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COMMUNITY INTERESTS IN INTERNATIONAL ADJUDICATION

Eyal Benvenisti*

This chapter develops the following propositions: All courts seek to be consistent to ensure equal treatment and a reputation for impartiality. Therefore, they have to look beyond the specific case and the specific parties. Therefore they have to take broader interests into account and anticipate the ramifications of each and every judgment for future litigants. To ensure consistency and deflect accusations of double standards, courts also have to develop coherent “rules of recognition.” These factors lead all independent courts to act necessarily in an “other-regarding” manner when adjudicating, and turn every judgment into a piece in the puzzle of law. When we focus on the latter, several additional factors highlight their role as communal legislators. International courts have an inherent interest in coordinating with other courts. They also have an interest in positive reception by national courts. Therefore they look beyond their specific area (trade, human rights, etc.) and try to accommodate the concerns of other legal systems and diverse stakeholders. In doing so, these courts participate in a collective effort to incrementally weave a web of norms called international law. The systemic character of judge-made international law permits regional and international courts to curb executive power and resolve collective action problems for states. Hence international courts are inherently attuned to take community interests into account and promote community interests where states fail.

INTRODUCTION

In the U.S. Supreme Court judgment of *Medellin v. Texas*, Chief Justice Roberts referred to the International Court of Justice (ICJ) rather dismissively as “a tribunal” that adjudicates disputes between states.¹ Only a very formalistic view of international law (and perhaps only in a country whose championship games are called “the World Series”) can still ascribe to the ICJ this limited role of an ad hoc, bilateral dispute settlement body. Most international lawyers, and particularly legal advisers to governments pay close attention to any international adjudication, especially by “the World Court,” due to the fundamental implications of their judgments. Many will agree with Hersch Lauterpacht who saw the ICJ “as an agency for developing international law.”² Even national court judgments that refuse to endorse the outcomes of the ICJ’s rulings, for example the 2014 judgment of the Italian

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¹ *Medellín v. Texas*, 552 U.S. 491 (2008). In his concurrence, Justice Stevens recalls that “the Statute of the International Court of Justice ... states that a decision of the ICJ has no binding force except between the parties and in respect of that particular case.” For a similar scholarly approach, see, e.g., JACK GOLDSMITH AND ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law reflects short-term interests of states and their bilateral obligations).

² HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 3 (1958).

Constitutional Court,³ recognize the ICJ's authority to state what international law is. Incrementally, albeit not without challenges, the view that international tribunals, rather than merely arbitrating disputes, legitimately function as authoritative even if not exclusive interpreters of international law has gained the upper hand.⁴

This chapter attributes this function of international courts and tribunals as agencies for developing international law to their permanency.⁵ It argues that it is this recursive adjudicative function which transforms permanent international courts (as opposed to ad hoc arbitration panels) into global standard setters and even lawmakers that weave together a system of norms with stable secondary rules of recognition. Moreover, and more relevant to this book, the chapter argues that due to this function, international courts are uniquely situated to take community interests – however defined⁶ – into account in their decisions, and that they often, if not always, do so. This implies that if properly insulated from partisan pressures or biases, and amply informed, international adjudicators are institutionally inclined and relatively well-positioned to promote community interests through their judgments, and therefore to act as trustees of humanity.⁷

International tribunals fulfill a crucial role in stating what the law is, thereby overcoming collective action failures of state and non-state actors who fail to reach an agreement.⁸ In an otherwise anarchic global system, these tribunals are in a unique position to stabilize expectations.⁹ To do so, they do not have to rely on formal enforcement of their decisions; it suffices to promise to treat like cases alike. This is why the absence of a formal rule of *stare decisis* or the dearth of formal mechanisms for enforcement has not diminished the authority of their jurisprudence in the eyes of most states.¹⁰ For the same reason, perhaps the harshest accusation for international tribunals is that of being inconsistent.

Herein lies their institutional motivation for promoting community interests: because they strive to be consistent, the courts should aim at norms that they would

³ See Judgment 238/2014 of the Italian Constitutional Court. An English version is available in: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf. See also the decision given by the Israeli Supreme Court when it was called upon to react to an adverse Advisory Opinion of the ICJ: H.C.J. 7957/04 Mara'abe v. The Prime Minister of Israel (available at: http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf)

⁴ GEERT DE BAERE, ANNA-LUISE CHANÉ & JAN WOUTERS, THE CONTRIBUTION OF INTERNATIONAL AND SUPRANATIONAL COURTS TO THE RULE OF LAW: A FRAMEWORK FOR ANALYSIS, 70-71 (forthcoming); Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 68 (2013); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 81-83 (2009); Laurence R Helfer, *The Effectiveness Of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2014); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 REC. DES COURS 217 (1994).

⁵ On this distinction, see also Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 Va. J. Int'l L. 361, 637-40 (2005).

⁶ See the introduction#...

⁷ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

⁸ Tom Ginsburg and Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WILLIAM. & MARY L. REV. 1229 (2004).

⁹ José E. Alvarez, *What are International Judges For? The Main Functions of International Adjudication*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 158, 176 (Cesare Romano, Karen J Alter & Yuval Shany eds., 2014) (“we might see what international adjudicators do as efforts to ‘stabilize the normative expectations’ of relevant actors”).

¹⁰ See the theory of “focal points” and its function in the coordination game theory in the context of international adjudicators influence on state's behavior, in Ginsburg & McAdams, *supra* note 8, at pp. 28-35; Ginsburg, *supra* note 5, 631.

like to follow and see followed in as many instances as possible. Being in such a privileged position to develop and stabilize global expectations imposes a heavy moral responsibility upon international adjudicators. Because they are able to set forth focal points that will lead states to just or unjust outcomes, to efficient or inefficient use of resources, they need to be able to know what are the “right” focal points that they should set. Therefore, they must take account of the implications of their judgments beyond the specific case at hand. This is why international tribunals must take whatever they perceive as community interests into account in each and every decision they make.¹¹

This chapter argues that by and large this is what international adjudicators are actually trying to do, with varying degrees of success as determined by their relative independence and skills.

The argument develops the following ten propositions:

1. All courts seek to be consistent to ensure equal treatment and a reputation for impartiality.
2. Therefore, they have to look beyond the specific case and the specific parties.
3. Therefore they have to take broader interests into account and anticipate the ramifications of each and every judgment for future litigants.
4. To ensure consistency and deflect accusations of double standards, courts also have to develop coherent “rules of recognition.”

These factors lead all independent courts to act necessarily in an “other-regarding” manner when adjudicating, and turn every judgment into a piece in the puzzle of law. When we focus on the latter, several additional factors highlight their role as communal legislators:

5. International courts have an inherent interest in coordinating with other courts.
6. They also have an interest in positive reception by national courts.
7. Therefore they look beyond their specific area (trade, human rights, etc.) and try to accommodate the concerns of other legal systems and diverse stakeholders.
8. In doing so, these courts participate in a collective effort to incrementally weave a web of norms called international law.
9. The systemic character of judge-made international law permits regional and international courts to curb executive power and resolve collective action problems for states.
10. Hence international courts are inherently attuned to take community interests into account and promote community interests where states fail. This analysis derives an “ought” from the “can”: international courts can take community interests into account, they often do so, and they ought to do so.

The chapter progresses accordingly. Part I deals briefly with propositions 1-4 and then focuses on propositions 5-8 in relation to international courts. Part II addresses proposition 9, and Part III discusses the last proposition.

¹¹ Alvarez, *supra* note 9, 171: “The governance function anticipates that judges and arbitrators, at the national and international level, must generally (or at least sometimes) consider the impact of their rulings on states, persons, or entities not directly represented in the case before them.”

I. COURTS – NATIONAL, REGIONAL AND INTERNATIONAL – AS SYSTEM BUILDERS

The first four propositions reflect the role of the judicial function in general. Courts seek to be consistent. They are aware of their duty (indeed, their very *raison d'être*) to treat like cases alike. Moreover, they know that they must be consistent to dispel accusations of double standards that might undermine their credibility. Therefore, courts have to look beyond the specific case and the specific parties. Already in the first judgment they render (and especially in that first judgment!) they must look to the indefinite future and design their general approach. Therefore already from the first judgment courts have to take into account broader, community-wide interests. They must anticipate the ramifications of each and every judgment for future litigants. To ensure consistency and deflect accusations of double standards, courts also have to develop “rules of recognition.” These rules of recognition are by definition generally applicable.¹²

These factors lead all independent courts to act in an “other-regarding” manner when adjudicating, and turn every judgment into an act of possible community-wide implications, however small and insignificant. This is also true for international tribunals. As Erik Voeten points out, “a court’s institutional legitimacy depends not just on compliance but also on the degree to which a court issues consistent, high-quality rulings that are motivated by the law.”¹³ Therefore, as Armin von Bogdandy and Ingo Venzke note, “[n]otwithstanding the mantra that international law knows no doctrine of *stare decisis*, courts regularly use precedents in their legal argumentation and at times engage in detailed reasoning on how earlier decisions are relevant or not. Judicial precedents redistribute argumentative burdens in legal discourse and generate legal normativity.”¹⁴ The Appellate Body of the WTO derived the *de facto* *stare decisis* rule from the structure of the Dispute Settlement Mechanism: “Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. ... The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote ‘security and predictability’ in the dispute settlement system, and to ensure the ‘prompt settlement’ of disputes.”¹⁵

When we focus on international courts, several additional institutional factors highlight their role as communal actors aiming beyond the interests of the immediate parties. First, international courts have an inherent interest in coordinating primary

¹² At times, the very first decision of the tribunal is an opportunity to express its philosophy. The World Bank Administrative Tribunal, situating itself among the various administrative tribunals, asserted that it was “free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family. In this way the Tribunal may take account both of the diversity of international organizations and the special character of the [World] Bank without neglecting the tendency towards a certain *rapprochement*.” (*De Merode and others v. World Bank*, 83 I.L.R. 639, ¶ 28 (World Bank Admin. Trib. 1981).

¹³ Erik Voeten, *International Judicial Behavior*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 550, 556 (Cesare PR Romano, Karen J Alter & Yuval Shany eds., 2014).

¹⁴ Von Bogdandy & Venzke, *supra* note 4, 57; Ginsburg, *supra* note 5. See also Appellate Body Report, *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, at paras. 158, 160 (April 30, 2008) (“It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSB.”)

¹⁵ *US – Stainless Steel, id.*, para. 161.

and secondary rules with other international courts. As George Downs and I have argued elsewhere,¹⁶ the phenomenon of a fragmented legal space is potentially unsettling for all international courts because incoherent jurisprudence could undermine the credibility of them all.¹⁷ This is why we see a collective judicial effort to coordinate attitudes and outcomes and reluctance to criticize each other's jurisprudence, especially with respect to each other's understanding of the rules of recognition of international law.¹⁸ Second, the multiplicity of tribunals, with often overlapping competences, sometimes prompt international courts to emphasize their unique legacy.¹⁹ Finally, tacit inter-court coordination is a function of the potential symbiotic relationships that can exist between international and national courts. International courts are heavily dependent on the responsiveness of national courts to their judgments, as well as on the attitudes of national courts toward the development of international law. National courts can, in turn, benefit from the jurisprudence of international courts that bolsters the independence of national courts vis-à-vis the domestic political branches (for example, through requirements of "due process" and "fair trial").²⁰ Domestic courts that are independent of their political branches increase the freedom of international courts to review the policies of state executives. This symbiotic relationship between international and national courts depends on a recursive exercise of mutual empowerment (but which can also reflect contestation in instances of disagreement). The constant process of communications that ensues ensures that courts pay attention to all relevant interests, beyond the immediate issues that arise in the specific litigation.

Because of these considerations, any international court will take seriously into account the jurisprudence of its international and national peers. It will weigh the interests and concerns of those other institutions while determining its own position. Assuming that the jurisprudence of the different courts is also sensitive to the concerns of at least some of their respective communities, paying attention to each other's jurisprudence is a reliable way to learn about the interests and concerns of those relevant communities, and take their concerns into account. Obviously, not all affected communities will be represented in this process, and this should cause concern and call for attention. With this important caveat, we can see that what begins with the simple urge to treat like cases alike and establish a reputation for consistency and impartiality yields a system of law that takes into account the interests of several if not all possible litigants.

Judge Greenwood has expressly endorsed such a vision for the ICJ to follow:

“[I]t is entirely appropriate that the Court, recognizing that there is very little in its own jurisprudence on which it can draw, has made a thorough examination of the practice of

¹⁶ See Eyal Benvenisti and George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 795 (2007).

¹⁷ Pierre-Marie Dupuy and Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 135 (Cesare PR Romano, Karen J Alter & Yuval Shany eds., 2014); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 87 (1999).

¹⁸ In that direction, see Vera Gowlland-Debbas, *Issues Arising from the Interplay Between Different Areas of International Law* 63 CURRENT LEGAL PROBLEMS 597 (2010); DE BAERE, CHANÉ & WOUTERS, *supra* note 4, pp. 53-54; Ginsburg, *supra* note 5.

¹⁹ See the Legacy website of the International Criminal Tribunal for Rwanda (at <http://unictr.unmict.org/>), Sara Kendall and Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal For Rwanda*, 112 AM. J. INT'L L. 212 (2016).

²⁰ On this point, see recently, David Kosar and Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109 AM. J. INT'L L. 713 (2015).

other international courts and tribunals, especially the main human rights jurisdictions, which have extensive experience of assessing damages in cases with facts very similar to those of the present case. International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.”²¹

It can be gleaned that international adjudicators are anxious to ensure the stability of expectations by creating a coherent set of norms and avoiding inconsistencies from statements of members of arbitral tribunals called on to resolve investment disputes. Even those among them that are formally designed to act as ad hoc bilateral dispute settlers are keen to maintain coherence out of explicit concerns about stable expectations and perhaps more implicit concerns about their own reputations. Thus, in *Saipem S.P.A. v. the People’s Republic of Bangladesh*, the tribunal noted that although it was not bound by previous decisions, it “must pay due consideration to earlier decisions of international tribunals [and that] subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases [and] it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”²² A similar approach was taken in *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, when the tribunal referred to previous proceedings, stating that “...a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.”²³ In the case of *AES Corporation v. The Argentine Republic* the tribunal emphasizes the goal of “contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.”²⁴

The systemic vision of “international law” smooths the sharp edges created by the fragmented international legal space. It operates to resolve potentially contradictory outcomes and to allow lawyers and courts to bridge across the archipelago of treaties and disparate state practice to fill legal voids. Indeed, this view assumes that no international legal undertaking is beyond the reach of the Vienna

²¹ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), 2012 I.C.J. Rep. 324 (June 19) (declaration of Judge Greenwood) (available at: <http://www.icj-cij.org/docket/files/103/17050.pdf>).

²² *Id.*, Para. 90.

²³ *Id.*, Para. 189.

²⁴ *Id.*, Para. 33. For literature on the growing case law and establishment of *de facto* precedent doctrine, see: Bogdandy & Venzke, *supra* note 4, p. 71; Moshe Hirsch, *Sources of International Investment Law*, International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law, pp. 19-20 (July 17, 2011), available at SSRN: <http://ssrn.com/abstract=1892564>; Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357, 368 (2007). For empirical data on the growing numbers of citations to previous decisions by different tribunals in cases of investment law, see Jeffery P. Commission, *Precedents in Investment Treaty Arbitration: a Citation Analysis of a Developing Jurisprudence*, 24 J ARB. INT’L 129 (2007).

Convention on the Law of Treaties.²⁵ As a system of law, international law has matured into a relatively predictable body of law that informs a community of actors who can predict the consequences of their and others' acts.

Such a systemic vision necessitates also constant synchronization among the different legal regimes, and this is achieved through evolutive interpretation and reliance on subsequent practice.²⁶ The systemic vision of international law promotes a vision of an evolving legal order that offers both continuity and change: continuity of the basic principles of a legal system, with its rules of recognition, coupled with the appreciation of the role of judges in developing the law through interpretation, and change through the ample opportunities state actors have to adjust specific norms by their practice.

II. INTERNATIONAL COURTS CAN CURB EXECUTIVE POWER AND RESOLVE COLLECTIVE ACTION PROBLEMS FOR STATES

This is the penultimate proposition presented above, which has two separate but interconnected aspects: first, courts can reduce the opportunities of powerful actors (states or private actors such as multinational corporations) to benefit from their relative strength vis-à-vis weaker states, thereby promoting more egalitarian outcomes; second, courts can develop norms when states are mired in disputes that prevent them from agreeing to such norms, thereby improving collective welfare.

A. *International Adjudication and the Redistribution of Power*

Courts are able – at least somewhat – to curb power.²⁷ Just like being coherent, the courts' ability and willingness to mitigate power is a litmus test for their credibility.²⁸ Together with reliance on the concept of *jus cogens*, which is also by and

²⁵ See U.N. International Law Commission, Study Group on the Fragmentation of International Law, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 176 U.N. Doc. A/CN.4/L.682 (2006) (finalized by Martti Koskenniemi): “States cannot contract out from the *pacta sunt servanda* principle—unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie.)”

²⁶ See Samantha Besson, Chapter ## (this book), and GEORG NOLTE (ED.), *TREATIES AND SUBSEQUENT PRACTICE* (2013). On the WTO Appellate Body's preference for contemporary concerns over the historic intergovernmental agreements, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004). The article suggests, for example, that in its Shrimp/Turtle decision, the Appellate Body invoked “contemporary concerns of the community of nations about the protection and conservation of the environment” in its interpretation of the particular treaty by referring to “the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties,” despite the availability of records of the negotiations; on the contribution of the court to legal development, see Christian J Tams, *The ICJ as a 'Law-Formative Agency': Summary and Synthesis*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 378, 388 (Christian J. Tams & James Sloan eds., 2013).

²⁷ DE BAERE, CHANÉ & WOUTERS, *supra* note 4, 28: “International courts ... contribute to a situation in which not physical force and the arbitrariness and oppressiveness of power contests but a system of rules is the manner in which disputes are to be settled, thereby representing the normative ideal of the rule of law.”

²⁸ Michael M. Bechtel & Thomas Sattler, *What Is Litigation in the World Trade Organization Worth*, 69 INTERNATIONAL ORGANIZATION 375, 377 (2015): “[T]he ability of hard law systems to mitigate power asymmetries is crucial for their legitimacy and the long-term success of these institutions. Only if states can expect international courts to improve their chances of realizing a fairer outcome than without a costly trial will they turn to this institution to settle disputes in the future. And the institution

large a judicial creation,²⁹ the systemic vision that judges adopt, and doctrines of treaty interpretation that overshadow the original intent of powerful negotiators who had dominated the treaty drafting processes, judges are able to reduce the impact of powerful states on lawmaking.³⁰ We can recognize this impressive feat by the outcome: the conscious effort by some key actors to “contract out” of international law through informal intergovernmental coordination and the delegation of standard-setting to private bodies.³¹

Even if sovereign equality is generally a legal myth, the generalizability of principles, the normative hierarchy, and the privileging of consistency and precedent provide weaker states with claims that they can employ in a variety of adjudicative bodies.³² Weaker states often seek judicial assistance in protecting their rights and promoting their interests no less and often more than do strong states,³³ while many others can “free ride” on others to litigate matters of common interest. As Bechtel and Sattler conclude, “[t]he potential spillover effects of WTO litigation on trading relations between defendants and third parties indicate that international institutions can alleviate discrimination among states beyond the immediate cases that they are dealing with.”³⁴ This offers a basis for the conclusion that the concept of international law as a legal system (as opposed to a fragmented archipelago of bilateral obligations) benefits the weaker states.

International adjudication can successfully curb power where several states are locked in a collective action problem and consequently fail to act, for example, when several of them face a demand for granting a concession (tax break, access to domestic markets, etc.) by a powerful state, international organization, or private company. Cases in point are the intervention by the ECJ to impose European legal standards on sporting associations that sought insulation from public law obligations,³⁵ and the insistence of the European Court on Human Rights that “where

will receive the type of sustained support necessary for its long-term survival only if settlements do not systematically come at the costs of other, possibly weaker members.”

²⁹ On the role of the ICJ in the evolution of the *jus cogens* concept and its derivatives, see Simma, *supra* note 4, pp. 291-292 (referring to ICJ decisions in *Corfu Channel*, *Reservations to the Genocide Convention*, *Barcelona Traction*, *Tehran Hostages* and *Nicaragua*).

³⁰ For further elaboration of this point, see Eyal Benvenisti, *The Conception of International Law as a Legal System*, 50 *German Y.B. Int'l L.* 393 (2008).

³¹ EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014), Chapter 2.

³² See Benvenisti and Downs, *The Empire's New Clothes*, *supra* note 16.

³³ On the WTO context, see Peter VAN DEN BOSSCHE, *THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION* (chapter 5), at pp. 5-6 (forthcoming): “The WTO dispute settlement system has been used by developed country and developing country Members of the WTO alike. In half of the years since 2000, developing country Members brought more disputes to the WTO for resolution than developed country Members. [...] Particularly noteworthy is the use of the WTO dispute settlement system by small developing country Members against the largest among the developed country Members. In the WTO system, might does not necessarily prevail over right”; Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 *THE JOURNAL OF POLITICS* 1033, 1045 (2009): “The multilateral trade system offers the potential to replace power politics with rule of law, but only for those states that know how to enforce their rights. The contrast between a majority of developing countries that seem marginalized in the system and a handful that actively participate led us to examine the conditions that support developing country use of WTO adjudication.”; Christina L. Davis, *Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 219 (John S. Odell ed., 2006). For an earlier, “darker” assessment, see: Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 *J. WORLD TRADE* 719 (2003).

³⁴ Bechtel and Sattler, *supra* note 28, 397.

³⁵ Case C-519/04 *David Meca-Medina and Igor Majcen v. Commission of the European Communities* (2006) I-06991; [C-415/93](#) *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) I-04921.

States establish international organisations ... and where they attribute to these organisations certain competences and accord them immunities” they must ensure that these bodies provide comparable protections to their citizens who they employ.³⁶ While individual states have sought to please these foreign or international actors rather than challenge them, the European courts were willing to step in and call those actors to order.

International adjudication is also a key for mitigating *intra*-state power imbalances and promoting internal equality or the domestic rule of law. The crucial role of the regional human rights courts in protecting individuals against government coercion is by now obvious.³⁷ The judicial contribution to the evolution of law to discipline governments engaged in civil wars (or “non-international armed conflicts”) has also been noted.³⁸ A more recent development is the referral of situations by some African states to the International Criminal Court that was at least partly motivated by the lack of sufficiently robust domestic infrastructure to bring perpetrators to justice.³⁹ The recognition by the ICJ of obligations *erga omnes* and *erga omnes partes* provides standing for third-party states to bring a case against people of authority who violated those obligations and harmed their own population.⁴⁰

³⁶ Waite and Kennedy v. Germany, App. No. 26083/94, Eur. Ct. H.R. ¶ 67 (1999) (“The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.”). See August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese J. Int’l L. 285 (2008).

³⁷ On the ECHR system, see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int’l Org. 217 (2000); ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* (2010). See, in general, Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 Int’l Org. 1 (2009). On the Inter-American system, see, Kosar and Lixinski, *supra* note 20; James Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter American Court*, Harvard Law School Public Law & Legal Theory Working Paper Series Paper No. 09-31; Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT’L L. 241 (2002).

³⁸ On the evolution of international humanitarian law in non-international armed conflicts by the International Criminal Tribunal for the former Yugoslavia (ICTY), see Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 13-17, 24-33 (2006); Luigi D.A. Corrias & Geoffrey M. Gordon, *Judging in the Name of Humanity -- International Criminal Tribunals and the Representation of a Global Public*, 13 J. INT’L CRIM. JUST. 97 (2015). This evolution – indeed, a transformation – was based, according to the ICTY in the *Tadic* case, on the grounds that “a State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach.” Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>).

³⁹ Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 947-948 (2011); Claus Kress, *'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy*, 2 J. INT’L CRIM. JUST. 944 (2004); ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr829.aspx; SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* (2013).

⁴⁰ In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ accepted Belgium’s standing to sue Senegal for not prosecuting or extraditing Habré: Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, 2012 I.C.J. Rep. 422 (July 20). Cf. South West Africa, Second Phase, Judgment, 1966 I.C.J. Rep. 6 (July 18); Barcelona

Even in the paradigmatic example of governmental prerogative, controlling borders and bilateral agreements on boundary delimitation, the ICJ has ventured to intervene. In the *Nicaragua* judgment it said that “[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. [...] An essential feature of truly humanitarian aid is that it is given ‘without discrimination.’”⁴¹

With respect to boundary delimitation, the ICJ has recently insisted on ensuring access of villagers to a river on which they depend and protecting the habit of seasonal migration of seminomadic peoples.⁴² The court “expresse[d] its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier.”⁴³ In its 2011 *Order of Provisional Measures of Protection in the case of the Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*,⁴⁴ the ICJ showed sensitivity toward individuals seeking access to the site pending the delivery of its judgment.

B. International Adjudication and Increasing the Global Pie

International courts use the opportunity to navigate the system of international law in directions that increase the global pie of natural resources. This function becomes relevant when high transaction costs prevent states from negotiating (or renegotiating) bilateral or multilateral agreements.⁴⁵ One could trace the judicial awareness of the judicial role in providing for global or transboundary resources as “shared” or held “in common,” thereby implying that riparian states are accountable to the other shareholders for their use of those resources and, in addition, forcing them to cooperate with respect to the use of the resource.⁴⁶

The ICJ (and earlier the PCIJ) has had several opportunities to promote community interests by ensuring free passage through straits,⁴⁷ canals,⁴⁸ and rivers.⁴⁹

Traction, Light & Power Co. (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5); Yaël Ronen & Yael Naggan, *Third Parties*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 806 (Cesare PR Romano, Karen J Alter & Yuval Shany eds., 2014); Simma, *supra* note 4, pp. 369-370.

⁴¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 1986 I.C.J. Rep. 14 (June 27), At para. 242-243. See Benton Heath, *Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission*, 43 INTERNATIONAL LAW AND POLITICS 419 (2011).

⁴² Frontier Dispute (Burkina Faso v. Niger), Judgment, 2013 I.C.J. Rep. 44 (June 27).

⁴³ *Id.* at para. 112.

⁴⁴ *Id.* at para. 61.

⁴⁵ In the WTO context, for example, see VAN DEN BOSSCHE, *supra* note 33, p. 34: “It is uncontested that the WTO has not been successful in negotiating much needed new and/or improved rules for international trade. In the face of the ineffectiveness of the political branch of the WTO, WTO Members may be ever more tempted to use the dispute settlement system to bring about new or improved rules, rather than seeking political agreement on such rules.”

⁴⁶ See EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE (2002).

⁴⁷ Corfu Channel case, Judgment, 1949 I.C.J. Rep. 4 (April 9).

⁴⁸ Case of the SS Wimbledon (Britain et al. v. Germany), PCIJ, ser. A, No. 1 (1923).

⁴⁹ Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder PCIJ, Ser. A, No. 23 (1929).

The court did so despite scant state practice or explicit texts.⁵⁰ It developed a concept of shared transboundary resources in the face of clear treaty text (and travaux) to the contrary. The ICJ's 1997 decision in the *Gabcikovo-Nagymaros* case⁵¹ demonstrates the ability of the court to step into the bilateral dispute (which is also, given the other riparians, a multilateral dispute), acting in the best interests of the state parties, as well as in the interest of third parties.⁵² The court invoked a 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses as a shortcut when recognized as reflecting contemporary customary law, although this finding was unsupported by consistent state practice or *opinio juris*.⁵³

Mirroring the concept of shared resources is the insistence on states' duties toward others and toward the community as a whole. This is reflected in the jurisprudence that regards sovereignty as entailing responsibility for acts and omissions that take place within a state's territory. This consistent approach dates to Judge Huber's famous *Las Palmas* arbitration⁵⁴ and continues with equally momentous decisions such as the *Trail Smelter* arbitration⁵⁵ and the *Hostages Case*.⁵⁶ Famously, in the *Genocide Case* the ICJ interpreted the Genocide Convention to entail a duty upon states to take measures to prevent genocide "wherever [they] may be acting or may be able to act," including in other countries.⁵⁷

In *Juno Trader (and the Grenadines v Guinea-Bissau)*,⁵⁸ the ITLOS expanded on the coastal state's duty to provide hearing to the detained ship owner and crew. While cast in doctrinal reasoning grounded in textual interpretation of UNCLOS, there is arguably an effort to ensure that states that seek to secure control over exclusive economic zones must ensure equal access to fishing fleets of all countries, thereby promoting an efficient use of global resources.

An important milestone in this respect is the recent ICJ judgment in the *Whaling* case.⁵⁹ The dispute focused on Japan's discretion to issue "special permits" for killing whales, arguably for scientific research as provided by Article 8(1) of the International Convention for the Regulation of Whaling (1946).⁶⁰ The said Article

⁵⁰ Pierre-Hugues Verdier and Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: an Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014).

⁵¹ Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. Rep. 7 (September 25)..

⁵² Alvarez, *supra* note 9, at 165: "Alter argues that international adjudicators are more appropriately seen as 'trustees' rather than mere agents. The trustee account explains not only many of the characteristic institutional features of these tribunals but also why, contrary to the 'ideal type,' we expect international adjudicators to give reasoned opinions that have expansive potential—the better to guide the behavior of regime participants and to prevent future disputes. It also explains why international adjudicators of all stripes—from the ICJ to the WTO—respect and produce regime-specific precedent even without explicit authority from their principals."

⁵³ The convention had been adopted less than four months earlier, and had no signatories at the time and numerous opponents, which included key regional players, pairs of riparians, and other states involved in regional disputes over water. Obviously, these states abstained from committing to regional cooperation in a general framework convention before entering into direct negotiations over the use of their regional resources. On some of the disputes among these riparians, see BENVENISTI, *supra* note 46.

⁵⁴ *Island of Palmas (Netherlands v. USA.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

⁵⁵ *Trail Smelter (U.S. v. Canada)*, 3 R.I.A.A. 1905, reprinted in *Annual Digest of Public International Law Cases* 315 (1938-40).

⁵⁶ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, judgment, 1980 I.C.J. Rep. 3 (May 24).

⁵⁷ Paras. 183, 430.

⁵⁸ "*Juno Trader*" (St. Vincent v. Guinea Bissau), ITLOS Case No. 13 (Dec. 18, 2004).

⁵⁹ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, 2014 I.C.J. Rep. 226 (March 31).

⁶⁰ *International Convention for the Regulation of Whaling (with Annexed Schedule)*, Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 72 (entered into force Nov. 10, 1948).

allows a member state to issue permits and impose conditions “as the Contracting Government thinks fit.”⁶¹ Japan interpreted this obligation as a “good faith” obligation, arguing that neither the International Whaling Commission nor the ICJ “have power to approve or disapprove the issue of a special permit.”⁶² Australia countered that Japan must demonstrate the scientific value of the permits because “Japan does not ‘own’ the whales it catches.”⁶³ As stated by James Crawford, arguing for Australia: “In respect of resources in the international public domain, to recognize a wide margin of appreciation is, in effect, to allocate those resources to the exploiting State.”⁶⁴ Given the global commons problem, continued Crawford, the Convention requires “a proper showing ... that [research] proposals are genuinely motivated by scientific considerations and adapted appropriately to achieve scientific goals.” Moreover, Japan must “consider seriously” the views of the IWC and its subsidiary organs, otherwise the conclusion will be “that the project is not being carried out for the purposes of scientific research, but for some other purpose inconsistent with the Convention.”⁶⁵

Although the court did not expand on the theory behind its interpretation, it subjected Japan’s discretion to strict scrutiny: “When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives.”⁶⁶

What is common to these judgments is their pretention that they are not doing what they actually do. They conceal the new law in “old bottles,”⁶⁷ playing their legislative role in a wise effort to escape controversy and questions about their personal accountability. After all, the legal system within which they operate does not explicitly recognize their legislative role or their mandate to redistribute power or to promote global welfare.⁶⁸

⁶¹ Article 8: “Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

⁶² Public seating, 4 July 2013, afternoon, verbatim record, p. 36 paras. 23-24.

⁶³ Public seating, 10 July 2013, morning, verbatim record, p. 65 para. 23.

⁶⁴ *Id.*, at para. 22

⁶⁵ *Id.*, at para. 26

⁶⁶ *Id.*, at para. 67.

⁶⁷ Alan E. Boyle, *The gabcikovo-nagymaros case: New law in old bottles*, 8 Yearbook of International Environmental Law 13 (1998).

⁶⁸ Ginsburg, *supra* note 5, 635. For the same with respect to the WTO Appellate Body see Robert Howse, Foreword: The World Trade Organization 20 Years On: Global Governance by Judiciary 27 *Eur J Int Law* 9 (2016); for the ICTY Robert Cryer, *The Philosophy of International Criminal Law*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 232 (Alexander Orakhelashvili, ed., 2011).

III. REGIONAL AND INTERNATIONAL COURTS SHOULD SEEK TO PROMOTE COMMUNITY INTERESTS

This Part addresses the last, conclusive, proposition: Because regional and international courts are in a position to rebalance power-relations and to promote global welfare through adjudication, they have a responsibility, if not an outright moral duty, to do so, and to develop international law accordingly.⁶⁹ Promoting global welfare is an obvious community interest; rebalancing power relations is often (although not always!⁷⁰) also a community interest. This proposition immediately raises questions about the competence and democratic appropriateness of this dual function. While Hersch Lauterpacht invoked in this context the classic aphorism *quis custodiet ipsos custodiet?*,⁷¹ these are actually two different although related questions. The first question concerns the skillfulness of the judges to arrive at the “appropriate” norm, whatever it should be. The second question concerns the democratic losses associated with the circumvention of politics (in this context, treaty negotiations and ratification) by effectively delegating the decisional authority to judges. Lauterpacht’s response is that judges are restrained by the voluntary nature of international adjudication and by the duty to provide reasoning for the judgment.⁷² As the international venues for adjudication proliferate and recourse to them is becoming increasingly a matter of economic necessity for many and good citizenship for others, opting out is not always an available option for many. Judicial reasoning is often wanting: judges frequently fail to convince their bench-mates! But more importantly, we need more than just accountable judges; we need them to respond to egalitarian and welfare concerns. Are they apt for the task?

In responding to these two questions, it is necessary to distinguish between two aspects of the judicial role that relate to the ways in which judges can obtain the necessary skills to arrive at the “right” norm. There are at least two ways for courts to do so: first, directly, by developing the law in ways that the judges believe promote common interests; and second, indirectly, by creating venues for deliberation for relevant actors – indeed, all those affected – that will produce norms in lieu of the courts.

It can often be shown that judges prefer the latter option if they can trust the process. For example, in decisions on ways to promote global welfare discussed in the previous Part (concerning the management of transboundary resources),⁷³ the courts prodded the parties to communicate with the relevant stakeholders and thereby

⁶⁹ HERSCH LAUTERPACHT, *supra* note 2, at 397, (emphasizing “judicial responsibility, in its quest for justice”). Strikingly, he supports his statement with a reference to the book by the Legal Realist Jerome Frank, *Law and the Modern Mind*. Frank in turn quotes Chancellor Kent, who had admitted to having relied on his “moral sense” before looking up the authorities.

⁷⁰ As Mancur Olson has taught us, sometime the community benefits from power disparity, if the relatively powerful actor is able to produce unilaterally a global good such as security or clean air: MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 22-36 (1965).

⁷¹ HERSCH LAUTERPACHT, *supra* note 2, at 397.

⁷² *Id.*, at paras. 399-400. See also KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW*, Chapter 9 (2015) (referring to the counter-majoritarian difficulty as less pronounced for international tribunals because they need to co-opt domestic interlocutors to secure compliance with their judgments).

⁷³ See text to notes 46-52.

overcome the collective action problem that prevented them from deciding in the first place.⁷⁴

But sometimes courts make law in the most direct manner (for example, in developing the laws concerning non-international armed conflicts).⁷⁵ It is here that the questions of aptitude and democratic legitimacy arise most poignantly. Are courts in a position to make *good* law – law that allocates global resources most efficiently, or curbs arbitrariness and injustice, taking into account competing and often irreconcilable conceptions of *the good*?

One contribution that court can provide in this context is to generate reliable and comprehensive information to evaluate the interests that are at stake. Fortunately, there are ways for courts to generate more information that looks at the possible effects on society at large. Courts are aware of the need to obtain information not only from the immediate litigants but also from third parties who are interested in the outcome of the litigation. Ways to respond to this need include improving the transparency of the litigation, not only constraining the court by the expectations for reasoned judgments⁷⁶ but also inviting more information from the general public that becomes aware of the proceedings, including by amicus briefs (at times provided pro bono).⁷⁷ Courts can also engage in dialogue with other international and national courts and thereby gain perspective on the sensitivities of relevant communities.⁷⁸ While the information will by definition never be comprehensive, it is unclear whether such information is inferior to that which is available to lawmakers.

Finally, we arrive at the question of the democratic legitimacy of value judgments made by the judges. This is the well-known counter-majoritarian difficulty, when rulings by the tribunals limit the discretion of democratic legislatures.⁷⁹ To assess this question, one must probe the promise of democratic decision-making as the preferred alternative to judicial intervention. When we examine democratic processes in many democracies we must often conclude that they fail to reflect the

⁷⁴ Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384 (1996). See also Jutta Brunee's contribution to this volume.

⁷⁵ See note 37 *supra*.

⁷⁶ Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, available at: <http://www.iilj.org/publications/documents/2009-6.kingsburyschill.pdf>. The authors argue that efforts to promote greater transparency and accountability within ICSID appear to be motivated by legitimacy concerns.

⁷⁷ VAN DEN BOSSCHE, *supra* note 33, 29 (amicus curiae in the WTO AB). Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. INT'L L. REV. 333, 348-349 (1996): "In each issued opinion, the Court has formally noted the briefs with the exception of the most recent case. At least one amicus brief has been accepted in each advisory proceeding and each contentious case. [...] It does not appear that the Court has ever rejected an amicus filing." On the influence of amicus briefs on the US Supreme Court, see Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 817-18 (2000) (finding that "Amicus briefs clearly do matter in many contexts, and this means that the Court is almost certainly influenced by additional information supplementing that provided by the parties to the case. [...] Amicus briefs matter insofar as they provide legally relevant information not supplied by the parties to the case-information that assists the Court in reaching the correct decision as defined by the complex norms of our legal culture.")

⁷⁸ Eyal Benvenisti & George W. Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 N.Y.U. J. Int'l L. & Pol. 741 (2014). Olga #

⁷⁹ This section draws on Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, in INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE 99 (Armin von Bogdandy & Ingo Venzke eds., 2012).

ideal vision of insulated polities that are free to promote their collective preferences by voting. In our fragmented global lawmaking processes, characterized by numerous, weakly related and independent treaty-regimes, powerful state executives can diffuse the potential opposition of developing countries and also evade domestic democratic limitations on their powers, thereby disenfranchising both types of stakeholders. Moreover, international courts often enhance democracy – understood also as providing a voice to foreigners, who are often excluded from domestic and global decision-making processes⁸⁰ – by helping to ensure that decision-makers take account of the interests of a greater proportion of the relevant stakeholders and that the outcomes are therefore better informed and more balanced.⁸¹ Lastly, international decisions are subject to national challenges. In particular, the back and forth with national courts, who are quite influential in shaping the evolution of international law (and who also, collectively, promote community interests when acting cooperatively),⁸² is a continuous process.

CONCLUSION

Judges of regional and international courts have the tools to promote community interests through their decisions, and they are often motivated by the desire to do so.⁸³ They do so by taking part in a concerted judicial effort to weave a web of legal norms for the global community, even if only due to the institutional necessity to treat like cases alike and to maintain their reputation for a rule of law that is distinct from power. Obviously, the extent to which judges are able to achieve these goals often depends on the willingness of state parties to ensure the courts' independence. Powerful states often seek to influence judicial outcomes by exercising the power to remove incumbents from the bench rather than by the power of the argument, but relatively speaking, international adjudicators are often in a position to make good law after hearing all those affected. By doing so, they promote community interests.

⁸⁰ Benvenisti, *Sovereigns as Trustees*, *supra* note 7 (on the need to take the perspectives of foreign stakeholders into account).

⁸¹ For an elaboration of this argument, see Benvenisti and Downs, *id.* See also Alter, *supra* note 72.

⁸² On this point see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN J. INT'L L. 241 (2008); Olga Frishman and Eyal Benvenisti, *National Courts and Interpretative Approaches to International Law: The Case Against Convergence*, in THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS 317 (Helmut Philip Aust and Georg Nolte Eds., 2016).

⁸³ See, for example, the philosophy of ICJ Judge Cancado Trindad in his book, INTERNATIONAL LAW FOR HUMANKIND (2010), as well as the interview with ICTY judge Antonio Cassese (Joseph HH Weiler, Nino in His Own Words EJILTalk! 2012 (<http://www.ejiltalk.org/nino-in-his-own-words/>)) (“I said to my colleagues, should we stick to the traditional concept that war crimes can only be committed in international armed conflict? This to me is crazy! ... So I took six months, and set up a team... [to] go through state practice and we came up with a lot of evidence... well some evidence.”)