Parties to the Rome Statute was the request for its signatories to not cooperate with the ICC regarding the Al Bashir Case – a possibility provided for in article 98 of the Rome Statute (AFRICAN UNION, 2009, para. 9 and 10).

This situation led to the debate regarding the obligation to arrest Al Bashir when in the territory of a state party of the ICC, considering his status as head of state and the consequent prerogative of immunity based on international law.

The question of Al Bashir's immunity, which stems from his status as acting head of state, is controversial. For the first time the ICC has a case against an acting head of state. There are precedents of judgments of former heads of state who did not have immunity rights because they were nationals of Rome Statute member countries, which implies the waiver of their immunities.[14] Before the question of whether, under international law, incumbent heads of state would enjoy the right to immunity from criminal jurisdiction and from orders of arrest in foreign states, many authors consider that Al Bashir is entitled to absolute immunity, even though he is accused of committing international crimes (AKANDE, 2009a).

14 Even the trial of heads of state in other international criminal tribunals created after the 1990s is different, since the ICC was created based on a treaty.

The immunity of state officials was addressed in the ruling of the International Court of Justice (ICJ) in the Case of the Arrest Warrant of 11 April 2000. In this case, which concerned, however, an individual who exercised the position of Minister of Foreign Affairs, the ICJ judged itself:

> [U]nable to deduce […] that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (ICJ, 2002).

The ICJ understood that the mere issuance of the arrest warrant by Belgium against an interim member of the Democratic Republic of Congo's government constituted a violation of international law's customary rules concerning the personal immunities enjoyed by foreign officials (*author*). The same reasoning can be applied to heads of state. There are, however, some differences: the arrest warrant against the Sudanese president was not issued by a foreign court and circulated in an international environment. It comes from an international court, being an international warrant for the arrest and surrender of Al Bashir (GAETA, 2009).[15]

After arguing that the immunity of heads of state is an impediment to the exercise of criminal jurisdiction by national courts, the ICJ sought to clarify the issue with regard to international criminal courts, ruling that immunity does not apply the same way. The ICJ decision referred to judgments in the International Criminal Tribunal for the former Yugoslavia (ICTY), in the International Criminal Tribunal for Rwanda (ICTR) and in the ICC. Regarding the ICC, it emphasized Article 27(2) of the Rome Statute, according to which immunities recognized under domestic or international law do not prevent the ICC from exercising jurisdiction over an individual (ICJ, 2002). However, the ICJ's assessment of immunity from international criminal tribunals did not go further, as it was unnecessary for the *sub judice* case. As a result, a number of questions remain regarding the observation of the immunity of government officials before international criminal tribunals.

The ICJ's assessment of the invalidity of immunities before international criminal tribunals is widely criticized, mainly because it mentions the

15 The issue of immunity of heads of state was also discussed in two other situations: in the Pinochet Case, before the House of Lords, in the United Kingdom; and in the Belgium v. Senegal, at the ICJ. However, both cases concerned trials of former heads of state before national courts, claiming universal jurisdiction due to the crimes perpetrated.

ICTY, the ICTR and the ICC, without considering the differences between these courts. These distinctions are central to the discussion of the (in)applicability of the principle of immunity of heads of state. Although the ICTY and ICTR are international courts, they are *ad hoc* tribunals, different from the ICC, which is a permanent court. The two courts were created from UNSC resolutions, so they are vested with the authority of a measure adopted under Chapter VII of the UN Charter. The ICC, as explained above, was created on the basis of a treaty, so it is founded on the direct consent of the contracting states.

This distinction is fundamental because it has an impact on the obligations of states to execute the arrest and surrender warrants issued by those courts against individuals who enjoy personal immunities based on international law (GAETA, 2009). When the ICTY and ICTR were created, the UNSC imposed obligations on all UN members to cooperate with these tribunals (UNSC, 1993, 1994). Therefore, although the ICTY Statute – or the UNSC Resolution establishing it – does not contain provisions on the breach of immunity, the issuance of the arrest warrant by the ICTY against Slobodan Milosević has been little questioned,[16] since it is considered that the UNSC is able to remove the immunities of officials and governments' representatives of UN Member States by virtue of their acceptance of Articles 25 and 103 of its Charter. In the case of the ICC, because it's based on a treaty, it cannot do the same, since the Vienna Convention on the Law of Treaties states in article 34 that treaties cannot create obligations and rights to third states without their consent (INTERNATIONAL LAW COMMISSION, 1969). In that sense, the Court only has authority to require the execution of an arrest warrant to its members.

The Al Bashir Case presents a difference from the situations referred to the Court by states themselves or by the Office of the Prosecutor: the fact that Sudan is not part of the Rome Statute. This implies that Sudan has not waived its rights to immunity. On the other hand, since the Al Bashir Case stems from a UNSC resolution, it is argued that only the Security Council has authority to remove the immunity from Al Bashir.

Although not a state party to the Rome Statute, Sudan would be obliged to cooperate with the ICC because of Resolution 1593, which stated that "the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance

16 The questions raised indicate that the existence of jurisdiction does not imply absence of immunities, a position that is in line with the decision of the ICJ in the Arrest Warrant Case (ICJ, 2002).

to the Court and the Prosecutor pursuant to this resolution" (UNSC, 2005). Resolution 1593, therefore, establishes an explicit obligation under international law for Sudan, which includes the duty to arrest and surrender any individual requested by the ICC. This case raises questions about the violation of Sudan's sovereign autonomy by a rule of the ICC, which authorizes the UNSC to bind that state to the statutory provisions of the Court, and consequently imposing obligations that were not adopted voluntarily. In sum, the Al Bashir case is questioned in this article because of these traces of sovereign inequality, not only found in the ICC, but also in other instances of international society.

As noted, the Al Bashir Case raises the discussion about the prerogatives given to some states by the Rome Statute over the ICC. By investing in large powers the ability to initiate an investigation against a state – which may or may not be a member of the Court – and to order that an investigation or trial under way in the ICC be discontinued, the Rome Statute crystallizes the condition of a select group of states as possessor of powers over the sovereignty of others. The signing of an international treaty is considered an expression of the sovereign will/autonomy of states. However, since this group – the five permanent members of the UNSC – has an express authorization to submit any State – with the exception of themselves, since the objection of one means the non-progress of the proposal – to that treaty, there is a trail of hierarchy and inequality to be followed.

The Case highlights precisely this issue. As the UNSC indicated that the ICC should investigate the situation in Darfur, Sudan was subject to the standards established by the Rome Statute. Provisions such as these establish differences between state sovereignties: while some have their sovereign rights violated, others not only maintain their prerogatives, but are also allowed to infringe upon those of others. The Al Bashir Case thus exemplifies the expression of a legalized hegemony.

It is worth mentioning that the UNSC process of negotiation around the issue finished with the adoption of a resolution without any vote against it and eleven states in favour. To some literature, extreme influential on the ICC functioning, but that do not engage critically with our argument,

> [...] the resolution was an international **vote of confidence in the ICC**. The US, which had been campaigning against the ICC since its creation precisely because of the Court's potential jurisdiction over nationals of states not parties to its Statute, had initially lobbied to other Security Council members to refer the situation in Darfur to another

> jurisdiction, for instance a joint African Union/United Nations Special Court for Darfur. But ultimately the US and even China, Sudan's largest trading partner, did not veto the Council's first referral to the ICC (NOUWEN, 2013, p. 248–249).

The veto power, being used or abstained by great powers, undoubtedly manifests the crystallization of a legalized hegemony within the United Nations. Nonetheless, the Al Bashir case makes evident that this transcends UN and both disseminate and articulate hegemony beyond it. Under any hypothesis – using or not the veto power – the Al Bashir case would be defined by the discretionary power of great powers and not by equal sovereign power of states.

The Al Bashir Case, Sovereign (In)equality, and Ruling through Rules

The Al Bashir Case in the ICC, as shown, is inserted in a very controversial context. The objective is not of investigating whether or not Al Bashir should be tried for the perpetration of international core crimes. The work sought to problematize the manifestation of sovereign inequality in the ICC, using the case study to elucidate how this hierarchization of sovereignties is expressed in the relationship between the Court and the UNSC. This section, then, builds on discussions on how the relationship of mutual constitution between different levels of institutions related to the ICC has an impact on the expression of sovereign inequality in each of them. The Al Bashir Case provides the opening to begin the discussion on the manifestation of sovereign inequality in the institutions of international society. It points to an aspect around which various questions can be posed: the authority of some states – the five permanent members of the UNSC – under the ICC regime. While some have their sovereign capabilities preserved, others do not enjoy this privilege. There is a hierarchy in international society that separates the great powers (and other developed states) from those whose sovereignty is vulnerable to violations.

The key point of the manifestation of sovereign inequality in the Al Bashir Case is in the subjugation of Sudan to the Rome Statute. In other words, once a state is forced to comply with the norms of a treaty that it has not ratified, it directly touches upon the principle of state sovereignty. Sudan neither signed nor ratified the Statute of the Court. There are rules within the framework of norms of international law, such as Article 34 of the Vienna Convention on the Law of Treaties, which prohibits the creation of obligations by a treaty to a state that has not given its consent

– through ratification. However, the Statute of the Tribunal, and other instruments such as the UN Charter, of which Sudan is a part, go in another direction. According to these documents, the UNSC has the competence to violate the sovereign prerogatives of a state.

This discussion points to the relationship between two types of institutions of international society, the specific regimes and the fundamental institutions, respectively the UNSC/ICC and international law/sovereignty/immunity of heads of state. One sees, therefore, how sovereign inequality is implied in the relation of mutual constitution. The establishment, by means of rules, of the relationship between the UNSC and ICC regimes, in the same way as the use of these rules by the Security Council to indicate a case to the Court – which, according to Onuf (2013b) also changes the rule, once it strengthens it – provokes changes in other fundamental institutions related to them. The adoption of a provision stating that the UNSC can enforce the Rome Statute's rules for a non-signatory state alters and even manipulates the content of key institutions. In international law, this has an impact because it creates variations on the rule in its framework, according to which the creation, through a treaty, of obligations to third parties without their consent is not allowed. In other words, state non-parties, which have not expressed their agreement, are not subject to conventional rules that provide for obligations. The circumstances of the case seem to show that the third-party obligations rule has another meaning. The original notion that the third state must express its agreement continues to prevail, except in situations in which the UNSC decides to create obligations, submitting it to the ICC regime.

Regarding the principle of sovereignty, it is modified, gaining greater flexibility. Sovereignty is (re)signified so that its preservation is tied to a series of conditions. There is also a redefinition of who has the capacity to transgress this principle. The same is true about the immunity of heads of state. Those who voluntarily join the Rome Statute are considered to waive their immunity rights. In the case of those who are not members of the Court, but which become states treated as parties, it is considered that immunity is also lost. In this case, there is the influence of another fundamental institution: human rights. Increased concern about serious violations of human rights and the consequent growth of norms dealing with these issues lead to changes in some principles. Once the superiority of rules of that institution is established, the conflicting principles become more flexible. Regarding the principle of immunity of heads of state, the ICJ decision confirmed the existence of immunity of a government official before the jurisdiction of a national court. However, it was affirmed that, in the case of an international criminal court, that immunity is overturned.

It was decided, therefore, that in the event of a case involving the perpetration of grave human rights violations, immunities will not be maintained, thereby bringing about a change in this fundamental institution.

So far, with the Al Bashir Case, it was shown how there is a process of interaction between specific regimes and fundamental institutions. In regimes, place of the most basic practices, decisions, actions and speech acts represent changes in the already existing fundamental institutions and, at the same time, these institutions have certain rules that limit the scope of action of the actors. Thus, the sovereign inequality affirmed in the Al Bashir Case, based on the rules established by the Rome Statute, is also present in the fundamental institutions, since these principles begin to express an unequal pattern, as is the case of sovereignty, which is (re)understood to encompass the notion that there are situations in which it can be violated.

These rules, such as those conferring authority to the UNSC over the ICC, also have an impact on the architecture of the international system. The crystallization of such rules would result in the condition that Onuf (2013b) calls heteronomy (which occurs in conjunction with the conditions of hierarchy and hegemony, but their characteristics prevail). This condition is reached once there is a significant set of commitment rules, which are standards that inform the actors of their rights and duties (ONUF, 2013b). These rules, therefore, define certain prerogatives of certain agents and guarantee for others that their rights will not be violated. However, in this scheme, this reaffirmation for the actors of their autonomy is nothing more than an illusion. Agents are never completely autonomous. Their decisions are always linked to social reality.

Under this condition of heteronomy is that much of the institutions of international society are formed. More specifically in the situation of the ICC, adherence to its constituent instrument, the Rome Statute, by ratification also creates such an illusion. The establishment of an international criminal court through a treaty, in contrast to the previous war crimes trials, was seen as a reaffirmation of the sovereignty of states, since the Court would exercise its jurisdiction only over those whom adhered to its statute. However, the idea of state autonomy was contrasted by a provision of the Rome Statute that established a mechanism through which the UNSC is given the capacity to indicate a case to be investigated and tried by the ICC. Hence, as already mentioned, the Council is empowered with the capacity to submit a state to a treaty to which it has not bound itself by its will.

The sovereign inequality that manifests itself in the regime of the ICC, as it has been emphasized, is not an isolated phenomenon. Although this

institution is not directly associated with the UN system, once it defines that the UNSC has competence to act on all issues involving the theme of international peace and security, the ICC regime becomes closely intertwined with it. Thus, sovereign inequality in the UN is a condition for its expression in the ICC. And because Sudan is a member of the UN Charter, it is under the authority of the UNSC. In this sense, the Al Bashir case points to this phenomenon in both regimes in the Court and the UN.

In this interaction of different levels of international institutions, there is a second form of relationship – beyond the one among regimes and fundamental institutions – between the fundamental institutions and the architecture of the international system. The rules, insofar as they crystallize an inequality of resources existing between states, begin to express the disparities of the system. They establish a framework of legalized hegemony that gives the illusion that there is autonomy/equality between states, but also constitute a series of prerogatives for some. The establishment of such rules, marked by these two values – autonomy/equality and sovereign inequality – such as those present in the Rome Statute and the UN Charter, in turn, influence the architecture of the system. Thus, there is a relationship between the three levels of institutions of international society. Therefore, one can see that there is a clear relation between the sovereign inequalities that are manifested in the different levels of institutions that compose the international order. And rules are the central piece in this scheme, being the ones responsible for producing the condition of heteronomy.

Conclusion

The present article sought to problematize a very common assumption in International Relations: the idea that the anarchy that marks the architecture of international society presupposes sovereign equality. From this assertion, it was argued that there is a sovereign inequality in the international system that is reproduced in the different institutional levels of that order. This hierarchy between sovereignties is legitimized through rules that crystallize inequality in the system. From this, the article sought to understand how this expression of sovereign inequality in the regime of the ICC – through the Al Bashir Case – is related to the manifestation of this phenomenon in other institutions.

The fact that the UNSC is empowered to carry out exceptional measures in international society – such as interventions, or even the indication of a non-member country to the ICC – denotes a hierarchy among states that

grants privileges to some and restricts capacities from others. The article, therefore, questioned the idea of sovereign equality, seeking to understand how, through the Al Bashir Case, the opposite can be verified. The case study paved the way for the problematization of sovereign inequality in international institutions. From this, we inquire about the interaction between the institutions that compose the international society and the relation between the expression of inequality between them and the architecture of the system.

The Al Bashir Case serves as an entrance to the discussion of sovereign inequality in the institutions of international society. This Case marked the first time that the UNSC made use of one of the two prerogatives granted by the Rome Statute: that of requesting an investigation by the Court into a certain situation. In this case, the UNSC did so through Resolution 1593, which established an investigation into the situation in Darfur and held a reservation on the investigation of individuals of other nationalities other than Sudanese. By referring the case to the ICC, the UNSC submitted to an international treaty a state that had not ratified it, thereby violating the sovereign prerogative of binding international treaties by expressing its will. This relation between the ICC and the UNSC is considered a manifestation of sovereign inequality since it authorizes great powers to have interference over the regime of international criminal law. This hierarchy, as stated, is expressed in the ability of the UNSC to violate the sovereign prerogatives of a state through its subjection to a treaty to which it has not adhered.

Based on this situation, the article analyses how the relationship between the different levels of institutions of international society implies the manifestation of sovereign inequality. With the creation – and use – of the norm that allows the UNSC to interfere in the ICC regime, a relationship is also established between these two specific regimes and the fundamental institutions related to them. Thus, the sovereign inequality that is expressed in the first relation is transposed to the second one, since it changes the actors' understanding of these fundamental institutions. The standard that defines the relationship between the ICC and the UNSC also has an impact on the system architecture. As stated, the type of rules that prevails in the international society has an impact on its structure. And, as pointed out, the institutions of the international order are marked by ambiguity, so that they affirm at the same time the autonomy between states and sovereign inequality. The result of this type of rules, as stated by Onuf (2013b), is an environment marked by heteronomy, which is considered by the author as the situation in which actors believe they have autonomy but actually live in a hierarchical environment. In this

sense, the assertion in these institutions of principles that point in different directions constitute international society as heteronomous.

This article, then, represents an effort of disputing the way anarchy in the international system is portrayed. The contribution of the present research, through a case study, to question the characterization of the international system as anarchic and marked by sovereign equality, through the use of theoretical conceptions explaining the interaction between institutions. While, on the one hand, the study of the Al Bashir Case in the ICC raises the discussion over the expressions of sovereign inequality in the international society, it also allows us to witness the material expression in international relations of the theoretical conceptions of the authors on whose ideas the present article was based. With this, it was highlighted how the different levels of institutions of the international society interact in terms of the expression of sovereign inequality. It has therefore been shown that, just as the structure of society has an impact on fundamental institutions and specific regimes, rules and norms are also participating in their construction and, therefore, in the making of a legalized hegemony in the international realm.

Acknowledgments:

We would like to thank Professors João Pontes Nogueira and Stefano Guzzini for reading and commenting on previous versions of this paper. We are also grateful to Nicholas Onuf whose teachings and work have immensely influenced this article. This study was financed in part by the Coordenação de Aperfeiçoamento de Pessoal de Nível Superior – Brasil (CAPES) – Finance Code 001.

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My iCourts experience

The process of writing and researching for a dissertation can be a very lonesome experience in which most of your conversations take place between four walls among your readings and yourself. As a PhD student starting to take my first steps into my research, amongst the literature of relevance for my work, I would find cutting edge and high-quality working papers, published articles and other kinds of writing that resonated a lot with what I was aiming to develop. Some would stand out for bringing debates and literature from other disciplines and non-conventional elements in their research. And surprisingly many came from the same centre. That is when I first learned about iCourts. From there, I knew that this was a place I would want to visit if I had the chance.

A year later, I would process my application to be a student at the 2019 iCourts PhD Summer School. The experience of the Summer School was a great one. Students from various countries and institutions getting together to engage in discussions on their projects amongst themselves and with iCourts professors was a very rich experience. Not to mention the School's great social programme! However, considering that the School only lasted for two weeks, I left with the feeling of wanting more.

That same year, I applied for a scholarship to do a semester of my PhD research at iCourts. In January 2020, I was back for a research stay. The first months were filled with academic encounters, presentations, and a deep dive into my dissertation topics that benefited a lot from the centre's own research projects. I presented my work and had a fantastic engagement and feedback (that I still come back to this day!). The discussions once held in a lonely office were taking place in real-time.

Beginning March, though, we got the news that everyone should stay at home. A global pandemic hit, and Denmark did not escape from it. That was a bucket of cold water to all the expectations that I had for that stay. The result, however, was that I got more from it than I expected, and it is from that time that I have my most fond memories of my time in iCourts. I had people checking on me constantly and providing a sense of being taken care of. Lilli Streymnes would always ask if I was in need of anything and offer a tale or two about her pandemics life. Sarah Scott Ford took me to socially distanced meetings with the PhD students who lived alone in the city, providing a greatly appreciated human company. Thomas Gammeltoft-Hansen would make these harsh and mad times so

much lighter by not only meeting me for face-to-face encounters in open spaces to chat about projects or even political nonsense but also adding two adorable tiny humans to those meetings. And, of course, Salome Addo Ravn, a constant company throughout these times, would phone me to chat for hours about topics that ranged from some cuteness her toddler was up to that day to some academic conundrum that either one of us was struggling to make sense, be that a very practical issue in need of a decision or something deeper into the literature. I will always cherish the kindness they showed me during these challenging times!

As I am now in the final months of my PhD, I know that the time that I stayed in Denmark, even with all the circumstances of the pandemic, were amongst the best in these past years.

By experiencing iCourts, I can say that I found more than the materialization of the discussions once held with written texts. It also brought me fellowship, (lots of) laughter and affects.

Hear, hear, iCourts!

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Extraterritoriality reconsidered: functional boundaries as repositories of jurisdiction

Ezgi Yildiz

Introduction

There is a myth that states have a monopoly of force within their borders and that they may not interfere in the affairs of other states. The 'Westphalian frame' it is called, and it is in decline.[1] The structural reorganisation of the international system has challenged the fields of international law and politics, and human rights is no exception. Human rights treaties operate within this frame and their successful implementation depends upon sovereign states that are willing and able to do so.[2] The question is, as 'the Westphalian frame is notoriously fracturing,'[3] how will human rights law accommodate the tectonic shifts in the system?

This chapter addresses this puzzle, though tackling such a far- reaching question in its entirety would exceed its scope. More specifically, it examines how legal institutions have adapted to an international system whose foundational myth is shattering. Territorial sovereignty is the consecrated organising principle of the international system. Yet it is becoming clear that it is not a useful concept for understanding international politics. How do international tribunals generate solutions to current problems with such inadequate tools? I focus on how the European Court of Human Rights (ECtHR) approaches extraterritorially committed violations of human rights.

The ECtHR has changed its approach to extraterritoriality. One thing has, however, remained constant. It has been careful not to extend the application of the European Convention of Human Rights (ECHR) beyond the territories of European countries. It has devised some varyingly strict criteria to limit the extraterritorial application of the Convention. The one adopted in *Jaloud v. the Netherlands* appears to be the product of judicial

1 Koskenniemi 2011, p. 65; Koskenniemi 2016.
2 Bhuta 2016, p. 2.
3 Ibid. p. 10.

innovation, and perhaps the most fitting approach to meet the needs of the current international system.[4]

This chapter examines closely the ECtHR's reasoning in *Jaloud*. Drawing from the logic employed in this case, I propose the concept of 'functional boundaries' in order to understand the Court's most recent jurisdictional test. I define 'functional boundaries' as repositories of authority exercised by a state on foreign soil. They are demarcation lines that establish extraterritorial jurisdiction, thereby holding states accountable for human rights violations committed on foreign soil. As the notion of neatly defined territorial borders as demarcation lines weakens, this concept may hold the potential to help us navigate in the current international order. However, one should also note that, while useful in addressing extraterritorially committed human rights violations, this is an innovation that is not produced in an entirely progressive spirit. Rather, it is a concession that strikes a balance between, on the one hand, ensuring accountability for human rights violations perpetrated beyond the territorial boundaries of European states, and on the other, not fully opening the ECHR system to claims emanating from outside Europe.

The European Court of Human Rights and the principle of territoriality

The ECtHR is certainly not the most progressive court in ensuring the extraterritorial application of human rights treaties. A progressive approach for a human rights court would entail constructing a more inclusive legal doctrine regarding states' extraterritorial human rights obligations. In this regard, the Inter- American Court of Human Rights (IACtHR) and the Human Rights Committee are generally regarded as more progressive.[5] For example, the IACtHR holds that states have extraterritorial obligations wherever they have 'authority and control over individuals or their specific situations'.[6] Similarly, the Human Rights Committee finds that an incident would fall under a state's jurisdiction as long as it was perpetrated by the agents of the state concerned.[7] By contrast, the ECtHR has followed a rather conservative line of argument. It has devised strict tests to limit the application of the ECHR to extraterritorially committed acts.

4 *Jaloud v. the Netherlands* 2014.
5 For a good analysis of how different tribunals approach extraterritorial jurisdiction, see Cleveland 2010.
6 Hathaway et al. 2011, p. 406.
7 *Lopez Burgos v. Uruguay* 1979, § 12.2.

However, the conservative line that the ECtHR has pursued is precisely the reason the ECtHR illustrates an innovative – and inconsistent – way to understand extraterritorial jurisdiction.

The Court's meticulous attempts to limit the ECHR's territorial application are reminiscent of the days when the European human rights regime was created. This regime is now considered the most authoritative regional forum for human rights protection.[8] However, it was entangled with controversy from the beginning. The most glaring of those was the fact that some of the founding members were still colonial powers when the ECHR was drafted in 1949.[9] Indeed, it was the French and the British who took the lead in drafting the ECHR, despite being implicated in serious human rights violations in their colonies.[10] As a result, the way the ECHR was drafted gave the impression that the rights safeguarded were for 'a select groups of individuals'.[11] This is most evident in the way that Article 56 of the ECHR is formulated. This infamous 'colonial clause' acknowledges the existence of 'overseas territories' (read colonies). Member states were empowered with the decision to extend the application of the Convention to 'all or any of the territories for whose international relations it is responsible'. But this effectively meant that this protection system would be not be open to non-Europeans by default.

Does the ECtHR's approach to the ECHR's territorial application reproduce the hierarchies upon which the system was built? In order to answer this question, I turn to the ECtHR's views on jurisdiction and extraterritoriality.

The Court's view on jurisdiction and extraterritoriality

Article 1 of the ECHR, which links the contracting states' obligations to their jurisdiction, reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms in Section I of this Convention.' However, while Article 1 refers to the contracting states' obligations to the persons within their jurisdiction, it does not offer a working definition of jurisdiction itself. However, in *Bankovic*

8 Helfer 2008, p. 126.
9 Reynolds 2017, pp. 129–30.
10 Madsen 2007, p. 144.
11 Christoffersen and Madsen 2011, p. 1.

and Others v. Belgium and Others, the ECtHR defined the scope of the contracting states' jurisdiction as follows:

> [J]urisdictional competence of a State is *primarily territorial*. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[12]

This definition underscores the idea that territoriality is the core constitutive element of jurisdiction, and extraterritorial jurisdiction is constrained by the territorial sovereignty of other states. According to Sarah Miller, this approach is 'intensely pragmatic' and reflects 'the realistic constraints of the system and a sense of comity'; it also 'eliminates some, but not all, categories of legal black holes'.[13] This approach arguably limits the complications that may arise from expanding the obligations of contracting states beyond their territorial borders, but it also leaves sufficient room for further developing the obligations if need be in the future.[14]

The ECtHR further reinforced the principle of territoriality by explaining that 'Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.[15] More importantly, with this statement the ECtHR established a 'rule and exception paradigm': territorial jurisdiction is the rule, extraterritorial jurisdiction only applies in exceptional circumstances, and it requires specific justifications. Such an approach sets the bar high for an extraterritorial act to fall within the jurisdiction of the state concerned. Therefore, it limits state obligations arising from such acts. Extraterritorial jurisdiction, then, is an exception to the rule that jurisdiction is primarily territorial. Although this distinction appears straightforward, establishing the existence or the absence of extraterritorial jurisdiction in specific cases is a daunting task. In practice, the ECtHR devised different tests to establish the existence of extraterritorial jurisdiction. While doing so, it has generated a rather inconsistent jurisprudence, as we will see in the next sections. Piecing different approaches adopted by

12 *Bankovic and Others v. Belgium and Others* 2001, § 59 (emphasis added).
13 Miller 2010, p. 1246.
14 Ibid.
15 *Bankovic and Others v. Belgium and Others* 2001, § 61.

the ECtHR together, one can conclude that there are two jurisdictional tests: the spatial control model (the exercise of control over territory) and the state agent authority and control model (the exercise of control over individuals).[16]

The spatial control model: effective control over territory

According to the spatial control model, states have extraterritorial jurisdiction if they exercise effective control over territory or they assume some functions usually performed by governments. This model was first developed and deployed in cases concerning the Turkish occupation of Northern Cyprus. A particularly important case is *Loizidou v. Turkey*. A Cypriot citizen who could not access her properties in Northern Cyprus brought this case before the Court. It related to an interesting ground for defining and clarifying what extraterritorial jurisdiction entails. The ECtHR ruled that

> the concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory.[17]

Therefore, when a state exerts 'effective control of an area outside its national territory'—be it exercised directly by means of military forces or via a subordinate local administration – that state incurs obligations.[18]

The ECtHR supported its approach by arguing that an alternative scenario would result in '*a regrettable vacuum* in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards'.[19] This statement laid the ground for a contentious concept: the ECHR's 'legal space' (*espace juridique*), encompassing the entire territory of its signatories. Initially introduced to extend the ECHR's protections to occupied Northern Cyprus, the statement would subsequently be used to limit the ECHR's application. In a sense, *Loizidou v. Turkey* confirmed that only persons in

16 Wilde 2010, p. 110; Rooney 2015, p. 408; Milanovic 2011, pp. 119–228.
17 *Loizidou v. Turkey* 1996, § 52.
18 Ibid.
19 *Cyprus v. Turkey* 2001, § 78 (emphasis added).

privileged spaces are protected under the ECHR, an idea that goes back to the time of the Convention's drafting.

This 'effective overall control' test was reaffirmed in *Cyprus v. Turkey*, in which the government of Cyprus brought complaints regarding the 1974 invasion and the subsequent occupation of the northern portion of the island. The ECtHR ruled that '[h]aving effective overall control over northern Cyprus', Turkey had responsibility over the acts of the local administration, which depended on the support of Turkey.[20] This reasoning was further reinforced in *Ilascu and Others v. Moldova and Russia*.[21] With these cases, the ECtHR determined that 'effective overall control' over a given territory (through, for instance, the presence of armed forces) is a sufficient and necessary condition for the establishment of extraterritorial jurisdiction.

However, the Court revised this approach in *Bankovic*. The case was brought against Belgium and sixteen other European states that participated in the NATO airstrike on the Radio Televizija Srbije building in Belgrade in 1999. Faced with this difficult case against European NATO member states, the ECtHR chose to take a cautious step and re-emphasised that jurisdiction was, in principle, confined within the territorial boundaries of the contracting states.[22] Having reiterated that jurisdiction was territorial, the Court repeated the exception to this rule: a state has extraterritorial jurisdiction over a territory when it exercises 'effective overall control' due to the presence of large numbers of troops in that territory.[23] A state can wield such control over a given territory or population either through military occupation or by exercising all or some of the public powers with 'the consent, invitation or acquiescence of the government of that territory'.[24] Consequently, with *Bankovic*, the ECtHR refined the above-mentioned rule and its exception, making the criteria for the establishment of extraterritorial jurisdiction even more stringent. Following this formula, the ECtHR found that airspace control was not sufficient to evoke extraterritorial jurisdiction. According to this reasoning, the control gained through aerial bombing does not pass the threshold to qualify as an exception to the rule.

Moreover, the Court reiterated the *Loizidou* argument that the ECHR had a 'legal space'. The borders of this legal space were limited to the

20 Ibid. § 77.
21 *Ilascu and Others v. Moldova and Russia* 2004.
22 *Bankovic and Others v. Belgium and Others* 2001, § 59.
23 *Loizidou v. Turkey* 1996, § 56.
24 *Bankovic and Others v. Belgium and Others* 2001, § 71.

territory of the contracting states to the ECHR. Hence, it was only normal to restrict its applicability to the 'legal space' of Europe. Not being a signatory to the ECHR at the time, Serbia was not within this space. Furthermore, the Court proclaimed 'the Convention as a constitutional instrument of *European* public order'.[25] The rights safeguarded under the ECHR could not be 'divided and tailored' for the particular circumstances of the extraterritorial act at issue.[26] According to this logic, the protection of human rights by the ECHR was an exclusive public good which only protected those who were within the borders of the European legal space.

This problematic and much-criticised decision served well for the purposes of political expediency. It evaded the complications that could arise from reviewing the acts of seventeen contracting states in a NATO operation. Thus, the ECtHR guarded itself against possible concerted criticisms coming from several of the contracting states. This also sent a message to the member states. The ECtHR effectively signalled that it would adhere to strict criteria when it came to reviewing future complaints arising from NATO operations in the region, or other similar operations in which the contracting states might participate.[27] The story, however, did not end there.

The personal control model: the state agent authority and control

The personal control model is the second model employed by the Court and it rests on a different logic. The control over an individual or a population – rather than a territory – is key here. In a nutshell, a state exercises jurisdiction over a specific individual or population under its control. A variant of this test is the 'state agent authority and control' model. According to this model, the source of jurisdiction is the state agents' extraterritorial use of force or exercise of control over persons. In other words, a state exercises jurisdiction whenever it establishes authority or control over individuals outside of its territory. Markus Mayr argues that the state agent authority and control model was initially developed to cover state agents in embassies and consulates. Subsequently, it was extend-

25 Ibid. § 80 (original emphasis).
26 Ibid. § 75.
27 The ECtHR softened this approach in *Issa and Others v. Turkey* 2004, in which it found that having overall control over a particular portion of territory was sufficient in order to establish the existence of extraterritorial jurisdiction.

ed to the cases concerning extraterritorial arrests and detentions.[28] This model, which deals with control over persons, is more straightforward compared to the spatial model, in which one has to establish whether a state's control over a given territory exceeds a certain threshold.

An early example of the state agent authority and control model cases is found in *M. v. Denmark.* This case concerned the removal of an East German citizen from the premises of the Danish embassy in East Berlin.[29] The applicant, who wished to escape to the West, complained about the fact that the Danish authorities handed him over to the East German police. In this case, the European Commission of Human Rights (the Commission)[30] argued that 'authorized agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property'.[31] This reasoning was built on an established rule under public international law regarding the special legal status of diplomatic premises, or vessels on high seas carrying a flag of a particular state.[32] The ECtHR's jurisprudence invoking the personal control model also includes cases concerning extraterritorial arrests and detentions, such as *Ilich Sanchez Ramirez v. France*[33] and *Ocalan v. Turkey*.[34] In both cases, the ECtHR found that the individuals concerned were under the authority and the jurisdiction of the responding states from the moment of their arrest.

Then came *Al-Skeini v. the United Kingdom.* This case was brought against the United Kingdom and involved allegations about human rights violations committed by British forces during the occupation of Iraq. It contained five separate cases in which six Iraqis lost their lives as a result of arbitrary killings and torture employed by British soldiers. The applicants argued that 'their relatives were within the jurisdiction of the United Kingdom … at the moment of death and that … the United Kingdom had not complied with its investigative duty under Article 2'[right to life].[35] The

28 Mayr 2010, p. 7.
29 *M. v. Denmark* 1992.
30 The European Commission of Human Rights was the body that was responsible for carrying out initial screenings of applications and for establishing admissibility of cases until it was abolished in 1998.
31 *M. v. Denmark* 1992, § 1.
32 Barker 2006. This reasoning was also applied in *Hirsi Jamaa and Others v. Italy* 2012.
33 *Ilich Sanchez Ramirez v. France* 1996.
34 *Ocalan v. Turkey* 2005.
35 *Al-Skeini and Others v. the United Kingdom* 2011, § 95.

United Kingdom invoked the above mentioned *Bankovic* case and denied having jurisdiction.

When evaluating the claims of the parties, the ECtHR began with the territoriality principle, reaffirming that jurisdiction is primarily territorial. It then listed the exceptions to this rule, starting from the state agent authority and control model. Moreover, it refined this model and expanded its application. For the Court, this model has three dimensions: first, extraterritorial jurisdiction exercised by diplomatic and consular agents in a foreign territory; second, extraterritorial jurisdiction which arises from exercising all or some of the public powers in another country; and third, jurisdiction exercised by state agents when conducting extraterritorial arrest and detention.[36]

What is interesting about these three dimensions is that the 'public powers' exception was also present in *Bankovic*, and it was conceptualised as an indication of the effective control model. However, in *Al-Skeini*, the ECtHR redefined the scope of the state agent authority and control model, and incorporated the public functions' criterion.

Having established the rules and exceptions once again, the ECtHR began assessing whether the acts concerned fell under the jurisdiction of the United Kingdom. For this purpose, it invoked the refined version of the state agent authority and control model. The next task was to establish whether the victims were under the control of British authorities. To this end, the Court turned to Security Council Resolution 1483, which designated the United Kingdom as one of the occupying powers in Iraq. The ECtHR took this resolution as a starting point, and found that the United Kingdom assumed 'some of the *public powers* normally to be exercised by a sovereign government'.[37] More specifically, the Court decided that the United Kingdom 'through its soldiers engaged in security operations in Basrah during the period in question, exercised *authority and control over individuals* killed in the course of such security operations'.[38] Thus, the jurisdictional link between British authorities and the deceased Iraqis was established.

Al-Skeini is a landmark judgment, not only because of its concrete outcome, but also due to its broader legal significance. The Court seized the chance to clarify jurisdictional matters under the ECHR. Instead of repeating the reasoning and the tests used in *Bankovic*, the Court adopted

36 Ibid. § 134–36.
37 Ibid. § 149 (emphasis added).
38 Ibid. (emphasis added).

a different approach. Effectively, it handpicked an element from the test used in *Bankovic*: the exercise of public powers. It added this criterion to the state agent authority control model, which was the only jurisdictional test applied in *Al-Skeini*. By doing so, the Court refined and broadened the state agent authority and control model.

The turn to functional jurisdiction

One of the most significant implications of *Al-Skeini* is that it brought about an emphasis on public functions. This 'nebulous *Bankovic* reference to public power', however, changed the rules of the game.[39] To recapitulate, the model according to which 'the exercise of public powers [is] normally to be carried out by local government' was first introduced in the *Bankovic* judgment as a criterion for measuring the effectiveness of control over territory. This model was then reintroduced as a criterion for measuring state authority to establish whether the United Kingdom exercised jurisdiction in the *Al-Skeini* case.[40] The public powers at issue were the maintenance of security and stability (by assuming, among other things, the control of military and security institutions) and the maintenance of civil law and order (by supporting civil administration).[41] The public powers exercised by the United Kingdom, for example, were 'patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations'.[42]

As Marko Milanovic argues, public powers mentioned above are indications of 'factual power, authority, or control that a state has over territory, and consequently over persons in that territory'.[43] Therefore, it is safe to assume that having jurisdiction indeed means exercising 'factual power'.[44] Accordingly, jurisdiction is derived from 'public power characteristic of sovereignty ('normally to be exercised by a sovereign government')'.[45] Admittedly, this conceptualisation resembles 'functionalist approaches' to sovereignty. Within this framework, inability to fulfil certain functions

39 Milanovic argues that this change is likely to cause uncertainty in the long run. See Milanovic 2012, p. 139.
40 Ibid. p. 128.
41 *Al-Skeini v. the United Kingdom* 2011, § 144.
42 Ibid.
43 Milanovic 2011, p. 32.
44 Ibid. p. 34.
45 Bhuta 2016, p. 11.

(such as the protection of a population) would nullify sovereign prerogatives and transfer the legitimacy of authority to (international) actors that claim to undertake these functions on behalf of or instead of national governments.[46] However, what is at stake here is not legitimising authority claims. Rather, it is about attributing responsibility to those actors who enjoy authority generated through functions, and holding them accountable for the crimes committed while doing so.

What is difficult, however, is to understand the confines of this functional authority and jurisdiction on foreign soil.[47] As we will see in *Jaloud*, territorial boundaries, which are traditionally used as yardsticks, may not be able to demarcate the extent of authority at issue. Therefore, I propose the concept of 'functional boundaries' for delineating the sphere of public functions and its limits. Functional boundaries correspond to a slightly different limitation compared to territorial borders. They enclose a more fluid type of power: an assemblage of the islands of authority that a state enforces through the functions it assumes on foreign soil. Functional boundaries surround these islands of authority and demarcate zones of functional jurisdiction. Unlike territorial borders, functional boundaries can be divided and tailored within a given territory. Hence, they are arguably better tools for comprehending the extent of jurisdiction derived from exercising public functions, and for holding states accountable for violations committed while carrying out such functions.

A need for reconfiguring political space is not a new idea. For example, John Ruggie explains that there are 'nonterritorial functional spaces', such as various types of functional regimes, common markets, and political communities, where the claims for exclusive territoriality are negated. Territoriality is unbundled in such spaces.[48] However, one can observe that these spaces too are demarcated by boundaries. This is primarily because enclosure through boundaries has a constitutive role. Considering the example of medieval city walls, Wendy Brown claims that such 'walls produced a legal and political entity'.[49] Brown's observation here is directly applicable to post-modern rearrangements of political space such as the one explored in this chapter. In what follows, I discuss *Jaloud*, the latest case in which the ECtHR tackled jurisdictional matters and also clarified the idea of functional jurisdiction, as well as its limitations.

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46 Orford 2011, pp. 196–99.

47 Functional jurisdiction may also be exercised in the sea. See for example, Gavouneli 2007.

48 Ruggie 1993, p. 165.

49 Brown 2010, p. 47.

'It all makes sense now!' Jaloud v. the Netherlands

Jaloud was heard amidst fears that the *Al-Skeini* decision would set a precedent for complaints arising from violations committed during military operations or foreign interventions.[50] The case was brought by an Iraqi national whose son had lost his life due to shots fired by Dutch forces stationed at a checkpoint.[51] The Dutch government argued that the case was inadmissible, since the acts that gave rise to the complaint did not fall under the jurisdiction of the Netherlands.[52] It further advanced that this case should be distinguished from *Al-Skeini*, because the Netherlands was not an 'occupying power' and did not exercise public functions or physical authority and control over the victim.[53]

Assessing the evidence presented, the ECtHR found that the victim lost his life when passing through a 'checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer'.[54] Consequently, the ECtHR found that the Netherlands indeed exercised jurisdiction since the Dutch forces controlled the checkpoint and asserted 'authority and control over persons passing through the checkpoint'.[55] Put otherwise, the ECtHR found that the Dutch government exercised jurisdiction simply because the Dutch army operated a vehicle checkpoint, which represented a Dutch sphere of influence.[56]

What is striking about this 'checkpoint jurisdiction' approach is that it relied on an indirect deduction.[57] The ECtHR first concluded that the Dutch forces were in control of the checkpoint and served a function associated with exercising public powers. The Netherlands had authority over this checkpoint and therefore the checkpoint and the victim who lost his life in an attempt to pass through it fell under its jurisdiction. This approach is built upon the idea that the exercise of jurisdiction is linked to the exercise of public functions. It is through these functions that the Netherlands had authority and control over the persons.

50 Cowan 2012. There were indeed other cases concerning the military operation in Iraq, see, e.g., *Hassan v. the United Kingdom* 2014.
51 *Jaloud v. the Netherlands* 2014, § 10–16.
52 Ibid. § 112.
53 Ibid. § 112–19.
54 Ibid. § 152.
55 Furthermore, the ECtHR also tackled the issue of attribution, which had not been discussed under the jurisdictional matters in its previous case law. For more on the link between attribution and jurisdiction see Rooney 2015.
56 Sari 2014, p. 301.
57 Haijer and Rynagaert 2015, p. 181.

What is at issue here is identifying the source of the authority and then demarcating its limits. In *Jaloud*, the extent of the authority was limited to the checkpoint that was under the command of Dutch forces. This checkpoint demarcated the extent of Dutch jurisdiction. It was an island of Dutch authority in Iraq, and the Netherlands had direct jurisdiction and responsibility over what was going on at this checkpoint. And so was initiated a clear turn towards emphasising functional jurisdiction when assessing the Convention's extraterritorial application. The same logic was used again in *Pisari v. the Republic of Moldova and Russia* – another example of functional jurisdiction exercised at a checkpoint.[58]

Conclusion

The concept of functional boundaries follows from an evaluation of public functions as demarcation lines of jurisdiction. It is the outcome of a compromise between an inclusive approach, which the ECHR applies whenever a person is under the authority and control of a member state, and a stringent approach, which the ECHR applies only to the 'legal space' of Europe. It is therefore a judicial innovation and the product of a prudential attempt to prevent over-expansion of the ECHR's application, while still leaving avenues for seeking justice for extraterritorially committed human rights violations.[59]

This judicial innovation has its own complications. It sets up a different, more elusive type of boundary, and shifts the emphasis from territorial borders to functional boundaries.[60] It is a more complicated legal test compared to identifying a border (territoriality), the existence of troops on the ground (effective overall control), or whether an individual has been arrested by agents of a certain state (authority and control over an individual). It is arguably difficult to establish the existence, degree, or scope of the public functions exercised by the state on a foreign territory. As a result, it is a boundary that is harder to discern.

As for its broader impact, the concept of functional boundaries is an innovative approach to the question 'what is within and what is beyond?' The case of *Jaloud* illustrates how this notion could be used as a means of reconfiguring political space, and provides us with food for thought.

58 *Pisari v. the Republic of Moldova and Russia* 2015.
59 De Costa 2012, p. 253.
60 Ibid. p. 247.

As traditional approaches to attribute responsibility for extraterritorially committed violations increasingly show their limits, perhaps it is time to turn to another yardstick for understanding jurisdiction and its limits.

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Hassan v. the United Kingdom, application no. 29750/09, ECHR [GC], 16 September 2014

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Issa and Others v. Turkey, application no. 31821/96, ECHR, 16 November 2004

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M. v. Denmark, no. 17392/90, Commission decision of 14 October 1992

Ocalan v. Turkey, application no. 46221/99 ECHR [GC], 12 May 2005
Pisari v. the Republic of Moldova and Russia, application no. 42139/12 ECHR, 21 April 2015

My iCourts experience

Ezgi Yildiz, 1 October 2021

My iCourts story starts with the day I met Mikael Rask Madsen, the director and co-founder of iCourts. I met Mikael in the ideal way students are told to look for supervisors or mentors: by reading. I trust that the recommendation to "read a wide-array of works on your topic and approach the authors of the ones you really like" is familiar to many. I heard this advice myself as a first year PhD student at the Graduate Institute, Geneva, Switzerland. At that time, I had just set myself the difficult task of writing an interdisciplinary dissertation on the European Court of Human Rights combining theories and methods from International Relations, International Law, and Sociology. As I began digging into the literature, I encountered Mikael's long list of articles, books, and edited volumes that skillfully weave insights, theories, and methods from multiple disciplines. Mikael's approach resonated with me and inspired me to do the same in my own research.

One day I wrote to Mikael. He did not only send me an encouraging response with recommendations for my dissertation research but also agreed to serve as my external supervisor, and support my grant application to the Swiss National Science Foundation. And, as a bonus, he invited me to the first summer school to be held at iCourts in Summer 2013. The summer school, where we could enjoy talking about international courts and how to study them with leading (and rising) scholars in the field, was a real treat. Those couple of days at the summer school showcased that iCourts is one of the rare institutions that can cultivate innovative work ethos in a friendly and collaborative environment. Having experienced this firsthand – albeit for a few days only – I decided to come back to iCourts as a visitor for a semester and work closer with Mikael in Spring 2014.

My research stay was scheduled between January and June 2014. This meant that I moved to Copenhagen in the depth of Danish winter, but I experienced one of the warmest welcomes from the iCourts faculty and staff as well as other visiting scholars. iCourts immediately became a home, where I was surrounded with scholars sharing my interests. Back then iCourts was still part of the Studiegaarden complex, located on Studiestraede 6, near Norreport. The main meeting room of the center was

looking at the Studiegaarden courtyard, which looked beautiful all year round, particularly when covered under the snow during winter. Some of my fondest memories of iCourts were made in that meeting room. I loved attending occasional breakfast briefings, lunch seminars, and seeing the presentations of leading scholars and practitioners in the field.

I particularly enjoyed and learned from my conversations with David Thor Björgvinsson, the former Icelandic judge to the European Court of Human Rights. I was lucky that my time at iCourts overlapped with that of David's, who had just taken up his professor of law position at iCourts. These conversations were one of the highlights of my time at iCourts and through them, I could take a look at Strasbourg from Copenhagen. In addition to David and Mikael, I also had the opportunity to exchange ideas with other members of the faculty such as Anne Lise Kjaer, Joanna Lam, Mikkel Jarle Christensen, Jakob Holtermann, Yannis Panagis, Urska Sadl, and Henrik Palmer Olsen. I learned a lot from the faculty and my peers and made great progress on my dissertation research. But the most important of it all is that I felt I grew as a scholar in the intellectually nurturing and collegial environment under the leadership of Mikael Rask Madsen and careful administration of Henrik Stampe Lund. In the course of the few months that I spent at iCourts, I met many wonderful scholars and made dear friends including Zuzanna Godzimirska, Juan Mayoral, Amalie Frese, Günes Ünüvar, Miriam Bak Mckenna, Salvatore Caserta, and Mihreteab Tsighe.

In 2015, I came to iCourts for a second time to discuss my dissertation work with Mikael. This time around, I could only stay for a few weeks but I could immediately feel as if I never left. What is more, I met other incredibly talented scholars and made new friends such as Marina Aksenova, Kerstin Carlson, Pola Cebulak, Jed Odermatt, Caroline De Lima e Silva, and Moritz Baumgärtel with whom I shared an office and a determination to finish our PhD projects on time. A couple of months after my second stay at iCourts, I submitted and defended my dissertation. Mikael, as my external reader, came to Geneva for my defense, and brought me support from iCourts friends.

A few years have passed since my last time at iCourts. Now I am a Senior Researcher for the Paths of International Law project at the Global Governance Center of the Graduate Institute, Geneva.

But I still remember the Center fondly and think about its impact on me as a young scholar and how it shaped my career trajectory.

IV. Contributions from former staff members

In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe[1]

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Abstract

This article aims to highlight the relevance of judicial trust in international courts, focusing on national judges' trust in the Court of Justice of the European Union (CJEU). EU Scholars have put a great deal of effort into explaining how legal and political factors affect the use of preliminary references by national courts. However, there is still a gap in the literature on the development of trust as a functional principle encouraging cooperation between national and international courts. This article explores the nature, causes, and potentials of judicial trust for the EU judicial system. A theory is offered in the article, which links national judges' trust in the CJEU to their corporatist identification and profile, to their attitudes towards EU, and, to their beliefs about the CJEU's ability to provide decisions that: 1) offer a clear guidance on European Union law, and, 2) will not undermine Member States' legal order.

Over the last decade, international courts (ICs) have increasingly become a main actor in transforming the interface of law, politics and society, both nationally and internationally, thus attracting the interest of policy-makers and scholars. This interest has been pushed by the impact of international adjudicatory bodies in the configuration of international and

1 I wish to thank Mikael Rask Madsen, Laurence R. Helfer, Karen J. Alter, Adrienne Héritier, Marlene Wind, Bruno de Witte, Alec Stone Sweet, Antonio Barroso, Aleksandra Sojka, Noreen O'Meara, Beatriz Martinez, Graham Butler, Tom Gerald Daly and to three anonymous referees for their valuable suggestions and comments. I would also like to thank the Spanish Judicial Council and the Spanish Network of European Law, the European Centre of Natolin and the European University Institute for their support. I am especially grateful to Tobias Nowak and the members of the project "National judges as European Union judges" for the data on national judges on Germany and the Netherlands. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and the Eurochallenge project and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts. This publication is dedicated to my father, Eugenio Mayoral Burgueño.

domestic politics, legal and social affairs. However, the map of ICs offers a mixed picture, full of variation in the effectiveness across ICs. To solve this puzzle, scholars started to theorize and develop indicators by which the effectiveness of ICs can be empirically assessed (Helfer, 2013; Shany, 2014). Among other mechanisms, academics have identified cooperation between national and ICs as a crucial element for reinforcing the effectiveness of the latter, which allowed national courts to deal with violations of international law in the domestic landscape.

The Court of Justice of the European Union (hereinafter: 'CJEU' or 'the Court') represents the most successful example of the so-called 'embedded effectiveness' (Helfer, 2013, p. 474). The secret of this success was the capacity of the Court to make alliances with domestic courts, which allowed the Court to effectively increase its power. On the one hand, the CJEU has established, through its rulings, the main principles that regulate the relationship between European and national legal orders. The CJEU empowered the position of European Union law through the acceptance of supremacy and direct effect at national level. On the other hand, national courts in EU Member States using the preliminary references system[2] opened the door to these doctrines, fostering the integration of EU regulations into national legal systems.

This issue is crucial for the scholarly and policy debate if we take into account that national courts are the key decentralized enforcers of the European Union (EU) law as they are responsible for ensuring the effectiveness of the preliminary references system by cooperating with the CJEU. Scholars of EU studies have put a great deal of effort into explaining how the mechanism of preliminary references (PRs) boosted the cooperation between national courts and the CJEU. These studies, discussed in more details in the next section, have pointed to the relevance of institutional incentives and their legal duty to refer in explaining why national courts cooperate (or not) with the CJEU. Nevertheless, there is still an absence of ideas on the existence and development of trust as a functional principle that may encourage national courts to send PRs.

By focusing on national judges' trust in the CJEU, this article is a first attempt to stress the presence of judicial trust in ICs and its formation, by defining it as *national judges' belief about whether the CJEU will follow*

2 According to article 267 TFEU (Treaty on the functioning of the European Union), national judges might request the CJEU to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

an expected course of action under conditions of uncertainty. Using original evidence collected through surveys and interviews in Germany, the Netherlands, Spain and Poland (Nowak, Amtenbrink, Hertogh, and Wissink, 2011; Mayoral 2015, see appendix for more details), the main purpose of this article is to disentangle the nature, causes, and potential of trust for the functioning of supranational judicial systems. In reference to the latter, the CJEU will have higher degrees of effectiveness in terms of cooperation receiving more PRs, and this is the assumption of the paper, if they enjoy a high degree of trust among national judges.

For that purpose, an original theory is presented that calls for a revision of our current understanding of the legal and judicial construction of Europe. The theory elaborates first a distinction between trust and other motives for sending PRs or 'cooperate' stressed in the interdisciplinary literature. In the following sections, a notion of judicial trust is discussed that explicitly links the trust of the national judges in the CJEU to their corporatist identification and profile, to their attitudes towards EU and to their beliefs about the ability of the CJEU to make decisions that: 1) provide a clear guidance on EU law, and, 2) will not undermine their national legal order. The revision of these sources of trust will help to uncover how national judges assess the most basic and important role of the CJEU as an adjudicatory body and the boundaries of this role, which has been constantly under discussion among scholars and relevant judicial actors.

This is done by considering judicial trust as one of the key elements of the European legal system as it creates, in conjunction with other factors, a deep connection between national and supranational judges. In the account that follows, it is also presented judicial trust in ICs as a distinct theoretical construct worthy of study in its own right. The study emphasizes these particular characteristics of judicial trust in ICs by differentiating it from citizens' trust in judicial institutions, and from national judges' trust in their own national judicial authorities. Finally, the article will conclude indicating further developments in this agenda that may encourage scholars to add a new layer to the theoretical understanding of the judicial construction of Europe.

Trust as an alternative for cooperating with the CJEU

At the outset, it is necessary to clarify how it differentiates and relates from other mechanisms already studied in the literature and identify why trust is important for national judges to cooperate with the CJEU though PRs. Until now contributions on EU studies implicitly suggest that the EU

legal order and the PRs system can function well in the absence of trust in the CJEU. First, legal scholars have argued that judges' cooperation with the CJEU is determined by their duty to obey the rules that govern the application of EU law (Dworkin, 1977; Posner, 2012). The CJEU established the criteria under which national courts should ask for a preliminary ruling in *CILFIT*[3] case. The judgment gives freedom to lower courts to refer while last instance courts are obliged to do it when there is any doubt about the application or validity of EU law[4]. However, the ruling gives a broad margin to last instance courts to appreciate whether EU law is clear enough or not.

Secondly, based on this legal discretion, the literature has underscored the importance of considering different institutional explanations for judicial cooperation. On one hand, judicial empowerment accounts point out that national courts got engaged in the PR system as it offered a mechanism for reviewing the acts of the executive and the legislative branch (Weiler, 1994; Mattli and Slaughter, 1998; Mayoral, 2015). In the same vein, the inter-judiciary competition theory assumes that national lower courts cooperate with the CJEU to increase their judicial review power vis-à-vis higher courts by playing the higher courts and the CJEU off, in order to influence legal development in the direction they prefer (Alter, 2001). On the other hand, legal scholarship (Micklitz, 2005), law & economics (Ramos, 2002) and legal neo-functionalism (Stone Sweet and Brunell, 1998) developed accounts where judges will refer to the CJEU when they face complex cases in their dockets due to their position in the judicial hierarchy (e.g. higher courts) or to an increasing transnational economic exchange in their jurisdiction. Other contextual incentives have also been considered as relevant as, for example, litigation rate (Broberg and Fenger, 2013), the respect shown by the CJEU towards the national constitutional structures of the Member States (Martinico, 2009), the configuration of the national legal order or the influence of public opinion on judges (Carrubba and Murrah, 2005), or the political culture of judges (Wind, Martinsen and Rotger, 2009).

Trust might also be another important element motivating the use of PRs. There is indeed a very significant body of social sciences literature on the notion of trust and its implications for cooperation. Sociologists have theorized trust as a process to reduce transaction or monitoring costs that may boost cooperation among individuals (Gambetta, 2000), while in eco-

3 C-283/81 *CILFIT v. Ministero della Sanità* [1982].
4 C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987].

nomics, trust bases cooperation on risk analysis (Fukuyama, 1995; Williamson, 1993). In political science, citizens' trust has been agreed as a key element for political systems in order to function in a satisfactory (Coleman, 1994; Levi and Stoker, 2000), while in international relations trust is conceived as an essential condition for cooperation between States (Kydd, 2005). All these accounts emphasize trust as a striking feature for any type of cooperation. Accordingly, and this is a primary assumption of this research, we could expect judicial trust to similarly affect cooperation of national judges with the CJEU by increasing the use of PRs.

How do these mechanisms differ from each other? Judicial deference relates to the internalization of legal duties which automatically make judges to follow rules and cooperate when they have a doubt about the application of EU law. It assumes the acceptance of others' decisions as a duty based on a kind of normative, moral, or ethical feelings of obligation and responsibility to obey rules in judicial authorities (Sunshine and Tyler, 2003).

While this account gives no discretion to the will of the judges, incentives and trust accounts stress the relevance of discretion and willingness in the decision-making of the judges, though for different reasons. Rational choice institutional perspectives focus on self-interest, instrumentality, and cost-benefit considerations where those benefits from cooperation are not conditional to any risk. In contrast, trust refers to the non-instrumental character of action (Rompf, 2014), which excludes strict self-interested utility considerations. This is done by adding a willingness to be vulnerable or take risks in the relationship based on uncertainty of the actions of the trustee that a self-centred actor will hardly accept as they will have based their actions on an expected benefit based on a rational cost-benefit calculus (Mayer, Davis and Schoorman, 1995).[5] However, we need to be cautious when dealing with exclusive categorization of institutional incentives and trust explanations, as current elaborations advocate for an integrative approach (see Rompf, 2014).

In the light of such developments, trust is considered a complement to the mechanisms listed above, not a substitute for them. This is done by suggesting that trust cohabits with other factors fostering cooperation with the CJEU with several consequences. On one hand, for example, institutional incentives can affect cooperation irrespective of a given level

5 Rational choice has included the notion of risk aversion as a discount factor that affect the expected utility of rational actors. A rational actor would prefer a present benefit to any risky prospect.

of trust, and when successful can serve to reinforce trust itself (Gambetta, 2000). On the other hand, trust may be a functional principle that may encourage cooperation in absence of other incentives, or, when they work against cooperation with the CJEU (Keck and Karelaia, 2012).

When has trust become relevant for cooperation then? In abstract terms, institutional rationalist approaches (Axelrod, 2006), which are close to neo-functionalism, would suggest that trust would be a *result* rather than a *precondition for judicial cooperation*. Trust would emerge in the European legal order as a by-product of national judges' ability to send PRs, and would consist in nothing more than trust in the success of previous cooperative interactions. Therefore, judicial cooperation could be triggered not by trust, but simply by the legal duty to refer or a set of legal practices incentivized by legal or political reasons. And that trust will follow rather than precede judicial cooperation between national judges and the CJEU.

However, some scholars on trust argued that when the cooperation has no iteration history, it might still be influenced by at least a *predisposition to trust*. In that sense, initial PRs may be based on *conditional trust* (Gambetta, 2000, p. 228): "Cooperation is conditional on the belief that the other party is not a sucker, but also on the belief that he/she will be well disposed towards us if we make the right move", that is, provided that certain preconditions are met. In the early days of the creation of the EU legal order[6], the conditions for trust may have emerged, for instance, as a result of the presence of interactive mechanisms that may precondition judges' attitudes towards the PRs system by national judges (e.g. judicial review). These conditions create an initial predisposition of judges to trust in the Court before cooperation has started. A different question is whether judicial trust was generalized enough or at least present among national courts. It seems that where some contexts where trust may have encouraged cooperation among small group of national judges in the initial stages of the Union. In that direction, sociology and history stress out the relevance of networks and associations (Alter, 2009; Davies, 2012; Vauchez, 2010), which are considered as an indicator of the density of trust and also relevant for trust-building (Claes and De Visser, 2013; Provan and Kenis, 2008). However, the current evidence does not allow adopting a firmed position on the emergence of judicial trust and its impact on PRs in the early stages of the Union. For that reason, the article will explore the cur-

6 The Community legal order was declared in C-26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963].

rent validity of trust by national judges in the CJEU for further research on the topic.

A Theory of Judicial Trust in the CJEU

While some research exists on the trust of ordinary citizens in courts (e.g. Gibson, Caldeira and Baird, 1998; Gibson, Jackson et al., 2011; Tyler and Huo, 2002) and some on citizens' perceptions of the CJEU (e.g. Voeten, 2013; Grosskopf, 2005; Arnold, Sapir, and Zapryanova, 2012; Gibson and Caldeira, 1998; Caldeira and Gibson, 1995), no attention has been paid to trust between judges and its implications. We still know very little about why and how national judges learn to trust the CJEU. The consideration of trust between judges introduces an important socio-psychological element, which affects the way national judges assimilate and perform their role as de-centralized EU judges and use PRs, beyond the scope of their formal duties to comply with EU law. Although trust is a contested definition, a minimum consensus about the definition might be achieved.

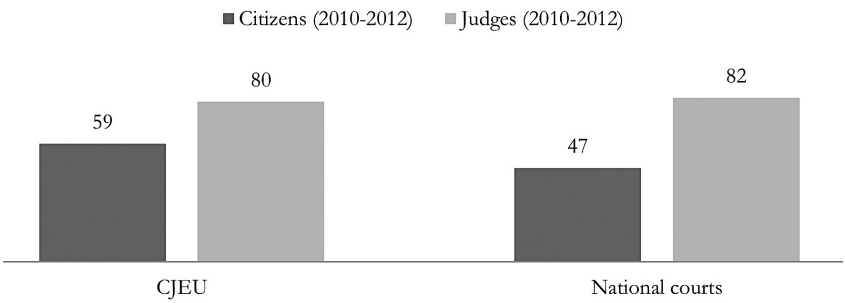
Firstly, trust is a *subjective belief*, that is, an individual assessment (Rompf, 2014). Secondly, trust is *relational*, meaning that an individual (a judge) is influenced by another actor or institution, like the CJEU, that has the capacity to betray his/her trust. Thirdly, it is *conditional*, i.e. it is given to specific institutions over specific domains (Levi and Stoker, 2000). That is, the belief that the person or institutions will perform its role in a manner consistent with the socially, politically or legally defined normative expectation associated with that role. In the case of the Court, this (legal) domain is framed by the functions and competences delimited by the Member States in the treaties. However, this aspect that defines its role as interpreter of EU law has been subject to several revisions due to the reform of the treaties or the own efforts of the Court to increase its power (Alter, 2001). On the contrary, national highest courts reacted by also shaping this domain by establishing specific boundaries to CJEU's power[7]. Fourthly, trust is particularly relevant in conditions of *uncertainty*, which links with the idea of risk, with respect to future actions which

7 Among the countries of interest, we found the following judgements limiting the power of the CJEU: **German Constitutional Court** *Solange I* [37, 271 (29.05.1974)], *Solange II* [73, 339, 2 BvR 197/83 (22.10.1986)], *Brunner case* in Maastricht [89 (12.10.1993)], *Lisbon Treaty* [2 BvE 2/08 (30.6.2009)] and *Honeywell* [2 BvR 2661/06 (06.07. 2010)]; **Spanish Constitutional Court** in Maastricht [Decision nº 1236 (01.07.1992)], Constitutional Treaty [Declaration No. 1/2004]. **Polish**

condition trustor's present decisions (Gambetta, 2000). The presence of uncertainty in this regard has been already pointed as the CJEU makes decisions that do not meet the expectations of national courts (Nyikos, 2003).

Finally, to fully cover the notion of judicial trust we need to talk about its *corporatist* nature and connection to *broader EU attitudes*. Studies on public administration have shown how corporatism directly promotes trust within and between the organizations (Öberg, 2002; Yamagishi and Kiyonari, 2000). In the same vein, we argue that judicial corporatism, identified as the membership to the judicial branch or common knowledge and expertise on EU law, also promotes trust within the national judiciary and between national and European judges. A quick look to the data in figure 1 shows higher density of trust in judicial institutions by judges compared to citizens, which evidences the presence of group-based trust in the four countries of interest (Germany, the Netherlands, Spain and Poland). Additionally, we claim that judicial trust might be also influenced by attitudes towards the EU common to all European citizens (Inglehart, 1970).

Figure 1: Trust in the CJEU and National courts by citizens and judges (%)



Notes: Citizens data from Eurobarometers 77.3 – 2012 (CJEU) and 74.2 – 2010 (National judicial systems). The values where 1: 'tend to trust', and, 2: 'tend not to trust the CJEU'. In the case of judges, the data refers to their trust in their domestic highest courts: The German, Polish and Spanish Constitutional Courts and the Dutch Supreme Court. The variable measures the intensity of trust in the both courts, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much. Trust is represented by taken values from 3 and 4.

Constitutional Tribunal on the *Polish Accession Treaty* [Case K 18/4 (11.05.2005) and on the *European Arrest Warrant* [Case P 1/05 (27.04.2005)].

Based on these elements, 'judicial trust' in the CJEU is defined as *the subjective belief that national judges have about whether the CJEU will follow an expected course of action under conditions of uncertainty*. When this belief is strong enough, the judge will consider the CJEU trustworthy. The *trustworthiness* of the Court is defined by its competence to fulfil the role ascribed by the EU treaties clearly defined in articles like the 267 TFEU. In other words, trustworthiness refers to the attributes that the CJEU as a trustee might possess when interpreting EU law, that is, the commitment of the Court to exercise its competence in the domain of EU law. Consequently, high density of individual trust might be interpreted as a signal of trustworthiness of the Court's behaviour with its mandates.

However, the belief that the CJEU will engage in such action will not be the same in all circumstances. This belief might depend on the individual predispositions or attitudes of judges (e.g. knowledge and expertise on EU law, beliefs about the functioning of the CJEU and the EU legal order and attitudes towards the EU) and their institutional-legal context. In relation to the first factors, close to the concept of epistemic community (Haas, 1992), judges share similar educational backgrounds, career histories, and legal experiences. Therefore, the question is whether there are any sources, such as beliefs, predispositions, attitudes or characteristics specific to judges that justify a new conceptualization.

By stressing the key importance of some specific elements, which are present for the assessment of the CJEU but do not feature in the national judicial institutions such as Constitutional or Supreme courts, some distinctive mechanisms of trust in ICs will be unveiled. This article does not claim that the factors mentioned next provide the sole explanation for how national judges make their opinion and shape their beliefs about the CJEU or any other IC. These features influencing the formation of judicial trust in the CJEU are: first, the competence of the Court to give a clear guidance on the application of EU law(a); and second, the legal framework on which the CJEU bases its decisions(b). The revision of these two sources of trust will help to uncover how national judges assess the most basic and important role of the CJEU as an adjudicatory body and the boundaries of this role, which has been constantly under discussion among scholars and relevant judicial actors. Secondly, to explore the distinctive corporatist nature of judicial trust, as compared to citizens' trust argued above, we consider whether knowledge of EU law and expertise(c), group-identity(d) and attitudes towards the EU(e) may enhance judges' trust in the CJEU.

a) The CJEU as a guidance provider

This source of judicial trust departs from the basic assumption that national courts look at the CJEU for guidance as a specialized court in EU law issues. This concern links directly with the main rationale behind the PRs mechanisms, i.e., the "desire to reach a resolution of disputes" (Micklitz, 2005, p. 443). This rationale is based on the necessity of national judges to reduce the norm's ambiguity or vagueness in order to make correct interpretations on EU law.

The connection of this rationale with national judge's main functions encourages national judges to ask for preliminary rulings in order to provide interpretation on EU provisions or to declare the validity of an EU act. Survey data shows how judges certainly look at the CJEU jurisprudence in 73 % for guidance on the application of EU law (Mayoral, 2015, p. 195). National judges will trust more the Court when they believe that they will receive a response that they can easily implement at the national level to solve any legal disputes on EU law. Likewise, the judges would be reluctant to trust in the Court, i.e., if judges expect that the Court's decisions will create difficulties or will not lead to a solution. Hence:

h_1: National judges trust more in the CJEU when they believe that the rulings made by the CJEU offer a clear guidance on the interpretation of EU law.

b) The CJEU as a mediator in multilevel legal orders

In theorizing about judicial trust it is important to identify the attitudes about the functioning of the legal order and the role of the CJEU that judges share as a legal epistemic community. These include a shared set of normative legal principles and a set of beliefs about the legal and political conditions under which those principles are best preserved, interpreted or implemented by the Court. In this regard, literature on European legal cultures has remarked the pre-existence of some common European legal (or constitutional) principles or values that conform a European legal identity, culture or community, whose constitutive elements depend on the author (e.g. Wieacker, 1990; Häberle, 2006; among others). While these principles might have shaped the EU legal system, the EU itself has also developed its own legal system of principles, which cohabits with the Member States' legal systems. It is a set of fundamental principles, such as direct effect, supremacy, mutual recognition, fundamental rights, market-based orientation, among others, that turned the EU legal system in an autonomous legal order (Semmelmann, 2012).

In this regard, the diversity and compatibility of principles among the EU and Member States' legal orders play a particularly important role in structuring judges' opinions, e.g. judges' attitudes about whether international legal regimes are compatible with their national legal orders. Judges might organize their opinions towards ICs around the complexity of the legal regimes they are embedded in. The CJEU continuously takes decisions within the EU legal framework, considered as a forum where different normative views and legal traditions meet and compete. In this context, national courts will assess whether the CJEU's "argumentation include a certain reflexivity that takes into account the differing legal cultures and traditions that underlie the pluralistic EU legal order" (Paunio, 2010, p. 14–15).

Hence, national judges will trust the CJEU when they feel that its decisions are based on a supranational legal framework compatible with the principles and values of their national legal orders. Especially, the judiciary will rely more on EU supranational judicial institutions when they believe that the CJEU's rulings do not undermine the national legal foundations of their legal system. Therefore,

h_2: National judges trust less in the CJEU when they perceive EU legal principles are alien to their legal system.

We should remark the relevance of historical-contextual aspects present since the early days of the EU, which increased the complexity, understanding and criticism of the EU legal system. We refer to the gradual incorporation of Member States from diverse political-legal traditions (e.g. monist vs. dualist system, common law vs. civil law, former communist law countries), supported by higher national courts that pushed for the dominance of their legal principles (e.g. national sovereignty, democracy, rule of law, human rights). Similarly, we had situations where the legitimacy and the political-legal foundations of the EU have been fading away, like in the Maastricht Treaty, Constitutional Treaty and Euro crisis.

As a result, we should expect some national legal idiosyncrasies and critical events to create better predispositions towards the EU legal system and the Court's power for several reasons. First, dualist orders treat national and international law (even European) as two separate sources of law, while monist systems integrate international legal orders into the national normative system with binding force (Ott, 2008). As a result, while monist legal orders, like the Netherlands, integrate the EU legal system as part of the national norms, implying the unconditional acknowledgment of EU law primacy; states with a dualist system, like Germany, Poland and Spain, emphasize the difference between national and international law and do

not automatically accept European legal supremacy.[8] Secondly, national Constitutional courts in Germany, Poland and Spain have established reservations to CJEU decisions enforcing the EU legal system to preserve the autonomy of their national constitutional legal orders[9]. Therefore:

h_3: National judges in countries with dualist legal systems and where higher courts established limits to the CJEU's powers are less likely to trust the Court.

c) Knowledge and experience with EU law

Typically, knowledge and expertise in EU legislation and jurisprudence may create some familiarity with the decisions of the Court (Mayoral, Jaremba and Nowak, 2014). According to 'cognitive mobilization' theories (Inglehart, Rabier and Reif, 1987; Inglehart, 1970), judges who are more knowledgeable and expert on EU law are more likely to understand the complexity of the institutional legal order and come closer to the position of the CJEU, thereby promoting trust.

h_4: National judges trust more in the CJEU when they have a higher knowledge on EU law.

In the same vein, we should expect that national judges serving in legal areas more affected by EU law, like administrative law, to be more experience with the functioning Court. Consequently, they should trust the CJEU more than those judges working in least Europeanized areas like criminal law.

h_5: National judges serving in legal areas other than criminal law are more likely to trust in the CJEU.

d) Trust in domestic judicial institutions

It is important to test the effect of group-based trust between judges that reinforces the corporatist aspect. According to the sociology of organizations (Öberg, 2002; Yamagishi and Kiyonari, 2000), it can be argued that trust within domestic judiciaries promotes trust between national and European judges too, by merely transferring trust from national judicial institutions to the CJEU.

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8 Nevertheless, this dichotomy is becoming less significant in EU law because of the principle of direct effect.

9 See reference to these cases in supra note 6.

h_6: National judges who trust their national judicial institutions, like Constitutional or Supreme Courts, are more likely to also trust the CJEU.

e) Support for the EU

Finally, judicial trust in the CJEU might be connected to general attitudes to the EU shared with European citizens. Current studies have remarked to what extent support for the EU positively affects trust in the EU institutions like the CJEU (Arnold, Sapir, and Zapryanova, 2012).

h_7: National judges who support the EU are more likely to trust the CJEU.

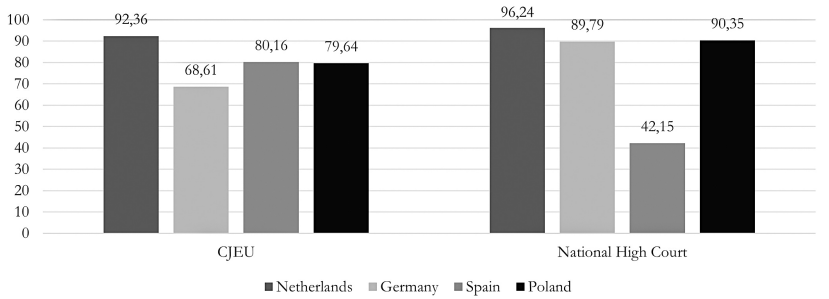
In the CJEU national judges trust: An empirical assessment

In this section, the main aim is to test the factors that influence the trust in the CJEU in order to disentangle the potential mechanisms leading national judges to send PRs. The dataset built for the study of national judges and EU law contributes to the empirical understanding of trust in countries such as Germany (131 judges), the Netherlands (127), Spain (112) and Poland (111). These four countries became EU member states in different stages[10] and reflect different institutional-legal frameworks, as we will see later. For the analysis of the dependent variable, probit regression models are estimated, since they tend to work better with ordinal variables. Some categories in variables where merged so as to avoid low observations count. The appendix provides a full description of the survey; variables and the statistical results (see tables 1A-5A). For better interpretation of the results, the effects of the explanatory variables on the highest value of the variable of interest ('trust very much') are reported generating predicted probabilities.

Figure 2 offers a picture of the cross-country variation on judicial trust in the CJEU within the sample collected.

10 (Western) Germany and the Netherlands in 1957, Spain in 1986 and Poland in 2004.

Figure 2: Judicial trust in the CJEU and National highest courts by country (%)



Notes: The variable measures the intensity of trust in the both courts, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much. Trust is represented by taken values from 3 and 4.

The figure offers first evidence on how, at an aggregate level, national judges generally trust their higher courts more than the CJEU, with the exception of Spain, where the Constitutional Court has fewer support due to the negative evaluation of its independence by its judicial peers (Mayoral, Ordóñez and Berberoff, 2013). It seems that Spanish judges trust the CJEU more when they think their constitutional court is not performing. Then the CJEU serves as an authoritative institution to challenge a distrusted domestic court. In the other situations, we see that national legal idiosyncrasies create better predispositions to the CJEU. This is the case of the Netherlands due to the openness of the Dutch legal system to other legal regimes, and, secondly, to the lack of reservations to CJEU decisions coming from the Dutch Supreme court (Claes, 2006). Germany scores lowest in terms of trust in the CJEU compared to the other countries in the sample, influenced by the critical attitude towards the CJEU's power by its German Constitutional Court asserting its authority in cases where domestic principles are at stake (Davies, 2012). In terms of CJEU's trust, the Polish judges find themselves in between those two contexts by being involved in some constitutional controversies on the accommodation of EU law due to the dualist nature of its system, but less contentious and continuous than the German case. These effects formulated in hypothesis 3 are also confirmed in the statistical analysis (see table 1A). We find a negative impact of contexts in Poland and Germany, reducing the probability of "trusting very much" by 0.16 and 0.20 respectively compared to the Netherlands. In Spain this expected effect is not found due to the reduced support for the Constitutional Court.

In the previous section, it was asserted that national judges will trust in CJEU rulings when they consider that its takes into account the differing national legal principles that underlie the pluralistic EU legal order. To confirm this statement, the *'EU principles are alien to the national legal order'* variable was added to the study with the aim of testing if national judges trust more the CJEU when they appreciate that its decisions may be founded on a supranational legal order that respect their national legal traditions. In table 1A, we see how at the 0.01 level of significance, judges that believe that the EU principles are alien to the national legal order are less prone to trust the CJEU. In other words, they trust the CJEU more because they think that the compatibility between the EU and national legal principles will prevent the CJEU from undermining the most basic national legal foundations of their national legal system with its decisions (see predicted probabilities in table 2A). On the contrary, national judges will be afraid about the possibility that the CJEU operates according to different principles that might affect the national legal system. To moderate national judges' fears "the legitimacy of the EU legal order requires the CJEU to pay due respect to the common national legal traditions" (Maduro, 2007, p. 6).

Accordingly, a judge during an interview underscored the relevance of the CJEU's consideration of the national constitutional principles. The reservations established by the highest national authority would take absolute primacy over the European treaties and CJEU rulings when the national constitutional principles are at stake:

> *"The Court of Justice will deliver better and more solid opinions if they take into account and consider the different types of legislations. For an international court and the great variety of national legislation that it makes, of course, it is very important that they know, not only what the case is about, but also the consequences and the practices in the Member States. This is part of the dialogue between the different judicial systems. (…) If one day, the Conseil Constitutionnel were to be in a position to say that the EU law violates the constitutional identity of France. We would of course not apply the European law. EU law is not my constitutional rule. We are French judges, we cannot violate our constitution."* (Interview March 2012)

This finding highlights the idea developed by *Constitutional Pluralist theories* that the CJEU must respect the main principles or constitutional identity of the national legal orders (Maduro, 2003; Walker, 2002). National judges require systemic compatibility between EU and diverse national systems, judging the recognition and adjustment of the EU legal order to the plurality of equally legitimated claims of authority made by other legal

orders (Maduro, 2003). This assessment is contingent on national judges' impression of sharing the same hermeneutic framework than the CJEU. We should note how national judges' acknowledgement of the problem in the coexistence of the supranational and domestic spheres does not play any role when assessing trust in national highest court according to the statistical analysis (model 1 in table 1A) and the predicted probabilities (see table 2A). In the same vein, a strong effect of *support for the EU* is found when evaluating judges' trust in the CJEU but not when evaluating the national highest courts (see table 3A). The role of this affective heuristic is interpreted as an indicator of the hope of judges to co-operate on a joint European project with the CJEU, which has traditionally been considered as the basis on which the EU and European judiciary is built. Both elements qualify as distinctive elements for the evaluation of the CJEU as IC compared to their domestic counterparts.

Secondly, the variable *'CJEU rulings are clear'* introduced in Model 2 and 3 shows that national judges trust more in the CJEU when they believe its rulings are clear (see predicted probabilities in table 2A). This finding highlights the competence of the Court to give clear guidance for the resolution of disputes on the application of EU law. This competence belief gets its fundament on the Court's role as maximum interpreter of EU law that is established by the treaties. The implications from these variables underscore the basic role of the Court in providing solutions to the national courts for the correct application of EU law. Both aspects: 1) their belief about the usefulness of the Courts' rulings and 2) their expectations about receiving a decision that contradicts national legal principles, refer to the characteristics which have been defined in considering the extent to which national courts find the CJEU trustworthy. That is, a competent court able to interpret EU law in a way that is not damaging for the national courts when complying with it.

Finally, the models and predicted effects (table 1A, A4 and A5) provide evidence of the influence of corporatist factors on trust. In this regard, we observe *group-based* effects supported by the transfer of trust from national judicial institutions to the supranational ones (table 4A), and also how trust seems to be a by-product of judges' *knowledge of the EU law* (table 5A) and *expertise from serving in administrative legal field/jurisdiction* (increasing in 0.29 the probability to trust the CJEU compared to criminal jurisdiction).

The empirical analysis has manifested a series of factors that affect trust. In this regard, these sources of judicial trust might present diverse combinations that may enhance the cooperation of national judges with the CJEU. For example, even if the CJEU makes decisions that do not provide

a clear guidance or undermine the national legal principles, corporatist factors or support for the EU might still create confidence in the CJEU and then encourage national courts to send PRs. In addition, the analysis offers evidence to support a theory of judicial trust, which is then considered complementary to other explanations behind the use of PRs. First, trust might be a functional principle that encourages cooperation when judges do not feel the legal duty to refer or when no competitive dimension is present. In this regard, a new explanation is offered which also stress the importance of socio-institutional and identity factors still not explored by other accounts. More importantly, it explains why national judges would still send PRs under conditions of high uncertainty about the behaviour of the CJEU, a fact barely addressed by judicial empowerment accounts. Second, despite its differences, we should not forget how the theory of judicial trust might be articulated with other explanations. In this regard, judicial trust might also emerge or being reinforced by previous interactions with the CJEU encouraged either by the legal duty to refer a question to solve a EU legal dispute, or, by the necessity of national courts to empower their judgements with a CJEU ruling. Further research should explore how these mechanisms could be interlinked.

Moreover, the idea of judicial trust also offers new mechanisms that might account for the creation and functioning of judicial networks. It could be argued that judges participating in networks are those who already developed a high level of trust in the CJEU (e.g. after referring several times to the CJEU). The current evidence is not conclusive, but we could still speculate how judicial networks might emerge in context of high density of judicial trust produced by previous judicial cooperation. Additionally, the findings might be also relevant to identify the trust-building mechanism that networks can implement in training and education programmes to create and reinforce links between national judges and the CJEU. In this direction, networks might be understood as a useful instrument that might help national judges to clarify the guidance and to accommodate the rulings provided by the CJEU, creating a positive attitude towards the Court.

Conclusions

This article aims at providing a new approach to judicial cooperation distinct from the current accounts based on legal deference and institutional incentives by establishing that the role of national judges' trust in CJEU needs to be further examined. Even if the evidence is still limited, this arti-

cle suggests that there is an existence of trust between national judges and the CJEU. More importantly, the evidence gives an empirical background from which we can theorize judicial trust in the CJEU, a construct that is distinct from citizens' trust in judicial institutions due to its corporatist element (based on group-identity, legal knowledge and expertise), and distinct from national judges' trust in their own national judiciary where the conflict between multi-level legal systems and support to co-operate on a joint European project are absent. Then the article predicts that national judges might be more likely to cooperate with the CJEU when they trust that the Courts' decisions offer a clear guidance for the correct application of EU law and will not create any conflict with their national legal order. In turn, the article underscores the CJEU's capability to create and promote trust through its decisions, facilitating the application and assimilation of a common legal framework shared by national judges.

This research brings new ideas to be theoretically and empirically addressed in future contributions about how trust might increase our understanding of the role ICs play in creating, sustaining and developing its effectiveness and legitimacy. First, despite the well-known evidence from other fields of the relevance of trust for cooperation, further analysis is needed to study the real impact of judicial trust in the cooperation with the CJEU and its legitimacy. In this regard, sociological studies suggest that trust might help to cope with conflict produced by competition. In this sense, it should be asked whether trust might be adequate for the resolution of situations where judicial clashes occur. Here, it refers to situations where national judges face opposing decisions coming from the CJEU and its national high court about the interpretation of EU law. The existence of trust may reduce the harmful consequences of competition between judicial authorities, by making national judges to solve conflicts on the application on EU law in favour of the CJEU based on trust.

Moreover, new data will help to explore the influence of other mechanisms which can be relevant for the trust of national judges in the CJEU: selection of judges, the political neutrality of the CJEU in the decisions, judicial proceedings, the discretion given to national courts by ICs rulings, their identity of national judges as EU citizens, their level of generalized trust, the role of judicial networks or trust in political institutions. In the latter regard, we can still ask if, for instance, trust in national governments and parliaments might affect negatively trust in ICs and why. In the same vein, it would be interesting to explore trust in CJEU from very different legal cultures like the common law and Nordic law. While UK courts had a pragmatic and non-doctrinaire mode of adjudication that predisposes

them to the CJEU rulings, the Nordic judges depart from a more reluctant attitude towards International law.

Finally, zooming out, the theory and features might be considered for the analysis of national judges' trust in other ICs. However, we must consider that judicial trust in ICs might still operate differently depending on the institutional context where international courts are embedded and how they interact with national courts. First, referring to other ICs with preliminary reference systems, we can speculate about whether and why these systems might perform similarly or not as regards the creation and development of judicial trust considering that the number of references is lower, like in the Andean Court of Justice, or almost non-existent like in the East African Court of Justice compared to the EU. Second, by comparing with other systems where there is not a straightforward judicial cooperation system, like the European Court of Human Rights (ECtHR) or the International Criminal Court. In these sense, the empirical evidence from surveys in Spain and Poland shows that trust in the ECtHR is lower than in the CJEU (Mayoral, 2015). It might be easily explained by the absence of a PRs system. This would make national judges to focus on more procedural or domestic aspects to trust in these specific courts, such as fair trial, the qualifications of international judges, or the position of governments as regards human rights, the level of human rights protection at the domestic level, judicial independence, etc.

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Interviews:

Interview to a French national judge, March 2012.

APPENDIX:

Survey procedure

The data set built for the study of national judges' attitudes towards EU legal order and institutions contributes to the empirical understanding of trust in countries such as Germany (131 judges), the Netherlands (127), Spain (112) and Poland (111). The data was collected between 2009 and 2012 from different projects. In the Netherlands and Germany (Nowak, Amtenbrink, Hertogh, and Wissink, 2011) and in Poland and Spain (Mayoral, 2015) the data was gathered among judges from district and regional courts working in different jurisdiction in cooperation with national authorities and institutions: the Dutch Judicial Council, the Ministry of Justice of North Rhine-Westphalia association of judges, the Spanish Judicial Council and the Spanish Network of European Law, the European Centre of Natolin and the Polish Ministry of Justice.

Survey studies can be affected by potential problem of endogeneity bias. After trying to run tests which could address the endogeneity problem and taking into consideration the nature of our data, it was concluded that there is no good statistical instrument that could deal with this dilemma. Consequently, this research acknowledges the burden of endogeneity and avoids strong statements for causality based on the results. With regards to the representativeness of survey design, the task of carrying out a random probability sampling was extremely difficult to execute due to the constraints in access to national judges and the conditions imposed by the judiciaries to cooperate. However, the authors of this data used different strategies during its collection that allowed for reducing representativeness bias, non-response and self-selection errors. The tables below confirmed how difficult was to obtain representative samples under these constraints. The tables compare the sample with country-level information on judges' characteristics to assess whether despite the difficulties it was still possible to secure a representative sample.

2012 Population	Judges	Male	Female	Lower	Intermediate/ Higher
Germany	19832	59,8 %	40,2 %	74,9 %	25,1 %
Netherlands	2410	45,7 %	54,3 %	77 %	23 %
Spain	5155	49,2 %	50,8 %	70,7 %	29,3 %
Poland	10114	36,1 %	63,9 %	93,3 %	6,6 %

Source: CEPEJ European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice. Council of Europe. UNECE statistics: http://w3.unece.org/PXWeb/en

2012 Sample	Judges	Male	Female	Lower	Intermediate/ Higher
Germany	131	40 %	60 %	87,8 %	12,2 %
Netherlands	127	46,7 %	53,3 %	68,5 %	31,5 %
Spain	112	48,1 %	51,9 %	27,6 %	72,3 %
Poland	111	56,6 %	43,4 %	71,2 %	28,8 %

As expected, with few exceptions, the data is not representative of the whole population of judges. However, the sample still serves the purpose of randomizing and increase the variation of some characteristics in EU law knowledge, gender and career levels (see above), avoiding the overrepresentation of certain profiles, like judges only knowledgeable about EU law and/or working exclusively in lower courts.

EU law knowledge	%
Bad	14.97
Moderate	37.42
Reasonable	37.21
Good/Very Good	10.4
Total	481

The questionnaires in Dutch, German, Polish and Spanish prepared by the researchers were originally distributed online among judges by the national judiciaries involved. Reminders were sent to encourage the participation in the surveys (see Nowak, Amtenbrink, Hertogh, and Wissink, 2011). All these projects rely on the cooperation of the judiciary to distribute via email and encourage the participation of the judges. The selection of online survey was selected due to the high number of judges available in the country. This method made it possible to reach the vast majority of them at a very low cost. The method has it risks as some judges did not trust the online methods survey or where not familiar with them. However, this collection technique was complemented with the distribution by the researchers of paper questionnaires among judges (from all jurisdictions and legal specializations) by attending judicial training courses, mailing the questionnaires or visiting the courts to handle the questionnaires with the permission of the presidents. This complementarity helped to reduce or avoid the overrepresentation of judges more knowledgeable with EU law and the underrepresentation of judges not interested in EU law, reaching judges from several jurisdictions (civil, labour, administrative, and criminal), profiles and position within the judicial hierarchy (see above). Moreover, to encourage the participation of national judges, those were informed about the main objectives of the project and several channels of response were provided to ensure confidentiality.

Variables

- *Trust in the Court of Justice of the European Union (CJEU):* The variable measures the intensity of trust in the CJEU, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much. Values 0 and 1 were collapsed.
- *Trust in the highest national court:* The variable measures the intensity of trust in the German, Spanish and Polish Constitutional Tribunal and the Supreme Court in the Netherlands, using a five-point scale variable: 0: do not trust, 1: hardly trust, 2: neither trust nor distrust, 3: trust, 4: trust very much.
- *CJEU rulings are clear:* Five-point scale that measures to what extent agrees or disagrees with the following statement: "In general, I believe that the rulings made by the CJEU are clear". 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree.
- *EU legal principles are alien to the domestic legal orders:* Five-point scale that measures whether judges agree or disagree with the following statement: "I think that European legal principles are alien to my national legal system". 0: strongly disagree, 1: disagree, 2: neither agree nor disagree, 3: agree, 4: strongly agree. Values 3 and 4 were merged.
- *Type of Court or Judge's position within the national judicial hierarchy:* The variable adopts the value of 0 when the judge belongs to a district court or similar, 1 if he/she belongs to a regional or appeal court, or works on a Supreme Court (only for Poland and Spain).
- *Knowledge of EU law:* These variables codes whether the judges think their knowledge of EU law is sufficient to judge the possible EU law content of the cases. This is measured by a 5-point scale that assesses their subjective evaluation of their knowledge of European law. The variable ranges from 'Bad'(0) to 'Very good'(4) knowledge of European law. Values 3 and 4 were merged.
- *Knowledge of national law*: A 5-point scale measuring their subjective evaluation of their knowledge of national law. The variable ranges from 'Bad'(0) to 'Very good'(4) knowledge of national law. Values 0 and 1 were merged.
- *Support for EU:* This variable codes whether the judge in general terms thinks his/her country's membership to the European Union is 'Bad'(0), 'Neither good nor bad'(1) or 'Good'(2). Values 0 and 1 were merged.
- Legal area: Classifies the legal area/jurisdiction in which the judge serves: 'Civil and commercial' (0), 'Criminal' (1), 'Labour and Social law' (2) and 'Administrative' (3).
- *Country:* This variable identifies national judges' country: 0: The Netherlands, 1: Germany; 2: Poland; and 3: Spain. Generally, the Netherlands will be treated as the category of reference to compare all these countries.
- Socialization in EU law: Number of legal peers (e.g. CJEU judges, national judges specialized in EU law, lawyers, etc.) available to consult on the issue of the application of EU law. It ranges from '0' to '4 or more'. This variable was added in model 3 as control variable.

- Judicial training in EU law: coded 1 when the judge has attended any training course on EU law, and 0 if otherwise. This variable was added in model 3 as control variable.

Statistical results:

Table 1A: Ordered probit regression of the intensity of trust in NHC and the CJEU

	Trust NHC	**Trust CJEU**	**Trust CJEU**
	Model 1	Model 2	Model 3
Trust in the CJEU	0.643*** [0.072]		
Trust in the Supreme / Constitutional Court		0.458*** [0.68]	0.462*** [0.68]
Knowledge of national law	0.242** [0.104]	-0.119 [0.112]	-0.114 [0.113]
Knowledge of EU law	-0.020 [0.065]	0.150** [0.71]	0.143** [0.72]
Type of court	0.095 [0.126]	0.120 [0.138]	0.108 [0.138]
EU principles are alien to the national legal order	-0.028 [0.061]	-0.235*** [0.065]	-0.235*** [0.065]
Support for the EU	0.234 [0.235]	0.719*** [0.255]	0.695*** [0.264]
CJEU rulings are clear		0.154*** [0.58]	0.154*** [0.586]
Country: The Netherlands (category of reference)			
Country: Germany	0.015 [0.160]	-0.804*** [0.183]	-0.778*** [0.205]
Country: Spain	-1.715*** [0.184]	0.098 [0.226]	0.074 [0.247]
Country: Poland	-0.505** [0.202]	-0.658*** [0.233]	-0.687*** [0.243]
Legal area: Criminal law (category of reference)			
Legal area: Civil and Commercial law	-0.252 [0.170]	0.076 [0.176]	0.037 [0.18]
Legal area: Social and Labour law	-0.069 [0.301]	0.393 [0.314]	0.378 [0.319]
Legal area: Administrative law	-0.993*** [0.288]	0.830*** [0.32]	0.780** [0.323]
Socialization in EU law			0.034 [0.68]
Judicial training in EU law			0.044 [0.139]
τ1	-0.353	0.114	0.145

τ2	0.228	0.783	0.803
τ3	0.857*	2.599***	2.622***
τ4	2.579***		
Observations	481	397	395
Pseudo-R^2	0.21	0.14	0.14
Standard errors in brackets *** p<0.01, ** p<0.05, * p<0.1			

Table 1.1A: Descriptive statistics

Variable	Obs.	Mean	Std. Dev.	Min	Max
Trust in the Constitutional/Supreme Court	481	3.043	1.024	0	4
Trust in the CJEU	481	2.997	0.842	0	4
Knowledge of National law	481	2.902	0.588	0	4
Knowledge of EU law	481	1.43	0.868	0	3
Type of Court	481	0.351	0.477	0	1
EU principles are alien to the national legal order	481	1.029	0.898	0	3
CJEU rulings are clear	397	2.078	1.025	0	4
Country: The Netherlands	481	0.264	0.441	0	1
Country: Germany	481	0.272	0.445	0	1
Country: Spain	481	0.231	0.421	0	1
Country: Poland	481	0.232	0.423	0	1
Legal area: Civil and Commercial law	481	0.752	0.431	0	1
Legal area: Criminal law	481	0.168	0.374	0	1
Legal area: Social and Labour law	481	0.035	0.184	0	1
Legal area: Administrative law	481	0.043	0.204	0	1
Support for the EU	481	0.948	0.222	0	1
Socialization in EU law	478	1.184	0.996	0	4
Judicial training in EU law	478	0.669	0.471	0	1

Table 2A: Predicted probabilities of main explanatory variables on "trust very much" (model 2)

	EU principles are alien to the national legal order[11]	CJEU rulings are clear
Strongly disagree	0.27	0.12
Disagree	0.20	0.15
Neither agree nor disagree	0.14	0.19
Agree	0.09	0.24

11 'Strongly agree' values where added to 'agree' category for this variable to avoid small observations.

Strongly agree	-	0.29

Table 3A: Predicted probabilities of 'support for EU' on "trust very much" (model 2)

	Trust in NHCs
Bad thing/neither good nor bad	0.06
Good thing	0.21

Table 4A: Predicted probabilities of 'trust in NHCs' on "trust very much" (model 2)

	Trust in NHCs
Do not trust	0.01
Hardly trust	0.04
Neither trust nor distrust	0.10
Trust	0.21
Trust very much	0.36

Table 5A: Predicted probabilities of 'knowledge of EU law' on "trust very much" (model 2)

	Trust in NHCs
Bad	0.14
Moderate	0.18
Reasonable	0.22
Good/Very Good	0.27

My iCourts experience

My time in iCourts was one of the most rewarding professional and personal experiences in life. I owe a great deal of my academic success and everyday joy to the Centre and my colleagues there.

Everything started when I was finishing my PhD in Political Science at the European University Institute (EUI). In 2013, Marlene Wind mentioned iCourts at one of the events organized there. That was the first time I heard of iCourts. At that moment, I did not know Marlene, so I approached her after her presentation. What attracted my attention was that the presentation centered on the Politics of EU law. I shared my interest in this topic with Marlene, and, after noticing my enthusiasm, she mentioned that a new Centre was being created in Copenhagen, where she was part of the team studying international courts and law. She encouraged me to apply to the upcoming postdoc positions. And since that conversation I kept my eye on iCourts and later applied for a postdoc position. In the meanwhile, I visited iCourts just to be sure that iCourts was as good as it was promised (it was).

In January 2014, I landed in Copenhagen after my defense and, ever since my arrival, iCourts went beyond any expectations I had. It turned out the Centre was (and still is) led by a scholar in law and sociology, Mikael Rask Madsen. While I have to admit I never heard about him before, he appeared to be an avid Real Madrid fan, who had strong attachment to Spain due to his previous master studies at the International Institute for the Sociology of Law in Oñati. This relationship, of course, was destined to become a dear friendship. Moreover, the Centre, which was already airborne for one or two years at the most, recruited many new members: Urška Šadl, Mikkel Jarle Christensen, Salvatore Caserta, Henrik Palmer Olsen, Güneş Ünüvar, Zuzanna Godzimirska, Yannis Panagis, Jakob v. H. Holtermann, Anne Lise Kjær, among others, all of them having research interests in the intersection between law, society, and politics. The Centre was (and is) also supported by great administrative staff, Henrik Stampe Lund and Lilli Streymnes. All this made iCourts a perfect place for developing interdisciplinary research. The day of my interview, I made it clear that I would not see myself in any other place than iCourts. My motivation at that moment was to find an academic context that will advance my interest in study of EU Law & Politics and iCourts provided unique environment for that.

Then, in summer 2014 I started my position as Postdoctoral research fellow at iCourts, where I continued learning from my colleagues and growing as a scholar, sharing this enriching experience with several generations of postdocs and friends: Pola Cebulak, Jed Odermatt, Marina Aksenova, Kerstin Carlson, Nora Stappert, among others, until spring 2021 when I took leave as Jean Monnet Associate Professor to continue as Ramón y Cajal researcher in Spain. I have always experienced iCourts as a privileged place for the genuine exchange of ideas that also gave me access to the most renowned institutions and scholars in the field of Judicial Politics such as Karen Alter, Laurence Helfer, Antoine Vauchez, Ron Levi, Erik Voeten, etc. This powerful network was constantly nurtured with new permanent incorporations and visiting researchers who left a great imprint in the institution.

The iCourts experience developed in me a great sense of belonging based on a healthy, critical, and respectful academic culture that made research a joyful task. I also benefited from great mentorship and advice from my colleagues making me a better researcher. The feeling as iCourtian was strengthened by the fact that everyone was encouraged to take an active role in the Centre by contributing to its development and construction with new ideas that might benefit the collective.

After seven years, I have so many great memories of iCourts, all of them shared with my colleagues who became loyal friends. Moreover, my stay in iCourts has been intertwined with important personal events that made understand how privileged I was of being in such a great Centre and the Faculty of Law. For that reason, I keep good memories of the celebration of my appointment as assistant professor in iCourts: it was one of these moments, when following the Danish academic tradition of drinks and discourses, my colleagues made me understand how iCourts without Juan would be less iCourts, and vice versa, and that we would miss each other so much if I ever leave.

Position and affiliation before joining iCourts: *PhD researcher at the European University Institute.*

Period in iCourts: *January 2014 – April 2021.*

Current position and institutional affiliation*: Ramón y Cajal Research Fellow at Carlos III University of Madrid.*

Unidentified Legal Object: Conceptualising the European Union in International Law

Jed Odermatt

I. Introduction: What is the European Union?

What is the European Union? This seemingly simple question gives rise to a multitude of different answers from EU lawyers, international lawyers, political scientists, and the media. In 1961 McMahon wrote that "although the [European] Communities were brought into being in the form of an international treaty, one should not allow the circumstances of their birth to obscure their real nature…"[1] What the 'real nature' of the EU is, however, remains a mystery. As is often the case with these questions, the answer still depends on whom you ask.[2] In an article on the topic of 'European Exceptionalism', it was noted "[t]he debate over whether the EU is a state, federation, international organization or flying saucer is as old as European integration itself."[3] The answer to the question 'what kind of legal entity is the EU?' still eludes us.[4]

Do such arguments and debates matter from a legal standpoint? One might argue that these are purely academic questions. To the European

1 J F McMahon, 'The Court of the European Communities: Judicial Interpretation and International Organisation' (1961) 37 *British Yearbook of International Law* 320, 329.

2 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682 p. 1–256 and 18 July 2006, UN Doc. A/CN.4/L.702, para. 483. "This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule-systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rule-system is your focus on."

3 T. Isiksel 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 *European Journal of International Law* 565, 571.

4 For a discussion on the perception of the EU focusing on dispute settlement bodies, see C. Binder and J.A. Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' 8 *European Yearbook of International Economic Law* (2017) 139–200.

Commission lawyer working on food safety standards, or the Legal Associate in London working on competition law, the question of what kind of legal entity the EU is not really significant. This article makes the case that legal categories do matter. In many cases, such characterizations are the 'starting points' in legal debates, which then shape legal outcomes. As the EU seeks to play a greater role in the international legal order, and one of the Member States has left the EU, the Union, its Member States, and third states will be faced with legal questions that touch upon the EU's legal nature. Developing a single theory of EU legal character will assist in providing legal certainty as new questions and problems arise.

The article sets out four main ways in which EU has been conceptualized in the international law and EU law literature. The article is structured according to these four models: (i) the EU as a 'new legal order'; (ii) the EU as a 'self-contained regime' in international law; (iii) the EU as a 'Regional Economic Integration Organization' (REIO); and (iv) the EU as a 'Classic intergovernmental organization' (Classic IO). These four models appear in the table below.

Models of the European Union in International Law

	Internal sphere	External sphere
Unique legal entity; high degree of autonomy	1. **'New Legal Order'** • EU has developed into a 'new' type of legal/political entity of a constitutional nature	3. **'Regional Economic Integration Organization'** (**REIO**) • EU is a 'special type' of international organization • Specialized rules are required to take into account its nature and autonomy
Fits within existing categories; low degree of autonomy	2. **'Self-contained Regime'** • EU is a part of international legal order, but has developed specialised internal rules	4. **'Classic' International Organization** • EU is not qualitatively different from other international organizations • Existing rules can be applied to the EU

The first view reflects the EU's own self-perception, that of the EU as a 'new legal order' or even a 'sui generis' entity. The second model is that of a 'self-contained regime' in international law, a legal system that remains a part of the international legal order but has for the most part developed specialized internal rules. The third model views the EU international organization, albeit one with special unique features, commonly described as a regional economic integration organization ('REIO'). The fourth model views the EU as a traditional intergovernmental organization, or 'classical' IO, that is not qualitatively different from other IOs. Each of these models is explained, analyzed and debated in more detail in the following section.

The four models differ with respect to a number of assumptions about the EU and its relationship with international law. The four models are placed on two axes. The first relates to the extent to which the EU is viewed as a 'unique' entity in international law. Debates about what kind of entity the EU is often revolve around this question of uniqueness. The 'New Legal Order' model and the 'REIO' model both assume that there is something special about the EU, which sets it apart from other legal entities. The 'Self-contained regime' model and 'Classic IO' model both see the EU as something that fits within existing international law categories; they either deny that the EU is unique at all or reject that any legal consequences should flow from its unique features. The second axis relates to the 'sphere' that is concerned, either from the perspective of the internal legal order of the EU, or from the perspective of the EU's place within the wider international legal order. The 'New legal order' and 'self-contained regime' models are mostly concerned with the relationship between the EU and the Member States and are less concerned about the EU's relationship with other entities (internal sphere). The 'REIO' and 'Classic IO' model focus on the EU's relationship with the wider world of international law (external sphere).

These four models are not mutually exclusive. In practice, one's conception of the EU may combine elements of these models or lie in between categories. Nor does the table seek to answer the vexed question of what type of legal entity the EU is. Rather, the four models highlight the different conceptions of the EU that we find in the legal literature, case law, and international legal practice. The four models are ideal types; few would subscribe fully to any of these models. While the CJEU and many EU lawyers gravitate towards the 'new legal order' model, their views are much more nuanced in reality. Likewise, even international lawyers who subscribe to the 'Classic IO' model would accept that the EU possesses certain characteristics that set apart from other IOs.

The reason for highlighting these four models is to illustrate the various conceptual 'starting points' that lawyers take when addressing legal questions dealing with the EU's place in international law. The article demonstrates how the legal outcome in different scenarios have been shaped by the assumptions associated with each of these models. In order to illustrate this, I rely on a number of examples from recent legal practice where the legal character of the EU played a role in determining the legal outcome. The examples discussed in the following sections include, among others, *Opinion 2/13* regarding the EU's accession to the European Convention on Human Rights; the *Miller* litigation on the invocation of Article 50 TEU; the EU's practice before the International Law Commission, in particular

during work on the responsibility of international organizations; and the EU's participation in international organizations and international dispute settlement mechanisms. In each of these instances, the legal outcome was shaped, at least in part, by these 'starting points' and the deeper conceptual understandings about the nature of the EU and EU law.

The different models in this article emerged from a review of international law and EU law literature. Although debates about the nature of the EU exist in international relations literature, this article restricts itself to the legal scholarship. IR scholars seem to have less problem with the multiple-nature of the EU, and can study it as a type of international organization, proto-state or federation.[5] Legal scholarship, on the other hand, appears to have more difficulty with such characterisations, since legal characterisations often lead to legal consequences.

A. Divergent Approaches

The United States of America, Botswana, Russia and Palau differ in terms of culture, language, military power, economic development, and legal systems, but we agree that they have at least one thing in common: they are all recognized as States in international law. However, there is no such consensus when it comes to the legal character of the European Union. How can it be that the EU (and its previous incarnations) has existed for over sixty years, but there is still no consensus among lawyers about how such a strange legal entity is to be identified?

One reason for the divergent views is academic specialisation. The topic is approached from different angles and academic fields. Public international lawyers, while not necessarily ignoring the European Union, often fail to engage in serious discussion about the EU's place within the international legal order. The EU and EU law is therefore often viewed as a separate, specialised field of study, and international lawyers are often reluctant to enter this terrain. Another reason is complexity. The EU, viewed by some as a complicated byzantine structure, is considered too complex and too specialised to be discussed seriously without in-depth knowledge of the EU and its institutions. This can also be explained in part by the 'managerial approach' to international law, which renders international

5 For an overview of this discussion, see W. Phelan, 'What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime' 14 *International Studies Review* (2012) 367–385.

law scholarship increasingly compartmentalised.[6] The study of the EU has for a long time been its own field of specialization, its own special box, one which many international lawyers are reluctant to open. The literature on the EU's place in the international legal order is then highly influenced by the intellectual community with which an author identifies. Simma and Pulkowski observe how "[o]ften, a scholar's approach seems to depend on whether her intellectual home is the sphere of public international law or that of a specialized subsystem."[7] A particular analysis may be shaped depending on whether one identifies as an EU or public international law expert.[8]

The EU lawyer may see herself as part of a wider community that seeks to uphold and promote the European project, and therefore more willing to accept that the Union is somehow special or unique. In a similar way, many who view themselves as part of the community of international law cling to the notion of international law as a universally applicable system of rules. The idea that the EU is a 'new legal order' implicitly challenges this idea of universality and adds to anxiety over the fragmentation of international law.[9]

From the EU law side, there is also a similar lack of engagement with the EU's role in the international legal order. Much of the literature examining the EU's place in international law falls into the category of 'EU external relations law'.[10] Such literature engages with legal issues arising

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6 M. Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 1.

7 B. Simma and D. Pulkowski, 'Leges Speciales and Self-Contained Regimes, Responsibility in the Context of the European Union Legal Order', in J. Crawford, A. Pellet, S. Olleson (eds) *The Law of International Responsibility* (Oxford, Oxford University Press, 2010) 139, 148.

8 K. S. Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation' in A. Orakhelashvili, *Research Handbook on the Theory and History of International Law* (Cheltenham, Edward Elgar, 2011) 268, 270.

9 See M Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 533. 'Fragmentation of International Law', *supra* note 79, para. 219. "[o]ne phenomenon that does contribute to fragmentation is the way the Union as an international actor is present in a number of different roles on the international scene."

10 "The existing EU literature is mostly devoted to the study of the EU's internal legal framework. As a result, analysis of the EU's place in the international legal arena tends more often than not to be limited to the rules governing the EU's external relations." Book Review, 'Kronenberger, Vincent (ed). The European Union and the International Legal Order: Discord or Harmony? The Hague: T.M.C. Asser Press. 2001' (2003) 14 *European Journal of International Law* 1051.

from the EU's participation in the international legal order, focusing on internal questions regarding issues like the EU's competence to conclude international agreements or to be represented in international institutions. Literature in this field remains inward-looking, debating legal issues facing the Member States and the institutions, but lacks self-reflection on the EU's place within the wider international legal order.

The effect of such academic specialisation and compartmentalization is that EU lawyers and international lawyers talk past one another. EU lawyers, for their part, tend to have a relatively well-developed and consistent idea of what the EU is. This 'self-perception' is discussed in more detail in Part II.A below. International law scholarship, on the other hand, has far more difficulty conceptualising the EU. Part of this lies with the state-centric approach that still pervades international law. Schütze explains how international law's assumptions that it is built on the sovereign state obscure the way it approaches 'compound subjects' such as the EU.[11]

The study of the EU from an international law perspective suffers from a broader challenge, that is, the inability to fully understand entities that do not neatly fit with existing categories such as 'state' or 'international organization'. The last three models discussed in the following section demonstrate how international lawyers disagree on a number of key points. Does the EU remains a creature of international law at all, or has it developed into something else? Which rules of public international law are to be applied to this kind of entity, and to what extent (if at all) should they be modified or adapted to take into account the EU's special status? Is the EU truly an autonomous actor on the international plane, separate from its Member States, as it often claims? Or does the EU simply represent the collective will of its members, each of which remain fully sovereign subjects of international law. Whereas the EU lawyer has a relatively robust understanding of how to conceive the EU legal order, international law scholarship diverges on these and many other points.

11 R. Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012) 217.

II. Conceptualizing the EU in International Law: Four Models

A. The Union's Self-Perception: A 'New Legal Order'

It is now well-established that the CJEU conceives the Union as a 'new legal order', holding in *van Gend en Loos* that the EEC Treaty was "more than an agreement which merely creates mutual obligations between the contracting states".[12] The Court continues to apply the logic of the 'new legal order' in its legal reasoning. In *Opinion 2/13*, before finding that an agreement designed to allow for the EU's accession to the European Convention on Human Rights was incompatible with the EU Treaties, the CJEU recalled its mantra: "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals."[13] The Court continues to invoke this "shibboleth"[14] in its judgments in various and sometimes surprising ways.[15]

This model of the EU as a 'new legal order' is closely linked with the EU's own self-perception and identity. It is one of the foundational myths used to construct the elements of the EU legal order.[16] Like national myths, it does not matter whether the 'new legal order' is technically or

12 Judgment of 5 February 1963 in *van Gend & Loos*, 26/62, EU:C:1963:1, 12.

13 Opinion 2/13 of 18 December 2014, EU:C:2014:2454, para. 157 (referring to *van Gend & Loos, supra* note 12).

14 Isiksel, 'European Exceptionalism', *supra* note 3, 571.

15 Opinion 2/13 *supra* note 13; Judgment of 28 April 2015, *Commission v. Council,* Case C-28/12, EU:C:2015:282, para. 39.

16 "[I]l n'est nul besoin de se raccrocher au mythe de la rupture totale du droit communautaire par rapport au droit international général pour rendre compte de sa spécificité, qui est réelle et profonde. En réalité, l'ordre juridique communautaire, ancré dans le droit international, y trouve l'essentiel de sa force et de ses caractéristiques." A. Pellet, 'Les fondements juridiques internationaux du droit communautaire', *Collected Courses of the Academy of European Law*, Volume V, Book 2 (1997) 268. "[O]ne of the greatest received truisms, or myths, of the European Union legal order is its alleged rupture with, or mutation from, public international law and its transformation into a constitutional legal order." J.H. Weiler and U.R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411, 420. See A. Cohen and A. Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 *Annual Review of Law & Social Science* 417, 426.

historically correct – rather, the account provides a useful symbolic narrative of the polity's construction and self-identity. The Court continued to put in place some of the cornerstones of EU law, including the notions of direct effect and primacy, in part, by building upon the new legal order narrative, which tends to set EU law apart from 'ordinary' international law.[17] The Court could have conceivably derived EU law principles such as direct effect and primacy by referring to existing public international law principles, such as customary rules of treaty interpretation.[18] Concepts such as supremacy and primacy pre-date the Union and its Court, and have been described as an "appropriate synonym of *pacta sunt servanda*"[19], a fundamental principle of the law of treaties.[20]

In this sense, it is not the unique features of the Union that set it apart from other polities, but the degree to which the Union possesses and exercises these features.[21] The Court did not use public international law as a building block of the EU legal order, but built these new concepts in contradistinction to international law. In order to do this it had to

17 As Lowe points out, the CJEU "imagined into existence an entire new, legal order, hammering into place the other great beams of that legal order, such as the supremacy of Community law …" V. Lowe, 'The Law of Treaties; or Should this Book Exist?' in C.J. Tams, A. Tzanakopoulos, A. Zimmermann, *Research Handbook on the Law of Treaties* (Cheltenham, Edward Elgar, 2014) 3, 6.

18 E. Denza, 'The Relationship Between International Law and National Law' in M. D. Evans, *International Law*, 4th edn (Oxford University Press, 2014) 412, 416: "This formulation of the supremacy of Community law – not self-evident on the face of the European Community Treaties – is among the features distinguishing European Community law from international law." See B de Witte, 'Retour à "Costa" La primauté du droit communautaire à la lumière du droit international' (1984) *Revue trimestrielle de droit européen*, 425.

19 O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 766, 785. Spiermann argues that "compared to other parts of the international law of cooperation, there is nothing new about direct effect and nothing innovative about precedence." (at 787).

20 De Baere and Roes argue that they are founded on the duty of loyalty. G. De Baere and T. Roes, EU Loyalty as Good Faith' (2015) 64 *International and Comparative Law Quarterly* 829, 840.

21 "Some people say that the EU is unique – that it resembles no other entity and, in its concept and design, owes nothing to anything found anywhere else. That is not true. Although the breadth and depth of its powers put the EU in a special position, this is merely a matter of degree. The EU is simply the foremost among a whole pack of international bodies that have the power to control what countries do." T.C. Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2004) xv.

caricature international law as relatively weak and unenforceable.[22] EU law, on the other hand, could be superior to national law and capable of direct effect, since the Member States had created a 'new legal order'.

EU lawyers now largely accept the 'new legal order' narrative developed by the Court. Those who deal with EU law in day-to-day practice do not imagine themselves working with a 'creature of international law'[23] but in what resembles in most respects a national legal order. The EU may have international law origins and its constitution is formally an international legal instrument,[24] but this is largely irrelevant to lawyers in Brussels and London working on state aid and competition law. This does not mean that questions of legal character do not have legal significance. More complex questions arise when this new legal order narrative is applied, not just to the relationship between the EU and its Member States, but to understand the EU's relations with third parties.

1. The EU as sui generis

Closely tied to the 'new legal order' narrative is the description of the EU as a *sui generis* entity.[25] Stating the EU is *sui generis* tells us that it is a unique creature, but nothing whatsoever about the legal consequences that flow from this. Like 'new legal order' it is also a malleable concept, which

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22 "Par ses faiblesses intrinsèques, le droit international public diffère profondément du droit communautaire. Plusieurs traits du droit international sont ainsi devenus, par contraste, d'utiles repères pour apprécier la spécificité du droit communautaire et, par là même, pour mesurer l'écart qui s'est creusé entre les deux orders juridiques." O. Jacot-Guillarmod, *Droit communautaire et droit international public* (Genève, Librairie de l'université Georg, 1979) 258.

23 T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 2 389, 403–404: "At least at its inception, the European Community was clearly a creature of international law. As there are no indications that a revolution in its legal sense has subsequently occurred … the European Treaties are still creatures of international law."

24 Barents argues, for instance, that "[a]lthough the EC is based on a document which bears the name 'treaty', this has but a formal meaning. In a material sense the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law." R. Barents, *The Autonomy of Community Law* (The Hague, Kluwer Law International, 2004) 112.

25 "The EU is usually considered a special, or *sui generis*, organization." B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge, Cambridge University Press, 2014) 208.

can be used in different situations to mean different things. The idea is that the EU is so special, so different from other forms of political and legal organization that it simply does not fit in any existing category of international or constitutional law.[26] Since the EU is not a state, and does not neatly fit easily among classical international organizations, there is a tendency to attach the label *sui generis* as some kind of mid-way category.

For most international lawyers, however, the idea that the EU fits into its own legal category is inaccurate at worst or unhelpful at best.[27] It is not a helpful conceptual model, but an "unsatisfying shrug'".[28] Schütze is highly critical of the *sui generis* 'theory'.[29] The first line of argument is that the term is conceptually useless – it cannot be used to analyse or measure the Union and its evolution. Moreover, the *sui generis* theory is an entirely negative one; the label only tells us what the EU is not, but does nothing to describe what type of polity the EU is, or how international law should apply to it.[30] The second argument is that the *sui generis* label is inaccurate: "the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law."[31] As discussed above, many of the supposed unique features of the Union which are put forward in favour of the EU being *sui generis,* can be found in entities outside the context of the EU.

Terms like 'new legal order' and *sui generis* were adopted because international law and constitutional law were missing the vocabulary to

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26 De Witte summarizes the view of many EU lawyers: "the dominant strand in the EU law literature takes the view that the European Union, whilst not a federal state, is also no longer and international organizations, but rather an ill-defined *sui generis* legal construct."de Witte, *supra* note , 20. De Baere similarly describes the EU is a *sui generis* legal concept, and that "cannot be fitted easily within either constitutional or international law…" G. De Baere, *Constitutional Principles of EU External Relations* (Oxford, Oxford University Press, 2008) 1.

27 Denza points out that "European lawyers are given to saying that the European Union is *sui generis* – which is true but not helpful." E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford, Oxford University Press, 2002) 1.

28 Hay argues that the notion of *sui generis* "not only fails to analyze but in fact asserts that no analysis is possible or worthwhile, it is fact P. Hay, *Federalism and Supranational Organizations: Patterns for New Legal Structures* (Illinois University Press, 1966) 44.

29 Schütze, *supra* note 11, 67.

30 Barents (*supra* note 24, 45–6) argues that "[T]here exists only a consensus about what Community law does not represent (constitutional or international law). However, this conclusion offers no explanation about the nature of Community law. In particular, it does not provide answers to fundamental questions …".

31 Schütze, *supra* note 11, 67.

describe an entity such as the EU. International lawyers tend to have an aversion to the *sui generis* concept, in part because it could imply that general international law should not, or cannot, apply to it. The international landscape consists of not just States but a highly heterogeneous array of complex legal structures and diverse entities. Could the WTO, with its unparalleled role in world trade and unique dispute settlement system be described as *sui generis*? Could the UN Security Council – which has no counterpart in the realm of international peace and security- also be described as *sui generis*? A completely negative definition such as *sui generis* tells us nothing about how international law should approach the subject.[32]

Some point out the distinctive features of the EU legal order, pointing to issues such as direct effect and supremacy; the position of individuals; the exercise of governmental powers by EU institutions; the role of the Court of Justice in interpreting and applying EU law; the inability of Member States to enforce EU law through traditional countermeasures;[33] and so on. The reply to this will often be that these are all features that make the EU distinctive, but cannot alter the EU's character as an international organization.[34] The fact that the EU is a well-developed or complex legal order does not mean that its character as a legal order of international law is lost.[35] The common story is that the EU was originally conceived using international law instruments, but it has since transformed into 'something else' which fits neither into the realms of international nor municipal law.[36] This 'something else' was described as *sui generis*.

International lawyers have often questioned the 'new legal order' and *sui generis* models. One reason for this is that such conceptions imply that

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32 B. de Witte, 'The Emergence of a European System of Public International Law: the EU and its Member States as Strange Subjects' in J. Wouters, A. Nollkaemper and E. De Wet (eds) *The Europeanisation of International Law* (The Hague, TMC Asser Press, 2008) 39–54.

33 See J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 8 2403, 2422.

34 See T. Moorhead, European Union Law as International Law (2012) 5 *European Journal of Legal Studies* 126, arguing that "the Union legal order is essentially one of international law."

35 Ibid.

36 Weiler and Haltern point out that "[t]here is no doubt that the European legal order started its life as an international organisation in the traditional sense, even if it had some unique features from its inception." Weiler and Haltern, *supra* note 16, 419.

the EU is not only a highly distinctive legal order, but also an *exceptional* one. Being unique can imply special treatment. This has given rise to discussion of so-called 'European exceptionalism',[37] a term has been given multiple meanings in the literature. Some refer to European exceptionalism as a form of double standards.[38] Isikiel, for instance, understands this exceptionalism as the Union seeking to release itself from international standards based on its "purported fidelity to principles of human rights, democracy, and the rule of law."[39] Nolte and Aust[40] and Ličková[41] view exceptionalism more in the sense of the EU justifying certain legal exceptions for itself, both in its own case law, but also in its legal relationship with third States. Both understandings of exceptionalism flow from a common idea: that the EU is not just distinctive, but special. One consequence of this is that other states and organizations "have to arrange themselves with particularities of the special status of the EU."[42] Such claims of exceptionalism can be seen in the CJEU's reasoning in *Opinion 2/13*. The following section discusses how the 'new legal order' narrative in this judgment was a starting point that shaped the ultimate legal outcome.

2. *Opinion 2/13 and the New Legal Order Narrative*

In *Opinion 2/13*, the Full Court of the CJEU decided that the Draft Accession Agreement, designed to allow the EU to join the ECHR, was inconsistent with EU law. The Court based its Opinion, in large part, on the idea of the EU as a 'new legal order':

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37 G. Nolte and H. Aust, 'European Exceptionalism?' 2 *Global Constitutionalism* (2013) 407, 416.

38 G. de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649, 690.

39 Isikel, *supra* note 3, 566, fn 4.

40 G. Nolte and H. Aust, 'European Exceptionalism?' 2 *Global Constitutionalism* (2013) 407, 416.

41 M. Ličková, 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 463.

42 "The argument is advanced that no other group of states has pooled sovereignty to the degree that EU member states have done. No other entity would have brought about such a distinct form of supranational governance which also acts alongside its member states on the international level. This would have particular consequences on the international level, for instance when other states have to arrange themselves with particularities of the special status of the EU." Nolte and Aust, *supra* note 37.

> "The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR."[43]

Here, the Court is using this new legal order narrative and the concept of autonomy to approach the question of how and under which conditions the EU can participate in an international convention.

Opinion 2/13 came as a surprise and was met with heavy criticism.[44] Not only academics but also the EU institutions and EU Member States were of the view that the Accession Agreement was compatible with the EU Treaties. One of the reasons for such a sharp divergence of views is the diverging view of the EU's legal character. Academic discussion following *Opinion 2/13* has focused on the Court's analysis of particular aspects of the Accession Agreement.. While the Court expressed its disapproval of the draft agreement through a discussion of technical details, the more fundamental disagreement was about the very nature of the EU and its legal order. One passage of the Opinion is particularly illuminating in this regard:

> The approach adopted in the [Accession Agreement] envisaged, which is *to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party*, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.[45]

The CJEU is not just critical of the Accession Agreement, but of the very 'approach adopted' by its drafters. These drafters approached the EU

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43 Opinion 2/13, *supra* note 13.

44 Some of this criticism includes: Isiksel, *supra* note 3; 'Editorial Comments' (2015) 52 *Common Market Law Review* 1–16; B. de Witte, Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' 40 *European Law Review* 5 (2015) 68; T. Locke, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it Still Possible and is it Still Desirable?' (2015) 11 *European Constitutional Law Review* 239, 243.

45 *Opinion 2/13*, *supra* note 13, para. 193. Emphasis added.

from the perspective of an international organization. According to this approach, the EU was to be treated in the same manner as other contracting parties, unless there was a clear reason to treat the EU differently. The Accession Agreement introduced certain innovations – the co-respondent mechanism and prior involvement procedure, for example – but these were exceptions designed to protect the autonomy of the EU legal order. For the most part, the EU was to be treated as another contracting party. Such an approach was an anathema to the Court. The starting point should not have been the EU's equality, as the drafters believed, but its *exceptionalism*.

The EU's self-conception as a 'new legal order' gives rise to problems when the EU seeks to apply that model to its relationship with other States and international organizations. Why should other members of the Council of Europe accept that the EU is to be afforded special treatment due to the CJEU's understanding of the EU as an autonomous legal order? The CJEU did not demand certain tweaks or adjustments to the Accession Agreement, but called for its redesign, based on the EU's autonomy and special characteristics. No such special treatment is afforded to any other contracting states to take into account, for example, their sovereignty or constitutional idiosyncrasies. Isiksel points out how "these questions throw into high relief why characterizing the EU as a *sui generis* entity is, in addition to being analytically unsatisfactory, politically and normatively problematic."[46] The new legal order narrative makes sense only as long as it is applied in the internal sphere, to regulate the relations between the EU Member States and the institutions. Problems arise when the Court asserts its conception of autonomy – an ill-defined and malleable concept – must also apply to the EU's participation in the international legal order.

B. The EU as a 'Self-contained Regime'

The second model is the conception of the EU as a 'self-contained regime'. Like the new legal order narrative, this model accepts the autonomy of the EU, but unlike the new legal order narrative, it still accepts that the EU is very much a part of the wider international legal order. According to one definition, a system can be considered 'self-contained'

46 Isiksel, *supra* note 3, 577.

> if it comprises not only rules that regulate a particular field or factual relations laying down the rights and duties of the actors within the regime (primary rules), but also a set of rules that provide for means and mechanisms to enforce compliance, to settle disputes, to modify or amend the undertakings, and to react to breaches, with the intention to replace and through this to exclude the application of general international law, at least to a certain extent.[47]

A self-contained regime is a 'sub-system' of international law; it not only regulates a certain sphere of activity, but also contains its own secondary rules, largely or completely replacing the application of general international law. Some examples of self-contained regimes that have been put forward include the legal system of the World Trade Organization, the regime of diplomatic law, and various systems in international human rights law. One of the characteristics of a self-contained regime is that, since they possess a complete system of rights and remedies, there is no 'fall-back' to general rules. This is based on the concept of *lex specialis* – states are free to establish a sub-system of legal rules that is more specialised and displaces the application of general rules. The ILC study on *Fragmentation of International Law* recognized that a system may develop into a self-contained regime over time.[48]

The ILC's study lists 'EU law' as a candidate for a possible self-contained regime.[49] The EU has been described as "the most convincing example of a self-contained regime"[50] and there are a number of very strong arguments that the EU should be considered as such. The main reason is that Union law provides an exhaustive system to deal with breaches of the EU Treaties.[51] It is now clear that EU Member States may not resort to traditional inter-state countermeasures against other Member States for

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47 E. Klein, 'Self-Contained Regime', Max Planck Encyclopedia of Public International Law
< opil.ouplaw.com/home/EPIL>.

48 'Fragmentation of International Law', *supra* note 2, para. 157.

49 Ibid., para. 129.

50 Klein, *supra* note 47; Simma and Pulkowski, *supra* note 7, 152.

51 Kuijper argues that upon establishing the European legal order, "[a]mong the Member States … general international law is no longer applicable within the scope of 'the Treaties." P.J. Kuijper, '"It Shall Contribute to ... the Strict Observance and Development of International Law" The Role of the Court of Justice' in A. Rosas, E. Levits, Y. Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (The Hague, TMC Asser Press, 2013) 589, 594.

breaches of EU law, excluding a key aspect of pubic international law from the powers of the Member States.[52] From a public international law perspective, the concept that general international law does not apply within scope of the EU Treaties is a revolutionary development. As Weiler points out, this is one of the key features that sets the EU legal order from international law:

> The Community legal order … is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without these features, so central to the classic international legal order, the Community truly becomes something new.[53]

While there appears to be no more room for inter-state countermeasures in the EU legal order, Simma and Pulkowski argue that these could still exist in certain narrow 'emergency' situations. These are (i) the continuous violation of EU law by a Member State and (ii) state-to-state reparation for breaches of EU law.[54] Even in these hypothetical scenarios, resort to public international law would only take place because the EU system would have effectively failed. The argument is that Member States have only given up their rights to institute inter-state countermeasures to the extent that the procedures under EU law remain effective. In these situations, there would be a 'fallback' to the general system of state responsibility. One could argue that since international law can continue to operate as such a 'fallback', this would imply that the EU is not fully self-contained system.[55]

International law tends to treat claims of self-containment with caution. As Special Rapporteur Arangio-Ruiz pointed out, "[g]enerally, the special-

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52 See e.g. Judgment in *Commission v. Luxembourg & Belgium*, Joined cases 90/63 and 91/63, EU:C:1964:80, 631 in which the Court found the principle of *exceptio non adimpleti conctractus* (enforcement of an obligation may be withheld if the other party has itself has failed to perform the same or related obligation) could not be applied in the EU legal order.

53 Weiler, *supra* note 33, 2422.

54 B. Simma and D. Pulkowski 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 518.

55 See G. Conway, 'Breaches of EC Law and the International Responsibility of Member States' 13 *European Journal of International Law* 3 (2002) 679, 695 concluding that "[d]espite the uniqueness and comprehensiveness of the system created by the European Communities, it remains the case that the term 'self-contained regime', strictly understood, cannot be applied to it."

ists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties…".[56] Indeed, whenever States create an international organization they decide to create new legal relationships between themselves and derogate (to a certain extent) from general international law.[57] Another reason that the self-contained regime label may be resisted is that it is viewed as contributing to the fragmentation of international law, caused by "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[58] The consensus on the topic seems to the be that, while the EU is probably the closest thing to a 'self-contained regime', the application of public international law has not been completely excluded, and international law would apply in order to solve problems not addressed by the Treaties, or to fill gaps. This means that the EU "… is very close to a genuine self-contained regime, but even here the umbilical cord to general public international law has not yet been cut."[59]

Like the new legal order and *sui generis* narratives, the 'self-contained regime' model has little explanative value, especially when understanding the EU's relationship with other legal entities. Presenting the Union as a self-contained or closed system of law only describes how principles of public international law should apply within the EU legal order. The next section discusses how some of these tensions have appeared during the legal debates in the United Kingdom related to its withdrawal from the European Union.

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56 Quoted in Simma & Pulkowski, *supra* note 7, 148.

57 "It was possible for the parties to the original EC Treaty to establish a system under which rules of general international law (at least those of the character jus dispositivum) would not apply; in fact, the point of establishing a new legal regime by means of a treaty is to derogate from the general law, so it could be expected that rules of general international law could play no more than a limited role within that regime." O. Elias, 'General International Law in the European Court of Justice: From Hypothesis to Reality' (2000) 31 *Netherlands Yearbook of International Law* 3, 5.

58 'Fragmentation of International Law', *supra* note 2, para. 8.

59 Klein, *supra* note 47.

1. The Brexit Debate

The question of whether EU law is a 'self-contained regime' is not only an academic exercise, but can have legal consequences for the EU and its Member States. The question of whether EU law provides a complete system of remedies and whether a fallback to principles of public international law are appropriate has already been discussed in the context of the UK's withdrawal from the EU. Brexit will give rise to further questions about the EU's legal character.

On 29 March 2017, British Prime Minister Theresa May officially gave notice under Article 50(2) of the Treaty on European Union (TEU) of the United Kingdoms' intention to leave the European Union.[60] This notice was given only after British Parliament passed the *European Union (Notification of Withdrawal) Act (2017)*[61] earlier in the month, giving the Prime Minister the power to give formal notice to the Council of the European Union. However, the UK Government without having involved British Parliament. This gave rise to litigation the High Court of England and Wales, and eventually the UK Supreme Court, on whether the British Parliament had to be consulted before Article 50 could be triggered.

R (Miller) v Secretary of State for Exiting the European Union (*Miller* case) ostensibly did not involve issues of public international law or even EU law; it involved a UK constitutional law question about the role of Parliament and the powers of the executive. Yet, *Miller* did address these questions tangentially by focusing questions on the legal character of the Union. The EU's legal character is not only defined by the CJEU and EU institutions, it is also co-shaped through other judicial institutions at multiple levels. This includes the legal systems of the EU Member States, which are a key part of the EU legal order.[62]

The UK Government had argued that there was no constitutional requirement to involve Parliament in invoking Article 50 TEU because such a step – the withdrawal from a treaty – is customarily done via royal prerogative. As the Government argued before the High Court: "[s]uch a notification [under Article 50 TEU] would be an administrative act on the

60 Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf [hereinafter Letter to the European Council].

61 European Union (Notification of Withdrawal) Act (2017).

62 "…the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties." Opinion 1/09, EU:C:2011:123, para. 85.

international law plane …"[63] The argument was the EU Treaties are, after all, international *treaties*, at least from the viewpoint of UK law. When withdrawing from these instruments, it was argued, the UK should follow its standard constitutional practice. Yet such a view overlooks the fact that when the UK joined the EU, the EU legal order had already transformed into something else, the constitutional foundations of a system that has in time become closely entwined with British law and confers rights upon individuals.

On January 24, 2017 the Supreme Court upheld the decision of the Divisional Court on appeal by an 8–3 majority.[64] One of the key issues influencing its decision on the issue of Article 50 TEU notification was the EU's legal character and the nature of EU law. The High Court acknowledged that "in normal circumstances"[65] the withdrawal from a treaty on behalf of the UK would be a matter for the Crown. In the case of leaving the European Union, however, this would not only produce legal effects on the international plane, but would also have the effect of modifying domestic law, including the rights enjoyed by residents in the UK.[66]

The Supreme Court also notes the *unique* nature of the EU Treaties and the way in which EU law is given effect in the UK legal order. EU law is a "dynamic, international source of law":

> The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts.[67]

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63 *R (Miller) v Secretary of State for Exiting the European Union*, 'Detailed Grounds of Resistance on Behalf of the Secretary of State', 2 September 2016, para. 5.

64 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

65 *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (Q.B.), [94] (Eng. & Wales), para. 30: "as a general rule applicable in normal circumstances, the conduct of international relations and the making and unmaking of treaties on behalf of the United Kingdom are regarded as matters for the Crown in the exercise of its prerogative powers."

66 *Miller* (UKSC), *supra* note 64, para. 69: "Although article 50 operates on the plane of international law, it is common ground that, because the EU Treaties apply as part of UK law, our domestic law will change as a result of the United Kingdom ceasing to be party to them, and rights enjoyed by UK residents granted through EU law will be affected."

67 *Ibid.*, para. 90.

The Supreme Court found that EU law is a "source of UK law."[68] The European Communities Act 1972 (*ECA 1972*) is not the only Act that gives effect to international instruments; in a dualist system such as the UK legislation is required to give legal effect to international treaties. The *ECA 1972* goes much further, however, since it authorises a process by which "EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes."[69] In this way the *ECA 1972* acts as a "conduit pipe"[70] between European and British legal systems. The Court acknowledges, therefore, that it is not just the *ECA 1972* that is unique, but also the EU legal order to which it is linked. Given the nature of EU law as an independent source of law, the British Government could not, through an act of royal prerogative, 'switch off' the effects of EU law by withdrawing from the EU Treaties.

Miller shows the divergent views about the nature of the EU and the EU legal order. The Court finds that the EU Treaties are not a form of ordinary international law. This contrasts with the approach of the British Government, whose starting point was that the EU Treaties remain instruments that produce effects on the *international plane* and are not a direct source of law in the UK. The dissenting judges in *Miller* also had a different conception of the EU and EU law. Lord Reed rejects the doctrine developed in *Van Gend en Loos*, stating that it "is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty."[71] To Lord Reed, EU law is not an independent source of law, but one that remains on the international plane, and is given effect via the *ECA 1972*.[72]

This is another example of how the legal result in a case can turn on the starting point taken. In *Miller*, the legal identity of the EU played an important role.[73] In a commentary on the Article 50 process, Eeckhout and Frantziou point out:

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68 *Ibid.*, para. 60.
69 *Ibid.*
70 *Ibid.*, 65.
71 *Miller* (UKSC), *supra* note 64, Dissenting Opinion of Lord Reed, para. 182.
72 *Ibid.*, para. 17. According to Lord Reed (dissenting), the *ECA 1972* "simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be."
73 As Elliott argues, the differing views in *Miller* illustrates "fundamentally different views about the constitutional status that EU law has (and will, until Brexit, continue to have) within the UK's legal system." M. Elliot, *Analysis: The Supreme Court's Judgment in Miller*, Public Law for Everyone, 25 January, 2017. <https://pu

> Article 50 raises important constitutional concerns not only for the withdrawing state – an issue that thrives in the UK blogosphere – but also from the perspective of the EU and its identity as a new legal order that creates rights and duties and safeguards them through accountable institutions, rather than being merely an international treaty signed by states.[74]

The legal arguments in *Miller* were focused on issues of UK constitutional law. Yet behind this dispute lies divergent views on the EU's legal identity. The *ECA 1972* is a statute of constitutional significance. However, this is not only because UK law decided that this would be the case, but also because the EU has evolved into a dynamic and independent source of law.

C. The EU as a Regional Economic Integration Organization (REIO)

The third model is that of the EU as a 'Regional Economic Integration Organization' (REIO). The two models discussed above – the EU as a 'new legal order' and the EU as a 'self-contained regime' – relate to the nature of the EU's internal legal order. They tell us little about how the EU is to relate with other subjects of international law, or where it fits within this wider international legal order. The REIO model seeks to address that question. This model accepts that the EU is unique in many ways but reiterates that it still belongs to the world of international organizations. This is perhaps the most common view among international lawyers: the EU is an international organization, albeit one with certain distinct features.

This conception of the EU is reflected in a number of international treaties which allow for participation of the EU. Only a small number of treaties specifically mention the EU as a party;[75] most allow for participation of 'regional economic integration organizations' (REIO), or alternatively (recognizing the EU's competence beyond economic matters) 're-

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bliclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/>.

74 *See* P. Eeckhout and E. Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading', UCL European Institute Working Paper, Dec. 2016, 42. Emphasis added.

75 For example, the EU (formerly European Communities) was a founding member of the WTO (Agreement Establishing the World Trade Organization, signed on 15 April 1994, 1867 UNTS 154).

gional integration organizations' (RIO).[76] The European External Action Service's Treaties Office Database shows that the EU is a party to 91 international agreements containing a REIO clause.[77] According to this model, the EU is first and foremost and international organization. While some may reject the description of the EU as an 'international organization', the EU has accepted the REIO label by joining international agreements and participating in international organizations via REIO clauses. On the one hand, the REIO model accepts that the EU is an international organization when it acts on the international plane. On the other hand, it also reflects the idea that such an organization is different from the classical form of intergovernmental organization, reflecting somewhat the EU's self-conception of a unique type of legal entity.

1. REIOs Before the International Law Commission

Is a REIO a distinct type of international organization for the purposes of international law? The EU has argued at the International Law Commission (ILC) that specialized rules should be developed with respect to REIOs.

The ILC has on many occasions been faced with questions regarding which rules of international law apply to subjects other than States. An early example of this can be found in the ILC's Waldock Report, referring to the EU in the context of succession of obligations of states. The question arose as to what type of entity the EU is according to international law. Waldock draws a sharp distinction between unions of States, which aim to create a new entity on the international plane (e.g. the UN or Council of Europe) and unions intended to create a new political entity on the plane of internal constitutional law (e.g. US, Switzerland or the former United

76 Art. 44, Convention on the Rights of Persons with Disabilities, UNTS (adopted 13 December 2006, entered into force 3 May 2008) GAOR 61st Session Supp 49 vol 1, 65: "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention."

77 European External Action Service (EEAS) Treaties Office Database, 'Ready Inventory of Agreements Containing the Regional and International Organisation Clause. http://ec.europa.eu/world/agreements/ClauseTreatiesPDFGeneratorAction.do?clauseID=30.

Arab Republic). The European Union, however, does not easily fit within either of these categories.[78]

The ILC's Study on the Fragmentation of International Law points out "the European Community […] is a subject of international law and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization."[79] The ILC has had to deal with the legal character of the EU in a number of codification projects. For example, when the ILC embarked on its project on the International Responsibility of International Organizations, it included the European Union in its work, implying that the EU is to be treated as an IO for the purposes of international law.[80] The evident problem with this approach is that it considers the EU alongside a host of different types of international organizations that share very few characteristics with the EU apart from the fact that they were established by an international treaty. The EU and some legal commentators questioned the usefulness of dealing with entities as diverse as the European Union, International Monetary Fund and World Meteorological Organization in one set of draft articles.[81] The European Commission, representing the Union, consistently argued that any draft articles must take into account the special nature of the EU legal order. Rather than frame this argument around the unique nature of the EU, however, the European Commission argued that the ILC should consider the EU as a REIO for which a different set of rules had developed.[82]

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78 EEC appears without any doubt to remain *on the plane of intergovernmental organisation*" Fifth Report 'On Succession in Respect to Treaties' (Special Rapporteur Sir Humphrey Waldock) 2 *Yearbook of the International Law Commission* (1972) 18. Emphasis added.

79 'Fragmentation of International Law', *supra* note 2, para. 219.

80 Draft Articles on the Responsibility of International Organizations with Commentaries, in Report of the International Law Commission, 63rd sess, Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10, at 52; GAOR, 66th Sess., Supp. No. 10 (2011).

81 See J. Klabbers, 'Self-control: International Organizations and the Quest for Accountability' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing 2013) 76: "surely, it will not do to have an identical regime for entities as disparate as the World Bank, the EU, and say, the European Forest Institute; hence to the extent that organisations welcome a general responsibility regime, they nonetheless feel that their situation is different."

82 The use of REIO clauses may also be significant in terms of developing customary international law. See J. Odermatt, 'The Development of Customary International

The academic literature on the international responsibility of the EU[83] is marked with the same set of divergent views as discussed in the introduction. International lawyers tend to discuss international organizations generally, and include the discussion of the EU in that analysis. According to this view, secondary rules of responsibility should be capable of applying to *all* international organizations irrespective of their particular type, including the EU. The other view in the literature (often written by EU lawyers or those working in the EU institutions) focuses on the EU itself, and discusses the particular issues arising from the nature of the EU and the EU legal order.[84] Much of this second strand of literature is inward-looking, focusing upon internal legal issues such as competences and mixity, rather than situating the EU among other international organizations. It is unsurprising that the latter strand of literature endorsed more EU-specific rules in the draft articles.

This cleavage in the academic literature could also be seen played out within the ILC. Of the many conceptual issues the ILC and the Special Rapporteur faced when developing the Draft Articles, one of the most perplexing was how to find a set of universally-applicable rules that could be applied to a highly diverse set of international bodies. The European Commission consistently argued that the draft articles had to take into account the unique nature of the Union, specifically its role as a REIO.[85] Indeed, the European Commission was sceptical about whether it would be possible or desirable to have rules applicable to all international organizations, given the high degree of diversity of international organizations that exist.[86] From the outset the European Commission highlighted the

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Law by International Organizations' *International and Comparative Law Quarterly*, Volume 66, Issue 2, pp. 491–511.

83 See e.g. A. Delgado Casteleiro, *The International Responsibility of the European Union From Competence to Normative Control* (Cambridge, Cambridge University Press, 2016); M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013).

84 P-J. Kuijper, E. Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking Out' in M. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 35. E. Paasivirta and P-J.Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169.

85 See Paasivirta & Kuijper, *supra* note 84.

86 "The European Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which

unique nature of the EU.[87] They comments build upon the idea of the EU as "a rather specific international organization."[88] The European Commission argued that, given this special nature, specialised rules were needed to take this into account in the draft articles. It was also argued that "concepts such as 'regional economic integration organization' have emerged in the drafting of multilateral treaties, which seem to reflect some of these special features."[89] For example, the European Commission argued that special rule of attribution should be included "so that responsibility could be attributed to the organization, even if organs of member states were the prime actors of a breach of an obligation borne by the organization."[90] Despite the arguments put forward by the European Commission, as well as much of the academic commentary, the ILC did not support the idea that any specialised rules of attribution had developed regarding the Union.[91] Rather than develop a set of rules applicable to REIOs only, the ILC chose instead to develop rules that applied equally to all international organizations, irrespective of their type or categorization. The ILC arguably did allow the diversity of international organizations to be taken into account through the inclusion of a *lex specialis* rule,[92] which sets out that general rules of responsibility may be supplemented by more specific ones. This

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the European Community is itself an example." International Law Commission, Sixtieth session Geneva, 5 May-6 June and 7 July-8 August 2007, Responsibility of International Organizations, Comments and Observations Received from International Organizations, 4.

87 Statement on behalf of the European Union, Professor G. Nesi, Legal Adviser of the Permanent Mission of Italy to the United Nations. Sixth Committee, Report of the International Law Commission Chapter IV, Responsibility of International Organizations Item 152, New York, 27 October (2003) <http://eu-un.europa.eu/articles/en/article_2940_en.htm>.

88 "The European Commission attaches great importance to the work of the International Law Commission, but necessarily looks at it from the perspective of a rather specific international organization." 'Comments and Observations received from International Organizations', Yearbook of the International Law Commission, Documents of the Fifty-Eighth Session (2006) 127.

89 'Comments and Observations received from International Organizations', Yearbook of the International Law Commission, Documents of the Fifty-Sixth Session (2004), 28.

90 Observations of Mr. Kuijper (Observer for the European Commission), Sixth Committee, Summary Record of its 21st Meeting, 18 November 2004, UN Doc. A/C.6/59/SR.21, para. 18.

91 G. Gaja, Special Rapporteur, International Law Commission, Second Report on Responsibility of International Organizations, 2 April 2004, UN Doc. A/CN.4/541, 5–8.

92 Art. 64 ARIO, *supra* note 80.

provision could potentially allow for the development of specialised rules in the context of the European Union.[93]

The REIO/RIO model of the EU accepts the EU as an international organization but implies that the EU possesses certain unique features that should be taken into account. However, as illustrated from the ILC's draft articles of responsibility of IOs, it is far from agreed upon what, precisely, these unique features are, and the extent to which they should be relevant for the purposes of identifying rules of international law.

D. The EU as a (Classic) International Organization

The final model is that of a classic intergovernmental organization. This view downplays the unique characteristics of the EU and the constitutional character of the EU Treaties. It accepts that the EU has certain unique features, but rejects that this sets it apart as a qualitatively different entity other international organizations or groups of states. Viewing the EU as 'just another' international organization may be conceptually appealing to many international lawyers who see the compartmentalisation of international organizations into discrete categories as a threat to the universal application of international law.[94]

The Classic IO model also dismisses arguments in favour of EU exceptionalism. It goes against the EU's self-perception as a 'new legal order'. Some describe the EU as an 'association of states'[95] which also tends to deny the characteristics of the EU as a distinct legal entity in its own right. In some instances, the EU is referred to as a 'bloc', which presents the EU

93 ARIO, *supra* note 80 (commentary) p. 100. But see J. d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union' in V. Kosta, N. Skoutaris, V. Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing, 2014) 75, 76.

94 A. Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law* 2, 315, 343.

95 M. Shaw, *International Law*, 7th edn (Cambridge University Press, 2014) 177 stating that "[t]he European Union is an association, of twenty eight states". The EU is presented in a section alongside the Commonwealth of Nations and the Commonwealth of Independent States (CIS). Likewise Triggs discusses the EU alongside ASEAN, the Arctic Council and the CIS and tells us that the "most well-recognised association of states is the European Union." G. D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 175.

as a group of like-minded countries, rather than an organization with its own personality and powers.

EU lawyers would reject such characterizations. As discussed above, even if the EU is technically founded on international law instruments, they would argue, treating the EU as an international organization is not helpful as an analytical tool. Yet they should be reminded that outside of the EU, the Union continues to be viewed in such a manner. We can see such a divergence of views in international forums where the EU Member States are in minority, such as at the United Nations General Assembly.[96] Here the EU is not viewed as a special or unique entity. It is viewed as an international organization or a political bloc. When the EU gained 'enhanced observer' status at the UN General Assembly in 2011, the UN Press Release described the Union as a 'bloc'.[97] Since the EU gained such observer status in the UN system, the Union has had difficulty asserting itself as an independent legal entity separate from its Member States. This, of course, is explained more by political than legal reasons – States that are not members of the EU may be sceptical or hostile to the idea of European states gaining greater power within multilateral bodies through separate membership of the EU. But this shows how the EU's own self-perception, that of a unique type of supranational organization, is not accepted universally, not least in many of the multilateral bodies where the EU seeks to enhance its participation and visibility.

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96 On the diplomatic saga involving the EU's efforts to upgrade its status at the UNGA, see E. Brewer, 'The Participation of the European Union in the Work of the United Nations: Evolving to Reflect the New Realities of Regional Organizations' (2012) *International Organizations Law Review* 181–225; G. De Baere, E. Paasivirta, 'Identity and Difference: The EU and the UN as Part of Each Other', in H. de Weale, J. Kuijpers (eds) *The European Union's Emerging International Identity: Views from the Global Arena* (Leiden, Martinus Nijhoff, 2013) 42; J. Wouters, J. Odermatt, T. Ramopoulos, 'The Status of the European Union at the United Nations General Assembly', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds), *The European Union in the World. Essays in Honour of Marc Maresceau* (Leiden, Martinus Nijhoff Publishers, 2014) 212–213.

97 United Nations, Press Release, 'General Assembly, in Recorded Vote, Adopts Resolution Granting European Union Right of Reply, Ability to Present Oral Amendments', 3 May 2011: "The European Union would be able to present oral proposals and amendments, which, however, would be put to a vote only at the request of a Member State. The bloc would have the ability to exercise the right of reply, restricted to one intervention per item."

III. Theorizing the EU's International Legal Character

The previous section outlined four views of the European Union that exist in the international and EU law. Using examples from recent legal practice, it showed that these views are not confined to academic literature. It showed howlegal outcomes are shaped, in part, by which model is taken as a starting point in a given circumstance. Moreover, the legal identity of the EU is shaped not only by the CJEU and the EU institutions, but also the judicial systems of the EU Member States, and at other levels, such as the International Law Commission or UN General Assembly. What are we to make of these diverging views? Which of these models is correct?

It is tempting for legal scholars to seek a single 'answer' to this question. The EU is not a subatomic particle that exists in multiple states or whose character depends on the observer. It is a legal entity. It enters into international agreements and appears before courts. In order to resolve some of the most complex legal issues – the responsibility of the EU, the legal fallout from Brexit, the EU's participation in multilateral fora, and so on – there should be a consistent understanding about what type of legal entity the EU is.

There is a tendency to argue that everything is relative and that the answer to this question will always be a matter of perspective and the standpoint of the observer.[98] In its 'Decision on Jurisdiction, Applicable Law and Liability' in *Electrabel SA v. The Republic of Hungary*, the arbitration tribunal was called upon to decide whether EU law should be considered international law, for purposes of defining the applicable law. The Tribunal noted the 'multiple nature' of EU law, stating that "EU law is a sui generis legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions."[99] The tribunal cites two academic articles to demonstrate that 'many scholars' accept that "EU law is international law because it is

98 L. Kirchmair 'The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law' (2012) 4 *Goettingen Journal of International Law* 677, 679. "Depending on its perspective – and not on a different standpoint of the observer – the ECJ applies a monistic doctrine relating to its Member States and a dualistic doctrine relating to international law, two completely diverging doctrines."

99 *Electrabel SA v. The Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability (2012), 4.117.

rooted in international treaties."[100] This reasoning feeds into the idea that the nature of the EU and EU law depends on the legal domain in question – national courts, EU courts, or international tribunals. It stresses that EU law can exist in multiple states.

The description of the EU legal order as "un ordre juridique interne d'origine internationale"[101] used by Advocate General Maduro in *Kadi I* seeks to capture the duality of the EU legal order, one with international law origins and dimensions, but with municipal, even constitutional, characteristics. Crawford and Koskenniemi also seek to capture the 'dual nature' of the EU legal order as one that is both international and domestic in nature.[102]This recognizes that the EU legal order has both an internal and external dimension. Which model we apply in a given case will depend on which dimension is being discussed. Gardiner captures this internal/external dichotomy in relation to the EU:

> In its internal aspect, that is viewing relations between the member states themselves, the Community is an organism for collective exercise of sovereignty in matters over which competence is transferred to the Community by treaty. In its external aspect, the Community functions as an international organization, entering into treaties in matters within its competences.[103]

In its *internal dimension*, the EU can be thought of as a constitutional legal order, one that regulates the rights and responsibilities of the EU Member States in their mutual relations. From this perspective, it makes sense to treat the EU as new legal order or self-contained regime. At the *external level*, when the EU participates on the international scene and mediates with other subjects of international law, these descriptions lose their value, and the EU is best treated as an international organization.

Such an approach might be conceptually appealing. It allows the CJEU and EU lawyers to continue with the 'new legal order' narrative, since this

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100 *Ibid.*, 4.120 and fn 7.

101 Opinion of the Advocate General Maduro in *P Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case C-402/05, EU:C:2008:11, para. 21. The original language of the Opinion is in English, which uses the more awkward phrase: "municipal legal order of trans-national dimensions."

102 J. Crawford and M. Koskenniemi, 'Introduction', in J. Crawford and M. Koskenniemi, (eds) *The Cambridge Companion to International Law* (Cambridge, Cambridge University Press, 2012) 12.

103 R. Gardiner, *Treaty Interpretation*, 2nd edn (Oxford, Oxford University Press, 2015) 129.

only applies in the internal sphere, while at the same time mollifies fears of some international lawyers that the EU is seeking special treatment or undermining the universality of the international legal order. However, it is unlikely that such a strict dichotomy can always work well in practice. Take, for instance, the legal dilemma that arose in *Opinion 2/13*. One could argue that the new legal order narrative was justified because the legal issue concerned the EU's internal legal order: whether a proposed accession agreement complies with EU law. However, this would ignore the fact that the case involved an external dimension too, since it dealt with the EU's interaction with other legal subjects and participation in another legal order (the ECHR system). By requiring the EU to obtain a high level of special treatment from the other ECHR contracting parties, the CJEU made it difficult for the EU to accede in practice. By viewing the dispute as one that involves the purely internal dimension, the Court overlooked the wider context of the dispute.[104] As was discussed above, one of the reasons that *Opinion 2/13* remains controversial is that involved a clash of two very different views of the EU and EU law. As the EU seeks to participate in the international legal order – through trade agreements, dispute settlement mechanisms, or via participation in international organizations and processes – it is likely that such clashes will arise in the future.

The relativistic approach – that the legal character of the EU depends on the legal domain in question – is also problematic in that it reduces legal certainty. For international law to work effectively, it must be possible for it to be applied consistently across different situations and to different subjects of international law.[105] The legal characterisations of the EU in any circumstance will often reflect deeper power relations. Where the EU is in a stronger position, it will be able to assert its 'new legal order' narrative. However, where it sits beside 193 members of the UN, it is less likely to dictate to others that it is unique and requires special treatment.

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104 J. Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU Law' in M. Cremona (ed), *Structural Principles in EU External Relations Law*, Hart Publishing (2017).

105 C. Eckes and R. A. Wessel, 'The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment' in T. Tridimas and R. Schütze (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford, Oxford University Press, 2015): "International law, however, only works when it is applied across the board for certain categories of international actors. Its rationale is to offer clarity and set the conditions for a smooth cooperation between different subjects."

If one applies this relativistic approach, legal outcomes will be shaped, in part, by these power dynamics. It is difficult, therefore, to develop a consistent conceptual model since legal arguments about the legal nature of the EU are closely entwined with political debates about the EU's place in the international legal order.

Is this really a problem? One might argue that the international legal character of the EU has, and always will be, the subject of contestation and debate, but this has rarely given rise to serious problems in practice. Academics and lawyers will continue to debate the nature of the EU in lengthy articles and at academic conferences, but the real world will move on. This article has argued, however, that such theoretical disagreements can have practical consequences. One should remember that the 'new legal order' narrative, while now accepted for the most part within the EU, was also subject to decades of debate and contestation. The debate today is no longer whether the EU is an autonomous legal order but whether this autonomy can be applied at the international level to the EU's relationships with third states and international organizations. The EU's self-perception continues to be challenged when it steps out into the world. It is unlikely that the EU will be successful in convincing third states that the EU is qualitatively different and requires international law to take into account this status. As the EU seeks to increase its interaction at the international level, and as one Member State seeks to extricate itself from the EU legal order, we are likely to see the question of the EU's legal character come up again.

Jed Odermatt

My iCourts experience

I became aware of iCourts during my PhD research on the European Union and international law. Writing about the EU Court of Justice, I was discussing whether it should be considered an international or domestic court. The research resulted in the article 'The Court of Justice of the European Union: International or Domestic Court?'[106] which discussed the definition of an 'international court'. A web search on the topic quickly brought me to the iCourts website. I saw that the Court of Justice of the European Union was included in iCourts' list of international courts.[107] This, I felt, corroborated my view that the EU Court should be considered an international court, or at least one with a dual character, possessing features of both an international and domestic court.

This concept of 'legal identity' continued to develop during my time at iCourts. I worked at iCourts when the UK Supreme Court delivered its judgment in *R (Miller) v Secretary of State for Exiting the European Union*, which addressed the question whether the UK government needed permission of Parliament to trigger Article 50 TEU, and starting the process of the UK's departure from the Union. In this judgment, I saw how the UK Supreme Court discussed the legal nature of EU law and the identity of the European Union. I had also been writing on the International Law Commission's (ILC) work on the Identification of Customary International Law. In a different legal setting, the ILC's work also touched upon the very question of whether the EU Court of Justice should be viewed as an international or domestic court.

The discussion of 'identity' has been the focus of some International Relations scholars.[108] It seeks to understand how actions can be shaped by the actor's self-understanding within wider social arrangements. Identity theory has also been applied in the context of international organizations

106 J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' 3 *Cambridge International Law Journal* (2014) 696.

107 iCourts Database of International Court Decisions <https://jura.ku.dk/icourts/research-resources/database/>.

108 See e.g. B. Bucher and U. Jasper, 'Revisiting 'identity' in International Relations: From Identity as Substance to Identifications in Action' (2016) *European Journal of International Relations* 1.

such as the EU.[109] Its actions can also be shaped by its self-perception. The EU has developed a set of beliefs and attitudes about itself: along with the new legal order narrative, the EU views itself as a body strongly dedicated to democracy, human rights, and the rule of law. Identity is further shaped, challenged, and given meaning by the perceptions of others.[110] The EU finds its self-perception challenged when it steps out into the world and engages other actors, each of which may have a different view of the EU. My first presentation at iCourts focused on this issue of 'legal identity' and resulted in the publication 'Unidentified Legal Object: Conceptualising the European Union in International Law', in *Connecticut Journal of International Law*. This article was influenced by the comments and feedback from the seminar.

These weekly presentations are one of the best academic initiatives of iCourts. I knew that each week, I could come to the 'iLab' and hear a talk by a colleague or visitor, touching upon topics as diverse as the resolution of territorial disputes by the ICJ, to judicial politics of the European Union, and there would be a lively and enriching discussion. After only a few of these talks, I began to realise that my iCourts colleagues tended to have their favourite types of questions and comments. 'But what's the point!?'; 'This reminds me of a situation in German law'; 'something something Bourdieu' emerged as some of the common refrains. I mentioned this to Mikael. I told him that his comment was usually some version of 'Isn't this all about power?'. I remember his immediate response: 'But it is!'.

Is it all about power? As a law student, discussions of power were often missing. The lasting effect of working at iCourts and the discussions I had with Mikael Rask Madsen, Marlene Wind, Achilles Skordas and others, was that we should openly discuss the role of power and the political context in which legal decisions are made. It is one thing for me to discuss the legal identity of the European Union and EU law. It is another to try to understand and reveal the reasons behind these diverging views, which are often explained, not by diverging legal interpretations, but by power

109 See S. Cho, 'An International Organization's Identity Crisis' (2014) 34 *Northwestern Journal of International Law & Business* 359, 379 using identity theory to understand the autonomy of international organizations over time. "An organizational identity is shaped by an IO's conscious interactions with the environment and guided by an organization's role expectation, as well as the expectations that the organization perceives from its environment (society)."

110 E. Elisabeth Johansson-Nogués, 'Is the EU's Foreign Policy Identity an Obstacle? The European Union, the Northern Dimension and the Union for the Mediterranean' (2009) 9 *European Political Economy Review* 24, 27.

relations. Professor Wind helped me to understand that academics (including me) are also affected by this. Academics, especially legal academics, can find themselves tied to a particular project, be it the European integration project or the constitutionalisation of international law, and their work should also be understood in this context.

Mnoindenty lasting memories of iCourts will be about the strong friendships I made and the close community we built.

The Uneven Impact of International Human Rights Law in Africa's Subregional Courts

Solomon Ebobrah[*]

1. Introduction

The active presence of international human rights law in the work of subregional courts in Africa is undeniable but the nature of its reception, deployment and consequent impact in the framework of each court varies significantly. The idea of regional integration in Africa is generally associated more with trade liberalisation and the integration of Africa's relatively small economies with the aim of enhancing economic growth and by extension, improving the standards of living of the peoples of Africa.[1] Consequently, the judicial organs of regional economic communities (RECs) in Africa are commonly established within their respective treaty frameworks for the purpose of interpreting and applying the constituent treaty and other legal instruments of the parent organisation.[2] However, unlike their counterpart in Europe on which they are arguably modelled, it is rather for their work in the field of judicial protection of human rights than in trade and economic integration that the best known judicial organs of

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1 See generally E. Aryeetey and A.D. Oduro, 'Regional Integration Efforts in Africa: An Overview', in J.J. Teunissen (ed), *Regionalism and the Global Economy: The Case of Africa* (The Hague: FONDAD, 1996), pp. 11–67.

2 Treaty for the Establishment of the East African Community (EAC Treaty), Arusha, 30 November 1999, in force 7 July 2000, Article 23, available at: www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf; Revised Economic Community of West African States Treaty (Revised ECOWAS Treaty), Cotonou, 24 July 1993, in force 23 August 1995, 2373 UNTS 233, Article 15, read together with ECOWAS Protocol A/P.I/7/91 on the Community Court of Justice, Abuja, 6 July 1991, in force, Article 9, available at: www.courtecowas.org/site2012/pdf_files/protocol.pdf.

these RECs, Africa's subregional courts,[3] have built a reputation.[4] Two of these subregional courts, the East African Court of Justice (EACJ) – the judicial organ of the East African Community (EAC) and the ECOWAS Community Court of Justice (ECCJ) – the judicial organ of the Economic Community of West African States (ECOWAS) – which are probably the most active of Africa's subregional courts have both increasingly become preferred *loci* for general[5] regional human rights adjudication in their respective subregions. They form the case study in this chapter.

In the course of building their respective reputations as courts with formidable albeit 'secondary' human rights jurisdictions, both the EACJ and the ECCJ may have had recourse to international human rights law beyond ways envisaged by the drafters of the treaties. This chapter analyses how international human rights law has shaped the work of subregional courts in Africa. I have adopted an analytical approach in the development this chapter. The objective is to show how each court has received and deployed international human rights law in a distinctive manner. In doing so, attention is also paid to how much of *peer learning*[6] from the mechanisms of international human rights law is evident in the jurisprudence of the EACJ and the ECCJ. A major claim in this chapter is that in ways probably unusual for courts of general jurisdiction[7] the courts under

3 There is at least one REC recognised by the African Union in each subregion in Africa. Thus, for convenience sake and partly to differentiate the courts of the RECs from the continental judicial body, the judicial organs of the RECs are generally referred to as 'subregional courts'. The term is adopted in this chapter.

4 See, for instance, James Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy', *Duke Journal of Comparative and International Law*, 24 (2013), 250, who takes the following view: '[T]he EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law.'

5 As will become clear in the course of this contribution, the subregional courts exercise their human rights jurisdiction over the entire scope of possible rights without any limitations of a functional basis.

6 I have deliberately preferred the term 'peer learning' to distinguish this phenomenon from the more common judicial dialogue because, in my opinion, thus far, the movement of learning is heavily one-sided.

7 As distinct from international courts specifically established for the purposes of human rights adjudication such as the African Court on Human and Peoples' Rights, the European Court of Human Rights or the Inter-American Court of Human Rights.

review have extended their own influence through human rights adjudication in which international human rights law has been robustly invoked. However, the chapter argues that the impact of international human rights law in the two courts has been uneven. Whereas the EACJ has maintained and expressed a willingness to apply international human rights law to enhance its interpretation of relevant provisions in the EAC Treaty, actual reference to that body of law is very negligible. On the other hand, the ECCJ's approach has been to engage in wholesale adoption of aspects of international human rights law in its substantive body of law in ways that would actually or potentially bypass national constitutional barriers to direct application of international human rights law in ECOWAS member States. I therefore conclude that whereas international human rights law has an independent impact on the practice of the ECCJ, it continues to have a dependent, almost parasitic impact on the human rights practice of the EACJ. After this introduction, I briefly present the nature of the human rights competence of the RECs and their courts before delving into an analytical account of the interaction between Africa's subregional courts and international human rights law. The concluding section summarises the main points addressed in the chapter.

2. *The Legitimising Role of Human Rights in International Relations: An African Anxiety?*

Why is international human rights law important in the framework of trade-oriented RECs and their judicial organs? Distinct from the RECs and their institutions such as the subregional courts, regional protection of human rights is communally pursued by African States on the platform of the African Union (AU) in what is known as the African human rights system (AHRS). The AHRS is, in a manner of speaking, as a self-contained human rights system complete with its own central normative instrument – the African Charter on Human and Peoples' Rights[8] (along with a host of other instruments founded on the Charter) and its own set of supervisory mechanisms including the Commission, the Court and the Committee of Experts on the rights of children.[9] Since all member States of the various

8 African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, in force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217.

9 For a comprehensive discussion of the African human rights system see F. Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford: Oxford University Press, 2012).

RECs are also member States of the AU, the AHRS already binds them to a transnational protection system through which potential victims of human rights violations can seek redress. This ought to allow the RECs to focus on the economic integration objectives for which they exist. Thus, there has to be some reason(s) why the RECs and their courts would also pay more than a passing attention to human rights.

One line of explanation (or perhaps, justification) that has been advanced is that human rights realisation under the RECs – what we may call Africa's subregional human rights regimes – are instrumental sprouts necessary for maintaining pacific domestic polities to enable economic integration to occur without disruption from domestic crises.[10] But this cannot be the only possible explanation. Another strong candidate as an explanation would be the search for legitimacy. At least two versions of the concept of legitimacy present themselves for consideration in this discourse. First is the kind of legitimacy that tilts towards national or domestic audiences. As Fritz Scharpf suggests, '[s]ocially shared legitimacy beliefs serve to create a sense of normative obligation that helps ensure voluntary compliance with undesired rules or decisions of governing authority'.[11] Citizens must perceive their government as legitimate in order for the government to enjoy voluntary compliance with its laws and policies. While this kind of legitimacy applies to the RECs in an indirect manner, it does not sufficiently explain why human rights must take centre stage in regional integration schemes.[12] A second perspective to legitimacy is that offered by Jack Donnelly when he opined that '[h]uman rights have become a (small) part of the post-Cold War calculus of polit-

10 This is especially true of the ECOWAS in West Africa which grappled with multiple civil wars and internal disturbances in the 1990s. See S.T. Ebobrah, 'The Role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small Strides in the Wrong Direction', in L. Hamalai *et al.* (eds), *40 Years of ECOWAS (1975–2015)* (Lagos: National Institute for Legislative Studies, 2014), Chapter 7; S.T. Ebobrah, 'The Role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small Strides in the Wrong Direction?', *iCourts Working Paper Series*, No. 27 (2015), 1–30, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621453.

11 F.W. Scharpf, 'Legitimacy in the Multilevel European Polity', *MPIfG Working Paper*, 09/1 (2009), p. 5, available at: https://pure.mpg.de/rest/items/item_1232320_3/component/file_1232318/content.

12 Since Fritz Scharpf agrees that international organisations do not necessarily demand direct compliance from citizens but rather from their States, this aspect of legitimacy is only relevant for assuring that litigants engage the services of the subregional courts. This is a small point I hope to develop a little more in this chapter.

ical legitimacy'.[13] In explaining how human rights have become a new part of the criteria for acceptance into the 'international society', Jack Donnelly cites Martin Wight to argue that 'collective recognition as part of international society […] appeals to "principles that prevail (or are at least proclaimed) within a majority of the states… as well as in the relations between them"'.[14] In plain language, if African States themselves and the international organisation(s) they create must receive recognition and acceptance in and by the rest of the international community, there has to be evidence that human rights are practised in the individual States or are proclaimed both in the legal framework of the States and in their relations *inter se*. If the proclamation under the auspices of the AU cannot be transferred to confer legitimacy on the RECs in their now separate – although connected – relationships, human rights had to feature in the treaties of the RECs to create eligibility for legitimacy. This is even more so as the collective commitment of European States to the European human rights system did not appear sufficient for the European Union (EU) to claim legitimacy. This is evident from the European Council's admission in its decision at its Cologne Summit that '[p]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy'.[15] In order to be serious candidates for recognition as legitimate members of the international community, the RECs in Africa simply had to make proclamations of commitment to human rights.

3. *Human Rights in the Mandates of the Subregional Courts*

The significance of the deployment of international human rights law in the practice of Africa's subregional courts cannot be fully appreciated without a basic understanding of the historical emergence of human rights in regional integration discourse in Africa. Either consciously or unwittingly,

13 J. Donnelly, 'Human Rights: A New Standard of Civilization?', *International Affairs*, 74 (1998), 20.

14 Donnelly, 'Human Rights', 1–2, citing M. Wight, *Systems of States* (Leicester: Leicester University Press, 1977), emphases omitted.

15 Annexes to the Presidency Conclusions, Cologne European Council, 3–4 June 1999, 150/99 REV 1, Annex IV, European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, p. 43, available at: www.consilium.europa.eu/media/21070/57886.pdf. See also A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review*, 37 (2000), 1307 (arguing, on this basis, in favour of a human rights charter for the EU).

African RECs may have mimicked European integration in which human rights were also recorded to have been a late normative addition to the integration framework.[16] The human rights experience in each of the RECs was, however, almost abrupt rather than the steady evolution reputed to have been provoked by the experience of national actors in Europe. The appearance of human rights in the work and language of subregional courts in Africa is a relatively recent development. In the first epoch of regional integration in Africa,[17] human rights hardly, if ever, featured in the negotiations and in the drafting of regional integration treaties.[18] Accordingly, the first generation treaties of RECs in Africa made little or no mention or reference to human rights. Whether this was an oversight or a deliberate strategy aimed at avoiding the complications of managing the sometimes conflicting relationship between trade and human rights, is unclear. It leaves room for speculation since at the time the treaties were being negotiated in various regions of Africa, the hazy structure of human rights protection in Europe spearheaded by the European Court of Justice was well-advanced yet was not copied by the RECs, even though other institutional structures were borrowed possibly from the EU.[19] However, by the 1990s when a so-called second wave of regionalisation hit Africa,[20] a significant shift that occurred was the inclusion of human rights

16 On the entry of human rights in the treaty framework of European integration see von Bogdandy, 'European Union as a Human Rights Organization?', 1307–38.

17 Efforts towards regional economic integration in Africa's subregions began soon after colonialism had ended on the continent. In the case of East Africa, the newly independent States of Kenya, Tanzania and Uganda picked up on and continued colonial efforts to integrate the three economies with the adoption of the original Treaty of the East African Community (EAC) in 1967. This attempt at integration in East Africa collapsed with the dissolution of the original EAC in 1977. In West Africa, attempts at integration began in the 1960s but only culminated in the adoption of the original Treaty of the Economic Community of West African States (ECOWAS) in 1975.

18 See Viljoen, 'International Human Rights Law in Africa', p. 482.

19 Former military leader of Nigeria and one of the founding founders of the ECOWAS, Yakubu Gowon alludes to the fact that the European Communities (and, to a smaller extent, the EAC which, in turn, borrowed from the EU) were major influences that guided the drafting and adoption of the ECOWAS, for instance. See Y. Gowon, 'The Economic Community of West Africa States: A Study in Political and Economic Integration', PhD thesis submitted to the University of Warwick (1984), pp. 102–3, available at: http://wrap.warwick.ac.uk/4397/1/WRAP_THESIS_Gowon_1984.pdf.

20 This second epoch is characterised by the revision of the Revised ECOWAS Treaty by States in West Africa and the revival of the EAC with the adoption of a new Treaty of the EAC in 1999 by the original three States of Kenya, Tanzania and

language in the treaties and constitutive documents of the revived RECs. The factors that triggered this sudden interest in including human rights in the integration treaties have not been fully explained, although some commentators attribute it *inter alia* to the momentum that the African regional human rights instrument – the African Charter on Human and Peoples' Rights – had gathered as a continental normative force.[21] Whatever the case may be, James Gathii, for instance, describes the development as 'a new form of rights-based legal mobilization that must be seen in the shifting normative context in which trade agreements include human rights in their preambles'.[22] In fact, the post-1990 treaties of the RECs in Africa did not only mention human rights in preambles, but went much further to include statements of commitment to human rights protection within operational parts of the treaties. However, in none of the treaties was the protection of human rights expressly included as a clear objective for integration in a manner that would warrant the classification of any of the RECs as a human rights organisation. Further, none of the RECs has adopted a treaty exclusively dedicated to the protection of human rights.[23] Consequently, despite the expression of institutionalised commitments to human rights values in this second epoch of integration, institutional protection of rights is not a primary function of the RECs or their judicial organs. Even more importantly for our present discourse, the references to human rights are relatively thin and non-committal in some sense, probably another impetus for the resort to international human rights law, as we shall soon find out.

3.1 Human Rights in the Treaty Framework of the East African Court of Justice

By its Article 5(1), the EAC Treaty declares the objectives of the Community to be 'to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and judicial

Uganda. These States have since been joined by Burundi, Rwanda and South Sudan bringing the number of partner States of the EAC to six.

21 See, for instance, Viljoen, 'International Human Rights Law in Africa', p. 483.

22 Gathii, 'Mission Creep or a Search for Relevance', 251.

23 Isolated provisions or groups of provisions expressly protecting rights or with implications for rights protection may, however, be found in some treaties, protocols and documents of some RECs.

affairs for their mutual benefit'.[24] Even though in two other paragraphs there are allusions to promoting sustainable use of the environment and ensuring protection of the environment as well as mainstreaming gender in all its endeavours, the EAC is hardly a human rights organisation. However, in fidelity to the trend of proclaiming, if not practicing, human rights to legitimise States and international organisations, the EAC Treaty makes clear allusions to human rights in a few Articles. For instance, Article 3 dealing with the consideration of applications from other States for admission as members of the EAC requires 'acceptance of the Community as set out in this Treaty' and more importantly 'adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice' as conditions for admission.[25] Article 6 titled 'Fundamental Principles of the Community' commits EAC partner States *inter alia* to 'the recognition, promotion and protection of human and peoples [sic] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.[26] Another provision worthy of mention is Article 7 titled 'Operational Principles of the Community' under which EAC member States 'undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.[27]

While drawing attention to the specific use of the phrase 'universally accepted' to qualify the human rights to be observed, one cannot also ignore the specific mention of the African Charter as a regional human rights instrument whose provisions EAC member States commit to observe. At the very least, these may well constitute the thin legal foundation upon which international human rights law enters into the juridical field in the EAC. As there is no dedicated institution within the EAC Community framework to coordinate the limited human rights aspects of the Treaty, the EACJ has since assumed responsibility for monitoring implementation of these human rights aspects in addition to other parts of the Treaty. The challenge is in the allocation of competence within the EAC Treaty, the main mandate of the EACJ is to 'ensure the adherence to law in the interpretation and application of and compliance with this Treaty'.[28] This mandate is further elaborated in Article 27 of the EAC Treaty which deals

24 EAC Treaty, Article 5(1).
25 *Ibid.*, Articles 3(3)(a), 3(3)(b).
26 *Ibid.*, Article 6(d).
27 *Ibid.*, Article 7(2).
28 *Ibid.*, Article 23(1).

with the jurisdiction of that Court. In its initial (current) jurisdiction, the EACJ is only authorised to exercise 'jurisdiction over the interpretation and application of this Treaty'.[29] The more interesting aspect is what may be termed the suspended jurisdiction which declares that the EACJ 'shall have such other original, appellate, human rights and other jurisdiction as will be determined by the [EAC] Council at a suitable subsequent date'.[30] It is in spite of this provision suspending a potential human rights jurisdiction at the legislative pleasure of the Council that the EACJ has boldly but creatively announced its presence in the field of regional human rights adjudication.[31] It is within the framework of its creative management of its jurisdiction to accommodate human rights that the invocation and deployment of international human rights law takes place.

3.2 Human Rights in the Treaty Framework of the Court of Justice of the Economic Community of West African State

Adopted before the EAC Treaty, the 1993 Revised ECOWAS Treaty was a clear departure from the 1975 original Treaty as far as human rights are concerned. It proclaims: 'The aims of the [ECOWAS] Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.'[32] The idea of human rights is completely absent in the objectives. However, in its Article 4 relating to 'Fundamental Principles', States parties 'affirm and declare their adherence to [certain] principles [including] recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of

29 *Ibid.*, Article 27(1). It comes with a proviso that the jurisdiction shall not cover matters reserved for organs of the member States.

30 *Ibid.*, Article 27(2). As of 14 January 2019, the protocol to confer the court with a human rights jurisdiction had still not materialised.

31 Accounts of the EACJ's bold decision in the pioneering case of *Katabazi et al.* v. *Secretary General of the East African Community and Attorney General of the Republic of Uganda*, 1 November 2007, AHRLR 119 (EAC 2007) abound in the literature. In this case, the EACJ famously declared that it will not abdicate its Treaty interpretation and application duty at the simple mention of human rights in the reference brought before it.

32 Revised ECOWAS Treaty, Article 3(1).

Human and Peoples' Rights'.[33] In Article 56(2) of the Revised ECOWAS Treaty, ECOWAS member States that are signatories to the African Charter on Human and Peoples' Rights and to a couple of other instruments 'agree to co-operate for the purpose of realising the objectives of these instruments'.[34] In Article 66 relating to 'The Press', the member States undertake to protect the rights of journalists.[35] Outside of the Treaty document itself, in ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance, ECOWAS member States declare: 'The rights set out in the African Charter on Human and People's [sic] Rights and *other international instruments* shall be guaranteed in each of the ECOWAS Member States.'[36]

In the absence of a dedicated mechanism for human rights supervision, the ECCJ has also become the institution confronted by disgruntled citizens seeking to ventilate their grievances of human rights violations. After a series of events discussed in the literature,[37] the ECOWAS member States adopted the Supplementary Protocol on the ECOWAS Court of Justice[38] which introduced far-reaching changes to the mandate of the ECCJ. From a human rights perspective, the grant of access to individuals for allegations of human rights violations and the grant of competence to the Court to receive complaints of human rights violations that occur within the territories of member States are perhaps the most outstanding.[39] An important feature of the human rights competence conferred on the ECCJ

33 *Ibid.*, Article 4(g).
34 *Ibid.*, Article 56(2).
35 *Ibid.*, Article 66(2)(c).
36 ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dakar, 21 December 2001, in force 20 February 2008, Article 1(h), emphasis added, available at www.internationaldemocracywatch.org/attachments/350_ECOWAS%20Protocol%20on%20Democracy%20and%20Good%20Governance.pdf. See also *ibid.*, Preamble.
37 S.T. Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice', *Journal of African Law*, 54 (2010), 1–25; K.J. Alter, L.R. Helfer and J.R. McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice', *American Journal of International Law*, 107 (2013), 737–79.
38 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English version of the Said Protocol, Accra, 19 January 2005, in force, available at: www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf.
39 See *ibid.*, Articles 3, 4 (amending Articles 9(4) and 10(d) of the Protocol on the Community Court of Justice).

was that no specific rights catalogue was attached to the mandate in spite of the knowledge that ECOWAS itself had no dedicated human rights instrument. It is against this background that the interaction between the ECCJ and international human rights should be understood. The ECCJ found itself with an expansive human rights mandate without a catalogue to supervise. Thus, in East Africa and West Africa, the proclamations of commitment to recognise, respect and protect human rights relevant for a claim to legitimacy before the international community have been squeezed into the treaties without any clear plan of action to actualise the rights proclaimed. This is where the subregional courts have stepped in to bring rhetoric in the form of the proclamations closer to practice. Against the expectation that 'the only means of securing compliance with human rights treaty obligations would be the machinery, if any, embodied in or attached to those treaties themselves',[40] Africa's subregional courts have positioned themselves to supervise implementation of various components of international human rights law within their respective areas of jurisdiction, with varying approaches and consequences.

4. *The Varying Application of International Human Rights Law by Africa's Subregional Courts*

From the discussion so far, it would have become clear that the RECs have raised some expectation that human rights would be protected within their respective frameworks. It is also clear that in the absence of an organ or institution dedicated to the monitoring and supervision of member States' compliance with the commitments made to recognise, promote and protect human rights, the subregional courts stand as the most likely institutions available to mediate the inevitable tension that arose as the gap between promised proclamation and actual practice increased and national courts are too handicapped by a variety of constitutional and other domestic legal obstacles to be able to provide succour. In the absence of their own human rights catalogues, it is to international human rights that litigants and the courts have turned in the their bid to translate proclamations of commitment to human rights into practice.

40 B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Yearbook of International Law*, 12 (1988–9), 84.

It must quickly be pointed out that unlike what happened in Europe where the human rights component was exercisable within the parameters of EU competence – either in the work of the EU organs and institutions or against member States in the course of implementing EU law, in both the EAC and ECOWAS, there was no such limitation of the scope of area over which human rights jurisdiction is exercisable. In the remainder of this section, I present a sample of cases (by no means exhaustive) in which international human rights law has been presented in claims before both the EACJ and the ECCJ, their respective reactions to the presentations and the ultimate resolution of the case highlighting the manner each court reacted to and deployed international human rights.

4.1 International Human Rights in the Practice of the EACJ

The first point to recall as we open the analysis in this section is that the EACJ still does not have a clear mandate to exercise competence over human rights claims. The effect of Article 27(2) of the EAC Treaty continues to stand as an obstacle against a full-blown exercise of jurisdiction. As a shortcut, the Court has adopted the wisdom of one of its former judges to claim that there is an 'inchoate' human rights jurisdiction in the EAC Treaty framework.[41] With this in mind, coupled with the EACJ's own jurisprudence beginning with the *Katabazi* case where the Court announced that 'it will not abdicate from exercising its jurisdiction of interpretation […] merely because the reference includes allegation of human rights violation',[42] the EACJ is a cautious but activist adjudicator willing to push the boundaries of its jurisdiction to accommodate what it probably considers to be deserving cases of human rights violations. Although it often passes as a hesitant adjudicator when it comes to claims of human rights violations, encouraging litigants to frame their claims on other less controversial Treaty-based causes of action such as alleged violations of the principles of the rule of law, the EACJ does apply regional international law in the form of the African Charter on Human and Peoples' Rights and even snippets of global international human rights law in its practice.

41 J. Ogoola, 'Where Treaty Law Meets Constitutional Law: National Constitutions in the Light of the EAC Treaty', in J. Döveling, K. Gastorn and U. Wanitzek (eds), *Constitutional Reform Processes and Integration in East Africa* (Dar es Salaam: Dar es Salaam University Press, 2013), pp. 49–64.

42 *Katabazi et al.* v. *Secretary General of the East African Community and Attorney General of the Republic of Uganda*, p. 16.

This happens in a constitutional format to evaluate national legislation and executive acts and inactions but rarely, if ever, does the EACJ review judicial action.

Faced with a claim in the case of *Plaxeda Rugumba* v. *The Secretary General of the East African Community and Attorney General of the Republic of Rwanda*,[43] in which the applicant challenged the legality of the arrest and continued detention of her brother, a Rwandan military officer detained by Rwandan authorities, the EACJ (First Instance Division) quickly affirmed that there was no debate as to whether the Court had jurisdiction over a human rights claim. The Court agreed that it had no human rights jurisdiction. However, it convinced itself that it was merely interpreting the EAC Treaty to ascertain if the actions of Rwanda were in violation of the EAC Treaty. In order to make this evaluation of State action against Treaty requirement, the EACJ found itself drawing on regional human rights normative framework in the form of the African Charter.[44] The EACJ then took pains to rationalise that '[t]he invocation of the provisions of the African Charter on Human and Peoples [sic] Rights was not merely decorative of the Treaty but was meant to bind Partner States'.[45] Effectively, while it sought to show a violation of Articles 6(d) and 7(2) of the EAC Treaty, particularly their references to the concepts of good governance and the rule of law, it could not avoid the ambit of human rights as provided for in the African Charter. It has to be noted that the impugned action of the Rwandan State had nothing to do with the economic integration process. It was strictly a matter arising from the domestic relations of the parties – how Rwanda, a State party to the EAC, treats its citizen within its national territory. The EACJ assumed the position of a general protector of human rights. Thus, in this instance, the EACJ received and deployed the African Charter's international (regional) human rights law to review the actions of a partner State as a domestic constitutional court would do. The Court then came to a conclusion and declared that Rwanda was in violation of the EAC Treaty by its failure to protect rights guaranteed in the African Charter.

The hesitant approach of the First Instance Division of the EACJ contrasts sharply with the position of the Appellate Division in cases in which international human rights law is raised. Initially, the Appellate Division

43 *Plaxeda Rugumba* v. *Secretary General of the East African Community and Attorney General of the Republic of Rwanda*, EACJ, Ref. No. 8 of 2010, Judgment, 30 November 2011.

44 See *ibid.*, para. 37.

45 *Ibid.*

was also quite defensive in its adjudication of human rights claims and by extension, its application of international human rights law. This comes out for example, in the appeal brought by the Attorney General of Rwanda in the same *Plaxeda Rugumba* case.[46] First admitting that '[i]t is trite that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27(2)', the Appellate Division concluded that '[i]t must follow […] that the Court may not, as of now, adjudicate disputes concerning violations of human rights *per se*'.[47] Yet, almost in the same breath, the Appellate Division stressed that '[t]hough the EAC Treaty is bereft of a chapter on Human Rights, nonetheless, it contains the hint of such rights in a number of its provisions'.[48] Citing former Judge James Ogoola, it referred to those as 'a layer of inchoate human rights in the Treaty'.[49] The difficulty in the Court's position is that it is doubtful if the so-called layer of inchoate human rights could sustain a legal claim for human rights on their own in pretty much the way issues arise with respect to the non-self-executing treaties principle in the United States legal system. To avoid expressly confronting the political authorities of the EAC in relation to its exercise of human rights jurisdiction, the Appellate Division of the EACJ has to explain that the EACJ looks for 'a cause of action flowing from the Treaty (that is different and distinct from violations of human rights) on which to peg the Court's jurisdiction… [and which provides] the legal linkage and basis for the Court's jurisdiction… separate and distinct from human right's [sic] violations'.[50] Taking advantage of the collective proclamation to protect rights in the Treaty but hindered by Article 27(2) of the EAC Treaty which denies it jurisdiction over human rights, the EACJ captures infringement of the EAC Treaty as the cause of action but subtly employs international human rights law to support the human rights nature of the infringement with little or no elaboration of the scope of the right(s) violated.

In the case of *Mohochi* v. *Attorney General of Uganda*,[51] the EACJ's struggle with the adjudication of international human rights comes out even

46 *Attorney General of the Republic of Rwanda* v. *Plaxeda Rugumba*, EACJ, Appeal No. 1 of 2012, Judgment, 21 June 2012.
47 *Ibid.*, para. 23.
48 *Ibid.*, para. 24.
49 *Ibid.*, para. 24, emphases omitted.
50 *Ibid.*, para. 24.
51 *Mohochi* v. *Attorney General of the Republic of Uganda*, EACJ, Ref. No. 5 of 2011, Judgment, 17 May 2013.

clearer. In this matter, a Kenyan lawyer who was part of a delegation of lawyers to the Chief Justice of Uganda was arrested, denied entry and deported to Kenya. The claim before the EACJ was that the actions of the Ugandan immigration authorities and the national law on which those actions were based were in conflict with and violated Uganda's obligations within the EAC Treaty framework, particularly Articles 6(d) and 7(2). In its defence, lawyers for Uganda proposed that Article 6(d) of the EAC Treaty 'consists of aspirations and broad policy provisions […] which are futuristic and progressive'.[52] It was in several ways a variation of the non-self-executory argument. The EACJ's response was to declare that 'the Treaty is neither a Human Rights Convention or [sic] a Human Rights Treaty as understood in international law'.[53] The Court went further to even declare that it was not aware of any areas in the EAC Treaty that could be referred to as human rights provisions.[54] Arguably, the Court in this case was resisting the terminology of human rights completely in order to rescue its claim to jurisdiction to interpret the Treaty. In fact, the EACJ stated categorically that 'it is not violations of human rights […] of the international community that is the cause of action'.[55] International human rights law had to be sacrificed for the Court to rescue its claim to jurisdiction.

The EACJ's internal dialectic on the status of international law in its practice probably came to the fore in the case of the *Democratic Party* v. *Secretary General of the East African Community et al.*.[56] The action was brought by a political party to force EAC partner States to perform certain obligations under the African Charter. It, therefore, was not exactly a claim for substantive rights of a litigant. In its judgement on the matter, the First Instance Division went on the defensive when it explained that the African Charter was applied in the 'specific [violation] of Article 6(d) of the Treaty and not the Charter per se'.[57] The First Instance Division of the EACJ would not be caught applying international human rights law, not even regional human rights law if that would amount to forcing jurisdiction on itself contrary to Article 27(2) of the EAC Treaty, notwithstanding the proclamation of commitment to universally acceptable human rights.

52 *Ibid.*, para. 19(ii).
53 *Ibid.*, para. 28.
54 *Ibid.*, para. 29.
55 *Ibid.*, para. 32.
56 *Democratic Party* v. *Secretary General of the East African Community et al.*, EACJ, Ref. No. 2 of 2012, Judgment, 29 November 2013.
57 *Ibid.*, para. 34.

In fact, the First Instance Division went even further to assert that 'this Court [cannot] properly delve into obligations created on the Respondents by other international instruments'.[58] This division of the EACJ was unwilling to stake out its head in pursuit of competence over international human rights law. It was loyal to its boundaries as spelt out in the EAC Treaty.

Before the Appellate Division, it became a different ball game altogether. The Appellate Division stated emphatically that the allusion to the African Charter in Article 6(d) of the EAC Treaty 'creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter [and that] [f]ailure to do so constitutes an infringement of the Treaty'.[59] It was almost as if without mentioning it, the Court invoked the good faith principle expressed in the Vienna Convention on the Law of Treaties. On the basis of its finding of an international human rights law obligation under the African Charter in the context of the EAC Treaty, the Appellate Division then proceeded to claim jurisdiction over international human rights law. It said: 'Articles 6(d) and 7(2) of the Treaty empower the East African Court of Justice to apply the provisions of the Charter […] as well as any other relevant international instrument to ensure the Partner States' observance of the […] Treaty, as well as those of other international instruments to which the Treaty makes reference'.[60] In other words, gradually, the EACJ put forward itself as capable of holding EAC partner States to account for their commitment to international human rights law even within their various domestic systems and even if their EAC proclamation might have been a façade to attract international legitimacy. Further, the Court asserts that mere mention of an international human rights instrument in the EAC Treaty framework was sufficient to confer jurisdiction. It would be noted, however, that apart from the African Charter, no other instrument receives such express reference, begging the question whether 'universally acceptable' human rights standards is a blanket reference to all international human rights instruments.

Perhaps, realising that it might have pushed the boundaries too far in favour of a competence to apply international human rights law, the Appellate Division of the EACJ seemed to pull the brake when it said in

58 *Ibid.*, para. 55.

59 *Democratic Party* v. *Secretary General of the East African Community et al.*, EACJ, Appeal No. 1 of 2014, Judgment, 28 July 2015, para. 64.

60 *Ibid.*, para. 69, emphasis omitted.

the same case that 'nothing can preclude the [EACJ] from referring to the relevant provisions of the Charter, its Protocol […] in order to interpret the Treaty'.[61] After departing in no small measure from the First Instance Division on the status of international human rights law in the practice of the EACJ, the Appellate Division then took a shortcut to realign with the First Instance Division when it said the EACJ can interpret the African Charter in the context of the EAC Treaty.[62]

So far, the story tells us that international human rights law is not excluded from the practice of the EACJ. However, that body of law is only invokable on the condition that it enjoys reference in the EAC Treaty, it is applied in the context of Treaty interpretation and invoked as an independent source of substantive rights. Two small points to be made are that Articles 6(d) and 7(2) of the EAC Treaty appear to serve the dual legitimacy attraction purpose. Towards the international community, the EAC partner States proclaim that they also respect or at least intend to respect and protect universally acceptable human rights. Towards their respective national audiences, the same provisions also seem to make the same statement. Yet, it is the EACJ, not the States that appear eager to bring proclamation to practice. While the EACJ seeks to drag and compel the transformation of proclamation into practice amidst the jurisdictional restraints imposed by the EAC Treaty, neither the Court nor its users have ventured much beyond the African Charter in the deployment of international human rights law in the EAC framework. Accordingly, despite the slight similarity of the language used to import international human rights law in both the EAC Treaty and the ECOWAS Treaty, the impact of international human rights law in the EAC is all but non-existent.

4.2 International Human Rights in the Practice of the ECCJ

International human rights law is the favourite adopted child of the ECCJ. A proper point to start the analysis of international law in the practice of the ECCJ is the story of the Court's refusal to assume and exercise jurisdiction in the case of *Afolabi Olajide* v. *Nigeria*.[63] Faced with a claim by an individual against his own State alleging a violation of provisions of

61 *Ibid.*, para. 71.
62 *Ibid.*, para. 73.
63 See generally Alter, Helfer and McAllister, 'A New International Human Rights Court for West Africa'.

the Revised ECOWAS Treaty and the African Charter, the ECCJ declined jurisdiction on the grounds that the ECOWAS Protocol establishing the ECCJ did not grant access to the Court to individuals. As the story goes, a number of events took place and, with the Court itself leading the charge while collaborating with civil society, ECOWAS heads of State and government were forced to adopt a Supplementary Protocol in 2005. Significant for present purposes is the fact that the 2005 Supplementary Protocol of the ECCJ opened access to individuals and conferred a somewhat imprecise but definite competence on the Court to receive and determine cases alleging the violation of human rights in the territories of ECOWAS member States.[64]

Notwithstanding the fact that ECOWAS, like the EAC, is not a human rights organisation and does not have its own human rights instrument, the 2005 Supplementary Protocol was silent on the source of human rights law to be applied by the ECCJ. Undeterred by any such institutional lacuna, litigants approached the ECCJ to claim remedies for alleged violations of human rights, invoking a mix of international human rights law sources.[65] Litigants generally did not motivate for or justify the rationale for invoking any international human rights law instrument beyond relying on the competence conferred on the ECCJ to entertain claims of human rights violations. For instance, in *Essien* v. *the Gambia*, the plaintiff sought '[a] declaration that the action and conduct of the Republic of the Gambia […] violated […] the African Charter on Human and Peoples' Rights and […] the Universal Declaration of Human Rights'.[66] The member States of ECOWAS did not object or oppose the invocation of these instruments beyond complaining that local remedies had not been exhausted prior to commencement of action as required by the African Charter.

In the absence of contestation by the member States, it was the ECCJ itself which used the opportunities of addressing the question of its competence to engage its basis for receiving claims based on international human

64 See Supplementary Protocol A/SP.1/01/05, Articles 3, 4 (amending Articles 9(4) and 10(d) of the Protocol on the Community Court of Justice).

65 For instance, in the case of *Essien* v. *Republic of the Gambia and University of the Gambia*, ECCJ, Ruling, 14 March 2007, ECW/CCJ/APP/05/05 (2007), the applicant invoked the African Charter and the Universal Declaration of Human Rights.

66 *Ibid.*, para. 1(b). See also *ibid.*, para. 10.

rights law.[67] In the *Essien* case, after making reference to the fact that the African Charter is mentioned in Article 4(g) of the Revised ECOWAS Treaty, the ECCJ without much ado or further reflection resolved that the critical question was whether 'the rights being claimed by the plaintiff [are] fundamental human rights guaranteed by the African Charter on Human and Peoples' Rights and the […] Universal Declaration [of Human Rights]'.[68] In these few words, the ECCJ claimed competence over international human rights instruments, even though it did not indicate from where the competence to apply the Universal Declaration of Human Rights (UDHR) as a body of positive normative obligation on ECOWAS States arose. In *Ugokwe*, it was in response to a challenge of non-exhaustion of local remedies that the ECCJ again went to town to elaborate the basis of its application of international human rights law. The Court stated that '[i]n articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of article 4 paragraph (g) of the Treaty of the Community, the Member States […] are enjoined to adhere to the principles including "the recognition, promotion and protection of human and peoples [sic] rights in accordance with the […] African Charter […]"'.[69] Like the EACJ, this Court has resorted to the statements of fundamental principles in the Treaty to found a link to international human rights law. The ECCJ then went further to assert that '[e]ven though there is no cataloguing of the rights that the individuals and citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court […] to bring in the application of those rights catalogued in the African Charter'.[70] In this one paragraph, the ECCJ moved from advancing a right of litigants to base claims on international human rights to asserting its own competence to apply that body of law, loosely relying on its authority to apply the sources of law set forth in Article 38 of the Statute of the International Court of

67 In a later set of cases brought by the NGO SERAP against Nigeria, the respondent State began to challenge the competence of the ECCJ over international instruments and argued that the Court could only adjudicate cases regarding the ECOWAS treaties. See *SERAP* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/18/12, 14 December 2012, para. 24.

68 See *Essien* v. *Republic of the Gambia and University of the Gambia*, para. 10.

69 *Ugokwe* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/APP/02/05, 7 October 2005, para. 29.

70 *Ibid.*

Justice.[71] However, in the later *SERAP (Environment)* case, the Court gave the hint of a rationale when it said it could apply international human rights instruments because ECOWAS States have 'renewed their allegiance to the said texts, within the framework of ECOWAS'.[72]. By 2007 when it heard the famous *Hadijatou Mani Koraou* case,[73] it had already been settled in ECOWAS law that by Article 4(g) of the Revised ECOWAS Treaty, the African Charter was the preferred source for human rights claims before the ECCJ but any other international human rights instrument was also welcome. The Court merely added that the reference to Article 4(g) permitted the application of the substantive parts of the African Charter but did not require insistence on the procedural aspects such as exhaustion of local remedies. By the time it decided the *SERAP (Environment)* case, the Court was bold to assert that 'the Court's human rights protection mandate is exercised with regard to all the international instruments'.[74] As far as the ECCJ was concerned, it was a new mechanism to protect human rights in all instruments to which ECOWAS States were signatories.[75]

In summary, encouraged by the ECCJ's uncritical reception of claims based on international human rights law, litigants before the Court increasingly invoked all available international human rights instruments. Thus, by a combination of emboldened litigant use of these instruments, favourable pronouncements by the Court and member States' subtle acquiescence, international law has become established as part of primary Community law that the ECCJ is authorised to apply. Consequently, in addition to the African Charter which occupies the pride of place,[76] instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the Convention against all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR); and

71 ECOWAS Protocol A/P.I/7/91 on the Community Court of Justice, Article 19(1).
72 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 29, emphases omitted.
73 *Hadijatou Mani Koraou* c. *La République du Niger*, La Cour de Justice de la Communauté économique des États de l'Afrique de l'Ouest, l'Arrêt, ECW/CCJ/JUD/06/08, 27 octobre 2008.
74 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 28.
75 *Ibid.*, para. 29.
76 In *Jallow and Scattred* v. *Republic of the Gambia*, ECCJ, Judgment, ECW/CCJ/JUD/06/17, 10 October 2017, p. 10, the ECCJ declared that the African Charter is the main source of human rights in the Community framework.

the UDHR have all founded human rights claims before the ECCJ. Like the EACJ regime, the claims before this Court have nothing to do with the economic integration process. Rather, allegations of violations arising from all aspects of civil life are acceptable candidates for adjudication. While in relation to treaties, the ECCJ's practice suggests that the condition for application is that the respondent State ought to have ratified the treaty in question,[77] the Court sets no conditions of any sort for its application of the UDHR. This raises the question whether the ECCJ applies the UDHR as customary international human rights law, a matter on which the Revised ECOWAS Treaty is silent. This is even more problematic as the status of the UDHR as codification of customary international human rights law is still being debated. Although, as far back as 1965, the late Judge Humphrey Waldock had already taken the view that the UDHR was a part of customary international law,[78] not everyone was convinced that all of the UDHR provisions constituted customary international law even at the turn of the century.[79] In the face of such uncertainty, the absolute deployment of the UDHR by the ECCJ to found obligations on ECOWAS member States might require deeper rationalisation and justification. Overall, it is indisputable that the ECCJ has embraced international human rights law to a degree that exceeds other comparable international courts of general jurisdiction and has in fact positioned itself as an alternative enforcement mechanism to the internal mechanisms established in the various human rights treaties.

Having established the comprehensive acceptance of international human rights law in the ECOWAS judicial framework, the remainder of this section examines some of the ways in which the ECCJ has deployed this body of law in its work. I shall only focus on the Court's use of international human rights law to expand *ratione personae*, to override domestic constitutional and legal obstacles to human rights adjudication and to strengthen or justify its decisions.

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77 See, for instance, the *SERAP (Environment)* case in which the Court indicated that the reason why the international instruments were applied was because ECOWAS member States were signatories to those instruments. *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 29.

78 H. Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', *International and Contemporary Law Quarterly Supplementary Publication*, 11 (1965), 15.

79 See, for instance, R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', *Georgia Journal of International and Comparative Law*, 25 (1996), 1 *et seq*.

4.2.1 Expanding ratione personae

Article 10 of the Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol, which grants access to the ECCJ to individuals is couched in language that suggests a victim requirement for bringing human rights cases.[80] In its jurisprudence, the Court has consistently maintained that only direct victims of a violation who can show concrete harm are eligible to bring cases before the Court.[81] A consequence of this provision is that indigent and other similarly disempowered victims of alleged human rights violations would be unable to approach the Court for relief. In order to escape this restriction of access, the ECCJ has had to rely on international law to invoke the concept of *actio popularis* to allow NGOs to represent victims of alleged human rights violations. In *SERAP* v. *Nigeria*, the ECCJ justified its decision to grant an NGO access to bring an action on behalf of the people of the Niger Delta in Nigeria. The Court said '[t]here is a large consensus in International Law that when the issue at stake is the violation of rights of entire communities, […] the access to justice should be facilitated'.[82] Relying on Article 2(5) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the Court stated that even though it was not an instrument binding on African States, 'its importance, as a persuasive evidence of an international communis opinion [sic] juris in allowing NGOs to access the Courts for protection of Human Rights related to the environment, cannot be ignored or underestimated by this court'.[83] The Court then went on to find support in the American Convention on Human Rights, the Rules of Court of the African Court on Human and Peoples' Rights and the jurisprudence of the African Commission on Human and Peoples' Rights.[84] On the basis of 'those authorities, and […] [on] the need to reinforced [sic] the access to

80 Supplementary Protocol A/SP.1/01/05, Article 4 (amending Article 10(d) of the Protocol on the Community Court of Justice which grants access to '[i]ndividuals on application for relief for violation of their human rights').

81 See, for instance, *Hassan* v. *Governor of Gombe State et al.*, ECCJ, Ruling, ECW/CCJ/RUL/07/12, 15 March 2012, paras. 46–7 where the Court emphasised the victim requirement. See also *Osaghae et al*. v. *Republic of Nigeria*,ECCJ, Judgment, ECW/CCJ/JUD/03/17, 10 October 2017, pp. 16, 17, 19, 26, 29.

82 *SERAP* v. *Federal Republic of Nigeria and ORS*, ECCJ, Ruling, ECW/CCJ/APP/07/10, 10 December 2010, para. 56.

83 *Ibid.*, paras. 57–8.

84 *Ibid.*, paras. 59–61 (calling the Rules of Court as 'the Rules of Procedure of African Court of Justice and Human Rights').

justice for the protection of human and people [sic] rights in the African context', the Court held that the NGO SERAP could bring the action.[85]

It has to be noted, however, that the ECCJ also relied on international human rights law to deny the right to bring actions in a representative capacity.[86] Nevertheless, it was also to international human rights law that the Court turned to when it hinted that in cases of 'serious or massive violations pursuant to article 58 of the African Charter', it would be willing to allow an action to be brought on grounds of *actio popularis*.[87]

4.2.2 Overriding Domestic Obstacles to Human Rights Adjudication

In a number of cases brought before the ECCJ, especially against Nigeria, preliminary objections based on domestic constitutional or other legal restrictions have been raised. The *SERAP (Environment)* case presents the best example. Challenging the jurisdiction of the ECCJ in that case, Nigeria raised two main arguments. First, it argued that its Constitution only recognises the authority of its domestic courts to examine allegations of violations of rights guaranteed in the ICCPR.[88] Secondly, it argued that the rights contained in the ICESCR are not justiciable rights.[89] In other

85 *Ibid.*, para. 61.

86 See, for instance, *Osaghae et al*. v. *Republic of Nigeria*, pp. 17–18, where the Court relied on decisions of the UN Human Rights Committee to define the victim requirement and limit the scope of *actio popularis*.

87 See *ibid.*, p. 17.

88 This is probably a shorthand version of the constitutional position. By Section 12 of the 1999 Constitution of Nigeria, international treaties do not have domestic legal consequence unless a national law is enacted to domesticate the treaty. In the case of the ICCPR, Chapter IV of the Constitution captures a number of rights guaranteed by that instrument and confers jurisdiction on domestic courts to hear cases alleging a violation of fundamental rights. See Constitution of the Federal Republic of Nigeria, (Promulgation) Decree No. 24 of 1999, Official Gazette, Extraordinary, 5 May 1999, Vol. 86, No. 27, pp. A855–1104, with Amendments through 2011, available at: www.constituteproject.org/constitution/Nigeria_2011.pdf?lang=en.

89 See *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 24. This is also a twofold objection. First, there is the objection based on the popular position in the Nigerian legal system that economic, social and cultural rights are not justiciable in Nigerian courts because these rights are contained in Chapter II of the Constitution relating to Directive Principles of State Policy. Secondly, it was argued that the ICESCR itself does not provide that the rights contained therein are justiciable.

words, the basis for challenging the jurisdiction of the ECCJ was incompatibility with Nigerian constitutional law. The ECCJ's response was, first of all, to point out that the basis of its jurisdiction was ECOWAS law rather than the constitutional law of its member States.[90] The Court then went on to assert as follows: '[O]nce the concerned right […] is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.'[91] This was clearly a restatement of the accepted position of international law, including the VCLT, that a State cannot rely on its national law to avoid its international obligations. The ECCJ then went further to specifically cite Article 5(2) of the ICESCR to conclude that 'invoking lack of justiciability of the concerned right, to justify non accountability [sic] before this Court, is completely baseless'.[92] On this basis of reliance on international human rights law, the Court's conclusion was that 'it has jurisdiction to examine matters in which applicants invoke [the] ICCPR and [the] ICESCR'.[93] As far as international human rights law permitted, the ECCJ would not be denied jurisdiction by the restrictions of any national law.

4.2.3 International Human Rights Law as Justification for ECCJ Decisions

As a relatively young court, the ECCJ has not generated a vast body of its own jurisprudence. It is also still growing its authority in the field of human rights. Accordingly, the Court has had to rely on the jurisprudence of more established international human rights bodies to justify or support some of its decisions. The cases of *Udoh* v. *Nigeria*[94] and *Obi* v. *Nigeria*[95] provide examples in this regard. In *Udoh*, the Court had to deal with the question whether the arrest and detention of the applicant was lawful. Coming to its own conclusion that 'there is no factual evidence of reasonable grounds or legal provision upon which the arrest and detention are based',[96] the Court resorted to international human rights law to clarify the concept of reasonable detention. It invoked the views of the

90 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 26.
91 *Ibid.*, para. 36.
92 *Ibid.*, para. 38.
93 *Ibid.*, para. 40.
94 *Udoh* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/26/16.
95 *Obi* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/27/16.
96 *Udoh* v. *Federal Republic of Nigeria*, p. 18.

UN Human Rights Committee in the case of *Mukong* v. *Cameroon*[97] and the judgment of the Inter-American Court of Human Rights in the case of *Castillo-Páez* v. *Peru*.[98] In *Obi*, the ECCJ's application of international human rights law was to justify its decision to reject the view that the prohibition of the death penalty would be absolute. The Court held: 'As for the thesis according to which the death sentence is contrary to the right to life as envisaged by international conventions, it is simply refuted by case law of comparable international courts, particularly the European Court of Human Rights […] and the Inter-American Court of Human Rights.'[99] International human rights law is not only a source of rights before the ECCJ, but also the body of law the Court applies to justify its decisions.

5. Conclusion

The change in the trajectory of Africa's subregional courts occasioned by their entry into the field of regional human rights protection is undeniable. While this has occurred in part by reason of the willingness of the member States to the RECs to introduce the concept of human rights in the respective, treaties, the Courts themselves have to take the credit for their emergence as formidable *loci* for human rights protection. While the member States were responsible for proclaiming their commitment to recognition and respect for human rights, possibly as a ticket to claim individual and collective legitimacy before the international community, it is the courts that led the charge to transform the proclamation into practice, leading to the 'recognition and empowerment of citizens as legal subjects of human rights'.[100] The story in this chapter is how international human rights law has aided Africa's subregional courts in advancing the course of human rights. I believe to have shown how the two most active subregional courts in Africa – the EACJ and the ECCJ – have both taken advantage of the inclusion of commitments to human rights in the statements of

97 *Mukong* v. *Cameroon*, Communication No. 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991 (1994).

98 *Castillo-Páez* v. *Peru*, Judgment, 3 November 1997, Ser. C, No. 34.

99 See *Obi* v. *Federal Republic of Nigeria*, p. 21.

100 Similar to Philip Alston's observation in relation to human rights in the EU. See P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law*, 13 (2002), 822.

fundamental principles to assert competence to apply international human rights law, to give flesh to the dry bones in the treaties. However, as was explained, the actual reception and deployment of international human rights law by the two courts has been uneven. Whereas the EACJ has been restricted by the suspension of its human rights jurisdiction, the ECCJ has enjoyed unlimited freedom in the use of international human rights law, effectively displacing its original jurisdiction and entrenching international human rights law as part of ECOWAS law. The consequences for citizens, the courts and the RECs themselves continue to emerge and will probably affect further developments.

My iCourts experience

The foundation for my incredible iCourts experience was laid in 2013 while I was on leave from the Niger Delta University, working as a consultant staff with the African Commission on Human and Peoples' Rights in Banjul, The Gambia. At the invitation of the Mandela Institute of the University of Witwatersrand Law School in South Africa, I attended a workshop on Sub-regional Courts in Africa at Wits in Johannesburg where I could not help but notice the very incisive contributions of someone who (I later found out) was the Director of the Centre of Excellence for International Courts (iCourts) at the University of Copenhagen. Naturally, I engaged him on the fringes of the workshop and realised that he had so much of the 'science' that I suddenly realised was missing from my own work on subregional organisations in Africa. That interaction with Professor Mikael Rask Madsen had a lasting impact on me. As such, months later when I saw an advert shared on the mail server of a professional group I belonged to, announcing openings for Post Doctoral positions at iCourts, I needed no persuasion even though I was then already a Senior Lecturer at my home University. I was convinced that the Post Doctoral position at iCourts was what I needed to learn and acquire the 'science' that I felt was missing in my academic work.

After what I considered to be a very thorough selection process, I was pleasantly surprised to receive the life-changing email that informed me of my selection as one four Post Doctoral fellows. It was with excitement that I approached the authorities at my home University for leave to take up the position, pursued the procurement of a work permit with the invaluable support of the International Office at the University of Copenhagen and resumed as a Post Doctoral Fellow in August 2014. On arrival, I was so well received. I immediately took note of the fact that everything at iCourts was so organised, almost to perfection! The staff, both academic and support, at iCourts and the Faculty of Law generally seemed to have gone out of their way to help me and my family settle down to life in Copenhagen. With the kind of support I received, my first formal meeting with Mikael (as I later became used to addressing him) went very well. That meeting was very useful in focusing the direction of my stay. As the conversation proceeded, it became clearer that I had made the right decision to come to iCourts. Working with me to develop a work plan for the three years that my fellowship was supposed to last, Mikael helped

me realised that I had to detach myself from the emotional attachment that I seemed to have for the institutions I was supposed to be studying. In that same conversation, it also became clear to me that scholarship had to be separated from advocacy approach to writing that I was used to in my earlier academic life. It was thus, with a very high sense of expectation and a determination to unlearn what I knew and learn new things that I returned to my shared office. Coming from an African University where academic work takes place under very challenging conditions, my work station at iCourts was itself a motivation for me to work. I simply felt that everything I needed to engage in pure academic work was in place and I inspired.

The learning process for me, did not take long to commence. Before the end of my first week I received notice of both of a forthcoming 'science lab' (where internal peer review of work in progress took place) and my first iCourts retreat. The experience in the room during 'science lab' and at every other academic event at iCourts was spectacular. There was always something to learn from everyone, including the carefully selected PhD students at various stages of their work. It was at iCourts that I had my first proper experience of applying for an academic grant. Working with my friends, the other Post Doctoral Fellows, I managed to put together an application that I went through over and over again even after the results had come in, and I had known that my application was not successful. The experience brought clarity to me that socio-legal research was doable. iCourts also taught me that there was more to legal scholarship than the doctrinal approach.

While I was happily digesting my new academic experience as a Post Doc at a place like iCourts, Mikael invited me and told me point blank that I needed to attend more conferences to publicise my work and get feedback from the relevant academic communities. Thus, the building of networks beyond my usual network began for me. The value of doing visible work good enough to be cited by other scholars was constantly a refrain in the hallways. As I got used to a new style of working, I got the reminder that I needed to also host workshops and conferences. I wondered how that was even going to be possible in Europe where I had no networks. But it was with the same ease that I learnt every other thing that I learnt how to host the conferences by working with the very well organised teams at iCourts. In all, iCourts made academic work a joy in all ramifications.

I had come to iCourts as a Senior Lecturer at the Faculty of Law, Niger Delta University in Nigeria. Some months into my fellowship at iCourts, I received notification that I had been promoted to the rank of Professor of

Law at my home University. I beamed with excitement as I went to share the news with Mikael. I remember that his comment was that iCourts had forced the hands of my home University as they suddenly realised the University could lose me to Europe. Then he asked me if I felt I had learnt the science enough. I knew I had not, and I told him so. I therefore, remained at iCourts for another year within which I learnt the science a bit more and felt more and more like a part of a family. That aura of being a family yet maintaining the disciple of a top academic institution is perhaps what I missed most about iCourts when I returned to home University where I assumed office as Dean of Law. After serving for two terms of two years each, as Dean of Law, I am currently the Director of the Institute for Niger Delta Studies at the Niger Delta University where I hope to bring my experience at iCourts to bear.

Territorial Disputes by Proxy: The Indirect Involvement of International Courts in the Mega-politics of Territory

Salvatore Caserta[*] *& Pola Cebulak*[**]

I. Introduction

International Courts (ICs) are increasingly called to rule upon mega-political disputes. These are legal issues concerning social, economic, and political conflicts that create cleavages at the national and international levels across or between societies.[1] Defined as such, mega-political disputes concern issues that divide societies, with the result that, whatever the outcome of an IC ruling on such matters, important and sizable social or political groups will be antagonized.[2] This makes the involvement of ICs in mega-political disputes extremely risky, especially in terms of backlash. This article explores whether, and under which conditions, ICs can serve as suitable venues for resolving mega-political territorial disputes. It focuses on a set of specific ICs—regional economic and human rights ICs—dealing with a specific type of mega-political disputes that we label Territorial Disputes by Proxy (TDbP). Concisely, regional ICs deal with TDbP when they do not directly decide on who should lawfully exercise sovereignty over a particular territory or whether a people have the right to independence. Instead, they are called to address specific legal questions only indirectly related to the territorial dispute, such as the property rights of ethnic minorities or free movement of goods within contested territories.

The empirical focus is on three regional courts that thus far have been particularly active in adjudicating TDbP: two economic courts, the Central

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1 Karen J. Alter & Mikael R. Madsen, *The International Adjudication of Mega-Politics*, 84 Law & Contemp. Probs (2021).

2 *Id*.

American Court of Justice (CACJ) and the Court of Justice of the European Union (CJEU), and a human rights court, the European Court of Human Rights (ECtHR).

II. Territorial Disputes by Proxy And The Mega-politics of Territory

Not all territorial disputes are litigated by proxy, and not all controversies involving contested territories are mega-political. Disputes become mega-political before they reach an international bench, if political divisions emerge in the societies driven by three main types of controversies—inter-state conflict, social cleavages or sovereignty concerns.[3] Territorial disputes become political mostly due to inter-state driven politics.[4] This can happen for national security reasons—when the states involved are willing to use (or threaten to use) force and military action—or when a territorial dispute is also linked to broader issues concerning ethnic minorities who inhabit the contested territories.

There can also be economic reasons for the public to have a strong stake in the outcome of a territorial dispute. For example, Western Sahara is a sparsely populated territory, and the export of phosphate and fisheries are a big part of the economy. A territorial dispute can also qualify as mega-political due to domestic politics that frames the issue as a divisive line in national electoral campaigns. Such developments can mobilize at least one of the national societies of the parties to the conflict and turn the issue into a question of extraordinary politics. More rarely, territorial disputes can also become mega-political due to sovereignty concerns,[5] but due to the potential for EU member states to perceive a decision on the right of separatist movements to self-determination as a limitation of their own sovereignty.

Ruling on territorial controversies was for long time—and to a certain extent still is today—the province of international arbitrators and of ICs with a global reach, such as the International Court of Justice (ICJ) and the International Tribunal of the Law of the Sea (ITLOS). Regional economic and human rights ICs generally do not have jurisdiction over territorial matters. This article, however, argues that a limited focus on inter-state arbitral and global courts provides only a partial view of how contemporary

3 Alter & Madsen, *supra* note 1, at 8.
4 *Id*.
5 Alter & Madsen, *supra* note 1, at 11.

ICs engage the mega-politics of territory in their practices. This is because arbitration and inter-state ICs share important institutional features that may well be key to explaining the positive findings of the above-mentioned literature, but in the end say little about the capacity of ICs to concretely and effectively deal with the mega-politics of territory.

For this reason, this article focuses on what can be called international adjudication of TDbP. As mentioned before, TDbP occurs when regional economic and human rights ICs with compulsory jurisdiction, private access, and a lack of direct jurisdiction over territorial matters adjudicate economic and human rights disputes that arise from an underlying territorial controversy. This means that the litigants do not ask the ICs to actually solve the territorial dispute. Rather, they want the courts to address certain underlying legal issues that are only indirectly linked to a territorial dispute in the sense that they have arisen as a consequence of a dispute over territory. Such disputes can be about the tariffs applicable to products crossing a contested border or the property rights of people displaced due to a territorial conflict.

We identify three main types of mega-political TDbP adjudicated by economic and human rights ICs: commercial, rights-based, and institutional. *Commercial TDbP* are highly divisive economic issues arising out of an ongoing or past territorial disputes. This type of dispute occurs, for instance, when one state imposes additional—often illegal—tariffs against another state that belongs to the same regional economic organization as a countermeasure for an alleged violation of territorial boundaries with the clear intent of isolating the state in the regional bloc. There are various types of *Rights-Based TDbP*, including the violation of the right to property of certain ethnic minorities, the limitation or suspension of the free movement of peoples or, more generally, the violation of basic rights of the citizens inhabiting contested territories. The third, transversal category of TDbP, *Institutional TDbP*, occurs when a territorial dispute gives rise to legal disputes before economic and human rights ICs concerning the broader functioning, responsibilities, and nature of the regional organizations in which the various courts adjudicating such a dispute are entrenched.

III. *Commercial and Institutional Territorial Disputes by Proxy in The Practice of Regional Economic Courts*

A number of commercial and institutional TDbP have been adjudicated by the CACJ and the CJEU. The CACJ has been particularly active, having

ruled upon several community law disputes arising out of a territorial conflict between Nicaragua and Honduras over the maritime boundaries of the Caribbean Sea. The CACJ also ventured into ruling upon an environmental and community law case arising from a territorial dispute between Nicaragua and Costa Rica on the protected area of the Rio San Juan. For its part, the CJEU has been called upon to address issues related to the import of products from the Turkish controlled area of Northern Cyprus into the EU and on issues regarding the import of products from occupied territories in the EU's Mediterranean neighborhood. The following part presents these cases and describes how the two ICs have dealt with them in their rulings.

A. *The Mega-politics of Territory in The Practice of The Central American Court of Justice*

In 1999, the CACJ was called to rule upon two disputes linked to a politically heated, long-standing dispute between Nicaragua and Honduras over the maritime boundaries of the Caribbean Sea.[6] The conflict involved notable disagreements between the two countries over their territorial and maritime boundaries, at times almost leading to military confrontations between the two countries. In 1986, Honduras and Colombia began negotiations to draft the *Lopez-Ramirez Treaty*, through which they redrew the maritime boundaries in the Caribbean Sea against the will of Nicaragua.[7] Although the latter repeatedly expressed discontent with the situation, the conflict did not escalate until 1999, the year in which Honduras—basically overnight—ratified the Treaty.

The Nicaraguan reaction was forceful. First, Nicaragua filed a case before the CACJ, asking it to suspend the ratification of the Treaty.[8] The position of Nicaragua was that Central American community law was characterized by the principles of progressivity and irreversibility and that, accordingly, the Central American states' power to conclude international treaties had to be exercised in compatibility with the purposes of the integrationist enterprise.[9]

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6 CACJ 25–05–29–11–1999 and 26–06–03–12–1999.

7 Diemer, Christian, and Amalija Šeparović, *Territorial Questions and Maritime Delimitation with regard to Nicaragua's Claims to the San Andrés Archipelago*, 66 Heidelb. J. Int. Law, 168.

8 *Id*. at VIII.

9 *Id*. at VIII letter a.

Despite the heated protests of the Honduran government, the CACJ declared itself to have jurisdiction to hear the case, basing its conclusion on a disposition of the Preamble to its Statute, which explicitly attributes to the Court the role of transforming the Central American isthmus into a unified and pacified nation.[10] Finally, the Court ruled that the SICA was not a mere economic community, it being, among other things, tasked to: "[r]eaffirm and consolidate the Central American self-determination,"[11] and "promote, in an harmonic and equilibrated way, the economic, social, cultural, and political development of the Member States and of the region."[12]

A second, mega-political TDbP was filed by Honduras. This dispute originated from when, in response to the ratification of the Lopez-Ramirez Treaty, Nicaragua had imposed additional taxes on Honduran and Colombian import goods, and suspended all commercial activities with Honduras; all behaviors that Honduras deemed in violation of SICA law.[13] In this case, the CACJ ruled that the Treaties of the Central American economic integration obliged the SICA Member States to respect free commerce between the Members of the Community and to treat the goods coming from other SICA Member States as though they were national goods.[14]

Finally, in 2011 the CACJ got involved in another mega-political TDbP. This time, it was linked to a dispute between Costa Rica and Nicaragua concerning the protected natural area of the Rio San Juan. The fact that the case was against Costa Rica added an additional layer of complexity and tension as, for a long time, Costa Rica had refused to be submitted to the jurisdiction of the CACJ on the grounds that it had not ratified the Statute of the Court.[15] In its decision, the CACJ initially declared itself competent to rule against Costa Rica regardless of whether that state had failed to fully ratify the Court's Statute.[16] The CACJ also also condemned Costa Rica for the damages to the environment that was protected by several international and regional Treaties of which Costa Rica was a signatory.

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10 *Id*. at considerando IX.
11 *Id*. Article 2 letter f) of the Protocol.
12 *Id*. at Article 3 letter h).
13 CACJ 26–05–29–11–1999, at resulta I) and II).
14 *Id*. at considerando X and XI.
15 For a detailed discussion of the CACJ's incomplete institutionalization, see Salvatore Caserta, International Courts in Latin America and the Caribbean: Foundations and Authority (Oxford University Press. 2020).
16 CACJ 12–06–12–2011, at considerando IV.

The societal and political responses to the TDbP cases of the CACJ are interlocutory at best. Ultimately, it could be argued that the Court's interventions exacerbated the conflicts, rather than channeling them toward a solution. There are many reasons for the CACJ's struggle to handle these TDbP, ranging from the nature of national politics of many of the Court's Member States, the controversies linked to the Court's actual jurisdiction over such disputes, the lack of substantial legal mobilization around the Court, and other similar contextual socio-political issues. Particularly important is the fact that, although all these cases were brought to the Court as commercial or community law cases, or both, the Court has often used these decisions to expand its judicial outreach to the actual underlying territorial dispute. In other words, the CACJ has refrained from bringing them into the realm of economic community law and has directly engaged with the underlying mega-political nature of the territorial disputes at hand.

The CJEU has only extremely rarely dealt with cases in which two states face each other as parties.[17] In 2018, Slovenia brought a case against Croatia, asking the CJEU to use EU law to force Croatia into compliance with a contested arbitration decision issued within the framework of the Permanent Court of Arbitration.[18] Here, the CJEU ruled that deciding territorial disputes and determining the boundaries of territories of EU member states was beyond the scope of EU law.

This, however, did not prevent the Court's involvement in a number of mega-political TDbP. In particular, the procedural arrangements, the lack of express jurisdiction on EU's territorial boundaries, and the CJEU's commitment to further supranational integration in the EU[19] made the CJEU particularly likely to deal with TDbP. This sub-part focuses on two cases, one located officially within the borders of the EU—the Northern Cyprus case—and the other in its southern neighborhood—the Western Sahara case.

The Republic of Cyprus joined the EU on 1 May 2004 with an ongoing territorial dispute about the northern part of the island.[20] Formally, the

17 Graham Butler, *The Court of Justice as an Inter-State Court*, Y.B. Of Eur. L. 179, 179–80 (2017).

18 Case C-457/18, Slovenia v. Croatia, 2020.

19 Renaud Dehousse, The European Court of Justice: The Politics Of Judicial Integration 78–79 (1998).

20 For context on the conflict, *see generally* Divided Cyprus: Modernity, History, and an Island in Conflict (Yiannis Papadakis, Nicos Peristianis & Gisela Welz eds., 2006).

whole island joined the EU. But a territorial exception was put in place for the territory of Northern Cyprus, controlled by Turkey.[21] This means that EU Treaties do not apply to the northern Cypriot territory, but only to its population. The series of three *Anastasiou* cases dealt with the status of products stemming from Northern Cyprus.[22]

In *Anastasiou* (1994) a British court asked the CJEU whether goods originating in the northern part of Cyprus were excluded from the preferential treatment granted by the 1972 Agreement establishing an association between the European Economic Community and the Republic of Cyprus. In this case, the CJEU ruled that these goods were indeed excluded and, accordingly, did not award the authorities from southern Cyprus the competence to issue certificates for products from the northern part.[23]

Another instance in which the CJEU had to indirectly touch upon the Cypriot dispute is the *Apostolides* case decided in 2009.[24] This case concerned the enforcement of a judgment rendered by a Cypriot court about property in Northern Cyprus before British courts. In this case, the CJEU relied on one of the most conservative and least controversial techniques of legal interpretation. Following a literal interpretation of Art. 1 of Protocol 10, the CJEU ruled that EU legislation applied to decisions of Cypriot courts based in the south of the island, even if those decisions concerned the territories in the northern part.[25] The Court also emphasized that, in principle, EU law applied to the whole territory of an acceding Member State and that exceptions to that rule have to be interpreted narrowly.[26]

A second case study concerns the CJEU adjudication regarding the import of products from occupied territories in the EU's Mediterranean neighborhood. In the landmark case *Brita* (2010), a controversy arose around the treatment of products originating in Israeli settlements in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights—areas that

21 *Id.*

22 Case C-432/92, The Queen v. Minister of Agric., Fisheries and Food, *ex parte* S.P. Anastasiou (Pissouri) Ltd. and others, 1994; Case C-219/98, Regina v. Minister of Agric., Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. and others, 2000; Case C-140/02, Regina on the application of S.P. Anastasiou (Pissouri) Ltd and others v. Minister of Agric., Fisheries and Food, 2003.

23 Case C-432/92, *Anastasiou*, 1994, ¶ 42.

24 Case C-420/07, Meletis Apostolides v. David Charles Orams & Linda Elizabeth Orams, 2009.

25 *Id*. at ¶ 37.

26 *Id.* at ¶¶ 33–34.

have been placed under Israeli administration since 1967.[27] Israeli authorities issued a movement certificate for home water-carbonators. Although the products were produced in the West Bank, the certificates attested to the Israeli origin of these products. Upon import to the EU, the German authorities refused to acknowledge this origin as a basis for entitlement to preferential treatment under the EU-Israel Agreement. The company Brita challenged this decision in German courts and eventually obtained a preliminary ruling referring the case to the CJEU.

In this case, the CJEU had to decide whether the EU-Israel Agreement or the EU-Palestinian Authority Agreement would be applicable to products originating in the occupied territories.[28] As both Agreements provide for the same preferential treatment, the national judges could have also just decided not to apply tariffs to the products in question, without specifying which Agreement to apply.[29] The CJEU ruled that products from the West Bank fall outside of the scope of application of the EU-Israel Agreement.[30] In its judgment, the Court even expressly stated the EU's (Commission's) position with regard to the goods stemming from the occupied territories:

> "The European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement."[31]

This approach shows that the Court can harvest political support for its rulings already at the moment of their issuing.

Similar issues arose in the cases concerning products from Western Sahara—a non-self-governing territory occupied by Morocco.[32] In December 2016, the Court ruled that the EU-Morocco Association Agreement was not applicable to Western Sahara, and hence denied Front Polisario (recognized as representatives of Western Sahara) standing to bring an

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27 For more recent rulings on the topic, *see, e.g.*, Case C-363/18, Organisation juive européenne & Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances, 2019.

28 Opinion of AG Bot, *supra* note , at ¶ 5.

29 *Id.* at ¶¶ 105–106.

30 *Id.*

31 *Brita*, *supra* note , at ¶64.

32 *See* Case T-512/12, Front Polisaro v. Council, 2015; Case C-104/16, Council v. Front Polisaro, 2016; Case C-266/16 Western Sahara Campaign UK v. Comm'rs for Her Majesty's Revenue and Customs & Sec'y of State for Env't, Food, and Rural Affs.

annulment case. In this decision, the CJEU relied on its own interpretation of international law to determine that the Moroccan occupation is not in conformity with the principle of self-determination.[33] Contrary to *Brita* (2010), the rulings regarding Western Sahara were not in line with the political will of the majority of the EU member states in the Council who wished to apply the economic cooperation with Morocco also to the territory of Western Sahara. This potential stand-off between the CJEU and the EU's political institutions illustrates the mega-political nature of this TDbP.

When analyzing the impact of the framing adopted by the CJEU when dealing with these commercial TDbP, this analysis so far has shown that decisions were largely determined by the scope of jurisdiction assigned in EU law. The CJEU has been careful in staying within the narrowly defined limits of its jurisdiction and underlining those limits. Contrary to the CACJ, it did not use those politically sensitive cases to expand the scope of its powers. The CJEU did, however, rule on commercial disputes arising from the background of territorial disputes. As a result, the CJEU rulings were subject rather to academic criticisms, but did not trigger wider political backlash.

IV. Right-Based And Institutional Territorial Disputes by Proxy in The Practice of The European Court of Human Rights

The ECtHR can be expected to be dealing with the rights-based type of proxy for territorial disputes. The ECtHR clearly does not have jurisdiction to decide over the territorial boundaries of the High Contracting parties to the Convention. As a human-rights court, it does, however, provide broad access for individual complaints regarding political and economic rights of the civilian population residing in the area concerned by an international territorial conflict. The ECtHR has dealt with many territorial and armed conflicts and developed its own doctrine about extra-territorial application of human rights and effective control.[34] The focus of this analysis lies with the rights-based cases arising in the context of the territorial conflict in Cyprus.

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33 Jed Odermatt, *Council of the European Union v. Front Populaire Pour La Libération De La Saguia-El-Hamra Et Du Rio De Oro (Front Polisario)*, 3 Am. J. Int'l L. 731 (2017), 735.

34 *See generally* Marko Milanović and Tatjana Papić, *The Applicability of the ECHR in Contested Territories*, 67 Int'l & Compar. L. Q. 779 (2018).

The territorial dispute in Cyprus discussed above in Part III.b., gave rise to a number of mega-political rights-based TDbP before the ECtHR. The cases can be broadly divided into two categories: individual complaints focusing on the violation of the human right to enjoy private property, and the inter-state cases raising a broader scope of human rights violations. Turkey has perceived both type of cases as a "political attack" and, in its responses to the judgments, continued to emphasize the ongoing inter-communal negotiations, questioning the ECtHR's legitimacy to intervene in the territorial dispute.[35]

This first relevant case to discuss in this context is the *Loizidou* case, in which the Court was asked to rule on the compatibility with the Convention of the deprivation of the applicant, Mrs. Titina Loizidou, of access to her property in Northern Cyprus as a consequence of the Turkish occupation and to grant compensation for the lost access to their property.[36] Property is protected in the ECHR under Art. 1 of Protocol 1 of the Convention, which has been ratified by Turkey. The *Loizidou* case pushed the ECtHR to provide an answer as to whether Turkey was exercising extraterritorial jurisdiction with regard to Northern Cyprus; a question which is perhaps the most contentious and debated issue of admissibility before the Strasbourg Court.[37]

The ECtHR ruled separately on the substance of the legal dispute, in 1996, confirming that Turkey had violated the right to private property by refusing Mrs. Loizidou and other refugees from Northern Cyprus access to their property. The Turkish side has been critical of the Court's engagement in the process, pointing to the ongoing inter-communal negotiations under the auspices of the UK. They pointed to the fact that the Turkish community of Cyprus has no standing before the ECtHR in a case where Turkey was the respondent state.[38] Such criticism already signaled the long path to the full enforcement of the Court's unfavorable ruling.

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35 Kudret Özersay & Ayla Gürel, *The Cyprus Problem at the European Court of Human Rights*, *in* Cyprus: A Conflict at the Crossroads 273 (Thomas Diez & Nathalie Tocci eds., 2013).

36 Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995); Loizidou v. Turkey, 23 Eur. Ct. H.R. 513 (1996).

37 In this regard, the ECtHR developed a test of "effective control" applied to establish when states are responsible for violations happening outside of their territory. *See* Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011) (the Court argued that Turkey exercised direct effective control over Northern Cyprus through its occupation by Turkish military troops).

38 Özersay, *supra* note 35.

The enforcement of this case is often cited as an example of the limited success of the ECtHR.[39] At first, the Turkish government was opposed to paying the damages as a matter of principle. As published in 1999 on the website of the Turkish Ministry of Foreign Affairs, the main concerns of the Turkish government revolved around the effects of the ruling on the *de facto* dormant bilateral peace negotiations led by the UN.[40] Eventually, in 2003, seven years after the judgment, Turkey paid Loizidou compensation for temporary deprivation of access to property, amounting to over $1 million.[41] However, Loizidou did not regain access to her property in Northern Cyprus.

The *Loizidou* judgment was followed by a series of similar complaints, brought by groups of applicants deprived of access to their properties in Northern Cyprus.[42] The ECtHR has relied on the same legal framing, assuming the responsibility of Turkish authorities for the human rights violations happening on the ground in Norther Cyprus. The pattern of compliance was also comparable – although the victims could obtain compensation as a result of political pressure within the Council of Europe, the violations were not actually ceased.[43]

The broadest engagement of the ECtHR with the Cyprus dispute, however, took place in the inter-state case decided by the Strasbourg Court in 2001, *Cyprus v. Turkey*.[44] In this case, the Cypriot government brought a case against Turkey for human rights violations resulting from the 1974 territorial conflict.

In its 2001 decision, the ECtHR condemned Turkey for a plethora of human rights violations relating to the situation that had existed in Cyprus since the start of Turkey's military operations in Northern Cyprus in July 1974. These included the right to life and prohibition of inhumane and de-

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39 Rick Lawson, *How to Maintain and Improve Mutual Trust amongst EU Member States in Police and Judicial Cooperation in Criminal Matters? Lessons from the Functioning of Monitoring Mechanisms in the Council of Europe*, http://hdl.handle.net/10900/66771 (2009).

40 Zaim M. Necatigil, *The Loizidou Case: A Critical Examination,* SAM PAPERS (Nov. 1999), http://www.mfa.gov.tr/the-loizidou-case_-a-critical-examination-by-zaim-m_necatigil_-november-1999.en.mfa.

41 *Turkey Compensates Cyprus Refugee,* BBC News, (Feb. 12, 2003), http://news.bbc.co.uk/2/hi/europe/3257880.stm.

42 *See* Yasa v. Turkey, App. No. 44827/08, Eur. Ct. H.R. (1998); Djavir An v. Turkey, App. No. 20652/92, Eur. Ct. H.R. (2003); Xenides-Arestis v. Turkey, App. No. 46347/99, Eur. Ct. H.R. (2005).

43 *Report*, *supra* note 98.

44 App. No. 25781/94 (May 10, 2001), Eur. Ct. H.R.

grading treatment with regard to missing persons, the right to private life and property with regard to displaced persons, and violation of freedom of religion in respect of Maronites living in Northern Cyprus.[45] Importantly, the ECtHR did not confirm any of the alleged violations in respect of the rights of Turkish Cypriots in Northern Cyprus. As a result, the Court did not touch on the question that was more divisive on the internal domestic rather than the international plane. The ruling was not received well by the Turkish Government, which expressed its discontent in a press release which claimed that the Court's decision "is contrary to the realities in Cyprus, devoid of legal basis, unjust and impossible to be implemented by Turkey."[46]

As a follow up to this first ruling, in 2010 the Cypriot government submitted an additional claim asking for damages in the name of the groups of its citizens that had suffered from the human rights violations. This led to the 2014 judgement of the ECtHR, by means of which the Court awarded Cyprus 30 million EUR for non-pecuniary damage suffered by the relatives of the missing persons and 60 million EUR for the Greek Cypriots enclaved in the Karpas peninsula.[47] Moreover, in its judgement on the *Güzelyurtlu and others v. Cyprus and Turkey* case of January 2019, the ECtHR has found, for the first time, a violation of Article 2 ECHR on the sole basis of Turkey's failure to cooperate with the Republic of Cyprus on criminal matters. This was a case brought by individual applicants against both Cypriot and Turkish authorities.

The *Loizidou v. Turkey* and *Cyprus v. Turkey* rulings have not been fully implemented by Turkey. The Committee of Ministers has not closed their procedure with regard to those two judgments, which means that full implementation has not taken place. The Committee of Ministers deals with each of the violations separately. It has declared satisfactory certain reforms implemented by the Turkish authorities, in particular with regard the right to education and religious freedom of the Greek Cypriots in Northern Cyprus.[48] The EU has also been contributing to the pressure on Turkey to comply with the Strasbourg judgments. The European Commission issues a yearly round of reports on progress of candidate countries to

45 *Id*.

46 *Press Release on the Cyprus v. Turkey Decision of the ECHR*, Turkish Ministry of Foreign Affairs (May 10, 2001) http://www.mfa.gov.tr/press-release-on-the-cyprus-v_-turkey-decision-of-the-echr_br_may-10_-2001.en.mfa.

47 Cyprus v. Tukey, App. No. 25781/94, Eur. Ct. H.R. (Dec. 12, 2014).

48 Resolution Concerning the Judgment of the European Court of Human Rights in the Case of Cyprus Against Turkey CM/ResDH (2007).

the EU. In its 2019 report on Turkey, the Commission points out the non-implementation of judgments of ECtHR as one of the serious problems in Turkey-EU relations.[49] The Council, composed of ministers from the EU member states, followed up on this criticism in its yearly round on enlargement package, stating: "The Council notes that Turkey continues to move further away from the European Union . . . . the Council notes that Turkey's accession negotiations have therefore effectively come to a standstill."[50]

The analysis of the cases related to the territorial dispute about Northern Cyprus before the ECtHR illustrates the possible escalation of rights-based territorial disputes by proxy into a mega-political dispute. This can happen due to several factors. The inter-state procedure provides a forum for a high-level exchange between the two parties of the conflict. The mega-politics leads the states to directly oppose the implementation of any judgments from the courts relating to a particular territorial conflict. The gradual development of the case law amounts to systemic judgments about the illegality of the occupation by one side of the conflict, which stretches the jurisdiction competences of the ECtHR. The ECtHR is, however, also an important case study for the strategies that courts can deploy to avoid or slow down such an escalation. The ECtHR has interpreted its standing rules restrictively. It has been consistent in a human-rights framing of the disputes before it and has focused on stabilizing rather than solving the conflict.

V. Conclusions

In the twenty-first century, the global governance architecture has grown such that a multiplicity of judicial actors can be engaged with the same territorial dispute. They include regional economic courts, regional human rights courts, the ICJ, and bilateral arbitration. This article has focused on regional courts, which do not have the jurisdiction to directly decide on the territorial boundaries of the states, but deal with TDbP. The analysis

49 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2019) 260 final (May 29, 2019).

50 *Council Conclusions on Enlargement and Stabilization and Association Process*, Council of the EU (June 18, 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/06/18/council-conclusions-on-enlargement-and-stabilisation-and-association-process/.

focused in particular on three types of disputes before regional courts. First, commercial disputes regarding trade and branding of products from the contested territories are crucial for the economic viability of any separatists' projects. Second, rights-based disputes focusing on individual rights are crucial for guaranteeing that the civilian population can live in human conditions, in spite of the conflict. Third, institutional disputes that raise the question of delegating political responsibility of dealing with the conflict.

The territorial disputes by proxy are linked with particular procedural arrangements before the regional courts, where cases are brought by individual applicants or national courts. As a result, it often happens that a court would deal with a question regarding a territorial conflict without one or both parties to that conflict being represented in the judicial proceedings. Although it might seem that this would negatively affect the legitimacy of such an adjudication, in practice, this arrangement allows the courts to maneuver around the potentially mega-political nature of a dispute, which would otherwise prevent them from being effective. It appears that what triggers the backlash is the presence of the highest diplomatic representative of a state before an international court and the adversary nature of proceedings. Regional courts can also adjudicate inter-state disputes and those tend to be mega-political, even if handled by legal proxy. It is only in those disputes that the legitimacy concern resulting from the lack of jurisdiction of those courts over territorial disputes becomes relevant.

We conclude that it is an extremely difficult task for the regional courts to have influence over stabilizing the civilian situation around a territorial dispute. International adjudication has proven effective in avoiding armed conflicts and settling territorial disputes on the international plane. International adjudication directly dealing with territorial disputes, however, involves inter-state judicial bodies with express competences to adjudicate upon such disputes and guarantee both parties influence over the appointments and the procedure. Importantly, such inter-state adjudication is also very time consuming. Therefore, while the territorial disputes remain unsolved, irreparable harm can happen to the economic development and rights of the civilian population in the region. TDbP create a possibility for international courts to affect the commercial, institutional and human-rights situation in such conflict regions. If they manage to avoid the mega-political framing of a dispute and guarantee the implementation of their rulings relating to commercial issues, human rights, and institutional competences, they could effectively improve the human security situation in a conflict zone without directly deciding upon a territorial dispute. The analysis of the selected case studies from the CACJ, CJEU

and ECtHR, shows how difficult this task is for regional courts. Those new-generation international courts appear to still trigger backlash, even if they deal with the territorial disputes only by proxy. The irreconcilable nature of a conflict can be brought up either more immediately, by the regional courts strategy of using highly sensitive cases as opportunities to extend their own jurisdiction, or by the adversary nature of inter-state cases. Alternatively, it can be brought up over time, as a court deals with series of cases regarding various conflicts, which subject its jurisprudence to political debates. Those cases of regional courts dealing with territorial disputes by proxy show how the mega-political nature of a question is related to its substance and the institutional and procedural strategies of avoiding and de-politicizing those questions are clearly limited, but not entirely ineffective at times.

Salvatore Caserta & Pola Cebulak

Our iCourts experience

Salva: I was among the first batch of PhDs hired at iCourts, together with Mihreteab and Carolina. I heard of iCourts when I was pursuing my LL.M at Berkeley, and Professor Malcolm Feeley had just received an email from Karen Alter advertising the opening of the centre. As he knew I was dating a Danish girl at the time (Mette), he advised me to try to apply for it. He also mentioned he knew the young man that had established the centre, Mikael: "a good guy that not too long ago passed through Berkeley as well". So I applied to it and after an embarrassing Skype interview with Mikael and Henrik, I incredibly got the job. And now I am Assistant Professor at iCourts.

Pola: My first contact with iCourts was at an academic retreat in the countryside of Normandy. I have read a book by a French political sociologist and decided to ditch a conference in my field of expertise (EU foreign policy) to explore the academic debates in the French province. I did not expect any other lawyers to participate in the retreat. Little did I know that there would be one, deeply embedded in this circle of scholars and that six months later, I would be sitting across from him in a job interview. Even though, I have spent less than two years as a Postdoc at iCourts (2016-18), its academic community has shaped me significantly as a scholar. I continue the research agenda set out in Copenhagen until today, working as an Assistant Professor in European Law at the University of Amsterdam.

Collaboration story: We met at probably the least successful iCourts conference – The Missing Link in January 2016. But for us that marked the beginning of a pleasant and fruitful collaboration, and of a good friendship. Soon after the conference, we started sharing office at iCourts and started working on some of our projects. We participated in many conferences together, we travelled a lot (Oslo, Lillehammer, Jerusalem, Washington, Mexico City, Toronto & the Great Lakes), and we went through many parties and hangovers. After one of the iCourts Christmas dinners, Pola broke her leg and was nursed back to health by Salva's dog and the rest of the iCourts team. Salva got many more white hair, two kids and a house in the meanwhile.

It is difficult to identify the best memory at iCourts as for us it is a constellation of many good memories. Rather than a memory, we then point to a period of iCourts 2015-2018, which for us was the most intense and pleasant, both academically and personally. It was the period when Juan and Günes were still here, Jed and Pola arrived as postdocs, Salva did not have kids yet. We extended conference trips, organized collaborative conferences or panels and took intensive Danish classes together with Yannis. We lived up to the Italian and Polish stereotypes by proposing to present to career trajectories of young researchers to the Danish Science Foundation as *via crucis* (Stations of the Cross). The couch in our office has been softened by regular visitors stopping for a chat on their way to the pantry.

Our story of collaborations and friendship is by far not the only one at iCourts. The centre has woven together an academic community through common reading lists at the onset, weekly exchanges on work-in-progress papers as well as yearly retreats and summer schools. The core pillars of this academic community are the premise of the rise of international adjudication as a global phenomenon, the study of international courts and tribunals in their historical, political and social context, interdisciplinarity and attention methods. Producing the methodological shift in the study if international courts and reflecting on it go hand in hand.

V. Appendix I-VII

Appendix I: iCourts Publication List: 2012-2021[1]

2012

1. Alter, Karen, Helfer, Laurence and Saldias, Osvaldo 'Transplanting the European Court of Justice: Findings from the Experience of the Andean Tribunal of Justice'. *American Journal of Comparative Law.* 60.1. P. 709-744. http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3083&context=faculty_scholarship
2. Alter, Karen 'Marketing Comparative Law and Legal Institutions to a Broad Audience'. *Law and Courts Newsletter.* 22.3. P. 43-45. http://lawcourts.org/pubs/newsletter/fall12.pdf
3. Alter, Karen 'The Global Spread of European Style International Courts'. *West European Politics.* 35.1. P. 135-154. http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1006&context=facultyworkingpapers
4. Alter, Karen 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review'. Dunoff, Jeffrey and Pollack, Mark (eds.). *International Law and International Relations: Synthesizing Insights from Interdisciplinary Scholarship.* Cambridge: Cambridge University Press. P. 345-370. https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/212/
5. Alter, Karen 'Too Much Power for the Judges? Understanding the European Court's Political Power'. Zimmerman, Hubert and Dür, Andreas (eds.). *Key Controversies in European Integration*. London: Palgrave MacMillen. https://www.worldcat.org/title/key-controversies-in-european-integration/oclc/930059700.
6. Freeland, Steven 'International Criminal Governance: Will the International Criminal Court be an 'Effective' Mechanism for Justice?'. Head, Michael, Mann, Scott and Kozlina, Simon (eds.). *Transnational Governance: Emerging Models of Global Legal Regulation*. Aldershot: Ashgate Publishing Group. P. 213-243. https://researchdirect.westernsydney.edu.au/islandora/object/uws:14108.

1 Publications in Danish are not included.

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Appendix II: Publication List for Center Director Mikael Rask Madsen 2012-2021

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94. Madsen, Mikael 'From Boom to Backlach? The European Court of Human Rights and the Transformation of Europe'. Aust, Helmut and Esra, Demir (eds.). *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective.*
96. Madsen, Mikael 'Sociological Approaches'. Law, David and Langford, Malcolm (eds.). *Research Methods in Constitutional Law: A Handbook.*

97. Madsen, Mikael 'Territorial and Normative Expansions: The European Court of Human Rights in Post-Cold War Europe.' Eckel, Jan and Stahl, Daniel (eds.). *Putting Human Rights to the Test: Claims, Interventions, and Contestations since 1990.*
98. Holtermann, Jakob v. H. and Madsen, Mikael 'European New Legal Realism: Towards a Basic Science of Law.' Talesh, Shauhin, Klug, Heinz and Mertz, Elizabeth (eds.). *Research Handbook on Modern Legal Realism.*
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100. Madsen, Mikael and Slosser, Jacob 'Institutionally Embodied Law: Cognitive Linguistics and the Making of International Law.' Bianchi, Andrea and Hirsch, Moshe (eds.). *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes.* P. 919-932. https://global.oup.com/academic/product/international-laws-invisible-frames-9780192847539?cc=us&lang=en .

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103. Madsen, Mikael and Caserta, Salvatore 'Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post - Colonial Legacies'. *iCourts Working Paper Series*, No. 10. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528978 .
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107. Madsen, Mikael 'Judicial Globalization and Global Administrative Law: The Particularity of the Proliferation of International Courts'. *iCourts Working Paper Series*, No. 28. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622983 .
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121. Madsen, Mikael 'Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops can Strengthen the Authority of the European Court of Human Rights'. *iCourts Working Paper Series*, No. 102. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016337 .
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Europe?'. *iCourts Working Paper Series*, No. 100. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993222 .

123. Madsen, Mikael and Huneeus, Alexandra 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems'. *iCourts Working Paper Series*, No. 96. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976318
124. Madsen, Mikael, Olsen, Henrik and Šadl, Urška 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation'. *iCourts Working Paper Series*, No. 85. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904012 .

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126. Madsen, Mikael, Cali, Basak and Viljoen, Frans 'Comparative Regional Human Rights Regimes: Defining a Research Agenda'. *iCourts Working Paper Series,* No. 115. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3109530 .
127. Madsen, Mikael, Cebulak, Pola and Wiebusch, Micha 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts'. *iCourts Working Paper Series*, No. 118. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131641 .
128. Madsen, Mikael, Cebulak, Pola and Wiebusch, Micha 'Special Issue – Resistance to International Courts: Introduction and Conclusion'. *iCourts Working Paper Series*, No. 123. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132321 .

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130. Caserta, Salvatore and Madsen, Mikael 'The Legal Profession in the Era of Digital Capitalism: Disruption or New Dawn?'. *iCourts Working Paper Series,* No. 149. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3310211 .

131. Madsen, Mikael 'Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance, *iCourts Working Paper Series*, No. 159. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387347 .

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Appendix III: iCourts Staff List – 2012

Name	Position
Mikael Rask Madsen	Professor, PI, Center Director of iCourts
Karen Alter	Permanent Visiting Professor
Henrik Palmer Olsen	Professor
Marlene Wind	Professor
Anne Lise Kjær	Associate Professor
Joanna Jemielniak	Associate Professor
Poul Kjær	Associate Professor
Urska Sadl	Research Assistant
Kristian Lauta	Research Assistant
Carolina Alvarez Utoft	PhD Student
Miriam Alide McKenna	PhD Student
Salvatore Caserta	PhD Student
Mihreteab Taye	PhD Student
Henrik Stampe Lund	Senior Executive Consultant
Gitte Schreyer	Center Coordinator

Appendix IV: iCourts Staff List - 2021

Name	Position
Mikael Rask Madsen	Professor, PI, Center Director of iCourts
Jan Komárek	Professor
Henrik Palmer Olsen	Professor/Associate Dean
Marlene Wind	Professor
Mikkel Jarle Christensen	Professor WSR
Thomas Gammeltoft-Hansen	Professor WSR
Astrid Kjeldgaard-Pedersen	Professor WSR
Joanna Lam	Professor WRS
Karen J. Alter	Permanent Visiting Professor
Basak Cali	Permanent Visiting Professor
Steven Freeland	Permanent Visiting Professor
Laurence R. Helfer	Permanent Visiting Professor
Ron Levi	Permanent Visiting Professor
Fernanda Nicola	Permanent Visiting Professor
Antoine Vauchez	Permanent Visiting Professor
Shai Dothan	Associate Professor
Veronika Fikfak	Associate Professor
Jakob v. H. Holtermann	Associate Professor
Anne Lise Kjær	Associate Professor
Marina Ban	Postdoctoral Research Fellow
William Byrne	Postdoctoral Research Fellow
Salvatore Caserta	Assistant Professor
Amalie Frese	Postdoctoral Research Fellow
Zuzanna Godzmirska	Assistant Professor
Nicholas Haagensen	Postdoctoral Research Fellow
Panagiota Katsikouli	Postdoctoral Research Fellow

Name	Position
Michal Krajewski	Postdoctoral Research Fellow
Aysel Küçüksu	Postdoctoral Research Fellow
Lucía López Zurita	Postdoctoral Research Fellow
Sabine Anita Mair	Postdoctoral Research Fellow
Nabil Orina	Postdoctoral Research Fellow
Sebastiano Piccolo	Postdoctoral Research Fellow
Karen McGregor Richmond	Postdoctoral Research Fellow
Niccolo Ridi	Postdoctoral Research Fellow
Jake Slosser	Postdoctoral Research Fellow
Günes Ünüvar	Postdoctoral Research Fellow
Cornelius Wiesener	Postdoctoral Research Fellow
Raphaële Xenidis	Postdoctoral Research Fellow
Wen Xiang	Associate Professor
Birgit Aasa	PhD Student
Ergun Cakal	PhD Student
Sarah Scott Ford	PhD Student
Yasin Huber	PhD Student
Anna Højberg Høgenhaug	PhD Student
Julie Jarland	PhD Student
Jenny Orlando Skaerbaek	PhD Student
Salome Addo Ravn	PhD Student
Regitze Helene Rohlfing Frederiksen	PhD Student
Magnus Esmark Schrøder	PhD Student
Hersh Sewak	PhD Student
Camilla Louise Johnson Wee	PhD Student
Jie Yang	PhD Student
Marina Aksenova	Global Research Fellow
Kerstin Carlson	Global Research Fellow
Pola Cebulak	Global Research Fellow
Solomon Ebobrah	Global Research Fellow

Name	Position
Federico Fabbrini	Global Research Fellow
Jed Odermatt	Global Research Fellow
Urska Sadl	Global Research Fellow
Nora Stappert	Global Research Fellow
Yonatan Lupu	Affiliated Senior Research Fellow
Cesare Romano	Affiliated Senior Research Fellow
Taylor St John	Affiliated Researcher
Henrik Stampe Lund	Senior Executive Consultant
Nicolai Ole Lillegaard Nyströmer	Data Specialist
Ioannis Panagis	Data Specialist

Appendix V: Visiting Researchers 2012-2021

Name:	Former position and employment:	Visiting period:	Current position and employment:
2012			
Valeria Galanti	PhD Canditate; IMT Institute for Advanced Studies Lucca, Italy	June 2012 - July 2012	Policy Officer, Office of the EU Anti-trafficking Coordinator
Laurence R. Helfer	Professor; Duke Law School, Duke University, US	June 2012	Professor; Duke Law School, Duke University, US
Nicole Bürli	PhD Canditate; Legal Expert, World Organization Against Torture, Switzerland	July 2012 - December 2012	Legal Expert, World Organization Against Torture
Balraj Sidhu	PhD Canditate; Postdoc, School of International Studies, Centre for International Legal Studies, Jawaharlal Nehru University, India	August 2012	Attorney at Law at Balraj Singh & Co
Antoine Vauchez	Professor, Pantheon-Sorbonne, Paris, France	September 2012	Professor, Pantheon-Sorbonne, Paris, France
Sabino Cassese	Judge of the Italian Constitutional Court, Italy	October 2012	Retired Judge and Professor of Law, IRPA, Italy
Elisa Tino	Visiting Research Fellow, iCourts, University of Copenhagen	October 2012	Teaching and Research Assistant; Postdoc, the University of Salerno, Department of Economics and Statistical Sciences, Italy
Wui Ling Cheah	Assistant Professor, Faculty of Law, National University of Singapore, Singapore	November 2012	Assistant Professor, Faculty of Law, National University of Singapore, Singapore
Liyu Han	Professor of Law, Renmin University of China Law School, China	November 2012 - January 2013	Professor of Law, Renmin University of China Law School, China
Karen Alter	Professor of Political Science and Law, Northwestern Univeristy, US	December 2012	Professor of Political Science and Law, Northwestern Univeristy, US

Name:	Former position and employment:	Visiting period:	
2013			
Astrid Kjeldgaard-Pedersen	PhD Student, University of Aarhus, Denmark	January 2013	Professor at iCourts, University of Copenhagen
Ingo Venzke	University of Amsterdam, the Netherlands	February 2013	Professor of International Law and Social Justice at the Department of International and European Law and Director of the Amsterdam University
Ilaria de Luca	MA Student, University of Pisa, Italy	February 2013	Lawyer at De Luca Law Firm
Milan Markovic	PhD Canditate; Research Fellow, Institute of Social Sciences, Belgrade, Serbia	February 2013 - March 2013	Human Rights Adviser/Head of the UN Human Rights Team and Programme (PCO), United Nations Serbia
Maria Varaki	PhD, Lawyer; Assistant Professor, Faculty of Law, Kadir Has University, Turkey	March 2013	Lecturer, King's College London
Stanislaw Goźdź-Roszkowski	Associate Professor, Department of Translation Studies, University of Lodz, Poland	March 2013	Associate Professor of Legal Linguistics at University of Lodz, Department of Specialized Languages and Intercultural Communication
Jan Komarek	Visiting Researcher at iCourts	April 2013	Professor at iCourts, University of Copenhagen
Jan Wouters	Professor, Katholieke Universiteit Leuven	April 2013	Professor, Katholieke Universiteit Leuven
Calogero Pizzolo	Professor, Universidad de Buenos Aires, Brazil	April 2013	Professor, Universidad de Buenos Aires, Brazil
Milosz Hodun	PhD Canditate; Expert, Nowoczesna Party, Poland	April 2013 - May 2013	International officer of Projekt: Polska Association, Expert and international adviser, Nowoczesna Party, Poland
Nikolaj West	Lawyer; Head of Section, Department of International Law, Danish Ministry of Foreign Affairs, Denmark	April 2013 - June 2013	Senior Terrorism Prevention Expert, United Nations Office on Drugs and Crime
Krzysztof Pelc	Assistant Professor, Department of Political Science, McGill Univeristy, Canada	May 2013 - June 2013	Associate Professor, William Dawson Scholar
Jacqueline McAllister	PhD Canditate, Assistant Professor, Kenyon College, US	May 2013 - August 2013	Associate Professor of Political Science, Kenyon College, US

Name:	**Former position and employment:**	**Visiting period:**	
Yonatan Lupo	Assistant Professor, George Washington University, US	August 2013	Associate Professor, Saint Anselm College
Pier Francesco Pompeo	Student LLM, University of Milan, Italy	August 2013	Research Officer presso European Asylum Support Office (EASO)
Lorand Bartels	Lecturer in Law, Unvieristy of Cambridge, UK	August 2013	Reader in International Law at the University of Cambridge
Wolfgang Teubert	Professor, University of Birmingham, UK	August 2013 - September 2013	Retired
Cormac Mac Amhlaigh	Lecturer in Public Law; Lecurer in Public Law, School of Law, University of Edinburgh, UK	September 2013 - December 2013	Senior Lecturer, School of Law, University of Edinburgh, UK
Cosette Creamer	PhD Canditate; Lawyer, Visiting Assistant Professor of Law, Boston University School of Law, US	September 2013 - January 2014	Assistant Professor of Political Science, University of Minnesota, US
Yves Dezalay	Researcher Director; Directeur de Recherches, CNRS (Centre National de la Recherche Scientifique), Paris, France	October 2013 - November 2013	Researcher Director; Directeur de Recherches, CNRS (Centre National de la Recherche Scientifique), Paris, France
Allan F. Tatham	Lecturer, CEU Uni, San Pablo, Madrid, Spain	November 2013	Lecturer, CEU Uni, San Pablo, Madrid, Spain
Lorenzo Casini	Professor, School of Law, NYU, US	November 2013	Tenured Professor of Administrative Law at the IMT School of Advanced Studies in Lucca.
Mike Scott	Analyst	November 2013	Lexical Analysis Software, UK, (private company)

Name:	**Former position and employment:**	**Visiting period:**	
2014			
Avason Quinlan-Williams	Magistrate; Senior Magistrate of Trinidad and Tobago, the Republic of Trinidad and Tobago	January 2014 - February 2014	High Court Judge, the Republic of Trinidad and Tobago
Ezgi Yildiz	PhD Candidate; Postdoc, Swiss National Science Foundation (SNSF), Switzerland	January 2014 - April 2014	Principle Investigator at Graduate Institute of International and Development Studies
Juan Antonio Mayoral Diaz-Asensio	PhD Candidate; Postdoc, Centre of Excellence for International Courts, iCourts,	January 2014 - May 2014	Ramon y Cajal Researcher, the University of Carlos III, Madrid

Name:	**Former position and employment:**	**Visiting period:**	
	University of Copenhagen, Denmark		
Kathryn Wright	Lecturer in Law, York Law School, University of York, UK	February 2014 - March 2014	Senior Lecturer (Associate Professor) in Law at University of York
Viviane Dittrich	Visiting Researcher at iCourts	May 2014	Deputy Director of the International Nuremberg Principles Academy
Suvi Sankari	University of Helsinki	May 2014 - June 2014	Research Coordinator of the University of Helsinki Legal Tech Lab
Jamie Rowen	Assistant Professor, University of Toronto, Canada	June 2014	Associate Professor at University of Massachusetts Amherst
Günter Teubner	Professor, Private Law, University of Frankfurt	June 2014	Professor, Private Law, University of Frankfurt
Aida Torres Perez	Associate Professor, Professor of Constitutional Law, University Pompeu Fabra, Barcelona, Spain	June 2014	Professor of Constitutional Law, and Deputy Director of the Law Department, University Pompeu Fabra, Spain
Sergio Puig	Associate Professor, James E. Rogers College of Law	June 2014	Professor of Law; Director, International Economic Law and Policy Program
Agata Helena Skora	PhD Candidate, Jagiellonian University, Poland	June 2014 - July 2014	International lawyer ILS Polish Academy of Sciences/ Winkiel-Skóra Law Office
Scott Stephenson	JSD Candidate; Lecturer, Melbourne Law School, University of Melbourne, Australia	July 2014 - December 2014	Senior Lecturer in Law, The University of Melbourne
Ally Possi	PhD Candidate; Advocate, High Court of Tanzania, Tanzania, and Lecturer, Law School of Tanzania, Tanzania	August 2014	Lecturer, Law School of Tanzania
Emilia Lindroos	PhD Candidate;Lecturer in Legal Linguistics, University of Lapland, Finland	August 2014	Content Producer, Legal Information, Edita
Amanda Potts	University of Lancaster	August 2014	Senior Lecturer in Public and Professional Discourse, Cardiff University
Titiania Sainati	Legal Advisor, International Justice Ressource Ctr in SF	August 2014	Adjunct Professor, International Investment Arbitration, Northeastern University Law School

Name:	Former position and employment:	Visiting period:	
Oddny Mjöll Arnardóttir	Professor of Law, Háskóli Ísland, Iceland	August 2014 - November 2014	Professor of Human rights Law, University of Iceland, and Judge at the Icelandic High Court, Iceland
Achilles Skordas	Professor, Univeristy of Bristol	September 2014	Professor Emeritus, University of Bristol, UK
Moritz Baumgärtel	Researcher, Uni Libre de Bruxelles	September 2014 - October 2014	Assistant Professor at the Faculty of Law of Utrecht University
Karen McAuliffe	Senior Lecturer;Reader in Law, Birmingham Law School, UK, and Visiting Professor, University of Luxembourg	October 2014	Professor of Law and Language at University of Birmingham
Niamh Nic Shuibne	University of Edinburgh	November 2014	Professor, University of Edinburgh

Name:	Former position and employment:	Visiting period:	
2015			
Hanna Bosdriesz	PhD Candidate; Lecturer, Leiden University, The Netherlands	January 2015 - February 2015	Legal Adviser International Legal Aid, the Ministry of Justice and Security
Julie-Enni Zastrow	PhD Candidate;Research Assistant, University of Potsdam, Germany	January 2015 - April 2015	Consultant at the Federal Ministry for Economic Affairs and Energy
Emilia Justyna Powell	Assistant Professor of Political Science, University of Notre Dame, US	March 2015 - April 2015	Associate Professor of Political Science, and Concurrent Assosicate Professor of Law, Univeristy of Notre Dame, US
Moritz Baumgärtel	PhD Candidate; Researcher, the Centre Perelman de Philosophie du Droit de l'Université libre de Bruxelles, Belgium	March 2015 - May 2015	Assistant Professor, Utrecht University
Ezgi Yildiz	PhD Candidate; Postdoc, Swiss National Science Foundation (SNSF), Switzerland	April 2015	Principle Investigator at Graduate Institute of International and Development Studies
Noreen O'Meara	Lecturer in Law; University of Surrey, UK	May 2015 - July 2015	Senior Lecturer in Human Rights and European Law at University of Surrey
Simone Benvenuti	PhD Candidate; Professor in Comparative Law, Lumsa University, Italy	May 2015 - July 2015	Researcher; Professor in Comparative Law, Lumsa University, Italy

Name:	Former position and employment:	Visiting period:	
Günther Teubner	"ad personam" Jean Monnet Chair at the International University College of Turin.	June 2015	"ad personam" Jean Monnet Chair at the International University College of Turin.
Christoph Sperfeldt	PhD Candidate, Regional Program Coordinator at the Asian International Justice Initiative and Non-Resident Fellow, Research Program, East-West Center, US	June 2015 - July 2015	Senior Research Fellow, Peter McMullin Centre on Statelessness, Academic Convenor of the Statelessness Hallmark Research Initiative, and an Associate of the Asian Law Centre, University of Melbourne, Australia
Caroline Nalule	PhD Candidate; Centre for International Governance & Justice (CIGJ), Australian National University, Australia	July 2015 - October 2015	International law and human rights consultant
Gerard Conway	PhD Candidate; Senior Lecturer, Brunel Law School and Director of CPE, UK	August 2015 - September 2015	Senior Lecturer, Brunel Law School and Director of CPE, UK
Barrie Sander	PhD Candidate in International Law, the Graduate Institute of International and Development Studies, Geneva, Switzerland	September 2015 - March 2016	Assistant Professor of International Justice at Leiden University - Faculty of Governance and Global Affairs
Georgios Dimitropoulos	Senior Research Fellow, Max Planck Institute Luxembourg, Luxembourg	September 2015 - October 2015	Associate Professor of Law at Hamad Bin Khalifa University Law
Vera Willems	PhD Candidate, Department of Sociology, Theory and Methodology, Erasmus School of Law (ESL), Erasmus University Rotterdam, the Netherlands	October 2015 - December 2015	Legal Officer Treaties Division Dutch Ministry of Foreign Affairs
Josephine Dawuni	Assistant Professor of Political Science, Howard University, US	November 2015 - December 2015	Associate Professor of Political Science, Howard University, US

Name:	Former position and employment:	Visiting period:	
2016			
Tom Daly	Associate Director, Associate Director, Edinburgh Centre for Constitutional Law, Edinburgh Law School, UK	January 2016 - June 2016	Deputy Director, Melbourne School of Government | Director, Democratic Decay & Renewal (DEMDEC)

Name:	**Former position and employment:**	**Visiting period:**	
Barrie Sander	Co-Founder & Board Member, Just Innovate, Geneva, Switzerland	January 2016 - June 2016	Assistant Professor of International Justice, Leiden University, The Hague, Netherlands
Fabien Tarissan	Researcher, CNRS (French National Centre for Scientific Research), Paris, France	February 2016 - March 2016	Associate Professor, University P.Curie
Armand de Mestral	Professor of Law, McGill University. Quebec, Canada	March 2016	Professor of Law, McGill University. Quebec, Canada
Laurence R. Helfer	Professor of Law, Duke University, US	March 2016	Professor of Law, Duke University, US
Pablo Barbera	Assistant Professor, Political Science and International Relations, University of Southern California, US	March 2016	Associate Professor, Political Science and International Relations, University of Southern California, US
Sophie Turenne	Associate Lecturer; Fellow and Senior College Lecturer, Murray Edwards College, UK	March 2016	Associate Member, International Academy of Comparative Law
Ciarán Burke	Professor, Friedrich Schiller University of Jena, Germany	March 2016 - June 2016	Professor and Senior Research Fellow, Jena Center for Reconcilation Studies, Friedrich Schiller University of Jena, Germany
Clarence Siziba	PhD Candidate, World Trade Institute, University of Bern, Switzerland	April 2016 - June 2016	Volunteer at Legal Resources Foundation
Neha Jain	Associate Professor of Law, University of Minnesota Law School, US	May 2016 - June 2016	Professor of Public International Law, European University Institute, Italy
Christina Contartese	Research Guest, Max Planck Institute, Luxembourg	September 2016 - December 2016	Lecturer in EU Law, The Hague University of Applied Sciences, Netherlands
Eugene Bakama Bope	Doctor of Law, Aix Marseille University, France	October 2016	Visiting Professor, Protestant University of Lubumbashi, Congo
Dan Priel	Professor of Law, York University, US	October 2016	Professor of Law, York University, US
Manuele Citi/ Mads Dagnis Jensen	Associate Professor, Department of Social Sciences and Business, Roskilde University, Denmark	November 2016	Associate Professor, Department of International Economics, Copenhagen Business School, Denmark
Nandor Knust	Lecturer in International Criminal Law, Tallinn University, Estonia	November 2016 - December 2016	Associate Professor of Law, The Arctic University of Norway, Norway
Fenghua Li	Assistant Professor, UIBE Law School, China	November 2016 - December 2016	Assistant Professor, UIBE Law School, China

Name:	**Former position and employment:**	**Visiting period:**	
Marco Duranti	Senior Lecturer, University of Sydney, Australia	November 2016 - December 2016	Senior Lecturer, University of Sydney, Australia
Federica Cristina	Visiting Professor, V.N. Karazin Kharkiv National University, Ukraine	December 2016	Senior Researcher, Institute of International Relations, Prague
Tommaso Pavone	Graduate Associate, Princeton EU Program & Law and Public Affairs Program, US	December 2016	Postdoctoral Fellow in Political Science, Univeristy of Oslo, PluriCourts Centre of Excellence, Norway

Name:	**Former position and employment:**	**Visiting period:**	
2017			
Line Engbo Gissel	Assistant Professor, Roskilde University	January 2017	Associate Professor, Roskilde University
Anna Aseeva	Assistant Professor, Faculty of Law, School of International Law, Sciences Po, France	February 2017 - March 2017	Assistant Professor, Faculty of Law, School of International Law, Sciences Po, France
Marco Bocchi	Lawyer, Ph.D. Candidate in International Law at the University of Rome Tor Vergata (Italy) and Visiting Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg (Germany)	February 2017 - April 2017	Lawyer, Ph.D. Candidate in International Law at the University of Rome Tor Vergata (Italy) and Visiting Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg (Germany)
Tommaso Soave	Dispute Settlement Lawyer, World Trade Organization	February 2017 - December 2017	Assistant Professor at Central European University
Steven McDowell	Adjunct Professor at University of Maryland University College	March 2017	Adjunct Professor at University of Maryland University College
Freek Van Der Vet	Postdoctoral Research Fellow, Erik Castrén Institute of International Law and Human Rights	April 2017 - May 2017	University Researcher at University of Helsinki
Krzysztof Pelc	Associate Professor and William Dawson shcolar, Department of Political Science, McGill Univeristy, Canada	April 2017 - May 2017	Associate Professor and William Dawson shcolar, Department of Political Science, McGill Univeristy, Canada
Emilia Justyna Powell	Associate Professor of Political Science, and Concurrent Assosicate Professor of Law, Univeristy of Notre Dame, US	May 2017	Associate Professor of Political Science, and Concurrent Assosicate Professor of Law, Univeristy of Notre Dame, US

Name:	**Former position and employment:**	**Visiting period:**	
Luis Viveros	Teaching Fellow and PhD Candidate, Faculty of Law, University College London (UCL), UK	May 2017 - July 2017	Teaching Fellow and PhD Candidate, Faculty of Law, University College London (UCL), UK
Brad Roth	Professor of Political Science and Law, Wayne State Univeristy, US	May 2017 - July 2017	Professor of Political Science and Law, Wayne State Univeristy, US
Fabien Tarissan	Research Associate, Paris-Saclay University, France	June 2017	Professor, Paris-Saclay University, France
Jörg Kammerhofer	Senior Research Fellow and Senior Lecturer at the Faculty of Law, University of Freiburg, Germany	June 2017	Senior Research Fellow and Senior Lecturer at the Faculty of Law, University of Freiburg, Germany
Viviane Dittrich	Postgraduate researcher at the Department of International Relations, London School of Economics and Political Science (LSE), UK	June 2017 - August 2017	Deputy Director of the International Nuremberg Principles Academy,
Aysel Küçüksu	Marie Curie Double PhD in Law and Philosophy, University of Geneva, Switzerland	June 2017 - September 2017	Postdoctoral Researcher, iCourts Centre of Excellence for International Courts, University of Copenhagen, Denmark
Ming-Sung Kuo	Associate Professor, School of Law, University of Warwick, UK	July 2017 - August 2017	Associate Professor, School of Law, University of Warwick, UK
Nora Stappert	Postdoctoral Research Fellow, University of Gothenburg, Sweden	August 2017	Lecturer in International Relations and International Law, University of Leeds, UK
Ed Bates	Associate Professor, Leicester Law School, University of Leicester, UL	August 2017	Senior Lecturer, Leicester Law School, University of Leicester, UL
Kevin Crow	Lecturer and Senior Researcher, Universität Halle-Wittenberg Law School, Germany	August 2017 - September 2017	Assistant Professor of International Law and Ethics, Asia School of Business, Malaysia
Christoph Sperfeldt	Regional Program Coordinator at the Asian International Justice Initiative and Non-Resident Fellow, Research Program, East-West Center, US	September 2017 - October 2017	Senior Research Fellow, Peter McMullin Centre on Statelessness, Academic Convenor of the Statelessness Hallmark Research Initiative, and an Associate of the Asian Law Centre, University of Melbourne, Australia

Name:	**Former position and employment:**	**Visiting period:**	
Lorenzo Gasbarri	Postdoctoral Researcher, University of Helsinki, Finland	September 2017 - November 2017	Postdoctoral Researcher, University of Bocconi, Italy
Anna Marie Brennan	Lecturer in Law, University of Liverpool, UK	November 2017	Senior Lecturer in Law, University of Waikato, New Zealand
Jeffrey Davis	Professor, University of Maryland Baltimore County, US	November 2017 - December 2017	Professor, University of Maryland Baltimore County, US
Robert Spano	Judge at the European Court of Human Rights, France	November 2017 - December 2017	President of the European Court of Human Rights, France
Shingirai Mtero	Lecturer, Rhodes University	November 2017 - December 2017	Lecturer, Rhodes University

Name:	**Former position and employment:**	**Visiting period:**	
2018			
Anthony David Gafoor	Facilitator, Chartered Institute of Arbitrators Course on International Commercial Arbitration	January 2018	Facilitator, International Arbitration Online Tutorial
Indira Rampersad	Lecturer, International Relations, The University of the West Indies, Trinidad and Tobago	January 2018	Lecturer, International Relations, The University of the West Indies, Trinidad and Tobago
Julius Schumann	Research and Teaching Assistant (prae doc) bei Universität Wien	January 2018 - February 2018	Research and Teaching Assistant (prae doc) bei Universität Wien
Kjersti Lohne	Postdoctoral Research Fellow, University of Oslo, Department of Public and International Law	January 2018 - June 2018	Senior Researcher at University of Oslo, Department of Public and International Law
Fernanda Nicola	Professor of Law, AU Washington College of Law, Director Program on International Org. Law and Development	February 2018	Professor of Law, AU Washington College of Law, Director Program on International Org. Law and Development
Sofiya S. Kartalova	Research Assistant and PhD Student at Research Training Group 1808, Eberhard Karls Universität Tübingen, Germany	February 2018 - March 2018	Research Assistant and PhD Student at Research Training Group 1808, Eberhard Karls Universität Tübingen, Germany
Obonye Jonas	Senior Lecturer, University of Botswana	February 2018 - April 2018	Senior Lecturer, University of Botswana

Name:	**Former position and employment:**	**Visiting period:**	
Michal Bobek	Advocate General at the Court of Justice since 7 October 2015.	March 2018	Advocate General at the Court of Justice since 7 October 2015.
Anna Dziedzic	Research Fellow and Convenor of the Constitution Transformation Network, University of Melbourne, Australia	March 2018 - April 2018	Global Academic Fellow, Law, Kong Kong University; Research Fellow and Convenor of the Constitution Transformation Network, University of Melbourne, Australia
Arthur Dyevre	Associate Professor KU Leuven	April 2018	Professor KU Leuven
Christoph Krenn	Senior Research Fellow at Max Planck Institute for Comparative Public Law and International Law	April 2018 - June 2018	Senior Research Fellow at Max Planck Institute for Comparative Public Law and International Law
Ingo Venzke	Professor of International Law and Social Justice at University of Amsterdam; Director of ACIL	May 2018	Professor of International Law and Social Justice at University of Amsterdam; Director of ACIL
Joseph Weiler	Professor and holder of the Jean Monnet Chair at the New York University (NYU) School of Law since 2001	May 2018	Professor and holder of the Jean Monnet Chair at the New York University (NYU) School of Law since 2001
Kathleen Claussen	Associate Professor, University of Miami School of Law	May 2018 - June 2018	Associate Professor, University of Miami School of Law
Erik Voeten	Professor of Geopolitics and Justice	June 2018	Professor of Geopolitics and Justice
Päivi Leino-Sandberg	Professor, Faculty of Law, University of Helsinki	June 2018	Professor, Faculty of Law, University of Helsinki
Signe Rehling Larsen	Visiting Researcher, Department of Management, Politics and Philosophy, Copenhagen Business School, Denmark	May 2018 - December 2018	Fellow by Examination, University of Oxford, UK
Walter Arevalo Ramirez	Professor of Public International Law	June 2018 - August 2018	Professor of Public International Law
Nora Stappert	Global Research Fellow	August 2018 - September 2018	Lecturer in International Relations and International Law
Jenna Sapiano	Postdoctoral Research Fellow at the Monash Gender, Peace and Security Centre (GPS)	August 2018 - October 2018	Postdoctoral Research Fellow at the Monash Gender, Peace and Security Centre (GPS)

Name:	**Former position and employment:**	**Visiting period:**	
Julian Dederke	Lecturer in International Relations, Luzern University	August 2018 - October 2018	Research Data Management Consultant, ETH Zürich
Tarald Laudal Berge	PhD Candidate, University of Oslo	August 2018 - December 2018	PhD Candidate, University of Oslo
Laurent Pech	Professor and Head of Department Law, Middlesex University London	September 2018	Professor and Head of Department Law, Middlesex University London
Michal Kaczmarczyk	Associate Professor, Faculty of Social Sciences, University of Gdansk, Poland	September 2018 - November 2018	Associate Professor, Faculty of Social Sciences, University of Gdansk, Poland
Alexia Brunet Marks	Associate Professor of Law at University of Colorado at Boulder	September 2018 - December 2018	Associate Professor of Law at University of Colorado at Boulder
Túlio de Medeiros Jales	Visiting Research Fellow, iCourts, University of Copenhagen	September 2018 - December 2018	Lawyer at TozziniFreire Advogados
Josephine Dawuni	Assistant Professor of Political Science, Howard University	October 2018	Associate Professor of Political Science, Howard University
Aysel Kucuksu	Marie Curie Double PhD in Law and Philosophy	October 2018 - December 2018	Postdoctoral Researcher at iCourts, University of Copenhagen
Jens Meierhenrich	Associate Professor of International Relations, and Director of the Centre for International Studies at the London School of Economics	November 2018	Associate Professor of International Relations, and Director of the Centre for International Studies at the London School of Economics
Alina Balta	PhD Researcher & Lecturer, INTERVICT	November 2018 - December 2018	Visiting Professional - Chambers at International Criminal Court
Bjoern Dressel	Senior Lecturer and Director of Research	November 2018 - December 2018	Associate Professor and Director of Research
Liana Muntean	Doctor of Philosophy, Central European University	November 2018 - December 2018	Information and Analysis Officer at European Asylum Support Office
Miroslaw Granat	Professor of Constitutional Law at Cardinal Stanislaw Wyszyński University, Warsaw	November 2018 - December 2018	Professor of Constitutional Law at Cardinal Stanislaw Wyszyński University, Warsaw
Raul Sanchez Urribrri	Senior Lecturer in Crime, Justice and Legal Studies at the Department of Social Inquiry, La Trobe University	November 2018 - December 2018	Senior Lecturer in Crime, Justice and Legal Studies at the Department of Social Inquiry, La Trobe University

Name:	**Former position and employment:**	**Visiting period:**	
Richard Collins	Lecturer in International Law, UCD Sutherland School of Law	November 2018 - December 2018	Associate Professor of International Law at University College Dublin
Władysław Jóźwicki	Visiting Fellow, iCourts, University of Copenhagen	November 2018 - December 2018	Assistant Professor, Adam Mickiewicz University, Poland

Name:	**Former position and employment:**	**Visiting period:**	
2019			
Władysław Jóźwicki	Assistant Professor, Adam Mickiewicz University, Poland	January 2019	Assistant Professor, Adam Mickiewicz University, Poland
Alina Balta	PhD Researcher and Lecturer, INTERVICT, Tilburg University, The Netherlands	January 2019 - February 2019	Visiting Professional, International Criminal Court, The Netherlands
Gisela Aljeandra Ferrari	PhD Student, Catholic University of Argentina, Buenos Aires, Argentina	January 2019 - March 2019	PhD Candidate and Lecturer in Constitutional Law, Catholic University of Argentina, Buenos Aires, Argentina
Aysel Küçüksu	Masters of Laws in Human Rights, Central European University, Hungary	January 2019 - September 2019	Postdoctoral Researcher, iCourts Centre of Excellence for International Courts, University of Copenhagen, Denmark
Agostina Allori	Legal Researcher, Centro de Estudios de Estado y Sociedad (CEDES), Buenos Aires, Argentina	March 2019	Consultant in Gender Equality - Policy Design Team, Yellow Window Design, Belgium
Ríán Derrig	PhD Researcher in International Law, European Univeristy Institute, Italy	March 2019	Research Fellow, Center for Global Constitutionalism, Germany
Monika Glavina	PhD Candidate and Researcher, Centre for Legal Theory and Empirical Research, KU Leuven, Belgium	March 2019 - April 2019	Postdoctoral Reserach Fellow, EUTHORITY Project, Centre for Legal Theory and Empirical Jurisprudence, KU Leuven, Belgium
Pawel Marcisz	Assistant Professor, University of Warsaw, Poland	March 2019 - April 2019	Assistant Professor, University of Warsaw, Poland
Stewart Manley	Lecturer in Law, University of Malaya, Malaysia	March 2019 - May 2019	Lecturer in Law, University of Malaya, Malaysia
Sergii Masol	PhD Researcher, European University Institute, Italy	March 2019 - August 2019	PhD Researcher, European University Institute, Italy

Name:	**Former position and employment:**	**Visiting period:**	
Damian Gonzales Salzberg	Lecturer in Law, University of Sheffield, UK	April 2019	Senior Lecturer in Law, University of Birmingham, UK
Misha Plagis	Doctor in Law, Freie Universität Berlin, Germany (2018)	April 2019 - June 2019	Postdoctoral Researcher at T.M.C. Asser Instituut
Stavros Pantazopoulos	PhD Student, European Univeristy Institute, Italy	April 2019 - June 2019	Legal and Policy Analyst at the Conflict and Environment Observatory
David Kosar	Associate Professor of Constitutional Law and Director of the Judicial Studies Institute (JUSTIN), Masaryk Univeristy, Brno, Czech Republic	May 2019	Associate Professor at the Department of Constitutional Law and Political Science
Iyiola Solanke	Professor, Centre for Law and Social Justice, University of Leeds, UK	May 2019	Professor of EU Law and Social Justice, School of Law, University of Leeds, UK
Yuliya Chernykh	PhD Research Fellow, Department of Private Law, University of Oslo, Norway	May 2019	Associate Professor at the Inland Norway University of Applied Sciences
Danielle Mueller	Teaching Assistant, University of Notre Dame, US	May 2019 - June 2019	PhD Candidate in Political Science, University of Notre Dame, US
Mike Videler	PhD Researcher, European University Institute, Italy	May 2019 - June 2019	PhD Researcher, European University Institute, Italy
Martin Brencke	Lecturer, Aston Law School, Birmingham, UK	June 2019	Senior Lecturer, Aston Law School, Birmingham, UK
Stamatia (Matina) Papadaki	PhD Candidate, National and Kapodistrian University of Athens and Researcher, AthensPIL, Greece	June 2019 - September 2019	PhD Candidate, National and Kapodistrian University of Athens and Researcher, AthensPIL, Greece
Julia Liebermann	PhD Candidate in International Relations, Cluter of Excellence, Darmstadt Univeristy and Goethe University Frankfurt, Germany	August 2019 - November 2019	PhD Student, Cluster of Excellence "The Formation of Normative Orders"
Martin Lolle Christensen	PhD Reseracher in Law, European University Institute, Italy	September 2019 - October 2019	PhD Reseracher in Law, European University Institute, Italy
Vigjilenca Abazi	Assistant Professor of European Law, Maastricht University, The Netherlands	October 2019 - November 2019	Assistant Professor of European Law, Maastricht University, The Netherlands
Angelina Atanasova	PhD Candidate, KU Leuven, Belgium	October 2019 - December 2019	Research Manager at Ecorys

Name:	**Former position and employment:**	**Visiting period:**	
2020			**2021**
Sroyon Mukherjee	PhD Researcher in Law, London School of Economics (LSE), UK	January 2020 - February 2020	PhD Candidate, Department of Law, London School of Economics (LSE), UK
Lucas Carlos Lima	Professor of Public International Law, Federal Univeristy of Minas Gerais (UFMG), Brazil	January 2020 - March 2020	Professor of Public International Law, Federal Univeristy of Minas Gerais (UFMG), Brazil
Wiebe Hommes	PhD Candidate, Amsterdam Centre for European Law and Governance, University of Amsterdam, The Netherlands	February 2020	PhD Candidate, Amsterdam Centre for European Law and Governance, University of Amsterdam, The Netherlands
Federica Cristina	Visiting Professor, V.N. Karazin Kharkiv National University, Ukraine	February 2020 - March 2020	Senior Researcher, Institute of International Relations, Prague
Luisa Giannini Figueira	PhD Candidate, Institute of International Relations, Pontifical Catholic University of Rio de Janeiro (PUC-RIO), Brazil	Febuary 2020 - July 2020	PhD Candidate, Institute of International Relations, Pontifical Catholic University of Rio de Janeiro (PUC-RIO), Brazil
Raphael Oidtmann	Lecturer and Research Fellow, Mannheim Law School, Germany	August 2020	Scientific Advisor to the Executive Director, Peace Research Institute Frankfurt, Germany
Elisabetta Baldassini	PhD Candidate, University of Macerata, Italy	August 2020 - September 2020	PhD Candidate, University of Macerata, Italy
Eun Hye Kim	PhD Candidate, European University Institute, Italy	August 2020 - October 2020	PhD Candidate, European University Institute, Italy
Christian Prener	PhD Fellow, Institute of Law, Aarhus University, Denmark	September 2019	Research Assistant, University of Southern Denmark, Denmark
Ula Kos	Student Research Assistant, ERC-funded Human Rights Nudge Project, iCourts Centre of Excellence for International Courts, Univeristy of Copenhagen, Denmark	September 2020 - October 2020	Student Research Assistant, ERC-funded Human Rights Nudge Project, iCourts Centre of Excellence for International Courts, University of Copenhagen, Denmark
Lucía López Zurita	PhD Candidate, European University Institute, Italy	September 2020 - October 2020	PhD Candidate, European University Institute, Italy
Stein Arne Brekke	PhD Researcher in Law, European University Institute, Italy	September 2020 - October 2020	PhD Researcher in Law, European University Institute, Italy

Name:	**Former position and employment:**	**Visiting period:**	
Soo-hyun LEE	PhD Researcher, UN 2030 Agenda Research School, Lund Univeristy, Sweden	October 2020 - November 2020	PhD Researcher, UN 2030 Agenda Research School, Lund Univeristy, Sweden
Catharine Titi	Visiting Professor at SHIELD and iCourts, and Research Associate Professor, University Paris II Panthéon-Assas, France	October 2020 - September 2021	Visiting Professor at SHIELD and iCourts, and Research Associate Professor, University Paris II Panthéon-Assas, France

Name:	**Former position and employment:**	**Visiting period:**	
2021			
Julie Wetterslev	PhD Researcher at European University Institute	January 2021 - February 2021	PhD Researcher at European University Institute
Petra Gyongyi	Postdoctoral Fellow, Department of Private Law, UiO	January 2021 - February 2021	Postdoctoral Fellow, Department of Private Law, UiO
James Nyawo	Lecturer, Kenyatta University, School of Security, Diplomacy and Peace Studies	August 2021 - September 2021	Lecturer, Kenyatta University, School of Security, Diplomacy and Peace Studies
Laura Aragonés Molina	Lecturer in the Department of Public International Law and International Relations at the University of Alcalá	August 2021 - September 2021	Lecturer in the Department of Public International Law and International Relations at the University of Alcalá
Silvia Steininger	Research Fellow at Max Planck Institute for Comparative Public Law and International Law	August 2021 - September 2021	Research Fellow at Max Planck Institute for Comparative Public Law and International Law
Elanie Fahey	Professor of Law at the Institute for the Study of European Law (ISEL)	September 2021	Professor of Law at the Institute for the Study of European Law (ISEL)
Alejandro Sánchez Frías	Professor of International and EU Law at the University of Malaga	September 2021 - November 2021	Professor of International and EU Law at the University of Malaga
Harlan Cohen	University of Georgia School of Law, Athens, GA Professor of Law	October 2021	University of Georgia School of Law, Athens, GA Professor of Law
Inga Kravchik	PhD Researcher at Human Rights under Pressure	October 2021	PhD Researcher at Human Rights under Pressure
Maciej Krogel	Researcher, Department of Law, European University Institute	October 2021 - November 2021	Researcher, Department of Law, European University Institute
Owiso Owiso	Doctoral Researcher, University of Luxembourg	October 2021 - November 2021	Doctoral Researcher, University of Luxembourg

Name:	**Former position and employment:**	**Visiting period:**	
2021			
Michał Balcerzak	Associate Professor, Faculty of Political Science and Security Studies, Nicolaus Copernicus University, Toruń, Poland	November 2021	Associate Professor, Faculty of Political Science and Security Studies, Nicolaus Copernicus University, Toruń, Poland
Sapna Shaila Reheem	Researcher, Kings College London	November 2021	Researcher, Kings College London
Emma Nyhan	Postdoctoral Fellow, Melbourne Law School, Australia	November 2021 - December 2021	Postdoctoral Fellow, Melbourne Law School, Australia
Eun Hye Kim	PhD researcher in Law 2018 - 2022 European University Institute (EUI) Florence, Italy	November 2021 - December 2021	PhD researcher in Law 2018 - 2022 European University Institute (EUI) Florence, Italy
Ikboljon Qoraboyev	Associate Professor at Higher School of Economics of M. Narikbayev KAZGUU University	November 2021 - December 2021	Associate Professor at Higher School of Economics of M. Narikbayev KAZGUU University

Appendix VI: Hyperlink to iCourts Working Papers Series

iCourts Working Papers Series (WPS) is the showcase of research output during the years. The series also include papers from researchers affiliated with the center; visiting professors, gust researchers and close collaboration partners. The WPS is an opportunity to get access to what is in the pipeline as regards future publications. Many of the papers are co-authored articles.
https://jura.ku.dk/icourts/research-resources/working-papers/

Appendix VII: Principal Investigator Projects at iCourts

Since iCourts is designed on a Principal Investigator (PI) model - consisting of one PI and one collective research plan conducted by a staff group - itself have generated and attracted new PI-projects, and since the whole spirit in the introduction was not only to look backwards, it seems natural to point out the major current PI-projects of the center. Without doubts we will here find some of the contributors to sharpening the future of the center.

As a group, the PI-projects have already made one important widening of the center identity: While some of the projects is basic research oriented in terms of being targeted towards empirical studies, field trips and clarification at conceptual and terminological level, others are occupied by counseling private or public partners, and make the knowledge of the projects more applied in a given context. Or rather the specific balance between the basic and applied components in each particular project differs from project to project.

The scope and the scale have expanded and the possible mutual inspiration between the PI-projects: iCourts from being a PI-project to an overall framework or platform for a multitude of PI-projects, seems to be one of the obvious challenges and changes of the next few years. One of the natural avenues would be that some of the successful PI-projects established and mature themselves as new, independent research centers.

Aside from the collective PI-projects iCourts also house a number of individually, external funded projects dealing with for example different International Courts, EU studies, and Chinese Legal Studies: The important growth layer and next generation of researchers of the center.

The following list is not exhaustive. Many of the PI´s have additional external funded projects.

PI-projects at iCourts

Project title: "Human Rights Nudge. Redesigning the Architecture of Human Rights Remedies". https://jura.ku.dk/icourts/research/humanrightsnudge/

PI: Associate professor Veronika Fikfak.

Funding: ERC.

Research plan: The research project examines how states respond to and implement decisions taken by the European Court of Human Rights. Although international institutions have long been concerned with human rights, national governments' respect for them has been overwhelmingly weak. Motivated by this distinction, the researchers want to take a closer look at why and how states interfere in the lives of individuals and then how and when this behavior potentially can be changed to foster greater respect for human rights norms. Based on previous cases of human rights violations, researchers look at how different specific remedies affect national governments' compliance and internalization of human rights. With insights from both behavioral economics, psychology and the social sciences, researchers want to find new solutions that governments, communities and even individuals can apply. The main purpose of the research project is to determine how human rights violations can be counteracted and minimized in the future.

Project title: "European Constitutional Imaginaries: Utopias, Ideologies and the Other" (Imagine). https://jura.ku.dk/icourts/research/imagine/

PI: Professor Jan Komárek.

Funding: ERC.

Research plan: Imagine examines the constitutional ideas behind the European integration project at both national and EU levels. First and foremost, researchers focus on how ideas created by constitutional thinkers at the EU level are communicated and established across borders and governments. Next, they take a closer look at how nationally rooted ideas about states, including state sovereignty, and constitutionalism have interacted with the demands of the integration project and how this has changed over time. The project focuses in particular on the discursive implications of "European constitutionalism", including how ideas can motivate and justify governance and collective self-government. The main purpose of the research project is to integrate different perspectives to get a bigger picture of how constitutional legislation views Europe.

Project title: "The Global Sites of International Criminal Justice" (JustSites). https://jura.ku.dk/icourts/research/justsites/

PI: Professor with special responsibilities Mikkel J. Christensen.

Funding: ERC.

Research plan: JustSites examines how so-called 'sites' help structure international criminal justice and the fight against international crimes. Justice sites are to be understood as a variety of localities under which the political, legal and professional activities that collectively create international criminal justice have been developed. These include NGO offices in conflict zones, foreign ministries, research centers, etc., all of which help to define and structure international criminal justice and developments in that field of research. The project then moves beyond the conventional focus on courts and focuses instead on the balances within authority and power in the various justice sites.

Project title: "International Law & Military Operations" (InterMil). https://jura.ku.dk/icourts/research/intermil/

PI: Professor with special responsibilities Astrid Kjeldgaard-Pedersen.

Funding: The Danish Defense Budget.

Research plan: In collaboration with the Center for Military Studies and the Defense Academy in Denmark, InterMil engages in research-based consultation in the public sector within military studies. The collaboration is motivated by a desire to create a greater focus on challenges with international law within international operations, cyber, drones, high tech and electronic warfare, which is summarized in four main themes. The first theme, International law and cyber operations below the threshold of warfare, focuses on cybercrime and how this poses an increasing threat to particularly technologically advanced small states such as Denmark. The second theme, State responsibility in partnered operations, looks at the division of state responsibility in international cooperation both between states and non-state actors. The third theme, New military technology, deals with the challenges that arise as a result of the development of new, advanced military technology. The fourth and final theme, Military operations at sea, focuses on the opportunities and challenges that arise in

the various military operations at sea, including the interplay between the law of the sea, international human rights and international humanitarian law.

Project title: "Study Hub for International Economic Law and Development" (SHIELD). https://jura.ku.dk/english/shield/

PI: Professor with special responsibilities Joanna Lam.

Funding: Faculty of Law.

Research plan: The Study Hub for International Economic Law and Development (SHIELD) deals with international economic law, conflict resolution and policy-making, including in particular international trade, investment and commercial law. The project focuses on both economic and non-economic interests and values, in addition to the institutional consequences of the interaction between them. A particular area of focus is global economic governance and transformations of the regulatory mechanisms in this field. As an academic platform, SHIELD wants to connect different interests and create a dialogue between both national and international actors.

Project title: "Judging Under the Influence: A critical review of the influence of legal actors on the jurisprudence of the Court of Justice of the European Union". https://jura.ku.dk/icourts/research/judging-under-the-influence/

PI: Associate professor Urska Sadl.

Funding: Sapere Aude, Independent Research Fund Denmark.

Research plan: The research project examines, with a critical examination, the influence of legal actors on the case law of the Court of Justice of the European Union. In any courtroom, law, politics and personality matter. The key question the research project seeks to answer is how much and when do they matter in Luxembourg? The overall aim is to show how the parties, the governments of the Member States, the European institutions and national judges shape the method of interpretation chosen by the Court, the precedents it cites, the arguments it develops and the result it achieves.

Project title: Danish Language Processing for Legal Texts (LEGALESE). https://jura.ku.dk/icourts/research/legalese-danish-language-processing-for-legal-texts/

PI: Professor Henrik Palmer Olsen.

Funding: GrandSolutions, Innovation Fund Denmark.

Research plan: The University of Copenhagen's Faculty of Law and the Department of Computer Science have entered into a collaboration with Schultz and the National Board of Appeal. The research project seeks to investigate and develop a technological product for language processing and impartial techniques to provide semi-automated auxiliary tools for both the public and private sectors. The purpose is to investigate and optimize case processing using Natural Language Processing (NLP) to obtain legal information. By developing NLP, which is specifically tuned to the Danish legal language, LEGALESE will develop models that form the basis for innovative functions in new software to make legal information gathering more efficient and secure. The project is based on state-of-the-art NLP (BERT) and uses a multilingual approach to model generation, trained and coded in general Danish legal texts, as well as on more specialized texts made available by the IT company Schultz and the National Board of Appeal.

Project title: "DATA4ALL: Data Science for Asylum Legal Landscaping". https://jura.ku.dk/english/staff/research/?pure=en%2Factivities%2Fdata-for-asylum-legal-landscaping-data4all(cfca7bfe-bd42-4c64-801c-f50986db5051).html

PI: Professor with special responsibilities Thomas Gammeltoft-Hansen

Funding: DATA+ pool, University of Copenhagen.

Research plan: By utilizing large decision-making data in the Nordic region, DATA4ALL is pioneering a new research agenda that combines computer science and migration law to understand the significant variations in the results of asylum decisions in and across countries. Despite decades of legal harmonization, the chances of receiving asylum for people from the same country still vary considerably across Europe. DATA4ALL seeks to compare large decision data from the Nordic countries and use NLP

(Natural Language Processing), sentiment analysis, machine learning and process mining to illuminate and provide a unique understanding of the phenomenon. The project draws further on critical data studies to engage decision-makers themselves, raise questions about the data and promote data literacy and ethics among both scholars and practitioners.