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Toward a Community of International Judges

DANIEL TERRIS, CESARE P.R. ROMANO, AND LEIGH SWIGART

I. INTRODUCTION

Over the last two decades, as new courts and tribunals with regional or global jurisdiction have been established and become operational, the group of individuals who have served as international judges has expanded dramatically. International judges are now hearing cases and making decisions in a number of courts located in Europe, Latin America, and Africa. In the process, they have developed international law at a rapid pace, particularly in the domains of international criminal and human rights law.

International judges are a diverse lot, hailing from many countries around the globe, from a variety of professional backgrounds, and from legal systems with different rules and traditions. They also sit on courts with widely varying jurisdictions and missions. Despite this heterogeneity, we contend that, taken collectively, international judges comprise a community of knowledge-based experts where similarities across the group are more important than differences. These judges tend to share similar backgrounds in terms of education and experience in the international community, which has led to considerable harmony in matters of judicial temperament, outlook, and style. A shared understanding of the judicial function, and what it entails, binds them together. And a common commitment to the aims of international justice animates their growing sense of belonging to a community of knowledge-based experts.
single professional group. Their shared outlook, cutting across many different courts, has led to mutual respect and deference, and has made judges and courts more predictable and the interpretation of law more stable than it might otherwise be.

The concept of a global community of judges is not new. A number of legal scholars have written about the growing interest in judicial dialogue and the use of jurisprudence across international courts and between international and national courts. Although this community is not formally organized, there is a growing sense among judges that they constitute a coherent professional group, seeing one another "not only as servants and representatives of a particular polity, but also as fellow professionals in a common judicial enterprise that transcends national borders." Some scholars are cautious about attributing too much to this loosely-constructed community, suggesting that establishing more formal procedures of dialogue might impede parochial tendencies in the judicial profession. Nevertheless, most observers agree that an international judicial community already exists and is in the process of becoming more defined.

This article builds on the various arguments that have been made for the existence of an international judicial community by bringing in the voices of judges themselves. The research on which this article is based indicates that international judges share a common conception of what it means to deliver justice in institutions that serve a population that stretches across political borders and, in some cases, extends to the whole globe. This common conception is still in formation, however, and it is clear that international judges and the institutions in which they serve

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face challenges of both a practical and ethical nature which courts at the national level may not experience.

We also found that this community is neither uniform nor necessarily benign. International judges can be parochial about defending their turf, and there is a keen competition between courts for attention and authority in an informal hierarchy of international law. Furthermore, an overdeveloped sense of community among judges has the potential to lead to a form of "corporate solidarity" that could deflect constructive criticism and stifle new thinking. These challenges may act as an impediment to the formation of a collective identity in the international judiciary. But they may also serve to underscore the particularities of the work of international judges, thereby reinforcing their sense of being engaged in an endeavor of unique importance.

This article is based upon research carried out between 2004 and 2006 on the international judiciary. The heart of our primary research was a series of interviews, ranging from one to three hours in length, with judges from the principal courts and tribunals in the international system. These interviews covered a wide variety of topics, including the judges' own backgrounds and career developments, the process by which they were nominated and elected or appointed to the court, the routine of their work, their relationships among colleagues, their thoughts on key cases decided by their courts, the ways judgments are crafted, the

4. The findings of this research served as the basis for our book, DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (2007). This article is largely drawn from that work.

5. There is no clear-cut, universally accepted definition of an international court. Five basic elements, however, characterize the international courts and tribunals that have the broadest and most sustained impact. Those courts: (1) are permanent, or at least long-standing; (2) have been established by an international legal instrument; (3) use international law to decide cases; (4) decide cases on the basis of rules of procedure which pre-exist the case and usually cannot be modified by the parties; and (5) issue judgments that are legally binding on the parties to the dispute. In 2006, thirteen courts met these criteria, and operated with a certain regularity: the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), Special Court for Sierra Leone (SCSL), European Court of Human Rights (ECHR), Inter-American Court of Human Rights (IACHR), World Trade Organization Appellate Body (WTO AB), Court of Justice of the European Communities, along with the Court of First Instance (ECJ), European Free Trade Agreement Court of Justice (EFTA Court), Court of Justice of the Andean Community (ACJ), and the Caribbean Court of Justice (CCJ). It is the judges of these courts who were the subjects of our research.
relationship between law and politics, and issues of character and ethics. Most of our interviewees were sitting judges at the time that we spoke with them. Our sample of thirty-two judges represents approximately one out of every seven sitting international judges. We also spoke on a less formal basis with a variety of other people observing international judges, including individuals who plead before them and work with them out of such offices as the registry and the office of the prosecutor.

This article will begin by providing the reader with a "snapshot" of the international judiciary, as it existed in January 2006, near the end of our research period. Subsequent parts of the article will discuss the ways in which international judges are beginning to form a recognizable professional group, in terms of their judicial culture, use of language, and interactions across courts through shared and borrowed legal thinking. We will also discuss the challenges that this community faces, both from external entities and from within its own ranks. We will show that international judges, perhaps against the odds, are beginning to coalesce into a professional group with a characteristic and increasingly uniform approach to the work of international justice, although the success of this community is far from guaranteed. Throughout the article, the words of our interviewees will be used to illustrate various points and to provide the reader with an insider’s view of the experience of international judges.6

II. WHO ARE TODAY’S INTERNATIONAL JUDGES?

Today’s international judiciary appears, at first glance, to be a very diverse group. Judges hail not only from different nations, but they also represent diversity through their ethnicity, legal training, professional background and experience, and language skills. Yet, a closer examination reveals patterns and similarities that go beyond the common garb of the judicial robes.7 Despite their

6. Most of the judges we interviewed have been quoted here without attribution, per our agreement, as detailed on pages xvi-xvii in THE INTERNATIONAL JUDGE. TERRIS, ROMANO & SWIGART, supra note 4. The excerpts in this article that are attributed to particular judges are drawn from interviews of those who agreed to be the subject of individual profiles in the book.

7. Of the courts considered here, only a few provide on their websites comprehensive biographical information on their judges, including name, nationality, date of birth, education, career background, publications, and extracurricular activities. The most detailed information can be found on the websites of the ICJ, ITLOS, and the WTO AB. A notch below the level of detail of these is the ICC, and sparser still are the
differences, the men and women on the international bench embody patterns of education and experience that have the potential to form the basis of a global community.

A. Where Do They Hail From?

In January 2006, the date of our international judicial snapshot, 215 men and women were serving as permanent members of the bench of the thirteen major international courts and tribunals. They hailed from eighty-six different countries from every inhabited corner of the globe. By region, Europeans were dominant, with nearly two-thirds of the group (137). The United Kingdom had the highest number of nationals on international benches (nine), followed by France, Italy, and Germany (seven each). There were thirty-seven citizens of the Americas, including three U.S. citizens; twenty Africans; and five from the Pacific/Oceania region. Asia, representing more than half of the biographical profiles on the websites of the ICTY, ICTR, SCSL, ECJ, CCJ and IACHR. The European Court of Human Rights started posting information on its judges only recently. More information on the ECHR judges can be found only in the records of the Council of Europe, which is hardly accessible to the public. The EFTA Court does not post any judicial information on its website at all. International judges' biographies do not provide any information on questions one might like to know about, like race, dual or multiple nationalities, political orientation, or religion. These factors play a great role in debates about judges in domestic courts but are absent internationally. At the international level, concerns about diversity and representativeness tend to be couched in terms of geographic diversity. Finally, there is no common format for biographies, making comparison and aggregation of data particularly problematic. Hence, a group portrait of international judges is necessarily sketchy and surely cannot claim absolute fidelity and completeness. The information here has been compiled with data collected in January 2006 through the official websites of the thirteen courts listed above. See Excel Spreadsheet, International Judges Data Spreadsheet (Jan. 2006) (on file with authors) [hereinafter International Judges Data Spreadsheet].

9. Id. These figures do not take account of judges sitting only for a particular case (i.e., ad litem judges at the ICTY and ICTR, alternate judges at the SCSL, ad hoc judges at the ICJ or ITLOS, or panelists of the WTO panels). Id. The figures also do not include the advocates general at the European Court of Justice, who have the status of judges, but who do not take part in deliberations (eight). Id. In January 2006, the number of permanent members of the thirteen major courts was as follows: ECHR (forty-five); ECJ (twenty-five); CFI (twenty-five); ICTY/ICTR (twenty-five); ITLOS (twenty-one); ICC (eighteen); ICJ (fifteen); SCSL (eleven); CCJ (seven); IACHR (seven); WTO AB (seven); EFTA Court (three); ACJ (five). Id. Note that, in April 2006, Venezuela announced the intention to withdraw from the Andean Community and, therefore, at the time of this writing there was no Venezuelan judge at the Andean Court of Justice, bringing the total for that court down to four judges. Id.

10. They were Thomas Buergenthal at the ICJ, Theodor Meron at the ICTY and Merit Janow at the WTO AB. Id.
world's total population, comprised just under eight percent of the judges on these courts (sixteen).

These considerable variations across the globe derive principally from whether or not states are inclined to create and subject themselves to the jurisdiction of international courts. The judicial pillars of the European area alone employ ninety-nine judges,\(^1\) a reflection of the continent's historical leadership and commitment to the development of transnational legal institutions. The Asian nations, by contrast, have not created regional courts to address economic or human rights issues, so their presence on the international bench is limited to courts with global representation. Africa's share would be larger if the survey included the judges of the several dormant or not yet active international courts on that continent.

**B. Education**

One of the distinguishing features of the international courts is the challenge of melding the two main legal systems of the world: the civil law system (essentially the legal system of the Roman Empire), and the common law system (developed first in England and spread around the world through the British Empire). Of the 215 judges serving in January 2006, sixty-three percent (136) were from civil law countries, a figure that reflects the large number from continental Europe.\(^2\) Another fourteen percent (30) hailed from common law countries, such as the United Kingdom or the United States.\(^3\) The remaining forty-nine judges came from countries that have either a mix of the common law and civil law systems (such as Cyprus or South Africa), or have Islamic law and/or local customary law blended to varying degrees with either civil law (e.g., Tunisia) or common law (e.g., Pakistan).\(^4\)

Typically, international judges have studied law in the leading universities of their native countries. While their legal training would have focused initially on their own country's domestic law, many also studied international law, which is neither common law, nor civil law, nor a blend of the two—it is a system of law unto

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11. The ECJ together with its Court of First Instance (fifty), the EFTA Court (three), and the ECHR (forty-six). *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
itself. Only a small number of the 215 judges did not have a formal law degree, and most of those had studied international law in an academic program outside of a law school, such as a program in international relations or political science.\(^{15}\)

The large majority of international judges also have graduate or doctoral degrees, most typically in international law, international relations, and/or international economics.\(^{16}\) In many instances, these advanced degrees have been obtained abroad, from a handful of the world’s elite universities. Using data as of January 2006, at least thirty-nine had degrees from universities in the United Kingdom and at least twenty-nine from institutions in the United States,\(^{17}\) a fact that suggests that many of those from civil law countries gained direct knowledge and experience of the common law outlook at some point in their training. The world’s most prestigious schools could boast of several international judges among their alumni: in the United States, Columbia and Harvard had seven each, well ahead of the next, Yale, with three.\(^{18}\) In the United Kingdom, Cambridge and the University of London topped the charts with fourteen and eleven respectively, ahead of Oxford with eight.\(^{19}\) In France, the University of Paris (in its various articulations) had the lion’s share, with eleven alumni serving in international courts.\(^{20}\) Among judges from countries that used to be in the Soviet sphere of influence, many studied at the University of Moscow or other top schools in former Eastern bloc countries.

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15. *Id.* Of the 215 judges sitting in January 2006, only one did not have a degree either in law or international relations: Arumugamangalam Ganesan, member of the WTO AB, who has an M.A. and M.Sc. in chemistry (University of Madras, India) but no law or international law degree. He has gained his experience and knowledge of the legal aspects of international relations instead through a life in national and international civil service. *Id.*


17. *International Judges Data Spreadsheet, supra* note 7. Complete information on educational backgrounds is not available for all of the judges.

18. Some have degrees from multiple institutions. Other U.S. schools where international judges studied are: NYU (three), UC Berkeley (two), U. Illinois (Chicago) (two), Notre Dame (one), St. Johns’ NY (one), Tufts (one), UCLA (one) New School (one), U. Michigan (one), Bethany College (one), Cornell (one), Duke (one), Georgetown (one). *Id.*

19. Others are Edinburgh U. (two), London School of Economics (two), Glasgow U. (one), King’s College (two), Kent at Canterbury (one), Nottingham (one), Leeds (one), Newcastle (one). Several did their barrister training at Gray’s Inn. *Id.*

20. Others are the École Nationale d’Administration—ÉNA (three), Strasbourg (two), Aix-Marseille (one), Nancy (one). *Id.*
Judge Thomas Buergenthal of the International Court of Justice offered this comment about the significance of a common educational experience among members of the international judiciary:

The question I get very often, and what I think the public should know, is that what unites international court judges is the fact that we are trained in the international legal system. Contrary to what some people believe, international law is a distinct legal system not unlike the civil law or common law system. That is, we share a common theoretical approach to the legal problems before us. In our analysis of a legal problem, we draw on the doctrines and methodologies of the international legal system. That unites us, regardless of where we judges come from. Moreover, most of my colleagues have studied international law not only in their countries but also in the major teaching centers of our field in the world. That, too, is a unifying factor.  

The fact that most judges have degrees from a handful of the world's elite schools means that, at least in large courts, it is not uncommon to find at least two judges who have studied in the same institution. It also means that a significant part of the international judiciary studied largely with the same professors, and in many cases, even the same textbooks. This similar education experience is one of the factors that create a sense of membership in a specialized and distinct professional group. Still, international judges have an educational background much more heterogeneous than that found among judges of most national high courts. As a comparison, five out of nine U.S. Supreme Court justices of the current bench (2006), studied law at Harvard, two at Yale and the remaining two at Northwestern and Columbia.

C. Gender

While the ranks of the international judiciary represent individuals from many different backgrounds, this diversity does not extend to gender. Women are absent from, or under-represented, in all of the courts considered here, although in the past few years the situation has slowly started to improve. Just twenty-one percent (forty-five) of the judges on the thirteen courts

were women in January 2006. Nearly a decade after its formation, no woman had ever served among the twenty-one members of the International Tribunal for the Law of the Sea. There was only one woman on the International Court of Justice; she was elected in 1995 and was the first to be elected in the court’s forty-nine year history. The first woman to be elected to the WTO Appellate Body was Merit Janow in 2003, who has since been replaced by Jennifer Hillman.

The European Court of Justice had two women judges among its twenty-five members, but its Court of First Instance, a more “junior” group, had a more balanced group of nine women out of twenty-five on its bench. Comparatively, the Andean Court of Justice and the Caribbean Court of Justice had a greater ratio of female representation with one woman each out of, respectively, four and seven judges.

Women tend to be slightly better represented in the case of human rights and humanitarian law bodies, but there are significant differences from body to body and region to region. At the Inter-American Court of Human Rights, Cecilia Medina Quiroga, the only female judge in 2006, was only the second woman in its twenty-five year history ever to serve on the court. The European Court of Human Rights showed more balance, but it did not come close to gender equality (twelve female judges out of forty-five). On the ad hoc international criminal tribunals, the number of women judges remained low. Out of nine trial judges there was one woman at the ICTY, and three at the ICTR. In the Appeals Chamber, shared by the two tribunals, there were two women judges out of seven. The Special Court for Sierra Leone had three women judges out of ten.

22. TERRIS, ROMANO & SWIGART, supra note 4, at 18.
23. It is noteworthy, however, that this judge, Rosalyn Higgins, was elected president of the ICJ by her peers in February 2006. Two ad hoc female judges are Susanne Bastid and Christine Van den Wyngaert.
25. TERRIS, ROMANO & SWIGART, supra note 4, at 19.
26. Id.
27. Judge Olga Navarrete Barrero was the President of the Andean Court of Justice at the time of this writing.
28. The first was Sonia Picado Sotela, who served from 1989-1994. Medina Quiroga was elected president of the court in fall 2007.
29. TERRIS, ROMANO & SWIGART, supra note 4, at 19.
30. Id.
31. Id.
A striking exception in January 2006 was the strong representation of women on the International Criminal Court (seven of eighteen members). At the Rome Conference that gave birth to the ICC in 1998, delegates noted the scarce presence of women in the *ad hoc* tribunals and the excellent performance of those few who had served there. Lobbying by non-governmental organizations and the support of sympathetic states helped bring about the article in the Rome Statute that required states to take into account the "fair representation of women" when choosing the court's judges. At the time of the first and second elections of the judges, several NGOs made extensive efforts to bring forward the names of women who met the election requirements, particularly from those countries that had little diplomatic leverage to get one of their nationals elected. Once nominated, NGOs vigorously lobbied states to elect them, which eventually resulted in an international bench with the highest female participation of all international courts, with women making up more than one-third of the bench.

Some observers have raised questions about the need for gender parity on courts. Judge Cecilia Medina Quiroga, current president of the Inter-American Court of Human Rights, responded:

Well, if you ask me if it is important to have women, just women, I would say, "Yes," because it shows that equality is respected. Why on earth not have women if we are half of the world? So it is important from a symbolic point of view for women to see other women on the court. And it is important for democracy, because it shows that women are not discriminated against. But it is also important in the sense of making progress for women's rights. For this, you not only need a woman on the court, you need one who is sensitive to the problems of being a woman and who is sensitive to doing...
whatever it takes to make people see that some of the situations that women undergo are actually violations of human rights.  

D. Professional Background

It is difficult to provide reliable aggregate data about the professional background of international judges. As they are invariably people with several decades of work experience, many have changed careers and have lengthy curricula. Few can be clearly labeled as belonging to a particular profession. A rich and diversified career seems to be the one trait common to most international judges.

International judges have principally had three kinds of careers: the national judiciary, academia, or civil service (either in an international organization or in the service of one's own government, in a variety of capacities, including diplomacy). Some have had significant legal practice as private attorneys, rising to the top of their respective law firms. A few might even have had political experience, but it is rare that career politicians become members of the international judiciary. Again, the blend varies

36. Terris, Romano & Swigart, supra note 4, at 186. From an interview recorded on September 24, 2006.

37. There are exceptions. At the ICJ, Pieter Hendrik Kooijmans was Foreign Minister of the Netherlands from 1993–1994. He was also Vice Chairman of the Dutch Evangelical Party (merged in 1980 with two other parties into the Christian Democratic Party), and Chairman of the Foreign Affairs Committee of the Christian Democratic Party. At ITLOS, Jean-Pierre Cot was a member of the European Parliament (1978–1979 and 1984–1999), President of the Budget Committee of the European Parliament (1984–1989), President of the Socialist Group of the European Parliament (1989–1994), Vice-President of the European Parliament (1997–1999). At the ICTY/ICTR, Mohamed Shahabuddeen was First Deputy Prime Minister and Vice-President, Guyana (1983–1987). At the ICTR, Jai Ram Reddy was a member of the House of Representatives and Leader of the Opposition in the Fijian Parliament (1977–1984, 1992–1999). At the ICC, Karl T. Hudson-Phillips was a member of the Parliament of Trinidad and Tobago (1966–1976); Elizabeth Odio Benito was Minister of Justice, and once a candidate for Prime Minister of Costa Rica. At the ECHR, Volodymyr Butkevych was a member of the Ukrainian Parliament; Andras Baka was a member of the Hungarian Parliament (May 1990–April 1991) and Deputy Chairperson of the National Assembly (1991–1994); Antonella Mularoni has been a member of the Grand and General Council of the Republic of San Marino since May 1993. At the ECJ, Antonio Mario La Pergola was elected to the European Parliament (1989–1994). At CFI, Irena Pelikanova was a member of the Legislative Council of the Government of the Czech Republic (1998–2004); Ingrida Labucka was a member of Parliament (2002–2004). At the IACHR, Sergio Garcia-Ramirez was a member of the Institutional Revolutionary Party (PRI) (since 1961) and occupied different positions under the PRI regime, and served in the cabinet of President José López Portillo as Secretary of Labor and then in the cabinet of President Miguel de la
from court to court, and it is not uncommon for some judges to have had more than one of these careers.

To provide some approximate figures, *grosso modo*: out of 215 judges, one can count about eighty-five who have significant academic credentials (tenured or associate, but not counting visiting and adjunct positions); seventy who can claim to be professional national judges; and about sixty who mostly had a career as civil servants. This last figure can be broken down further: about forty served in international organizations and approximately twenty for their own government. Finally, about ten can be labeled as practicing attorneys.

While none of the three principal careers (judge, academia, or civil service) provides a clear majority of judges in any particular court, some seem to provide a generally larger share of international judges than others. In the early days of international dispute settlement, most judges and arbitrators were drawn from the halls of universities. Because of their profession, international law professors were likely to have written a fundamental opus on a relevant topic, and their former students had often moved onto becoming legal advisers and diplomats for countries or organizations. In recent years, however, it seems academics have been losing their edge, if not in absolute numbers, then at least in relation to the other recruitment pools that have widened. As governments grow increasingly concerned about judicial activism, an extensive record of publication may provide the basis of opposition to an academic's candidacy for the position of an international judge.

Especially since the advent of international criminal tribunals, the number of national judges serving on international benches has considerably increased. Courtroom management skills are a valuable asset when handling criminal trials, especially high-profile ones, so it should be no surprise that the statute of the ICC tends to favor those with competence in criminal law and procedure, as well as the necessary relevant experience as judge, prosecutor, or

Madrid as Attorney General. In 1988, he lost the PRI internal bid for the party presidential candidacy against Carlos Salinas de Gortari.

38. TERRIS, ROMANO & SWIGART, *supra* note 4, at 20.

39. This last distinction is particularly imprecise as often someone might serve in an international organization on behalf of his own government.

40. TERRIS, ROMANO & SWIGART, *supra* note 4, at 20.

41. *Id.*

42. *Id.*
advocate in criminal proceedings. The statute provides that the bench will have no fewer than nine judges with this type of experience on a bench of eighteen.\footnote{43} Those with expertise in relevant areas of international law such as international humanitarian law, and experience in a professional legal capacity that is of relevance to the judicial work of the Court, have only five "reserved" seats.\footnote{44} In adopting this balance, negotiators of the ICC statute were probably taking into account the criticism that the first benches of the Yugoslavia and Rwanda tribunals were too "academic" and, therefore, responsible for the slow pace of the courts' first trials.

Civil service, whether for a national government or an international organization, is another principal recruitment pool.\footnote{45} Legal advisors of an international organization to which the court is attached occasionally make the transition to the bench: Allan Rosas, currently judge of the ECJ, was previously the principal legal adviser of the European Commission.\footnote{46} It is not uncommon to find on the bench of newly created international courts some of the diplomats who negotiated its creation. For example, a large number of the judges of the ITLOS were at some point involved in the negotiations leading to the adoption of the Law of the Sea Convention.\footnote{47} The same is true in the case of some judges of the International Criminal Court, whose president, Philippe Kirsch, a Canadian diplomat by background, was a principal figure in the Rome Conference that created the court.\footnote{48} Having reached the apex of service domestically or internationally, a civil servant can end his career in a very dignified way by serving as an international judge. Because of their connections both within their countries and in the international community, many senior diplomats have an inside track in both the nomination and election processes.\footnote{49}

This description of the international judiciary illustrates that the benches of international courts are more heterogeneous than those of their national counterparts. This is simultaneously their

\footnote{43}{Rome Statute, supra note 33, at art. 36.3.}
\footnote{44}{Id. at art. 36.5.}
\footnote{45}{TERRIS, ROMANO \& SWIGART, supra note 4, at 21.}
\footnote{46}{Id.}
\footnote{47}{Id.}
\footnote{48}{Id.}
\footnote{49}{About twenty-six judges, at some point in their career, had ambassadorial appointments. International Judges Data Spreadsheet, supra note 7.}
greatest weakness and greatest strength. It is a weakness because
great efforts have to be made in order to bridge differences among
judges. It is a strength because this same heterogeneity provides a
range of skills, competences and backgrounds much wider than
any domestic court could ever exhibit—a range which is necessary
to tackle the kind of problems international courts deal with on a
daily basis. To be effective, the bench of an international court
needs to achieve a balance between prioritizing collective
endeavors and appreciating and benefiting from individual
diversity.

III. THE EMERGENCE OF AN INTERNATIONAL JUDICIAL CULTURE

It might seem that achieving such a balance is nearly
impossible, but it is clear that international courts are, in fact,
relatively successful at doing just this. Working as an international
judge can create a powerful common mindset. The members of
this community tend to see each other not as servants or
representatives of a particular polity, but instead as fellow
professionals in a common judicial enterprise that transcends
national borders. They are bound together because they face
common substantive and institutional problems; they pay attention
to one another's judgments beyond what might formally be
mandated by any legal principle or judicial structures; and they
learn from one another's experience and reasoning. All of these
connections contribute to the emergence of an international
judicial culture.

But how can such a common culture develop in this context of
vast individual diversity? Why is there not a continual clash of
ideas and understandings? In the judicial institutions studied here,
tensions related to different worldviews inevitably arise, not only
inside the courts themselves, which are characterized by alliances
and hierarchies like other large institutions, but also in relation to
the work they perform and the constituencies they serve. It can be
observed, however, that within these tensions, there exists an
enormous potential for forging new and powerful collective
approaches to justice that can still honor the multiplicity of
cultural understandings found both inside the courts and around
the world at large.

International judges can be seen as forming what some social scientists have termed an "epistemic community," that is to say, a group of people who, while different in many regards, are animated by common ideas, sets of values, or aims. Members of an epistemic community are a "network of knowledge-based experts," held together by the members' "shared belief or faith in the verity and the applicability of particular forms of knowledge or specific truths." The judges who serve on international courts share a belief in the aims of international justice and the value of international law. This allows them to transcend personal differences—or, very often, to use these personal differences—to carry out the work of their institutions.

The development of this epistemic community—for, indeed, it is still in a formative stage—is facilitated by certain pre-existing similarities among international judges: the common patterns of training and professional background explored above. Yet, despite these patterns, the wide array of perspectives that judges bring to bear on the work of an international court strikes a contrast with work in a national context. One judge was surprised by the difference. "I always thought that I understood international organizations because I had worked with them a lot," he said, "but I didn't. Being in one is completely different. You realize how homogenous a government is, instinctively. A government is basically monolithic, and people may have their differences, but they don't challenge the basics. In an international organization, everyone challenges the basics all the time."

In many cases, judges see the mix of professional backgrounds as an asset to their institutions. One European judge called it "Great fun to work with people from very different backgrounds—not just national backgrounds, but actually almost more important here are the professional backgrounds of the people. Professors tend to be interested in solving juridical problems. Former administrators tend to be interested in solving the problems of administration."

52. *Id.* at 2-3.
53. The idea of an epistemic community has been applied also to human rights practitioners working in the field of transnational justice. See Kathryn Sikkink & Ellen Lutz, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001). Sikkink and Lutz point out that this group blends characteristics typical of both epistemic communities and advocacy networks. *Id.*
54. Terris, Romano & Swigart, *supra* note 4, at 64.
in getting a practical solution to work on the ground. Judges tend to be preoccupied with getting through a caseload and not keeping everyone waiting.\textsuperscript{55}

There thus seems to be general agreement between judges and observers that, because international courts are required to tackle very different sets of international and transnational problems, a bench with people from different backgrounds is a crucial asset. Indeed, each of the three basic pools from which candidates are drawn contributes uniquely to the blend. Diplomats provide the understanding of the larger political framework within which the case is embedded, as well as potential ramifications of judgments. They are often those providing the essential reality check in the deliberations. Academics are able to connect the judgment to the larger construction of international law, providing the formal correctness and consistency necessary to buttress the legitimacy of the ruling. National judges know how to deliberate and manage to reach consensus, how to run a courtroom, and how to correctly assess evidence and give proper weight and consideration to both parties' arguments. Each group naturally has weaknesses as well. Diplomats tend to be too deferential to governmental and systemic interests, and often argue for the status quo. Academics are often accused of being incapable of participating in a consensus, of being too abstract and of being "maximalists" who are disinclined to make the necessary compromises of judicial work.\textsuperscript{56} National judges might have too little understanding and appreciation of international law and may not be as worldly as those in the other groups.

The president of a criminal court painted a less rosy view of the professional mix in his institution. "When you look at what the judges actually were before," he said, "you see many differences. Some are former international judges, some are former national judges, some are former lawyers, some are former law professors, and some are former diplomats. Well, you put that together, you shake, and it explodes."\textsuperscript{57} Different backgrounds contribute significantly to different practical approaches to problem-solving. "I found the national judges extremely rigid in the way they were approaching things," he continued, "and the diplomats tended to

\textsuperscript{55.} Id.  
\textsuperscript{56.} Id.  
\textsuperscript{57.} Id. at 64-65.
see everything like, 'This is something that should be fixed.' Neither approach works. So, at the beginning, certainly, the cultural differences based on all these different factors were very pronounced. But, over time, I think there has really been a tightening of the judicial culture here."58

Judges in international courts seem to be relatively successful in creating a collective identity for themselves, one that allows them to pull together and work toward a common goal. This is very obvious in a court like the European Court of Justice, where dissenting or separate opinions cannot be made. One ECJ member remarked that

[A] judge coming from a national system who was appointed to the court, and who continued to see everything in terms of his own national legal system, looking at it through "national spectacles," would come up with a completely different viewpoint on all of the questions. And if all the judges were free to do that, then you would not actually manage to forge a community rule at all. You would have a collection of national viewpoints. The fact that the judges are obliged to pool their perspectives, and obliged to reach some kind of common view, is, I think, one of the main reasons why the court has succeeded.59

Several ECJ judges observed that not only is it possible for a large group of judges from different professional, national, and linguistic backgrounds to agree in the process of writing a judgment, it is not even particularly difficult. This can perhaps be explained by the fact that the judges appointed to the court have already demonstrated that they have gone beyond a narrow nationalism and participate in a larger European identity. Even for a body like the International Criminal Court, with a virtually worldwide jurisdiction and judges from around the globe, the mission of the institution seems to be so compelling that judges are able to put aside their differences and, in the words of one ICC judge, "start working together and reconcile their differences in order to form a united approach to justice."56

This "united approach to justice"—the new judicial culture that is beginning to characterize the international system—is something that may not be familiar to new international judges. It

58. Id.
59. Id. at 65.
60. Id.
is something that may very well have to be absorbed through experience and learned by trial and error. And despite the newness of this profession, there is little formalized training or mentoring about the practical aspects of being an international judge for those who are just coming onto the job. Novice judges are mostly left alone to figure out how things work in their court, posing questions to colleagues for clarification as they go. Only one court seems to have made a more formal attempt to help incoming judges learn the ropes of their institution—the creation of a “godfather system” between new and experienced judges at the European Court of Justice. But this scheme was, in the end, more an idea than a reality. Several judges from various courts noted that the support staff at their courts (experienced legal officers and secretaries) were the most helpful in providing them guidance upon their arrival and helping them to transition smoothly onto the bench.

International judges do not simply encounter a series of new duties and procedures in joining a court, however. They also become members of a complex community, made up of fellow judges, support staff, and administrators. Across this spectrum, judges inevitably end up allying themselves with like-minded individuals, in both professional and social contexts. Some judges confess to being drawn to colleagues with whom they share a language or training. For others, worldview and ideology are more significant as a foundation for friendship and collegiality. “I think there are natural alignments,” commented one member of the International Court of Justice,

[A]nd I don’t think they are related to nationality, geography, gender, or language. I really profoundly believe this from my experience. It’s just where your mindsets are similar. You have similar views on important questions like ethics, and the right way to go about things. You might expect it to be about whether you are on the conservative or the liberal end of the spectrum. But I don’t believe it’s any of the criteria you might imagine.

A European Court of Justice judge similarly noted that there are some differences between judges who are more conservative

61. See id. at 57.
62. Id. at 65-66.
63. Id. at 66.
64. Id.
and those who are more liberal. "There are people who want to be more cautious than others. But then, in my view, it's a sliding scale, and somebody who might want to be very cautious in a certain type of situation tends to be much more bold in other situations." Thus, it is difficult to predict with whom judges will feel the most solidarity or sympathy among the members of their bench.

International courts face an additional challenge unknown to most national judiciaries: their benches are composed of judges who have been trained in distinct legal traditions. Most judges have either a common or civil law training, depending upon the country where they studied. Countries of the post-colonial world generally inherited the system of their colonizer; thus, judges from the UK, Nigeria, St. Kitts and Nevis, and India will all have a common law training, while their peers from France, Mali, Algeria, and Vietnam will have a civil law training. In some countries, judges might also use customary or Islamic law alongside common or civil law. One might say that international judges have learned to speak the language of law using not only different vocabularies but also different grammars.

Judges necessarily bring their training with them to the courts on which they serve. These courts have found various and unique ways of blending the different systems, especially in terms of their rules of procedure and evidence. As a judge of the European Court of Justice explained, "European Union law is a kind of mosaic system, a mixture of common law and continental systems," and the same mosaic effect exists in all international courts to a greater or lesser degree. On the Caribbean Court of Justice, judges with a civil law perspective work in tandem with experts in common law. One former clerk of the court said, "This collaboration allows highly-accomplished judges to learn from each other and benefit from each other's experiences." One judge who was instrumental in the development of the rules of procedure and evidence for the Yugoslavia tribunal described the accomplishment of the first real code of criminal procedure on the international level as,

[A] synthesis of three things. First, [it is] a synthesis between the civil and the common law. And the statute was made on the

65. Id.
66. Id. at 68.
67. Id.
68. Id.
basis of common law, but we managed to inject a good part of civil law—at least permitting a more active role of the bench in the cases. Secondly, we had to inject into it all the codes of human rights that were developed in the UN. And then, thirdly, we had to adapt it to the conditions of the international legal system, which is a different environment, particularly in its access to persons and to evidence and to territory. So, it was very complicated!

International judges disagree about how significant an impact the different training of judges actually has on the work of their courts. Many would agree that the impact is less about substantive law and more about the habits and procedures that directly shape the outlines of judicial work. It has been noted that common law judges are clearly more comfortable with oral hearings than their civil law peers. One member of the European Court of Justice remarked on how this plays out in day-to-day work.

There is a different attitude among members of the court toward hearings . . . . Some think that oral hearings are not very important, because they have this notion that it is the court that knows the law and there's no purpose in having a hearing. Because we know the law. That's very much in the French legal tradition. Why do we need the parties to come and tell us the law? We don't have anything to gain by having to sit here for three hours listening to the parties. And so you will see that many times they will not even ask any questions. And then you have other members who actually use hearings not only to promote discussion of the facts but also to clarify some elements of the law. I think it's a reflection of the nature of this court where you have quite different legal traditions. It makes it interesting, but sometimes it also creates certain tensions, this different approach to defining judicial function and the search for the legal truth.

Another ECJ judge observed that attorneys from civil law countries are often stymied when asked by the bench to answer questions extemporaneously, expecting to simply read their statement aloud to the court. Barristers from common law countries, on the other hand, are experienced with such requests and handle them with great skill.

69. Id.
70. Id. at 69.
71. Id.
The procedural differences between common and civil law traditions become even more visible in the context of an international criminal court. Civil law judges and attorneys may not be familiar with the cross-examination of witnesses or the notion of the inadmissibility of hearsay evidence. Their common law colleagues may find communication between judges and counsel outside the formal setting of the courtroom to be not only unfamiliar but also a breach of ethics. A common law judge on a criminal tribunal admitted to discomfort with the role of written evidence in trial proceedings, preferring the common law insistence on oral testimony by witnesses:

The big fight is between written and oral evidence. [Civil law judges] say a lot of things can come in by written evidence. You don't have to have the person who saw it or heard it and that sort of thing. Now, I do not feel myself capable of assessing a written document by a presumed witness unless it's on its face incredible or contradictory. But if somebody tells a straight story and I never see the person or never have a chance to cross-examine them, I don't feel that I can evaluate it. The civil law folks say, well, you have juries, and those are lay people and so that's why you need to have the actual witness, because they are not capable of evaluating written evidence, but judges are. Well, I think that's baloney! We are no more capable of looking at a piece of paper and knowing whether it's truthful unless we know a lot more about the situation in which it was written.72

But this same judge has experienced some of the civil law procedures of the international court as liberating.

I especially liked the fact that, more so than in [common law domestic] courtrooms, the rules permit the judges to ask questions. Usually you try not to interrupt the flow of the testimony, but as you listen to it, you're compiling in your own mind what you think they haven't covered. And it's perfectly allowable at the end of the testimony for the judges to ask those questions. In several instances, I felt those questions were very useful. And I felt like I was in the process, I was an active player!73

The Rwanda tribunal also struggles with its mix of civil and common law procedures.74 Some suggested that certain common

72. Id. at 69.
73. Id. at 69-70.
74. Id. at 70.
law procedures might even be considered the culprit when it comes to the tribunal's long and drawn out trials. "I find the common law approach struggles quite a bit about the admission of documents," one judge noted with exasperation.

That's quite a waste of time, sometimes. There, I prefer the civil law or mixed law approach, simply to say that we take it in as much as possible and we weigh it on the merits at the end of the day. In my courtroom, I deliberately try to avoid any procedural discussions. Procedural discussions are just sand in the machinery. The point is to get rid of the question, in a fair way, balancing the interests, but not to allow discussions just for the sake of it.  

Georges Abi-Saab is a member of the World Trade Organization Appellate Body and formerly served as an appeals judge for the ICTY and an ad hoc judge for the ICJ. He considers "the judicial function" to be one of the elemental notions that link judges together from different kinds of courts. He offers this comment on the three courts on which he has served:

You can see that there is a great difference among those three fora. But they have something in common: on whichever you sit, you are exercising the same function, the judicial function. The judicial function has its own requirements, and it is the same everywhere. However, it is like living in different houses. The rules of architecture are the same, but you feel the environment is very different. That is the judicial policy that varies from organ to organ. But judicial policy has to remain within the parameters of the judicial function.  

IV. THE CHALLENGES OF LINGUISTIC DIVERSITY  

Even if judges agree on the function they are to fulfill as members of a bench, they may occasionally experience the difficulties that come with working in groups that are linguistically diverse. Having multilingual benches is of an undeniable benefit to judicial institutions; it broadens the sources of jurisprudence that judges can access and may provide important insights into the interpretation of testimony, the legal traditions of different countries, or the background of particular cases. But on an

75. *Id.*
76. Interview with Georges Abi-Saab, Member, WTO Appellate Body (Oct. 31, 2006) (on file with law review).
77. *Id.*
everyday level, working alongside speakers of different languages also has the potential to impede the development of a sense of community among international judges.

"Language issues bedevil all international courts!" declared a judge of the ECHR. While he feels this is true for international courts generally, it is particularly applicable to his own. With a jurisdiction covering the forty-six states of the Council of Europe and a judge representing each one of them, language problems are perhaps particularly pronounced at the ECHR. Yet, all courts experience to some degree the challenges that accompany the linguistic diversity not only of its staff, but also of the parties appearing before the court.

All languages are not equal, however. The most common pattern followed by international courts, and historically by other international institutions as well, is to elevate one or more languages to the status of a "working language." All court personnel are required to speak at least one working language, and official documents are produced in only those languages. English and French are the most common working languages, reflecting the global predominance of the first in the contemporary world, and the historic centrality of the second to the development of international law and institutions. The ECHR pairs English and French, as do all the United Nations courts. The International Criminal Court has followed suit. The Rwanda tribunal has made efforts to make Kinyarwanda, the language of most of the Rwandan population, a quasi-working language of the court. Courts with regional jurisdiction generally operate in the languages that make sense in their geographic zone: the Inter-American Court of Human Rights uses Spanish, with English serving as a secondary language; the Serious Crimes Investigation Unit in East Timor had English, Portuguese, Tetum and Bahasa Indonesian as working languages, although English played a very significant role among judges and staff; the Caribbean Court of Justice has three official languages, English, French, and Dutch, although the latter is little-used compared to the others; and the African Court of Human and Peoples' Rights has adopted the languages that have official status in the countries of the African

78. TERRIS, ROMANO & SWIGART, supra note 4, at 71.
79. Id. at 71-72.
continent—English, French, Portuguese, and Arabic. Only one court—the European Court of Justice—uses French as its sole working language.

The decreased role of the French language in international courts parallels its declining importance on the world scene over the past century. Although equal in status as a working language in many courts, it is rarely spoken by as many judges or court staff as English. This may leave the Francophones feeling frustrated or marginalized, especially in courts where the Anglo-Saxon presence—both linguistic and legal—is dominant. In a court like the European Court of Human Rights, where most judges come from countries where neither working language is spoken, English is clearly the priority language to learn, despite the fact that the court is located in Strasbourg, France. An ECHR judge commented,

> It's very frustrating when, like myself, you're coming here trying to get your French up to the standard and every time you open your mouth in French, someone responds in English. And when you are in a deliberation and somebody is speaking in English, hardly anyone is listening on the interpretation, sometimes no one. But when someone is speaking in French, then you will always see two, three, or four judges listening to the translation.

The dominance of English over French is also noted by judges of the WTO Appellate Body, the Law of the Sea Tribunal, and the International Criminal Court, all of which use both as working languages. One ICC judge observed that despite the possible tension that could arise from this language “competition,” the court staff does not necessarily divide up into Francophone and Anglophone groups: “English obviously dominates here, as it dominates any other international organization. The reason why I've said there's no Anglophone group is that the English-speaking world is no longer Anglo-Saxon—it's much bigger than that now.” Indeed, another ICC judge, noting that she and many other judges speak English as a third or fourth or fifth language, claims that the real language of the ICC is “broken English.”

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80. These are also the official languages of the African Union, the establishing body of the court. See African Union Official Website, http://www.africa-union.org.
81. TERRIS, ROMANO & SWIGART, supra note 4, at 72.
82. Id.
83. Id. at 72-73.
This natural evolution toward a single working language in courts may appear beneficial, as it might eventually reduce the need for translation altogether, at least among judges. Many judges point out, however, that those who have English as a native language find themselves in an advantageous position in relation to their peers. Only native speakers have the full range of lexicon and usage that allows them to express complex legal ideas with the greatest subtlety and skill. "If somebody from China takes the floor in English," observed a judge of the Law of the Sea Tribunal, "even if he is an expert and had been at the Law of the Sea Conference, he will never leave the same impression from his ideas as somebody whose mother tongue is English." One judge from a small country bemoaned the fact that he has never been able to work in his native language at all, which he has experienced as a great professional disadvantage. There is, however, clearly more to being a judge than speaking a working language fluently, and this should not be minimized. A judge whose native language is Arabic noted:

There is always an advantage for someone who speaks his own language, especially in law. I mean, I've spent my whole life working in two languages that are not my own. And that's a great handicap. I might have been much better had I been able to use my own language! And even between the two foreign ones, I get a little bit confused sometimes. So I think the linguistic advantage is important. But it is outweighed sometimes by the intellectual advantage. I mean, someone who is not very articulate in a particular language... still, if he has a certain force of reasoning, he can impose his way in spite of this small handicap.\(^\text{85}\)

Despite the obvious primacy of English in most international courts and tribunals, many judges concur that the ideal scenario is for courts to have members who are proficient in multiple working languages. Those with the greatest linguistic skills often end up taking the lead in deliberations. A judge of the European Court of Human Rights observed,

\[\text{P}eople\text{ who have facility in one or other or both of the working languages—and by that I mean practically speaking them like a native—have an enormous advantage. And I think that their influence is proportionately increased in that regard.}\]

\(^{84}\) Id. at 73.  
\(^{85}\) Id.
It's noticeable that at the top level of the court, the people are multilingual.  

A judge of the International Court of Justice spoke admiringly of colleagues whose knowledge of both English and French is so impeccable that they can look at versions of court judgments in both languages, see where the translators have not quite gotten it right, and make an alternative suggestion for phrasing or terminology. A judge on the Rwanda tribunal from an English-speaking country discovered, upon taking up his post, that speaking French would facilitate his work immensely. He immediately undertook to study it, despite his already crushing workload. Many international judges similarly add language study to their already long list of professional activities, and often the court administration facilitates such efforts. For example, the Caribbean Court of Justice has instituted weekly Dutch classes aimed at allowing members of the court to serve citizens of Surinam with greater ease.  

Several judges, and perhaps not surprisingly those who are multilingual themselves, have suggested that candidates for the position of international judge be evaluated, at least partially, on their language skills. A member of the Rwanda tribunal bench, who has neither French nor English as a native tongue, insisted on the need for broad language competency:

> We all speak with our accents, but judges should certainly be fluent in at least one and, hopefully, in both languages of the court. I think that what we should strive for in the future, at the international level, is a situation where we have bilingual judges. I speak English and French and I find that it is a huge advantage.

A former Yugoslavia tribunal judge and native English speaker suggested, as an alternative, that courts try to have more bilingual legal assistants and other staff. That way, judges could be assisted in their work on documents in languages that they do not speak. An ICTY colleague—a non-native English-speaking polyglot—argued, however, that asking for judicial candidates who speak two working languages is not overly demanding, and noted the disadvantages of depending on legal assistants for such assistance: "When you have two languages only, you should select

86. Id. at 73-74.
87. Id. at 74.
candidates who have at least a good basic knowledge of both, otherwise it can't work. Sometimes, for judges who speak just one language, I have the impression that they are maybe led to a certain extent by their bilingual assistants."

Despite recognizing the obvious advantages of international courts having multilingual benches, many in the field of international law fear that requiring extensive language skills for the position of international judge would further limit an already small pool of qualified potential candidates. Linguistic competence tends to receive, in fact, only a cursory examination during the election process for international judges. For the time being, professional experience and legal knowledge seem to trump linguistic skill as qualifications for the position of international judge.86

Can a community of international judges be created if all its members do not speak the same language? This is a challenge that most national judiciaries do not have to face, since even the most multilingual of countries tend to have a single official language that serves as the medium of communication in a court. In the international judicial system, the problems of communication among speakers of different languages will probably be solved in the same way it has in the domains of academia, scientific research, and business. It will fall to non-native speakers of English to master the global lingua franca if they are to keep in step with their fellow judges and benefit from judicial dialogue.

V. JURISPRUDENTIAL DIALOGUE

One of the most important forms of dialogue that judges engage in is the reading and sharing of each other's jurisprudence. They pay attention not only to the jurisprudence of their own court, but also to that of other courts. Since most courts are self-contained worlds and have different jurisdictions (subject matter, personal, geographic or otherwise), it is not often that judges have a formal reason to consider one another's rulings. Yet, from time to time, courts use rulings to engage in a sort of jurisprudential dialogue. The dynamics of this dialogue are variable, but a few patterns do exist. First, it seems to be far from egalitarian. There is an informal and unconscious, but tangible, pecking order among

88. Id.
89. Id.
international courts and tribunals. Some courts prefer talking—or worse, lecturing—to listening. And when it comes to listening, the level of attention depends on which court is doing the talking. 50

Then, some courts have closer relationships than others, which inevitably instigates more intense exchange. For instance, the ad hoc tribunals for Yugoslavia and Rwanda are Siamese twins, connected at the head, as they share the same appellate chamber. The statute of the Special Court for Sierra Leone specifies that the court “shall be guided by the decisions” of the two tribunals. 91 The International Criminal Court, once it starts to issue decisions, will likely consider the rulings of the ad hoc tribunals as well. The European Court of Justice and the Court of the European Free Trade Agreement are also linked, as the agreements creating the EFTA Court require it to follow the jurisprudence of the ECJ. 92 The ECJ and the European Court of Human Rights, having some area of overlap, especially regarding individual freedoms, are engaged in a regular dialogue. 93 Their judges meet once a year for an informal one-day seminar and brief each other on pending cases that might be of mutual interest. The ECHR and the Inter-American Court of Human Rights closely read each other’s judgments since both are involved in the application of human rights conventions that contain many similar, if not identical, provisions, although the massive case law of the ECHR gives the Strasbourg court a louder voice than the one in San José. 94

The role of precedent across international courts has not yet been thoroughly studied, since only recently has the number of international rulings of most courts become sizeable. 95 Of course, policies (always tacit, never explicit) might vary from court to court, and each judge might have a different attitude, but it seems

92. See generally Thordis Ingadottir, The EEA Agreement and Homogenous Jurisprudence: The Two-Pillar Role Given to the EFTA Court and the Court of Justice of the European Communities, 2 Y.B. OF INT’L L. & JURIS. (2002).
94. TERRIS, ROMANO & SWIGART, supra note 4, at 120.
95. See Miller, An International Jurisprudence? The Operation of “Precedent” Across International Tribunals, supra note 90, at 483-526.
that a few elements of a sort of "theory of precedent" are gradually emerging. 96

First, no international judge seems to feel bound by the jurisprudence of another court. This is unsurprising given the fact that courts are not even formally bound by their own precedent, are not hierarchically organized, and despite a few exceptions, are self-contained jurisdictions. However, this also seems to stem from a certain sense of pride and defense of one's own judicial turf. Thus, jurisprudence of other courts is taken into consideration only when one's own court has no useful precedents. Although some judges might be more willing than others to cite, it is generally done sparingly, selectively, and grudgingly. Relying too much on other courts' jurisprudence is tantamount to abdicating one's own role. As a veteran judge said, "Referring to and even quoting a judgment of another court does not make it a formal source. It is just as an example of one proposed solution, a solution which was adopted by the colleagues of another international court."97

Second, if, on a given point of law, judges of one court feel differently than those of another court, out of judicial comity they will simply omit to take cognizance of judgments that do not support their reasoning. Citing to say "they got it wrong" is generally avoided, even severely frowned upon. 98 A judge of the Sierra Leone court commented that in the case involving the immunity of Charles Taylor,99 a relevant ICJ case100 was cited

96. TERRIS, ROMANO & SWIGART, supra note 4, at 120.
97. Id.
98. There are, however, some very notorious exceptions. For example, the ICTY tribunal chastised the International Court of Justice in the decision of its appeals chamber in the Tadic case. In its earlier Nicaragua case, the ICJ had to determine whether a foreign state (the United States), because of its financing, organizing, training, equipping and planning of the operations of organized military and paramilitary groups of Nicaraguan rebels (the so-called contras) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27). The ICJ held that a high degree of control was necessary for this to be the case. It required that first, a party not only be in effective control of a military or paramilitary group, but that also the control be exercised with respect to the specific operation in the course of which breaches may have been committed. In the Tadic appeal decision, the ICTY criticized the "Nicaragua test" as not consonant with the logic of international law of state responsibility and at variance with judicial and state practice. Prosecutor v. Tadic, Case No. IT-94-1-I, Appeals Judgment, ¶¶ 116-145 (July 15, 1999).
profusely, but “we did not follow it because one was able to distinguish it. So that’s how we proceed. We try to be independent in our thinking without showing disregard to earlier thinking of the other courts. We show them the utmost respect.”

Third, the formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, non-binding advisory opinions or anything else. What they look at is the jurisprudence rather than any specific case, and what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive. As one judge admitted, “I’m not certain that there is much great practical difference between a decision that is binding, and one that is not binding but persuasive.”

In the judges’ minds, international courts seem to be divided between generalized (like the ICJ) and specialized (all others), and between regional courts and the so-called “universal courts,” whose jurisdiction is not restricted to any particular geographic area. This means that specialized courts will consider, quote, and defer to the ICJ on matters of general public international law. As a WTO Appellate Body member admitted, “I think we would never take on the ICJ. Whenever there is a reference, it is a reference as an authority.” Arguably, this should also imply that the ICJ will defer to specialized tribunals with special knowledge or competence on certain matters, but to date, no such case has arisen.

Fifth, “universal” courts might consider, but will refrain from quoting, regional courts. This is because of the need not to attribute particular value to the jurisprudence of certain regions in the determination of the content of rules of international law with universal reach. One ICJ judge expressed the concern that “if we cite the European Court of Human Rights, somebody from Africa might say, ‘Why are they relying on this European court as the authority?’” The judge pointed out, however, that in the Wall case the ICJ did cite the United Nations Committee on Human

101. TERRIS, ROMANO & SWIGART, supra note 4, at 120-121.
102. Id. at 121.
103. Id.
104. Id.
Rights. "And there we had no problem because it is a UN body, thus representative of the world, not a particular region." Regional courts, on the other hand, do not seem to have any qualms considering and quoting "universal" courts.

Relying on the jurisprudence of national courts seems to be more problematic. Much like the case of international rulings, they are just a documentary source that can be used to provide evidence of a rule generated by one of the primary sources. Yet, their impact on substantive international law is limited by several factors.

Domestic courts rarely pronounce themselves on rules of international law. They are rather a more useful source when it comes to searching for general principles of law. Besides, they seem to be considered a last resort, to be looked at only when international sources do not help. "National case law will come into play mostly when international sources don't give an answer," one judge explained.

For example, when there is a matter of what is impartiality, there is no need to go to a Canadian or German supreme court and find out what impartiality is when you have established case law at the global and regional level. So it becomes more subsidiary. But when it comes to, say, the question of a rather procedural issue that has never been dealt with in human rights case law, and which is very criminal law-oriented, then, why not look at the national level and try to distill, to find out what is the common denominator here, or what is the best solution, even if it is not the common denominator?

Attitude towards national case law varies from court to court, and from judge to judge. The civil law/common law divide might play a role in this variation. The Special Court for Sierra Leone, for example, felt free to draw upon the decision of the British House of Lords regarding Chilean dictator Augusto Pinochet, when considering matters of immunity. Similarly, it referred to both U.S. and British decisions in a case that came before the appeals chamber regarding judicial independence. "We go

105. Id.
106. Id. at 122.
107. Id.
wherever we can find a suitable decision with principles that we agree with,” said one SCSL judge.

Sometimes where possible, where it’s relevant, we go to the jurisprudence of civil law courts. We don’t use civil law doctrine and jurisprudence much because, even within the civil law, there’s not the degree of harmony that people thought. German civil law is different from the French civil law. And there is so much variation and if you are not a civil lawyer, you do have to leave that side alone. But where we get a clear pronouncement which we understand, then we use it.¹⁶

Other courts and judges are much more cautious. For instance, the European Court of Justice rarely cites national judgments. One judge explained that his colleagues do sometimes look to the U.S. Supreme Court on matters such as antitrust law or questions of discrimination, but,

[M]aking the direct acknowledgement could be politically awkward or undesirable. If you do that, then you should be, in principle, open to do that also with, say, the Supreme Court of Somalia. You sort of open up something. We wouldn’t necessarily like to have a practice where we would only cite the U.S. Supreme Court but no other national courts, and it also has to be noted that we don’t cite our own national courts either, except of course when they ask us for preliminary rulings. That you can’t avoid, but otherwise we wouldn’t cite national courts.¹³

As a judge on the court commonly recognized to be at the top of the pecking order, ICJ judge Thomas Buergenthal is perhaps exceptional in how he views the sharing of jurisprudence. His experience with other international courts, and his openness to having a dialogue with other international judges, is reflected in his knowledge and recognition of the value of the jurisprudence of other courts, both international and domestic:

Contrary to what one would think, we at the ICJ do read decisions of other courts that bear on what we are doing. And even though we don’t cite them—I’ve written and said we should cite them, but we don’t cite them—we do read them, and we take different views into account when they are relevant. The same is true of important national court decisions. The argument for not citing other court decisions or academic

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¹⁰. TERRIS, ROMANO & SWIGART, supra note 4, at 122.
¹¹. Id.
writing is that it avoids criticism that we are influenced by the views of one or the other region of the world. There is always the question, for example, that if we cited the European Court of Human Rights, somebody from Africa or Asia might say, "Why are they only relying on this European Court of Human Rights as the authority?" We don't cite authors because [people would] say, "How come you cited X and you didn't cite Y?" On the Inter-American Court, we did cite the ICJ and we cited the European Court of Human Rights, and initially we even cited academic authorities. Eventually, though, we decided not to cite academic authorities in order to avoid criticism from a variety of quarters. But in my opinion there is no good reason for not citing the judgments of other international courts.112

VI. SOLOISTS IN THE CHOIR

International courts are collegial bodies, and their decisions are taken by majority. But, at the same time, courts are composed of remarkable individuals with well-developed ideas, an awareness of their own values, and, very often, pride. Formation of consensus, and the dialectics of the deliberation room, might pose a challenge to men and women used to being the voice of authority.

There is no uniform practice regarding whether judges are allowed to express publicly their disagreement with their court's judgment or to explain individually their own legal reasoning.113 While most of the thirteen major international courts permit dissenting and individual opinions and declarations, the European Court of Justice, with its large caseload and extensive impact and influence, is one exception to this allowance.114 At the WTO, Appellate Body dissents are discouraged, but not forbidden, and the practice in this regard is in a state of flux.115

112. Buergenthal Interview, supra note 21.
113. TERRIS, ROMANO & SWIGART, supra note 4, at 123.
114. The EFTA Court also does not permit dissents. See Carl Baudenbacher, Judicialization: Can the European Model be Exported to Other Parts of the World?, 39 TEX. INT'L L.J. 381, 384 (2004) (stating that "[t]he main argument against introducing a dissenting opinion system in the Community courts and the EFTA Court is the fear that dissenting judges could be exposed to pressures by governments and their chances to be reappointed could be placed at risk").
115. John H. Jackson, Dispute Settlement and the WTO: Emerging Problems, in FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM 71 (2000). ("There is no indication of particular authorship of any part of an Appellate Body report and no provision for dissenting opinions."). A recent WTO AB decision, however, may suggest that this is changing. In the Asbestos case, one of the panelists
The issue of dissenting and individual opinions is one where the rift between common law and civil law traditions is most evident. The concept of entitling members of a collegiate judicial body to give their personal opinions on the legal questions presented is rooted in the Anglo-Saxon legal tradition, where the judgment is conceived as the sum of the decisions of the individual judges. Conversely, the traditional civil law stance on the issue is that a court is a uniform entity taking decisions by a majority that remains anonymous after deliberating in camera. One of the reasons why the ECJ (and its twin, the EFTA Court) does not allow opinions is believed to be that the founding members of the European Community, which also created the court, were all countries of civil law tradition.

Judges are divided on the merits of formal individual opinions. In the case of concurring individual opinions, it is argued that they enrich the judgment because, having been usually drafted by a single judge, they show a higher degree of inner logic and consistency than the majority opinion. In the case of dissenting opinions, by letting dissenters go their way, the judgment of the majority looks less like a patchwork of various opinions and a compromise solution. Dissenting opinions may also help the defeated party accept the verdict because they signal that the court gave full consideration to the arguments presented. Pragmatically, in courts that do not routinely operate in chambers, and where cases are decided by groups of ten judges or more, judges argue that opinions might be the only alternative to impossibly protracted deliberations. As a president of a court admitted, “We try to avoid dissent, but sometimes it’s very difficult to do that, and entirely time consuming, so it’s better to have a dissent sometimes.”

Some argue that judges are human beings and thus are entitled to their individual freedom of speech. Opinions are an essential safeguard of judicial independence and ensure greater transparency and accountability. They allow judges the


116. TERRIS, ROMANO & SWIGART, supra note 4, at 123.

117. Id.

118. E.g., France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg.

119. TERRIS, ROMANO & SWIGART, supra note 4, at 124.
opportunity to explain their votes and thus prevent speculation and erroneous attribution, particularly when the bench taking the decision is made of a few judges. In the case of the WTO Appellate Body, where they are discouraged but not forbidden, the result is a compromise whereby dissents are included in judgments but are not attributed. Yet, since decisions are taken by a chamber of three members, usually everyone involved knows who has authored the opinion. A member of the EFTA Court, where dissenting opinions are not allowed and, likewise, there are only three judges to decide cases, voiced his unease: "I think that we should be more honest and introduce a dissenting opinion system, particularly in a court of three, since rumors are going around. We would be much more protected by a dissenting opinion system. Then dissents would be official. Otherwise, they are just floating around."

Judges critical of dissenting and separate opinions argue that, far from ensuring independence, they might actually undermine it, particularly in those courts where judges can be re-elected or reappointed. This carries special force at the ECJ, where there is no real competition between states to get their nominees elected, so states de facto decide who their judges will be. Collective judgments, in other words, allow judges more freedom, because their individual role in the decision is hidden from public view. Dissenting opinions would expose judges to the scrutiny of their governments. An ECJ judge observed that

[B]ecause no opinions are allowed, and it is not said who voted in favor or against, there is no way in which a government would know which way a judge voted on something or another. By the same token, the advantage of not having dissenting opinions is that there is no opportunity for a judge to signal to the boys back home, "Look what a good boy am I."

Allowing opinions places judges in a series of ethical dilemmas, as another ECJ judge explained:

You would have the situation where judges start writing opinions before their mandate expires or before they are asked to resign. Whatever you do then is wrong: if you go against the government because now you are just doing it in order to show

120. Jackson, supra note 115.
121. TERRIS, ROMANO & SWIGART, supra note 4, at 124.
122. Id.
that you're independent. And if you go for the government, it's because you want to be reappointed. It opens up all these sorts of nasty speculations.\textsuperscript{123}

Critics of opinions also argue that dissents, or alternate bases for reasoning, weaken the authority of a court. At the WTO, where the Appellate Body is composed of three-person divisions, one member asks, "What's the authority of the decision which is supported by only two?"\textsuperscript{124} Manifest dissent jeopardizes the uniform interpretation of the law. In international criminal tribunals, separate or dissenting opinions have the danger of undermining the perception that the accused has been found guilty beyond reasonable doubt. In other contexts, dissents might stir and provide fuel to internal conflicts between institutions and organs and between states and institutions, an anathema particularly for the building of the European federalist project.

This is also why the ECJ, unlike all other international courts, has advocates general. They are full members of the court, but they are not judges and they do not take part in the court's deliberations.\textsuperscript{125} Their role is to give the court, as complete independents, a reasoned opinion on the pending case, weighing pros and cons and the likely impact of the judgment on the overall legal system. It is a sort of "institutionalized opinion," one that comes from someone close enough to the court to compensate for the fact that opinions are not allowed at the ECJ, but separate enough not to undermine the court.\textsuperscript{126}

General debate about the advantages and disadvantages of opinions aside, everyone agrees that the use or misuse of opinions is largely a matter of an individual's culture and background, self-discipline, and the capacity of the president of the court to mediate. As one judge puts it, "It's a question of disposition. You have to have the discipline not to do that as a breaking exercise. Your colleagues rapidly know if you are going for the common good and try to polish things up and get it a bit better."\textsuperscript{127} Another judge echoes those words: "It shouldn't be an avenue for you to portray yourself, or indulge your ego. It's such a disservice to the

\textsuperscript{123} Id. at 125.
\textsuperscript{124} Id.
\textsuperscript{126} Id.
\textsuperscript{127} TERRIS, ROMANO & SWIGART, supra note 4, at 125.
people who put you there. A judge of the ICJ elaborated on good uses and bad uses of opinions:

The purpose of the opinion is not to criticize a judgment; it’s to let your opinion be known, which is not exactly the same thing. There are good uses and not-so good uses. For instance, in the Kosovo cases, a majority of the court—a slight majority—decided that there was no jurisdiction because Yugoslavia was not a member of the United Nations at that time. However, there was a strong minority thinking that there was no jurisdiction for quite different reasons. I think it was quite justified in this case to make an opinion because these might have an impact on the Bosnia-Herzegovina case we have now.

Unsurprisingly, academics-turned-judges have a particularly bad reputation when it comes to their capacity for team play and for keeping the purpose of the exercise well in focus.

No matter how hard a court tries to find a common ground and no matter how skilled and patient a president might be, certain personalities simply cannot be corralled. Shigeru Oda, the former Japanese judge of the ICJ, has probably taken advantage of the possibility of speaking his mind the most. In twenty-six years at the ICJ (1977-2003), he authored no fewer than fifteen declarations, twenty-three separate opinions, and fifteen dissenting opinions. Others, like the Sri Lankan Christopher Weeramantry, will probably go down in the history of the court as the author of the lengthiest opinions, often exceeding the length of the judgment itself and resembling veritable treatises of international law in

128. Id.
132. TERRIS, ROMANO & SWIGART, supra note 4, at 125.
their own right. 134 Recalling the seminal Tadić case, decided by the ICTY/ICTR Appeals Chamber, a judge noted, "There was even one judge, the Pakistani judge, who said, 'I write my own judgment.' And he wrote the separate opinion, which was in reality a veritable separate judgment. He just didn't participate!" 135

All together, opinions of judges of international courts form a very bulky corpus. Numbers at the ICJ alone are staggering: in over sixty years of activity, it has accumulated 1017 opinions (262 declarations, 406 separate opinions, 349 dissenting opinions) in slightly more than one hundred cases. 136 Whether concurring or dissenting, opinions do have a decided, but unquantifiable impact on international law. First, international law is shaped by multiple factors that are difficult to unbundle. Second, the exact value of subsidiary sources in the shaping of international law is quite unclear. Third, although parties do frequently cite opinions, they are rarely expressly cited in decisions of international courts themselves, even where that might have been useful or appropriate. Be that as it may, there are numerous examples in international legal scholarship, especially that of the eldest of standing international courts, the World Court, 137 that have altered the course of international law or the subsequent development of the given court's case law. 138

At one extreme, one might say that opinions are merely equal to the writings of the most distinguished scholars of international law. That is to say, they are just another subsidiary source that can be examined when determining the content of the law as established by the primary sources. 139 At the other extreme, one

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135. TERRIS, ROMANO & SWIGART, supra note 4, at 126.
137. This term refers collectively to the Permanent Court of International Justice and its successor institution, the International Court of Justice.
might say that their practical value approximates that of decisions of a whole court, particularly when well-written and reasoned. Regardless, it seems that if law-making by international courts is not readily accepted, law by a single judge should arguably be considered even more problematic. The emergence of a global judicial community, however, is creating a legal environment that tends to curtail grandstanding.

VII. PUBLIC PRESSURES

The legitimacy of international courts does not rest solely, however, on the value and unanimity of their judgments. The courts also need the support and visibility that can be created through the embrace of public opinion in key regions and around the world. Although the ideal image of judges and their courts shows them operating in seclusion from the outside world, immune from political influence or public pressure, international courts are institutions born of politics and often beholden to the public. They are subjected to particularly close scrutiny—from member states, the press, and the public at large—and this makes for unique challenges to their ability both to function independently and to feel the full benefit of judicial community-building.

Insulation from public opinion is, in some ways, the very essence of the work of the judge, whose first duty is to the law rather than to an electorate. In practice, judicial seclusion from public pressure has proved less than perfect. In the United States, for example, there have been numerous attempts by legislatures and other political bodies to coerce judges to be more responsive to majority sentiment, and the public examinations of U.S. Supreme Court candidates have become a regular ritual of political scrutiny. Nevertheless, direct attempts to influence

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140. For example, the recent appointments to the U.S. Supreme Court to fill vacancies left by Sandra Day O'Connor and William Rehnquist created heated debate. Harriet Miers went so far as to withdraw herself as a nominee after being subjected to rigorous scrutiny over her politics and judicial qualifications. For discussion of the recent appointments to the U.S. Supreme Court, see Michael A. Fletcher and Charles Babington, Miers, Under Fire From Right Withdrawn as Court Nominee, WASH. POST, Oct. 28, 2005, at A1; David Stout and Timothy Williams, Miers Ends Supreme Court Bid After Failing to Win Support, N.Y. TIMES, Oct. 27, 2005, available at http://www.nytimes.com/2005/10/27/politics/politicsspecial/27cnd-scotus.html; Peter Baker, Alito Nomination Sets Stage for Ideological Battle, WASH. POST, Nov. 1, 2005, at A1; Elisabeth Bumiller and Carl Hulse, Bush Picks Appeals Court Judge to Succeed O'Connor on Court, N.Y. TIMES, Oct. 31, 2005, at A1. For a recent article touching on U.S. attitudes towards international courts,
judges represent clear violations of a longstanding traditional standard of detachment.

It could be argued that in some ways the international courts have the opposite problem. To the extent that their long-term success depends on their credibility as international institutions, these courts need public attention. They need to establish their relevance, their integrity, and their effectiveness. To do so, they need to be seen and heard, not just by the legal and diplomatic communities, but also by a broad cross-section of the citizenry of the countries that support them. Legal scholars Lawrence Helfer and Anne-Marie Slaughter have argued that international courts ignore this larger constituency at their peril. They point out that "individuals and their lawyers, voluntary associations, and nongovernmental organizations are ultimately the users and consumers of judicial rulings," and that

[A]n appreciation of the relationship between these social actors and the institutions of state government opens the door to deploying them as forces for expanding the power and influence of international tribunals. Just as an international tribunal may align its case law with the independent incentives facing some national courts, it can also address itself to the individuals and groups who are likely to be the ultimate beneficiaries of the enforcement of international norms and instruments.

Without that visibility, the courts run the risk of indifference, leading inexorably to a drop in the support and cooperation from states that are so vital to their success.

The need for public recognition puts international judges in an awkward position. How can they solicit public attention without creating public pressures for particular outcomes? Conscious of the importance of their insulation from public opinion, judges have traditionally been reluctant to speak publicly about their cases, preferring to let the texts of their judgments speak for themselves. Yet, judgments are legal documents, precise enough to follow the dictates of the law, parsed by lawyers, but usually inaccessible to those outside the profession. How far should international judges

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141. Helfer and Slaughter, Toward a Theory of Effective Supranational Adjudication, supra note 1, at 312.

142. Id.
go in making conscious efforts to reach a broader audience? What dangers to their independence and effectiveness might arise in making such efforts?

Some members of the international bench maintain traditional judicial caution about public statements. "As a matter of principle, personally, I don't talk to the press," said one judge who has served as a court president. "But if the head of the public affairs section says I should talk, then I talk." Others prefer to let the official documents speak for themselves, except in unusual circumstances. "Obviously, for a judge who decided a case, especially as one of several judges, to interpret judicial decisions to the media would seldom be wise, and in certain circumstances might be inappropriate," said one judge. "But in case of egregious error or gross misrepresentation by the media, a correction by the judge cannot be entirely excluded. Helping journalists report notable judicial decisions accurately so that the public becomes better informed increases appreciation of the importance of our work and is a legitimate public relations function." One court president is willing to reach out to specific constituencies, such as ministers of state or national judges, and he conceded that press releases by themselves are "obviously not enough." Nevertheless, he said that "it would be dangerous for the courts through the president to try to explain the judgment."

A growing number, however, particularly from the criminal courts, see the dangers, but still believe that the courts must be more proactive in establishing strong relationships with the media. "We really need to create closer links with the media to inform them," said one judge, "because it's the only way for the people to know what's going on here." By maintaining a judicial silence, warned another judge, courts run the risk of letting interested parties "own" the story. "There should be a much greater attempt to explain the purpose of the court and to keep the public apprised," she argued. Otherwise, the court's work is interpreted either by inexperienced members of the press or by NGOs who

143. TERRIS, ROMANO & SWIGART, supra note 4, at 171.
145. Id.
146. TERRIS, ROMANO & SWIGART, supra note 4, at 171.
147. Id.
148. Id.
have an interest in giving it their own spin. Another judge recalled that in the early days of the Inter-American Court of Human Rights, judges were prevented from making "any but the blandest pronouncements" about cases before them. "Judgments of international human rights courts that are not adequately publicized are much easier for governments to disregard," he explained.

With greater efforts in public outreach come increased and sometimes specific public expectations. These expectations are clearest for the criminal courts, to the extent that those courts are seen not as instruments of impartial justice but as mechanisms for punishment or even revenge. "You know, they're all guilty anyway," is how one judge characterized a commonly-held public sentiment. "These are the people that in the international sphere are pushing for convictions and long sentences. They get furious—I'm overstating it—if you don't give a life sentence to everybody that comes down. So there is a switch and the pressure is on to convict by and large over there." For judges with a human rights background, this pressure comes with a considerable irony. Many of them spent earlier parts of their careers protecting the rights of defendants in national courts, holding military organizations, police departments and justice systems accountable for their violations of fairness and justice. Now, as judges on international criminal courts, they can find themselves pressured by erstwhile colleagues to give primary attention to the rights of victims, rather than those in the dock.

The president of the International Criminal Court worried that "expectations have always been extremely high" for the ICC. "While the ICC will do everything it can to fulfill its role effectively, it is simply not possible to meet all of the expectations," he continued. "An accurate understanding of the court is important to ensuring sustained, effective—and necessary—support. This is why, when speaking about the court, I explain not only its potential, but also the limitations of the court's

149. Id.
151. Id.
152. TERRIS, ROMANO & SWIGART, supra note 4, at 172.
jurisdiction, the complexity of situations in which it operates in the field, and its dependence on external support . . . .

It is clear, then, that international courts depend upon the press to disseminate information about their decisions and major accomplishments. Without this publicity, the full impact of their work in bringing about justice, and even reconciliation, cannot be felt. At the same time, court staff members often feel that the press does not report on their work accurately, and this can ultimately harm the reputation of the institution. Navanethem Pillay, formerly president of the ICTR and now a judge of the ICC, spoke of a junior journalist who visited the tribunal while there were no trials in session. This was subsequently reported as, “These judges are doing nothing!” in a half dozen papers, without any fact checking. A full account of the work of the tribunal is available on the court website, provided and maintained by the outreach office. “The public has access to it,” said Pillay, “[b]ut the media is not interested in it. You don’t sell papers with that kind of information. You need something sensational.”

Non-governmental organizations may also play a key role in intensifying media and public scrutiny. This is a role that international judges consider a mixed blessing. One criminal court judge called NGO involvement a “healthy development” because activists call attention to “real burning issues” that judges, by habit of professional detachment, tend to set aside. At the same time, she argued that NGO involvement “really has to be controlled—they mustn’t come here to argue one side of the thing. We’re not [only] in the business of convictions.” Another judge pointed out that NGOs, by their nature, are maximalists: “[M]ost of them aim at one hundred percent success and if they don’t get that, then there is something wrong.” This passion means that they can be of considerable assistance to the courts in providing advice and information, but that their methods are sometimes at odds with the judicial temperament of balance. When it comes to relations with NGOs, “Dialogue, yes, but control, no,” said one judge.

The non-criminal courts, too, find themselves under pressure to prove their relevance, and judges on these courts concede that

153. *Id.* (quoting Phillipe Kirsch).
154. *Id.* at 45. From an interview recorded on April 5, 2005 in the Hague.
155. TERRIS, ROMANO & SWIGART, *supra* note 4, at 172.
156. *Id.*
157. *Id.*
they keep one eye on public concerns. At the International Court of Justice, for example, one judge pointed out that the court is under pressure to issue decisions backed by a large majority in politically sensitive cases such as territory disputes, "where having a pretty united bench is thought pretty important to stop the fighting on the ground."\textsuperscript{158} Even though the ICJ’s presidents have traditionally maintained considerable reserve, the court as an institution has taken a series of steps to better accommodate the press, including renovations to the press room, increased staff, and video coverage of proceedings. Despite these developments, it is still difficult to get attention for the ICJ’s work: "The truth of the matter is that the press at the moment thinks that international crimes are sexy, but that law that’s not criminal is boring."\textsuperscript{159}

Another ICJ judge noted that states parties themselves are adept at using the media for their own ends.\textsuperscript{160} For the state’s representatives, sometimes the outcome of the court’s decision is secondary to the opportunity to prove to the domestic public that they have defended their country’s interests before an international institution.\textsuperscript{161}

Regional courts like those in Europe face the challenge of communicating a continental perspective through domestic media that inevitably filter the courts’ work through their national self-interest.\textsuperscript{162} "Most of our decisions are decisions where [the] direct and immediate impact is on a small concentrated group of people," said one judge on the European Court of Justice.\textsuperscript{163} That impact is usually negative. According to this judge, one example of this dynamic is "opening a national market, requiring a member state no longer to give protection to its nationals regarding economic support of the state. And instead the benefits are diffused through all the other nationals of the European Union, for example. And who is going to focus on this case? Well, the newspapers of the state it is in and not the other ones."\textsuperscript{164} In that situation,

[T]his means that we are a court whose individual decisions will normally, because of its asymmetries of the situation of costs

\textsuperscript{158} Id. at 173. \\
\textsuperscript{159} Id. \\
\textsuperscript{160} Id. \\
\textsuperscript{161} Id. \\
\textsuperscript{162} Id. \\
\textsuperscript{163} Id. \\
\textsuperscript{164} Id.
and benefits, tend to have a risk of lacking popular support. So it is very important that we try to make people understand in terms that our legitimacy comes from the system.165

The situation is aggravated because affected governments speak readily to their own press, fanning the flames. In one case, an ECJ judge reported, officials of a member state used the press to threaten withholding financial support for the court if a particular judgment was unfavorable; such a use of the media, he said, “is an illegitimate form of pressure.”166

On occasion, the international courts feel an obligation to bend their rules and procedures in the face of national or international opinion. “Sometimes,” said a member of the International Court of Justice, “you’re quite convinced that the law requires X, but if dreadful things are going on in a particular country, you know, then there is the discussion of, how will the world see it if we say we can’t hear this, or that they’ve not complied,” or if there are “procedures” that interfere with a case being heard.167 The judge cited the case involving the wall between Israel and the Palestinian territories. Even though “there was no basis” in the court’s usual procedure for allowing a non-state entity—the Palestinians—to appear as a party, “yet every single one of us thought—’they’ve just got to be here.’”168 Part of this is a calculated effort on the part of the courts to prove their relevance on matters of import. One WTO Appellate Body member bemoaned the fact that laymen fail to distinguish between the WTO as an organization and the dispute settlement mechanism, where concerns about the institutional priorities can be aired. The public tends to believe, he argued, that the appellate body itself “is there to further globalization, to serve the interests of the multinationals, to serve the big powers against the small.”169 Outsiders have the opportunity, he said, to “master the machinery” and further their interests within the system by using the dispute settlement mechanism, “rather than throwing stones from the outside.”170

165. Id.
166. Id.
167. Id. at 173-174.
168. Id. at 174.
169. Id.
170. Id.
Defenders of the ideal of the secluded judge will view the increasing openness of the international courts to the media and the public as a loss for judicial integrity. Nevertheless, there is every reason to come to the opposite conclusion. In a world where public scrutiny of failure is inevitable and public attention to success is scant, the courts as institutions must seize every opportunity to explain their work from the viewpoint of their institutional concerns. This may present some ethical challenges for judges as individual professionals, but for the courts as institutions, cautious self-promotion is vital to the exercise of their function. They must participate in the process of shaping realistic perceptions of their work. If they do not, they become more vulnerable to the pressure of uninformed, self-interested public expectations. International courts do not operate in splendid isolation from political actors and the larger public, and to pretend that they do simply damages the prospects for effective justice. In this sense, the emerging global judicial community must cautiously build connections to broader networks as its members seek to strengthen their work and their institutions.

VIII. "CORPORATE SOLIDARITY"

Even while it is extending its reach, a more coherent judicial community also has the potential for insularity. In most international courts, judges are themselves responsible for maintaining the integrity of their institutions, and for overseeing the procedures for disciplining their colleagues in cases of breaches of law or ethics. In these situations, there lurks the danger that international judges may put loyalty to the emerging community ahead of their responsibilities to their institutions.

Every international court specifies a procedure for removing a judge for egregious misconduct. Most frequently, the court's statute provides that the judges of a court may remove one of their peers from the bench if they decide unanimously that he or she has not lived up to the requirements of service. The statutes provide broad flexibility for making that decision; they do not lay out a series of precise circumstances under which judges can or should

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171. *See Terris, Romano & Swigart, supra* note 4 at 193-207.
172. *See, e.g., ICJ Statute, supra* note 139, at art. 18.
remove their fellows.\textsuperscript{173} It is obvious, however, that it would take an extraordinary situation—one where the misconduct was flagrant and beyond doubt—for all of the other judges on a court to agree to such drastic action. No judge has ever been removed "for cause" from an international court or tribunal.\textsuperscript{174}

Most misconduct, however, falls far short of the kind of blatant greed or incompetence that would lead to removal, and the statutes provide little guidance for what to do in situations that call for less dramatic corrective action. There are procedures for assessing the necessity for disqualification from individual cases when judges do not recuse themselves.\textsuperscript{175} But beyond recusal, the courts have precious few mechanisms for regulating the behavior of judges, especially in the harder-to-measure areas that fall under the category of "professional ethics."\textsuperscript{176}

In the absence of formal mechanisms for monitoring the performance of judges, the president of the court plays an important role. In practice, court presidents tend to have little actual authority over their fellow judges, but the president is the chief administrator of the judges' business, and disciplinary matters end up in his domain.\textsuperscript{177} As in a national court, said one court president, "the president normally has no disciplinary powers over his judges so you're trying to reason with the judges and some will at once accept that."\textsuperscript{178} The president may find himself trying to convince a judge to recuse himself in a particular case, rather than be disqualified by his peers. Alternatively, he may try to persuade a judge to tone down the recriminations of his colleagues in the draft text of a dissenting opinion or he may have to take a judge aside and urge him not to speak so openly about


\textsuperscript{174} TERRIS, ROMANO & SWIGART, supra note 4, at 204.

\textsuperscript{175} See, e.g., ICJ Statute, supra note 139, at art. 24 ("If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.").

\textsuperscript{176} For additional information on this subject, see Project on International Courts and Tribunals, Research Themes: Ethics/Independence, available at http://www.pict-pcti.org/research/ethics_indepce.html.

\textsuperscript{177} ICJ Rules of Court, supra note 173, at art. 12 ("The President shall preside at all meetings of the Court; he shall direct the work and supervise the administration of the Court.").

\textsuperscript{178} TERRIS, ROMANO & SWIGART, supra note 4, at 205 (citing a judge on condition of anonymity).
the court's business to the media. "It's much more pleasant to do the work if you have a nice climate . . . . I think it enhances the credibility of the court to the outside world if you prevent clashes from being made public."179 His power, though, is limited. "If that happened when [judges were calling] each other fools and idiots and irresponsible or non-patriotic and all the rest I would certainly come in and say, 'You can't do that,' but I can't guarantee, I have no veto right or disciplinary powers."180 Presidents also have the option of using back-door political channels to put pressure on under-performing colleagues. The president of a UN court, one judge pointed out, could theoretically urge the Secretary General to speak quietly to the government of a bad judge, putting pressure on him to resign.181 It is not a perfect method, the judge conceded, but "there may be no other way to cure it."182

These examples suggest how large a premium many judges place on keeping disciplinary matters internal and quiet. This is a matter not only of shielding individual colleagues from the glare of the public spotlight but also of protecting the reputations of the institutions. If maintaining credibility takes precedence over uprooting misconduct, though, the integrity of the courts is bound to suffer.

As in domestic courts, the accountability of the international judiciary is largely a matter of conscience and collegiality. "'Accountable to God,' is an old-fashioned way of putting it," said one judge.183 He does not even see himself as accountable, exactly, to fellow judges. "I have to live with my colleagues," he said, "and it is a feature one prefers, to be well thought of by one's colleagues rather than to be thought a pain in the neck."184 Another judge emphasized the power of pride: "If you're associated with something, you want it to be good," she said.185 "You don't want it to be some kind of sloppy mess kind of thing. And in that sense that's really the accountability kind of thing."186 Another put it

179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
even more succinctly: "There is no check from the outside; it's only from the inside." 187

Even if the judges act individually with integrity and dignity, the question remains whether the courts can collectively fail the test of character. We tend to think of ethics in terms of personal decision-making, overlooking the critical aspect of collective responsibility within organizations. 188 Each international court develops its own judicial culture. If we are going to examine judicial ethics and character in the broadest sense, we need to ask whether the judicial culture of international courts nurtures integrity and fairness.

Like any organization, the greatest threats to organizational integrity lie in the inherent tendency towards self-protection. Internal matters of privilege, power, and advancement within the system create alliances and forces that resist change and marginalize those who bring new methods and ideas. 189 "I was surprised at the amount of politics," said one criminal court judge, speaking of the internal decision-making process of the court. 190 The lack of clear rules regarding the assignment of cases, the intricacies of elections for the officers of the court, the assignment of judges to particular chambers—these internal matters contribute to a sense of expectation that individual judges should stay in line. 191 This judge charged that this has the potential for impact on actual decisions because those who disagree publicly with the court's leadership can be punished through administrative procedures. "So all this means that the judges are not independent, but not because of external pressure; but because of internal anxiety." 192

187. Id.
188. See, e.g., Bruce A. Green, The Role of Personal Values in Professional Decisionmaking, 11 GEO. J. LEGAL ETHICS 19, 20-21 (1997) (exploring tensions between personal beliefs and professional norms).
190. TERRIS, ROMANO & SWIGART, supra note 4, at 206 (citing a judge on condition of anonymity).
191. See Project on International Courts and Tribunals, supra note 176.
192. TERRIS, ROMANO & SWIGART, supra note 4, at 206 (citing a judge on condition of anonymity).
This perception suggests a high risk of what one former international judge called "corporate solidarity." Gil Carlos Rodríguez Iglesias, who served as a judge on both the European Court of Justice and the European Court of Human Rights, emphasized that "a judge's personal responsibility should be determined only by a judicial body," but he worried that "the need for judicial independence is hard to reconcile with the creation of a system for ensuring responsibility." Corporate solidarity, Rodríguez argued, arises in any situation where peers sit in judgment on one another. Individuals have a natural interest in withholding judgment of their peers, because of bonds of collegiality, because of concerns for the public face of the institution, and because they wish mild treatment for themselves in return. The tendency reflects a potential shortcoming of the "epistemic community" of judges that has been remarked upon previously. Rodríguez does not offer a practical solution to the tension between independence and accountability—indeed, he seems to suggest that the problem may not be resolvable. An open discussion of the problem, he seems to feel, may itself be a form of raising the standards of responsibility.

There are, of course, some good reasons for the relative weakness of the system of accountability for international judges. Strong methods of oversight by external monitors are vulnerable to abuse and raise the specter of interference with judicial independence. Better, perhaps, to run the risk of misconduct by an occasional "bad apple" than to create structures where powerful players can interfere with judicial decision-making under the guise of improving professional standards. In practice, the system seems to work reasonably well; judicial misconduct appears to be relatively infrequent, and it has not, to date, substantially

194. Id. at 302-03.
195. Id. at 304.
196. TERRIS, ROMANO & SWIGART, supra note 4, at 206.
197. JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION, supra note 193, at 113-21. (discussing the positive aspects of an international epistemic community of judges).
198. Id. at 304-05.
damaged the work of any of the international courts. But the weak mechanisms of accountability leave the courts vulnerable in two important respects. First, the climate of self-regulation reinforces the arguments of critics who portray international judges as free-floating individuals whose standards of justice are at odds with individual nations and citizens. Second, without stronger processes in place, international courts may be vulnerable to a major scandal whose damage would be widespread.

**IX. THE FUTURE OF THE "INVISIBLE COLLEGE"**

As we have seen, the community of international judges is partly a matter of common patterns of education, partly a matter of common professional experiences in the world of law, academia, and diplomacy, and partly a matter of increased opportunities for meaningful interaction and dialogue among the various courts. There was once a time when the "invisible college" of international judges consisted of a small band of men, principally Europeans, clustered tightly in the Hague. Today's more extensive network has much more diversity in terms of geography, race, and gender, but the common bonds across space and time and the universal understanding of the judicial function often minimize those differences. Training in a relatively small number of key universities ensures significant commonalities in the legal mindset of international judges, shaping attitudes and philosophies. The career paths for many international judges overlap and intersect in international courtrooms and academic and diplomatic conferences, allowing personal relationships to develop that can carry over to the bench. A growing number of judicial conferences have created new opportunities for previously scattered international judges to sit together and compare ideas about such topics as the use of precedent, independence and accountability, the writing of judgments, and the problems of enforcement.

The development of this community has had a profound effect on the work and role of international judges. The major differences in legal method and practice between the civil law and

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200. TERRIS, ROMANO & SWIGART, supra note 4, at 207.
202. *Id.* at 223.
common law systems appear to pose challenges for international courts, but judges insist that a fidelity to basic principles developed through their networks tends to minimize this conflict. The community has also created important restraints on the threat of fragmentation in the international legal system as judges read and take into consideration the judgments of their peers on other courts, even if they do not always cite or rely upon them. In the criminal field, men and women with experience in the ad hoc tribunals are now playing a key part in the development of the permanent International Criminal Court, bringing rules, practices, and procedures with them. International judges cannot rely for authority and consistency on an extensive body of history, tradition, and documents, as can their counterparts in the strongest national systems; the "invisible college" of international judges goes a long way towards mitigating the relative paucity of those crucial bulwarks. In many ways it appears that the international community of judges both takes advantage of and contributes to trends towards globalization by building on communication networks and by making legal interpretations that break down barriers between nations and peoples.

Two important cautions, however, should be heeded regarding the direction and development of this community. First, we should be careful not to exaggerate its closeness and its consistency. The growing "epistemic community" of judges may help close some anticipated gaps, like the differences between civil law and common law, but other breaches remain. One such breach has to do with how much judges and courts should rely explicitly on dialogue and community itself. For example, when it comes to how much international courts should cite one another's judgments, and who should cite whom, there is considerable disagreement. Perhaps more importantly, the veneer of cosmopolitanism cannot entirely hide the presence of national perspectives on the international bench, as political divides subtly,
but inevitably intrude (just as they do in domestic jurisdictions) into judicial practice and decision-making.\textsuperscript{266}

The second and more important caution is that the development of a judicial community could nurture stagnation as easily as vitality. To the extent that international courts increasingly represent a collection of men and women who have trained and worked in similar institutions, thinking and practices can become ossified, and the pace of change and innovation can decelerate. As we have seen, some people who work for judges in international courts fear that this has happened to some extent already, as judges wrap themselves in a mantle of infallibility that comes with the privileges of office. Others fear that the development of a global community threatens to institute an artificial construct of global values that will blur or mask healthy differences of national or local perspective. As judges and courts become more intertwined, there is always the risk that individual judges will be more likely to put the interests of their prerogatives and institutions ahead of larger considerations of justice.

It seems likely that the international judicial network will continue to grow and expand—at least on the surface. Yet, this development will not lead inexorably towards a healthy combination of coherence and innovation. Fifty years from now, the "invisible college" of international judges is likely to be more visible, but whether its impact will be superficial or profound remains to be seen.

\textsuperscript{266} Schachter, \textit{The Invisible College of International Lawyers}, supra note 201, at 218 ("In observing that international lawyers are likely to reflect their value systems and meta-juridical preferences, I do not mean to suggest that they will necessarily accept the positions of their national states.").