

Judicial Activism in International Law—A Conceptual Framework for Analysis

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In this article the author provides an analytical framework designed to assess the phenomenon of judicial activism in international law. Although international judicial activism has not attracted much scholarly attention, the increasing importance of judicial decisions in international law raises the question of whether the interaction between judicial bodies and other actors concerned by their activities can be captured through the notion of judicial activism. Offering a pragmatic definition of judicial activism, the article discusses a number of parameters which can be relied on to evaluate judicial activism at the international level and concludes that the actual power that international judges may enjoy depends on numerous parameters ranging from the environment in which they work to the reception of their decisions.

With an unusual candour for an academic, Pierre Bourdieu once noted ‘the ability [of academics] to raise speculative problems for the sole pleasure of resolving them, and not because they are posed . . . by the necessities of life’.¹ At first sight judicial activism in international law seems an excellent candidate for the kind of academic issues with little or no practical relevance that Bourdieu had in mind, and this is for a very simple reason. Given the central place of the judicial branch in domestic legal contexts, it comes as no surprise that domestic lawyers are interested in the powers of the judge, and give extensive attention to the issue of judicial activism.² However, the jurisdiction

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¹ Pierre Bourdieu, ‘The Scholastic Point of View’ (1990) 5 *Cult Anthropol* 380.

² The literature is extremely rich, particularly in the United States. See *ex multis*, Wallace Mendelson, ‘The Politics of Judicial Activism’ (1975) 24 *Emory LJ* 43; Bradley C Canon, ‘Defining the Dimensions of Judicial Activism’ (1982–1983) 66 *Judicature* 236; Clifford Brown, ‘Judicial Activism’ (1986) 13 *Ohio Northern Univ LR* 157; Rebecca Adelman and Amanda Haynes Young, ‘Judicial Activism: Just Do It’ (1993–1994) 24 *Mem St UL*

of international judges exists ‘only because and in so far as the parties have so desired’.³ Indeed, the law of international litigation is still governed by the founding principle that ‘no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement’.⁴ It is true that the jurisdiction of some international tribunals is mandatory but it is equally true that these exceptions are treaty-based and as such do not alter the fundamental scheme of the international legal order.

Yet this first impression should be resisted for a number of reasons. First, international tribunals play a tremendous role in shaping the structure and content of international law. Numerous areas of international law such as the law of treaties, the law of international organizations, the law of human rights, the law of foreign investments and the law of international trade have been significantly influenced by the case law developed by various international tribunals. It is striking, for instance, that the concept of *erga omnes* obligations, which has brought about crucial changes in the understanding and conceptualization of modern international law, owes its emergence to a mere *obiter dictum* contained in a judgment of the International Court of Justice.⁵

Further, a cursory glance at the practice of international courts shows that international tribunals can be very creative and capable of extending considerably the scope and reach of their jurisdiction and the rules they are entrusted to interpret. Since this understandably comes at the price of the limitation of other actors’ discretion, it seems interesting to consider whether the dynamics between international tribunals and the actors directly or indirectly concerned by their activities can be framed in terms of judicial activism and judicial restraint as it has been the case with similar experiences in the context of domestic laws.

The methodology, which will be followed in this article, calls for a certain amount of explanation. First, this article will rely on a reflexive approach by examining not only legal materials that are conventionally used in the international legal scholarship, but also some of the ways in which international lawyers traditionally deal with international law. This will be done not only because reflexivity is obviously part of any self-conscious scholarly enterprise, but also because, as this article will argue, international lawyers seem to play a truly constitutive role in the empowerment of international judges.

Secondly, the analysis which follows will try to distance itself from the ‘ethos’ of international legal practice to the extent that it does not purport to justify or criticize any particular judicial philosophy. As Paul Kahn aptly put it, ‘[one]

Rev 267; Greg Jones, ‘Proper Judicial Activism’ (2001–2002) 14 Regent Univ LR 141; Keenan D Kmiec, ‘The Origin and Current Meanings of Judicial Activism’ (2004) 92 California LR 1441. For a European perspective, see Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989).

³ Declaration of Judge *ad hoc* Verhoeven, *Armed Activities on the Territory of the Congo*, ICJ Reports 2001, 684.

⁴ *Status of Eastern Carelia*, PCIJ (series B, No 5) 27. See also *Rights of Minorities in Upper Silesia*, PCIJ (ser A, No 15) 1928, 22; *Corfu Channel*, ICJ Reports 1948, 27; *Anglo-Iranian Oil Co*, ICJ Reports 1952, 103; *Monetary Gold*, ICJ Reports 1954, 32; *Continental Shelf*, ICJ Reports 1984, 22; *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, 133; *East Timor*, ICJ Reports 1995, 101.

⁵ *Barcelona Traction*, ICJ Reports 1970, 32.

cannot study law if [one is] already committed to law'.⁶ In short, this article has no normative claim.

Finally, as the title of this article makes abundantly clear, the aim here is to provide a conceptual framework for understanding and analysing judicial activism in international law. This implies many things, chief among them being the fact that this article does not have the ambition to provide a totalizing account of what may pass for the relevant practice. Using the famous definition of philosophy offered by Wilfrid Sellars, the objective of the present article is 'to understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term'.⁷ In other words, the analysis which follows aims simply to bring to light a number of general trends which can be observed to capture the phenomenon of judicial activism in international law in the same way as the ideal types in the Weberian sense could be said to shed light on social practices.

A terminological caveat should be entered at the outset. The terms 'judicial' and 'judges' will be used throughout this article in a generic way to refer to all categories of third-party dispute settlement bodies called upon to decide a case on the basis of law, from the World Trade Organization (WTO) Appellate Body to arbitral tribunals and judicial bodies *stricto sensu*. There is no substantive reason for this choice other than the lack of a better generic designation. However, arbitral tribunals and judicial bodies will be treated separately when the distinction is justified by virtue of reasons relevant to the assessment of judicial activism in international law.

Section 1 of the article begins in familiar fashion, with an attempt to elaborate a working definition of judicial activism. Section 2 turns to identifying a certain number of variables relevant for assessing judicial activism. Finally, judicial activism in international law will be assessed in the last section in light of those variables.

1. *How to Define Judicial Activism?*

In the rich literature that the topic has attracted in the context of domestic laws, some attempts have been made at systematizing the various meanings commonly attributed to the notion of judicial activism. The insights generated by these efforts might be a good starting point to draw a conceptual picture.

In a study which offers a valuable historical perspective, Keenan D Kmiec introduces the following 'core meanings' of judicial activism: '(1) invalidation of arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial "legislation", (4) departures from accepted interpretive methodology, (5) result-oriented judging'.⁸

In a book-length study devoted to judicial activism, Sterling Harwood defines activism as designating one of the following adjudicative practices: '(1) refusing to take an attitude of judicial deference... for legislative or executive power or judgment; (2) relaxing requirements for justiciability...; (3) breaking

⁶ Paul W Kahn, *The Cultural Study of Law* (University of Chicago Press 1999) 27.

⁷ Wilfrid Sellars, *Science, Perception and Reality* (Humanities Press 1963) 1.

⁸ Kmiec (n 2) 1444.

precedent...; and (4) loosely or controversially construing constitutions, statutes or precedents.⁹

In contrast to domestic laws, the concept of judicial activism has not attracted much attention in international law.¹⁰ In one of the very rare attempts at defining the concept in the context of international law, Hugh Thirlway distinguishes between ‘formal’ and ‘substantive’ understanding of judicial activism. In the formal type of judicial activism, ‘the judge deals with legal issues... other than those which could suffice to constitute the logical structure leading up to his ruling’¹¹ in order to contribute to what the judge conceives to be the development of law. Substantive judicial activism refers to an activism at a different level. ‘Being unsatisfied with existing law, or with what he sees as lacunae in the existing law’, a judge engaged in a substantive judicial activism ‘will be ready’, writes Thirlway, ‘to indulge in something close to open law-creation in order to base his decision’.¹²

Another analysis in the context of international law is offered by Robert Howse who defines judicial activism as ‘a tendency to impose on states legal limits or constraints not justified by the strict rule of international law’.¹³

Two major traits seem to emerge from these various definitions. Judicial activism is sometimes defined by reference to a certain implicit conception of the relationship between judicial and political branches. More precisely, judges are considered to be activist when they lack deference to political branches and pass judgment on matters which are deemed normally to be reserved to those political branches. In the second approach judicial activism is defined in such ways as to imply a certain conception of the manner in which the judiciary should conduct what is indisputably conceived to be its own ‘business’. In neither case, however, do we have self-sufficient criteria to operate the supposed distinction in a rigorous way. Admittedly, there is little room for disagreement as to the fact that judges are there to resolve cases submitted to them on the basis of law. But what precisely the legal resolution of cases implies in terms of the relationship between law and politics or the proper conduct of judicial ‘business’ varies depending upon the general conception of law that one holds.

For a formalist, law is complete and provides an answer to every case, leaving no room for judicial discretion or for political manoeuvring.¹⁴ The very

⁹ Sterling Harwood, *Judicial Activism. A Restrained Defense* (Austin & Winfield 1996) 2.

¹⁰ The most directly relevant studies are the following: Paul Mahoney, ‘Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin’ (1990) 11 *Human Rights L J* 57; Hugh Thirlway, ‘Judicial Activism and the International Court of Justice’ in N Ando (ed), *Liber Amicorum Judge Shigeru Oda* (2002) 75; Pieter Kooijmans, ‘The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy’ (2007) 56 *Intl Comp LQ* 741; Richard H Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’ (2004) 98 *AJIL* 247. As the titles of these studies make clear, none of them offers a general perspective.

¹¹ Thirlway (n 10) 75–76.

¹² *ibid* 76.

¹³ Robert Howse, ‘The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power’ in Thomas Cottier and Petros C Mavroidis (eds), *The Role of the Judge in International Trade Regulation* (University of Michigan Press 2003) 35.

¹⁴ I take Richard Posner’s characterization of formalism as an accurate description of the formalist jurisprudence: ‘[Formalism stands for] the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be

notion of activism does not make much sense in this formalist picture of law; either judges apply legal prescriptions and there is nothing to say about this scenario given that they are supposed to have no room for doing anything else, or they do not follow legal prescriptions, in which case they are not doing law but something else.

The Kelsenian conception of law is substantially different from this picture. Under Kelsen's theory of interpretation judges cannot help doing politics, since the choice of one interpretation out of the whole range of permissible interpretations is not dictated by law and remains an 'act of will' rather than a purely cognitive enterprise.¹⁵ One could argue that in this case judicial activity differs from politics not so much in kind as in degree.

The more common view is the middle ground provided by HLA Hart, according to whom judges enjoy discretion only in areas of 'penumbra', but the heart of law is constituted by a highly constraining core which leaves no room for discretion.¹⁶ In other words, there is little room in law for 'extra-legal' moves.

Rather than speculating along these highly abstract lines, this article proposes a pragmatic approach to the question and argues that trying to define judicial activism from within the law is a hopeless enterprise since judicial activism is not something legally impermissible. This is so because whatever outcome a judge comes to, such an outcome is always reconstructible as a legally permissible solution by virtue of the very logic of legal enterprise. This is not a claim about the radical indeterminacy of law but an empirical claim that judges cannot decide cases in a legally unrecognizable way and continue at the same time to claim to be doing law.¹⁷ In other words, as stated by a commentator, asking whether and under what conditions judges can render legally 'off-the-wall' decisions would be similar to asking whether 'the Pope can espouse heresy'.¹⁸ And the same holds for the audiences who read judicial opinions. As Paul Kahn put it, there is no room for miracles in the legal world because the legal mind is constructed in a way that enables it to accommodate any given solution as a rational implication of preexisting legal materials.¹⁹

This being the case, it seems that judicial activism can only be defined in a highly contextualized way. A tentative definition can be attempted along the following lines. In every legally organized community there is a range of courses of action that are considered to be appropriately judicial: there is a rough consensus about what judges are permitted to do as well as the limits that the judiciary cannot legitimately transgress. In this light judicial activism

pronounced correct or incorrect' (Richard A Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986–1987) 37 *Case Western Reserve LR* 181).

¹⁵ Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2005) 353–56.

¹⁶ HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard LR* 593, 614–15.

¹⁷ This point has been most forcefully and convincingly made by Stanley Fish. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989) 92–93.

¹⁸ Bradley C Canon, 'A Framework for the Analysis of Judicial Activism' in Stephen C Halpern and Charles M Lamb (eds), *Supreme Court: Activism and Restraint* (Lexington Books 1982) 385, 395.

¹⁹ Kahn (n 6) 119.

would be a term of art to characterize a course of action that goes beyond the boundaries of what is deemed appropriate for the judiciary in a given context.

Such a definition does not rest on the conceptually debatable distinction between law and politics, nor does it operate on the premise that judicial activism is legally impermissible. All it says is that the notion of judicial activism depend on the social conventions²⁰ in effect within a given society about what is the appropriate role of the judiciary.

Three precisions are in order to refine the understanding of judicial activism thus defined.

- (a) Whether something is identified as judicial activism or a ‘regular’ application of law is often a matter of perspective. This is so because ‘judicial activism’ is not a value-free label: activism is almost exclusively pointed to in the spirit of accusation rather than praise.²¹ After all, it is not a compliment for a judge to be reminded that she has engaged in an exercise that is inappropriate for her mission.

A clear implication of this is that the characterization of an approach as judicial activism is often outcome dependent. Those who are happy with the outcome of a case are unlikely to call the judge activist. The dynamic between the then-called Court of Justice of the European Communities (ECJ) and the German Constitutional Court provides a good illustration for this pattern. In the 1970s the German Constitutional Court heavily criticized the human-rights deficit of the EC law and claimed a power of judicial review with regard to EC law as long as this situation was not remedied.²² The ECJ took this warning very seriously and elaborated an extremely creative human-rights jurisprudence²³ to the point that a decade later the German Constitutional Court took note of this well-settled jurisprudence and abandoned its claim of judicial review of EC law as long as the latter meets the standards of the German Constitution in terms of the protection of fundamental rights.²⁴ Now compare this episode with the analysis of the constitutionality of the Maastricht Treaty carried out by the same German Constitutional Court. In this analysis the Constitutional Court addressed a warning to the ECJ about the limits of the judicial extension of the scope of the constituent treaties due to the requirement of democratic legitimacy enshrined in the German Constitution.²⁵ It is true that there is an obvious difference between two episodes. Whilst in the first episode human-rights limitations on the

²⁰ On social conventions, see Andrei Marmor, *Social Conventions. From Language to Law* (Princeton University Press 2009).

²¹ See Steinberg (n 10) 248 (stating that ‘[m]ost of those characterizing WTO dispute settlement as “activist” do so pejoratively’).

²² *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 2 BvL 52/71, 2 CMLR 540, 554 (1974).

²³ *J Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities*, Case 4/73 [1974] ECR 491, 507 (14 May 1974); *Liselotte Hauer v Land Rheinland-Pfalz*, Case 44/79 [1979] ECR 3727, 3744–45 (13 December 1979). See on this case law Bruno De Witte, ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’ in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 859–97.

²⁴ *Re Wünsche Handelsgesellschaft*, Case 2 BvR 197/83 [1987] 3 CMLR 225, 265.

²⁵ *Manfred Brunner & others v The European Union Treaty*, 1 CMLR 57, 105 [1994].

power of the EC institutions were at stake, in the second episode the Constitutional Court expressed its concerns about the extension of the power of those institutions. But one should not lose sight of the fact that in terms of judicial *modus operandi* the ECJ's human rights jurisprudence was much more audacious than the jurisprudence concerning the powers of the EC institutions: there was no textual basis for the former, whereas the latter was mainly grounded on teleological readings of the black-letter provisions of the EC treaties. The point is not that the label of judicial activism is not used consistently: it would be naïve to expect a logical consistency from any social practice. The point is that behind the labels of judicial activism there often lie concerns about substantive outcomes.

- (b) The second precision is that in international law judicial activism is not perceived to be the same thing as judicial lawmaking. The distinction between the two is rarely made,²⁶ but these phenomena should be kept separate for analytical purposes. Judicial lawmaking is an acknowledged phenomenon in international law, and is often presented as a functional corollary of judicial activity. In other words, few think that there is anything wrong with a certain amount of judicial lawmaking as such in international law. This attitude has important consequences for the phenomenology of international judicial function to which I will return later. But at this point what is important to register is that in the collective representation of international law judicial lawmaking is conceived differently from judicial activism.
- (c) Finally, there seems to be no necessary or logical correlation between judicial activism and specific interpretive approaches. This claim may sound counterintuitive since it is well known that in international law teleological interpretations are, for instance, often associated with dynamic readings of law while recourse to *travaux préparatoires* is considered as a symbol of backward-looking interpretations. This approach seems, however, inaccurate both conceptually and empirically.

Conceptually, interpretive methods alone can hardly be expected to dictate interpretive outcomes. Paraphrasing the famous Holmesian quote,²⁷ one can say that general methodological propositions do not decide concrete interpretive controversies. It is difficult to see how things could be different in international law in this regard.

The essentialist conception of interpretive methodologies is also empirically wrong. As practice shows, recourse to the 'object-and-purpose' argument does not necessarily lead to an extensive interpretation.²⁸ In the same vein, the use

²⁶ For an exception, see W Michael Reisman, 'Judge Shigeru Oda: Reflections on the Formation of a Judge' in Nisuke Ando and others (eds), *Liber Amicorum Judge Shigeru Oda*, vol 1 (Springer 2002) 57, 66. ('To be sure, the judicial function involves "supplementing and policing" the application of inherited law, which becomes particularly urgent in periods of rapid transition. This is not judicial activism but an appropriate discharge of the judicial function, and it is quite distinct from an active lawmaking role that deems itself entitled to ignore expressions of authoritative policy and assumes a competence to determine itself, case-by-case and "progressively", what the law should be.')

²⁷ *Lochner v New York*, 198 US 45, 76 (1905) (Holmes, J, dissenting).

²⁸ See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996, 66, 79 (holding that the purposes assigned to the WHO in its Constitution do not enable the WHO to address the legality of the use of nuclear weapons).

of *travaux préparatoires* does not necessarily amount to a conservative interpretation.²⁹

This assertion should not be misunderstood. It does not amount to denying that some interpretive methodologies are frequently associated with, and considered to support, judicial activism. It has, for instance, been convincingly asserted that ‘the heavy reliance’ on the ordinary meaning approach in the WTO proceedings is due to the desire of the WTO’s judicial instances to avoid the charge that they have added to or diminished the rights and obligations of the WTO members, a prospect explicitly prohibited in the Dispute Settlement Understanding (DSU).³⁰ The point is simply that it would be wrong to see a logical relationship between those methodologies and particular kinds of outcomes. In other words, there is a distinction to be made between the way things are presented in the collective representation of international legal practice and the way things are as a matter of conceptual analysis.

2. *Parameters of Judicial Activism*

A certain number of variables can be put forward for the assessment of judicial activism as defined above in any given context.

A. *The Conception of Judicial Function*

How judges and other actors in a legal system conceive the nature and scope of the judicial function bears understandably on the way judges go about judicial business. Two ideal models with particular relevance for the purposes of this article can be distinguished.³¹ Judicial function can be construed narrowly as consisting of deciding particular cases without pursuing any grand design. This roughly corresponds to the ‘judges-as-dispute-settlers’ model described by Martin Shapiro.³² An alternative model is the one in which judges are expected to perform broader tasks by ‘[giving] meaning to [the] public values’³³ of the community within which they operate.

B. *The Degree of Determinacy in the System*

It is not necessary here to enter into a theoretical debate on the extent to which law is indeterminate. What is important to bear in mind for the purposes of this study is that in any given legal system the question of determinacy operates on two distinct levels. The first level is the determination of what counts as law in the system; the second level involves the interpretation of law thus identified.

²⁹ See *LaGrand*, ICJ Reports 2001, 466, 504–05 (using the preparatory work of art 41 of the Statute to support the conclusion that provisional measures indicated by the Court are binding); *Kudla v Poland*, ECtHR, Judgment of 26 October 2000, para 152 (using the preparatory work of art 13 of the ECHR in support of an extensive reading of the right to an effective remedy).

³⁰ Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization’ (2002) 36 J World Trade 605, 617.

³¹ This construction follows the one provided by José E Alvarez. See José E Alvarez, *International Organizations as Law-makers* (OUP 2005) 528–45.

³² Martin Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press 1986) 1.

³³ Owen M Fiss, ‘Foreword: The Forms of Justice’ (1979–1980) 93 Harvard LR 1, 44.

Judicial activism obviously has something to do with both of these questions given that judicial discretion increases with the indeterminacy at either level.

C. *The Existence of a Hierarchically Structured Judicial System*

This item requires little explanation. In a system with a hierarchically organized judicial system, judicial decisions are subject to appeals that constitute an additional source of constraint on judicial discretion. In other words, decisions involving what is considered to be an inappropriate exercise for the judiciary can always be overturned at a higher level.

D. *Prudential Doctrines about the Relationship between the Judicial and Political Branches*

Most legal systems possess some prudential doctrines (political question, act of state, *actes du gouvernement*, etc.) invoked by judges to avoid interfering with politically sensitive questions. Even though they are rarely formalized, these doctrines are part of the game of law and accordingly shape the expectations of legal actors. They are obviously relevant to the sense of appropriateness of judicial approaches.

E. *The Mechanisms of Political Control*

Judges do not operate in a vacuum. Because judicial decisions are addressed to particular audiences, judges are understandably sensitive to the reactions of those audiences. At the same time, judges' political interlocutors are unlikely to be passive observers of judicial decision-making given the political costs of many judicial decisions.³⁴ Interaction between judges and their interlocutors is therefore an important parameter for analyzing judicial behaviour,³⁵ especially if that interaction gives rise to what has been called mutual 'expectation of expectations'.³⁶ Using the analytical framework developed by Bourdieu for a theory of practice, one can say that the interaction 'functions like a self-regulating device programmed to redefine courses of action in accordance with information received on the reception of information transmitted and on the effects produced by that information'.³⁷

As far as judicial activism is concerned, the crucial elements are the 'exit' and 'voice' mechanisms available within the system to those who are unsatisfied with judicial decisions.³⁸ Judges may understandably be influenced by a prospect of

³⁴ As Martin Shapiro observes, 'No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints'. Shapiro (n 32) 34.

³⁵ See Barry Friedman, 'Dialogue and Judicial Review' (1993) 91 Michigan LR 577. Roosevelt's 'Court-packing' plan and the subsequent change in the judicial philosophy of the US Supreme Court is a good example of the possible influence of political branches on the judiciary.

³⁶ Niklas Luhmann, *A Sociological Theory of Law* (Routledge Kegan & Paul 1985) 62.

³⁷ Pierre Bourdieu, *Outline of a Theory of Practice* (CUP 1977) 10–11.

³⁸ In this article these terms will be used as defined by Joseph HH Weiler. Building on Albert O Hirschmann's famous work (Albert O Hirschmann, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970)), Joseph HH Weiler defines the exit as 'the mechanism of organizational abandonment in the face of unsatisfactory performance' and the voice as 'the mechanism of intraorganizational correction and recuperation'. Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403, 2411.

being overturned. Accordingly, as recently asserted in the political science literature, 'as long as courts care about influencing policy, they have an incentive to anticipate legislative and executive reactions when making their rulings'.³⁹

F. *The Legitimizing Function of Legal Academics*

As the late Sir Robert Jennings put it, 'the most important requirement of the judicial function [is to] be seen to be applying existing, recognized rules, or principles of law' even when 'a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction'.⁴⁰ The present article argues that this 'fiction-maintaining' function is essentially accomplished by legal academics who, by stripping cases of their singularities, bringing them under the jurisdiction of general 'neutral principles', and submitting judicial decisions to an analysis which is always already committed to the ideal of rational reconstruction, enhance the legitimacy of those decisions. This scholarly disposition has clear implications for the way in which legal analyses are conducted: the legal analyst generally looks only to 'noble' reasons and public-regarding justifications and is thus committed to what has been called 'legalism', an attitude which consists in seeing or presenting 'the case law as the inevitable working out of the correct implications of the text; and the... court as the disembodied voice of right reason'.⁴¹ Since judicial activism as defined in the present article depends on the definition of what is an appropriate judicial course of action, the latitude judges enjoy in a legal system also depends on the degree of efficiency with which the theoretical discourse about law performs this legitimating function.

G. *The Nature of the Proceedings*

Many parameters may be relevant in this regard. An advisory proceeding does not technically have to face compliance problems and therefore may involve more interpretive freedom for judges. In the same vein, permanent tribunals may feel less constrained than tribunals appointed by the parties. Political science literature also considers access to tribunals and implementation of final decisions as relevant parameters in that the extent to which they are independent of the will of governments can impact the degree of freedom enjoyed by judges.⁴²

H. *Discursive Constraints*

As any discursive space, the space of judicial discourse is subject to constraints.⁴³ In systems committed to the ideal of the rule of law as opposed to the system of 'kadi justice', judges cannot decide cases in whatever way they

³⁹ Clifford J Carrubba and others, 'Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice' (2008) 102 APSR 435.

⁴⁰ Sir Robert Jennings, 'Judicial Function and the Rule of Law in International Relations' in *Collected Writings of Sir Robert Jennings*, vol I (Springer 1998) 486.

⁴¹ Martin Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California LR 538.

⁴² Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457.

⁴³ See Michel Foucault, 'Orders of discourse' (1971) 10 Social Science Information 7.

like, as legal enterprise imposes on them a certain number of ‘disciplining rules’.⁴⁴

I. Social Legitimacy Considerations

Since they operate within a socially organized order, judges pay attention not only to the ‘legal legitimacy’ of their decisions, but also to social legitimacy considerations.⁴⁵ There are many reasons why they might want to do so, and considerations of ‘appearance management’⁴⁶ are not the least of these. Depending upon the context, social legitimacy considerations can pull judges toward activism or judicial restraint. Societal demands therefore seem relevant for framing the issue of judicial activism.

3. Assessment of Judicial Activism in International Law

A. The Conception of Judicial Function

The division of courts into the categories of ‘dispute-settlers’ and ‘community-servants’ seems to correspond roughly to the conception that international judges and, more generally, international lawyers have of the judicial function. For some, the function of an international court is limited to deciding cases submitted to them. Others, whilst agreeing that case-management is part of judicial duty, also find it important that the opportunity of individual cases be seized to serve larger purposes.⁴⁷ This dichotomy is clearly expressed in one of the early reports of the WTO Appellate Body:

[T]he basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the DSU . . . Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.⁴⁸

An example can illustrate how this distinction produces practical consequences relevant for assessing judicial behaviour. For the proponents of the view which considers judges as mere ‘dispute-settlers’ the main judicial philosophy which must guide judges is judicial economy: whenever a case can be decided on multiple grounds, judges must, on this account, give preference to the least disputed grounds.⁴⁹ The International Court of Justice’s (ICJ)

⁴⁴ On disciplining rules, see Owen M Fiss, ‘Objectivity and Interpretation’ (1982) 34 Stanford LR 739.

⁴⁵ On these different kinds of legitimacy see Richard H Fallon, Jr, ‘Legitimacy and the Constitution’ (2004–05) 118 Harvard LR 1787, 1794–96; Michael L Wells, ‘“Sociological Legitimacy” in Supreme Court Opinions’ (2007) 64 Washington & Lee LR 1011, 1020–27.

⁴⁶ On this concept introduced by the sociologist Erving Goffman, see Wells *ibid* 1011. On judicial self-presentation, see Lawrence Baum, *Judges and Their Audiences* (Princeton University Press 2006) 25–49.

⁴⁷ This dichotomy closely follows the one proposed by Sir Gerald Fitzmaurice, ‘Hersch Lauterpacht – the Scholar as Judge’ (1961) 37 British Yearbook of International Law 1, 14–15.

⁴⁸ *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body of 25 April 1997, 19.

⁴⁹ The principle of judicial economy has been posited explicitly by some international tribunals. See *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Reports 1958, 55, 62 (‘The Court has to adjudicate upon the subject of the dispute . . . It retains its freedom to select the ground upon which it will

Arrest Warrant judgment⁵⁰ and *Kosovo* opinion⁵¹ are arguably good examples of the implementation of this judicial philosophy. In the *Arrest Warrant* case the ICJ carefully avoided the controversial issue of universal jurisdiction and decided the case on the less controversial ground of immunity even though the issue of universal jurisdiction was logically prior to the question of immunity. Similarly, the *Kosovo* advisory opinion somewhat disingenuously avoided the controversial questions about the effect of a unilateral secession or recognition of Kosovo. Those who think that the task of judges goes beyond deciding individual cases would arguably assert that the ICJ should have seized those occasions to clarify controversial aspects of international law.

The contention being made here is not that all international courts can be easily divided into these two clear-cut categories. Individual judges may and do clearly differ in their view of the judicial function⁵² and any single court might engage with different philosophies at different times. That being said, it does not seem too far-fetched to suggest that every permanent international court has a certain organizational identity. It is indeed possible to find for each of them a 'center of narrative gravity'⁵³ throughout the case law that they develop. Some of them make the task easier by rendering their judicial philosophy explicit. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) has voiced its sensitivity to the communitarian concerns that gave rise to its creation.⁵⁴ Likewise, the European Court of Human Rights (ECtHR) has consistently held that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'.⁵⁵ More recently the ECtHR made it still clearer that it considered itself as a 'community servant court'.⁵⁶ All judges at these tribunals may not follow the same

base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose'); *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (n 48) 19 ('A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute').

⁵⁰ *Arrest Warrant, ICJ Reports*, 2002, 3.

⁵¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion of 22 July 2010.

⁵² As stated by Georges Abi-Saab, each judge 'has to relate to the legal universe in which he is supposed to act, through his own understanding of the international judicial function and what it implies for the role of the international judge as well as his understanding of the specific mandate of the tribunal' (Georges Abi-Saab, 'The Normalization of International Adjudication: Convergence and Divergencies' (2010) 43 *NYU J Int Law & Politics* 10).

⁵³ I borrow this phrase from Daniel Dennett. See Daniel C Dennett, 'The Self as a Center of Narrative Gravity' in Frank S Kessel and others (eds), *Self and Consciousness: Multiple Perspectives* (Psychology Press 1992) 103.

⁵⁴ See, among others, *Prosecutor v Zejnil Delalic et al.*, Case No: IT-96-21-T, Judgment of the Trial Chamber, 16 November 1998, para 170 ('The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation. The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law').

⁵⁵ *Ireland v the United Kingdom*, ECtHR, Judgment of 18 January 1978, Series A 25, para 154; *Guzzardi v Italy*, ECtHR, Judgment of 6 November 1980, Series A No 39, para 86.

⁵⁶ *Karner v Austria*, ECtHR, Judgment of 24 July 2003, para 26 (noting that '[a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy

philosophy. But deviations from what is considered to be a crucial component of an organizational identity are unlikely to occur frequently.

In contrast, the ICJ seems more inclined toward the philosophy of 'settlement of individual cases'. The characterization of this court as 'the guardian of legality for the international community as a whole'⁵⁷ is in fact a vast exaggeration, as its case law reveals a court more attracted by a transactional justice approach specifically tailored to address the contingencies of individual cases rather than by large-scheme purposes.⁵⁸ It has, however, been argued that a different philosophy might be at work when it comes to the rule prohibiting the use of force.⁵⁹ As the principal judicial organ of an international organization whose primary purpose is the maintenance of international peace and security, the ICJ might well consider itself to have been entrusted with a specific mission in this area. This may be a likely explanation for its otherwise hardly understandable resistance to the trend toward a less restrictive legal regime concerning the use of force.⁶⁰

B. *The Degree of Determinacy in International Law*

Where international law stands in terms of determinacy has been admirably summarized by Sir Gerald Fitzmaurice in the following terms:

[A]lthough on the domestic plane there may still remain uncertainty as to what the law is (for statutes, judicial decisions, etc., have to be interpreted and applied) there is never any uncertainty as to what is law. On the international plane there may be uncertainty under both heads.⁶¹

International law is notoriously uncertain in terms of 'what is law'.⁶² Few international lawyers still believe today that the list provided in Article 38 of the Statute of the ICJ corresponds to a comprehensive description of what counts as international law. The status of principles, guidelines, best practices, standards, or transnational regulatory regimes in terms of international law is hard to determine with any reasonable amount of certainty. It is therefore common to find in international legal conversation a fundamental anxiety of the kind expressed by the Appellate Body of the WTO when it had to determine the status of the precautionary principle in international law:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The

grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States').

⁵⁷ Separate opinion of Judge Lachs, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, ICJ Reports 1992, 3, 26.

⁵⁸ See Georges Abi-Saab, 'De l'évolution de la Cour internationale : Réflexions sur quelques tendances récentes' (1992) 96 RGDIP 281.

⁵⁹ See Dinah Shelton, 'Form, Function, and the Powers of International Courts' (2008–09) 9 CJIL 563.

⁶⁰ See below, F.

⁶¹ Special Report by Sir Gerald Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' *Livre du Centenaire, Institut de droit International 1873–1973* 251.

⁶² For a recent discussion of the question, see Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 Harvard LR 1792, 1803–08.

precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear... [The] status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.⁶³

The indeterminacy of international law as regards 'what the law is' might seem less remarkable given that domestic laws do not seem radically different in this regard. It can, however, be argued that the phenomenon of indeterminacy at this level manifests itself to a greater extent in international law due to the fact that international lawmaking involves reaching compromises among a wider range of divergent interests. The normative content of international law is replete with references to highly under-determined concepts such as 'equitable', 'fair', 'reasonable', 'due diligence' and so on. An indeterminacy of such magnitude is likely to empower international judges.

C. *The Absence of an Organized Judicial System*

This seems to constitute another feature of international law, which is likely to increase the level of discretion of international judges. As the Special Tribunal for Lebanon recently stated, in international law 'each tribunal constitutes a self-contained unit'.⁶⁴ The absence of an organized judicial system in international law implies that except in very limited circumstances⁶⁵ judicial decisions are final and judges are not subject to any constraint coming from higher judicial instances. To be sure, this does not mean that judicial behaviour is unconstrained at the international level, nor does it mean that judges are not sensitive to any systemic consideration. The point is that the finality of international judicial decisions augments the space of discretion of international judges regardless of whether discretion is utilized in practice, and therefore shapes the expectations of international legal actors.⁶⁶

D. *The Lack of Elaborate Prudential Doctrines*

There is no clear separation of powers in international law.⁶⁷ This is probably why in the present state of international case law there seems to be no room for the political question doctrine. To be sure, the argument has been invoked numerous times, especially before the ICJ. The Court has, however,

⁶³ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Appellate Body Report of 16 January 1998, para 123.

⁶⁴ *Decision on Appeal of pre-trial Judge's Order Regarding Jurisdiction and Standing*, Special Tribunal for Lebanon, Appeals Chamber, 10 November 2010, para 41. The Special Tribunal added that at the international level '[t]here is neither a horizontal link between the various tribunals, nor, a fortiori, a vertical hierarchy' (ibid). See also *Prosecutor v Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 11; *Prosecutor v Zejnil Delalic et al.*, Case No: IT-96-21-A, ICTY, Appeals Chamber, 20 February 2001, para 24; *The Right to Information on Consular Assistance: In the Framework of the Guarantees of the Due Process of Law*, IACHR., Advisory Opinion OC-16/99 of 1 October 1999, Series A No 16, para 61.

⁶⁵ The appeal mechanisms within international criminal tribunals and WTO and the annulment proceeding within ICSID are among these exceptions.

⁶⁶ Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2004-05) 45 *VJIL* 631, 633.

⁶⁷ Alvarez (n 31) 533.

consistently rejected the doctrine.⁶⁸ Its position can be roughly summarized as follows: to the extent that international law has something to say about a case, international judges can hear it whatever its political implications or sensitivity. Admittedly, international judges do have political sensitivity. As the ICJ's *Nuclear Weapon* and *Kosovo* opinions show, international judges may well be largely deferential when it comes to questions of 'high politics'. However, the point is that there is no elaborate doctrine capable of ensuring certain predictability about judicial behaviour and shaping the expectations of actors.

The doctrine, which comes closest to a somewhat prudential doctrine in international law, is that of the margin of appreciation developed by the ECtHR.⁶⁹ The main rationale behind the doctrine is that because of their proximity to complex factual matters and the life of their societies, national authorities are 'in a better position than the international judge to give an opinion' on the necessity of human rights restrictions.⁷⁰ Despite some scholarly attempts to generalize this approach,⁷¹ the margin of appreciation doctrine is, however, far from being generally applicable. One could even doubt that the rationale behind the doctrine, which has obviously something to do with the subject matter of the ECtHR jurisdiction, is conceptually generalizable: it would, for instance, be hard to convince international judges that national authorities are in a better position to judge the legality of the use of nuclear weapons. Be that as it may, the margin of appreciation doctrine as applied by the ECtHR is not really a prudential doctrine in the same way as the political question doctrine. As the ECtHR has consistently affirmed, the margin granted to national authorities does not exclude the supervision of the international judge.⁷² Moreover, the margin of appreciation left to national authorities is subject to substantial limits.⁷³ In these circumstances one could hardly believe that such a flexible standard could exercise any meaningful constraint on the discretion of international judges.

This is all the more so considering what can be called, using the political science vocabulary, 'the general decline of sovereignty cost'. It is fashionable these days to announce the death of state sovereignty. Whatever the truth value of such statements may be, one thing is beyond doubt: state sovereignty has lost much of its discursive force and attractiveness in international legal conversation. The degree of sensitivity to state sovereignty is obviously bound to produce an impact upon the way in which judicial function is carried out. Under traditional international law, in which states' freedom of action was the

⁶⁸ *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 3, 20; *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1984, 392, 435.

⁶⁹ See Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Springer 1996). Other human rights bodies have followed the approach developed by the ECtHR. See I/A Court HR, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984, Series A No 4, para 62; Human Rights Committee, *Hertzberg et al. v Finland*, Communication No 61/1979, UN Doc CCPR/C/OP/1, para 10.3.

⁷⁰ *Ireland v United Kingdom* (n 55) para 207; *Handyside v United Kingdom*, ECtHR, Judgment of 7 December 1976, Series A 24, para 48; *Müller et al. v Switzerland*, ECtHR, Judgment of 24 May 1988, Series A 133, para 35.

⁷¹ Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 Eur J Intl L 907.

⁷² *Ireland v United Kingdom* (n 55) para 207.

⁷³ *Christine Goodwin v United Kingdom*, ECtHR, Judgment of 11 July 2002, para 103 ('the range of options open to a Contracting State [cannot include] an effective bar on any exercise of the right').

rule, international obligations were naturally seen as exceptions. In line with a well-established rule, provisions which limited state freedoms were expected to be interpreted in a restrictive manner.⁷⁴ Today there seems to be no room for such an interpretive philosophy.⁷⁵

Another piece of evidence of the declining appeal of the sovereignty argument is the marginalization of parties' intentions in the process of interpretation. It is true that the official discourse does not deny the relevance of parties' intentions to treaty interpretation. According to the Appellate Body of the WTO, treaty interpretation seeks, for instance, 'to establish the common intention of the parties to the treaty'.⁷⁶ The starting point of modern interpretive discourse in international law is, however, the assumption that

[T]he text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties.⁷⁷

Understandably, this text-based approach leaves more discretion to interpreters than the intention-based approach. Consider the following two statements on treaty interpretation. The first of these is from 1897:

[W]e are to interpret and give effect to the treaty of April 15, 1858, in the way in which it was mutually understood at the time by its makers It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words of sentences.⁷⁸

The second, based on the interpretive regime for the Vienna Convention, was issued in 1984:

[T]he Vienna Convention does not require any demonstration of a 'converging will' or of a conscious acceptance by each Party of all implications of the terms to which it has agreed. It is the 'terms of the treaty in their context and in the light of its object and purpose' with which the Tribunal is to be concerned not the subjective understanding or intent of either of the Parties.⁷⁹

⁷⁴ See *Free Zones of Upper Savoy and the District of Gex (France / Switzerland)*, 1932 PCIJ (ser A/B) No 46, 96, 166 (stating that 'the sovereignty of [a state] is to be respected in so far as it is not limited by her international obligations, and . . . that no restriction exceeding those ensuing from these [obligations] can be imposed on [the state] without her consent'). See also *The S.S. 'Wimbledon' (United Kingdom, France, Italy & Japan v Germany)* 1923 P.C.I.J. (ser A) No 1, 15, 24 (stating that 'all restrictions or limitations upon the exercise of sovereignty . . . must be construed as restrictively as possible and confined within [their] narrowest limits').

⁷⁵ *Siemens v Argentina* (Decision on Jurisdiction, 3 August 2004) ICSID Case No ARB/02/8, para 81; *Iron Rhine Arbitration* (PCA Award, 24 May 2005), para 53; *Aguas del Tinari S.A. v Republic of Bolivia* (Decision on Respondent's Objections to Jurisdiction, 21 October 2005) ICSID Case No ARB/02/3, para 91; *Dispute regarding Navigational and Related Rights*, ICJ Reports, 2009, 237, para 48; *Application of the Interim Accord*, ICJ, Judgment of 5 December 2011, para 70.

⁷⁶ *EC - Customs Classification of Certain Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998), para 93. This is, however, not the most common approach in modern treaty interpretation practice.

⁷⁷ Report of the International Law Commission to the General Assembly on the work of its 18th session, ILC Yearbook (Vol II 1966) 220.

⁷⁸ *First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the two Republics*, 28 Report of International Arbitral Awards, 215, 216.

⁷⁹ *Iran v United States*, Case No A/18, 5 Iran-US Cl Trib Rep 251, 260.

Admittedly, the second approach leaves more room for discretion than the first one. This is so even though international lawyers are generally convinced that intention is an untenable fiction⁸⁰ because that does not make much difference in terms of the constraining power of the intentionalist approach: to proceed to interpretation with the assumption that what one is after is the determination of the intention of the parties provides an important constraint on one's interpretive discretion whether that intention is empirically ascertainable or not.⁸¹ The modern interpretive regime in international law therefore leaves room for a great deal of discretion, facilitating judicial activism.

E. Limited Mechanisms of Political Control

Mechanisms of political control available to states in the international arena seem to be of limited efficacy. In particular, international exit and voice mechanisms are notoriously weak. Consider, for instance, the possibility of overturning a judicial decision with which a state is not satisfied. Since no state can unilaterally change international law, be it custom or treaty law, the threat of overturning cannot exercise a powerful constraint on judicial action, for the unsatisfied state needs collective support. Such support is difficult to obtain given that the actors, which are not directly targeted by the decision, would be unlikely to consider themselves to be affected.⁸² The very logic of political action dictates this outcome. As Karen Alter points out, politicians do not have the same 'time horizons' as courts. While courts are concerned about long-standing principles, politicians feel obliged to react only when their short-term interests are at stake.⁸³ It is also interesting to note that the areas in which the judicial courage of international judges is most pronounced are not those where 'vital interests' of states come into play, which confirms Stanley Fish's famous point that '[t]olerance is exercised in an inverse proportion to there being anything at stake'.⁸⁴ It is accordingly hardly surprising that there are very few precedents of overturned international judicial decisions.⁸⁵ Paraphrasing what has been suggested by one author in the context of the EU law, one can say that in international law the legislative change is a 'nuclear option': indisputably 'effective', but extremely difficult to implement.⁸⁶

The exit option seems equally difficult, especially when international courts enjoy a compulsory jurisdiction as in the case of the Court of Justice of the

⁸⁰ For a clear statement of this position, see the comments by Sir Eric Beckett during the debates of the Institute of International Law on treaty interpretation, (1950) 43 *Annuaire de l'Institut du droit international* 438.

⁸¹ Pierre-André Côté, 'Fonction législative et fonction interprétative : conceptions théoriques de leurs rapports' in Paul Amselek (ed), *Interprétation et droit* (Bruylant 1995) 191, 192–93.

⁸² For a similar argument made in the context of the EU, see Karen J Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52 *Intl Org* 121, 123.

⁸³ *ibid* 130–31 (noting that '[t]he short-term focus of politicians explains why they often fail to act decisively when doctrine that is counter to their long-term interest is first established').

⁸⁴ Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* (OUP 1994) 217.

⁸⁵ The reversal of the holding of the PCIJ's *Lotus* decision by the 1952 Brussels Collision Convention and the 1958 Geneva High Seas Convention is the most frequently mentioned example.

⁸⁶ Mark Pollack, 'Delegation, Agency, and Agenda Setting in the EC' (1997) 51 *Intl Org* 99, 118–19. The WTO adjudication system gives the political bodies the possibility to block an undesirable report, but by requiring a consensus to that end it decreases considerably the likelihood of the scenario (see DSU, art 17.14).

European Union, the ECtHR or the Appellate Body of the WTO.⁸⁷ But even when jurisdiction is subject to an optional recognition which could be withdrawn by the states, it does not automatically follow that international judges would be sensitive to the threat of exit. Consider, for instance, the examples of France in the context of the *Nuclear Tests* cases⁸⁸ and the United States in relation with the *Nicaragua*, *LaGrand* and *Avena* cases⁸⁹ before the ICJ. In neither case did the ICJ subscribe to the core position of the defendant states. It is true that the ICJ has an obvious interest in not losing its 'clientele', especially considering that, with developed countries generally avoiding it, it increasingly looks like a tribunal designed to settle the boundary disputes of developing countries. But it is equally true that the ICJ is also sensitive to its external image, which is obviously enhanced when the Court shows, not only in words, but also in deeds, that no special treatment is reserved for powerful states when it comes to the settlement of disputes on the basis of international law.⁹⁰

The threat of non-compliance has its own difficulties. It may be costly not only in material terms, as in the case of the WTO, but also in terms of reputation. Political culture can make the option unattractive as well: contesting judicial decisions is not 'something that is done' in societies in which the ideal of the rule of law is taken seriously.⁹¹ The projection of this culture on the international plane may enhance tolerance of judicial activism.

As for the political control of international tribunals through the appointments mechanism, this can hardly be considered an efficient tool when it comes to permanent standing courts. It is true that there are no life-appointed international judges and that the career incentives of international judges are certainly to be taken into account. That being said, except for the Court of Justice of the European Union and the ECtHR, international courts have a limited composition that excludes the possibility that every government could appoint a judge.⁹² It also must be noted that even when each government has the right to appoint a judge, an individual government is certainly not in a position to control the composition of the entire court.⁹³

The power of political constraints cannot, however, be completely denied.⁹⁴ First of all, when a judicial decision about a politically important issue generates general dissatisfaction, the cost of mobilization can be more easily

⁸⁷ Kooijmans (n 10) 747.

⁸⁸ *Nuclear Tests*, ICJ Reports 1974, 253, 457.

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14; *LaGrand* (n 29); *Avena and Other Mexican Nationals*, ICJ Reports 2004, 12.

⁹⁰ Keohane and others (n 42) 481.

⁹¹ On this implication of the rule of law, see *Hassan & Tchaouch v Bulgaria*, ECtHR, Judgment of 26 October 2000, para 87. For a general discussion, see Keohane and others (n 42) 478–79 (noting that '[l]iberal democracies are particularly respectful of the rule of law').

⁹² On the political ramifications of the appointment of international judges, see Eric Voeten, 'The Politics of International Judicial Appointments' (2008–09) 9 CJIL 387.

⁹³ This does not mean that governments do not use their appointment power to influence the judicial behaviour of courts. See Keohane and others (n 42) 471 (mentioning the rumour that 'the German government sought to rein in the ECJ by appointing a much less activist judge in the 1980s'); Steinberg (n 10), 264 (noting that, while interviewing candidates to the WTO Appellate Body's membership, the USTR focuses, among other things, on their judicial philosophy).

⁹⁴ Carrubba and others (n 39).

met,⁹⁵ especially if the treaty gathers a small number of states. A recent episode from the North American Free Trade Agreement (NAFTA) provides an apt illustration of this.⁹⁶ Extensive interpretations of the fair and equitable treatment standard of NAFTA,⁹⁷ prompted the NAFTA Free Trade Commission, which is composed of the representatives of the three contracting parties, to issue an interpretive note pointing out that the fair and equitable treatment standard within NAFTA amounted to the same standard as the minimum treatment standard of customary international law.⁹⁸

Similar experience can be at work elsewhere. Bolivia and Ecuador have withdrawn from the International Centre for Settlement of Investment Disputes (ICSID) Convention⁹⁹ and Venezuela has recently denounced the same Convention¹⁰⁰ partly in response to investor-friendly approaches espoused by investment tribunals. Australia has recently announced that it would no longer include in its investment agreements any provision enabling an investor to submit its disputes with the government to an arbitral tribunal.¹⁰¹ If such a movement were followed by a relatively significant number of states, it would be unlikely for investment tribunals to remain insensitive to the charges levelled against them.

The recent declarations issued by the High Level Conference on the Future of the European Court of Human Rights (ECHR) can be analyzed along similar lines. The Izmir declaration

[i]nvites the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances.¹⁰²

The Brighton declaration in its turn stresses the subsidiary nature of the European Convention system, invites the ECtHR to have 'due regard to the State's margin of appreciation' and calls on the Council of Europe's Committee of Ministers to prepare an amending instrument to include the principles of subsidiarity and margin of appreciation in the Preamble to the Convention.¹⁰³

⁹⁵ It goes without saying that there is no legal obstacle to the power of the parties to overturn any judicial interpretation. The WTO Agreement even explicitly states that the power of ultimate interpretation rests with the parties (see art IX: 2 of the Agreement establishing the WTO).

⁹⁶ For a discussion of this episode and its implications for the behaviour of NAFTA tribunals, see Ginsburg (n 66) 662–63.

⁹⁷ See for instance *Pope & Talbot v Canada*, Final Award, 10 April 2001, paras 111–17.

⁹⁸ Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, para 2.

⁹⁹ See List of Contracting States and Other Signatories of the Convention available at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>> accessed 20 April 2012.

¹⁰⁰ The World Bank received written notice of Venezuela's denunciation of the ICSID Convention on 24 January 2012.

¹⁰¹ Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement' (2011) 15 (22) ASIL Insights, available at <<http://www.asil.org/insights110802.cfm>> accessed 20 April 2012.

¹⁰² Izmir Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, 26–27 April 2011.

¹⁰³ Brighton Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights organized at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, 19–20 April 2012.

Considered in light of the concerns recently expressed by some parties to the ECHR about the over-intrusiveness of the ECtHR, such declarations are arguably clear warnings on behalf of the parties to the Convention that the ECtHR has gone beyond what they consider admissible.

Secondly, if the amendment of existing regulative frameworks proves to be difficult, this does not mean that states could not draw lessons from any relevant past experience when they engage in new normative enterprises. For instance, it has been argued that the fact that the jurisdiction of the Court of Justice of the European Union has been severely restricted or completely denied in politically sensitive areas of intergovernmental co-operation has something to do with concerns generated by the past activism of the Court.¹⁰⁴ Along the same lines, the WTO DSU provision according to which ‘recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’¹⁰⁵ has been interpreted as a device used by contracting parties to prevent a framework designed for purely economic co-operation from being turned into a scheme for ever deeper integration through the activism of judges as in the case of the ECJ.¹⁰⁶ The Rome Statute of the International Criminal Court provides another case in point. As William A Schabas points out, the fact that states have kept for themselves the power to adopt the elements of crimes¹⁰⁷ as well as the rules of procedure and evidence¹⁰⁸ and that a specific provision has been added to protect ‘national security information’¹⁰⁹ has something to do with the very creative jurisprudence of the *ad hoc* international criminal tribunals.¹¹⁰ Likewise, alarmed by the interpretations of relatively flexible standards of treatment of foreign investors adopted in investment awards, a number of states have decided to detail the specific content of those standards in model bilateral investment treaties and treaties in order to prevent their extensive interpretation by arbitral tribunals.¹¹¹

In the same vein, it should be noted that the mechanisms of voices are not doomed to fail inevitably. It is, for instance, contended in the literature¹¹² that virulent protestations on the part of numerous developing countries against the suggestion of the Appellate Body that panels could decide discretionarily to allow ‘any party to the dispute to attach the briefs by nongovernmental organizations, or any portion thereof, to its own submissions’¹¹³ resulted in subsequent panels being more reluctant about authorizing such briefs.

¹⁰⁴ Alter (n 83) 141.

¹⁰⁵ DSU, art 3.2.

¹⁰⁶ Geneviève Bastid-Burdeau, ‘Le pouvoir créateur de la jurisprudence internationale à l’épreuve de la dispersion des juridictions’ [2006] 50 *Archives de la philosophie du droit* 289, 295.

¹⁰⁷ Art 9 of the ICC Statute. According to the Statute, the elements of crime are designed to ‘assist the Court in the interpretation and application rules of procedure and evidence’ (art 9).

¹⁰⁸ Art 51 of the ICC Statute.

¹⁰⁹ Art 72 of the ICC Statute.

¹¹⁰ William A Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *JICJ* 731, 755–56.

¹¹¹ See 2004 US Model BIT, art 5; Canada’s Model Foreign Investment Promotion and Protection Agreement, art 5; The United States-Dominican Republic-Central America Free Trade Agreement (CAFTA), art 10.5.

¹¹² Steinberg (n 10) 266.

¹¹³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Appellate Body Report of 12 October 1998, para 110.

Critical voices are particularly frequent at the universal level where the culture of the rule of law is not as embedded as in advanced democracies. It is, for instance, striking to compare the reactions of France and the United Kingdom to General Comment No 24 of the Human Rights Committee¹¹⁴ with the reactions of the same states to the substantially identical reasoning of the ECtHR.¹¹⁵ While both states protested virulently against the interpretation proposed by the Human Rights Committee about the power of review of the latter over reservations to the Covenant,¹¹⁶ neither of them challenged the interpretation espoused by the ECtHR.¹¹⁷ This shows that even allegedly rule-of-law-friendly states can raise critical voices at the universal level where protesting against judicial rulings is far from being considered as ‘something not to do’ and implies less reputational cost than the same kind of behaviour would generate in a democracy committed to the ideal of the rule of law.

F. *The Legitimizing Function of International Law Academics*

Although this variable rarely features in scholarly discussions,¹¹⁸ judicial activism enjoys a tremendous amount of legitimating support from international law academics. The international judiciary may well be ‘the least dangerous branch’,¹¹⁹ but it is certainly the one most favoured by international legal scholars. The reason of such a disposition can only be identified by applying a reflexive sociological approach to the scholarly field of international law.

First of all, one can consider that the phenomenon in question has something to do with the way in which the discipline of international law has been professionalized. As some writers acutely observed, international lawyers have always suffered from a kind of ‘inferiority complex’ in their attitude towards domestic law.¹²⁰ Taking the domestic legal experience as the parameter against which any legal system should be judged, jurists in the field of national law and international-relations scholars have long questioned the extent to which a system which has no mandatory judges and no centralized enforcement mechanisms can really be deemed a legal one. ‘Is international law really law?’ is a question that has tormented many generations of international

¹¹⁴ CCPR/C/21/Rev.1/Add.6.

¹¹⁵ *Belilos v Switzerland*, ECtHR, Judgment of 29 April 1988.

¹¹⁶ Observations transmitted by letter dated 21 July 1995, Official Records of the General Assembly, Fiftieth Session, Supplement No 40 (A/50/40), Annex VI; Observations transmitted by letter dated 8 September 1995, Official Records of the General Assembly, Fifty-first Session, Supplement No 40 (A/51/40), Annex VI.

¹¹⁷ This does not mean that the compliance record of the parties to the ECHR is absolutely perfect. The UK has not complied yet with a 2005 judgment of the ECtHR (*Hirst v the United Kingdom No 2*, Grand Chamber judgment of 6 October 2005) holding that the indiscriminate restriction of the right of detainees to vote was incompatible with the Convention. The Committee of Ministers of the Council of Europe has expressed its concerns in this regard (Interim Resolution CM/ResDH (2009) 160).

¹¹⁸ For a remarkable exception, see André Decencière-Ferrandière, ‘Essai critique sur la justice internationale’ (1934) 41 *Revue générale de droit international public* 149. On the general point of the role of legal scholarship in shaping law, see Mark V Tushnet, ‘Academics as Law-Makers’ (2010) 29 *University of Queensland LJ* 19.

¹¹⁹ Alexander M Bickel famously characterized the judicial branch as ‘the least dangerous branch’. See Alexander M Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (Yale University Press 1986).

¹²⁰ Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretive Method’ (2009) 22 *Leiden J Intl L* 651, footnote 9; Bruno Simma, ‘Fragmentation in a Positive Light’ (2004) 25 *Michigan J Intl L* 845.

lawyers.¹²¹ The defence of the field against ‘existential hostility’ has thus been part of the professionalization of the discipline of international law. Dealing with a legal system that struggles even to prove its very existence, international lawyers are happy to have their own judge since the judge is almost universally taken as integral part of the definition of law.

Another likely explanation lies in international lawyers’ attitudes towards state sovereignty. International law has an ambivalent relationship with sovereignty. On the one hand, sovereignty is recognized as a matter of international law.¹²² On the other hand, international law has always had to defend itself from sovereignty. As early as its first judgment,¹²³ the Permanent Court of International Justice met with the paradox of the legally bound sovereign: if sovereignty means that there is no authority above the state, how can a state make any commitment from which it is not allowed to withdraw if it so desires? Sovereignty calls into question the very viability of international law for another, related reason. One of the traditional attributes of sovereignty is said to be the power of auto-interpretation, which allows states to determine *uti singuli* the content of their international rights and obligations,¹²⁴ in other words, contrary to an old legal maxim, states are traditionally conceived of as judges in their own cases. But the interpretations of rights and obligations by states themselves are likely to be self-serving and can endanger the very existence of an objective legal order.¹²⁵ This explains why international lawyers are suspicious of state sovereignty and particularly favourable to third-party interpretations of international law: what is at stake is nothing less than the very existence of their discipline. Their suspicions become even more understandable when one considers that the darkest horrors of the twentieth century were committed in the name of sovereignty. This state of affairs may explain why international lawyers tend to be fairly systematic in favouring restrictions on states’ freedom of action. As Jan Klabbers has it,

for us internationalists, the state was, until recently, the root of all evil, so it follows that anything that attempts to reach beyond the state is laudable and praiseworthy, regardless of its precise contents State sovereignty needs to be overcome if life will ever get better.¹²⁶

This unquestionably favourable disposition on the part of international lawyers toward international judges manifests itself in the form of at least two patterns, which are highly relevant for judicial activism.

¹²¹ As early as 1710, a dissertation was written to demonstrate the inexistence of international law (Arnold Rotgers, *Dissertatio qua demonstrator jus gentium non dari*, cited in Ernest Nys, *Le droit international* (Albert Fontemoins 1904) 250).

¹²² One of the foundational principles of the UN Charter is ‘the sovereign equality’ of states. See art 2, para 1 of the Charter.

¹²³ *The S.S. ‘Wimbledon’ (United Kingdom, France, Italy & Japan v Germany)*, 1923 PCIJ (ser A) Nos 1, 15, 24.

¹²⁴ *Lake Lanoux case*, 12 Report of International Arbitral Awards 281, 310; *Air Service Agreement of 27 March 1946*, 18 Report of International Arbitral Awards 417, 483.

¹²⁵ This is exactly the argument put forward by the Nuremberg Tribunal in its attempt to counter the characterization of the German invasions of Denmark and Norway as acts of self-defence by Germany: ‘whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced’ (International Military Tribunal, Trial of the Major War Criminals (Nuremberg), 1947, vol I, 208).

¹²⁶ Jan Klabbers, *An Introduction to International Institutional Law* (CUP 2002) 340.

The first pattern is what can be called ‘the narrative of the functional unavoidability of judicial lawmaking’. This narrative can in turn take two forms. In its weak manifestation the narrative amounts to the proposition that judicial function necessarily implies a certain amount of judicial lawmaking. Since no legal instrument can be drafted in a way which leaves room for neither gaps nor for ambiguities, international judges called upon to decide concrete cases are, so the argument goes, by necessity lawmakers, filling gaps and clarifying ambiguities,¹²⁷ all the more so considering that there is a widespread consensus that the option of *non liquet* is not open to international judges. Such a claim may at first sight seem unremarkable, but it must be appreciated that there is not necessarily a logical link between the fact that legal instruments have gaps and ambiguities and the claim that international judges should remedy this situation. As in fact occurs in international practice, gaps and ambiguities may well be part of a drafting strategy to leave to affected actors some room for discretion when a dispute arises over the meaning of the instrument.

The second form of the narrative is still more far-reaching. Here, international judges are presented as the agents best placed to provide remedies to the structural deficiencies of the legislative function in international law. Two of these structural problems are worth mentioning for the purposes of this study.

In national legal systems, adapting law to changing circumstances is rarely a difficult task, with the possible exception of constitutions. If a given statute no longer fits adequately with newly arising situations, legislators can take action to amend it or to adopt a new law. These courses of action are not so readily available in international law. None of the main sources of international law has been designed to meet this structural need for adaptation. In principle, customary law needs time to mature. Whilst scholars have sometimes mentioned the idea of instant customary law, this type of law rarely develops quickly. The same is true of treaties, for treaty modification, like treaty conclusion, requires consent from the parties involved. There are no formal constraints that prevent states from modifying treaties to adapt them to contextual changes, but since treaties are often based upon exchanges of compromises, states rarely wish to engage in formal amendment processes.¹²⁸

The other structural problem is rooted in the way in which international lawmaking is organized. Since in international law the lawmaking process is not centralized nor coordinated in any systematic way, international law is inherently fragmentary and normatively conflict-generating. International judges are therefore often expected to settle the normative conflicts of international law and furnish the system with internal coherence whenever they confront issues involving such conflicts.¹²⁹

¹²⁷ This is often explained by the legislative deficiencies of international law. See separate opinion of Judge Fitzmaurice, *Barcelona Traction* (n 5) 64 (‘Since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development.’). See also Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958) 77.

¹²⁸ Alain Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007), 21–22.

¹²⁹ David D Caron, ‘Towards a Political Theory of International Courts and Tribunals’ (2006) 24 *Berkeley J Intl L* 401, 409; Luigi Condorelli, ‘L’autorité de la décision des juridictions internationales permanentes’ in *La juridiction internationale permanente* (Pedone 1987) 277, 310.

The second pattern that the discourse of empowerment of international judges takes is the systematic identification of the rules of international law with the judicial interpretation of those rules,¹³⁰ which explains why ‘isolated passages from judgments [are treated] almost as if they were passages from Holy Writ’.¹³¹ International legal scholars tend ‘to consider [international] law to be identical to “[international] law” as it is re-presented from the perspective of the judge’.¹³² It is true that lawyers have a natural preference for judicial interpretation as opposed to interpretations proposed by political branches. But whatever the reason for this disposition may be, there is certainly no room in international law for the proposition that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’¹³³ if that should mean that international judges have the power of ultimate interpretation, because everything in the structure of international law defies such a suggestion.¹³⁴ Yet many international law academics write and comment as if that proposition were valid in international law.

An example may be helpful for illustrating this point. The ICJ has developed a state-centric conception of self-defence which excludes self-defence against armed attacks launched by non-state actors with no state involvement.¹³⁵ Even in the post-9/11 world the ICJ has not changed its position and held that ‘Article 51 of the Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State’.¹³⁶

This interpretation, which finds little support in the UN Charter, has been challenged in many instances of state practice. The military operation launched by Israel against Hezbollah in July 2006 provides a case in point. This operation, mainly carried out in Lebanon, was claimed by Israel to be grounded on the right of self-defence.¹³⁷ Interestingly enough, Israel specified that it was not fighting Lebanon, but terrorists operating within Lebanon. The UN Security Council’s debates about the Israeli military intervention showed that many states and the UN Secretary-General had endorsed the Israeli claim of self-defence.¹³⁸

Yet many international law academics, especially those writing in Europe, persist in their claim that the law of self-defence remains unchanged and continues to be governed by the framework provided by the ICJ.¹³⁹ The reason

¹³⁰ For a discussion of this tendency, see Jean Combacau, ‘Les réactions de la doctrine à la création du droit par le juge en droit international public’ in *La réaction de la doctrine à la création du droit par le juge* (Economica 1980) 401.

¹³¹ Sir Robert Jennings, ‘The Role of the International Court of Justice’ (1998) 68 *British YB Intl L* 1, 41.

¹³² Pierre Schlag, *Laying Down the Law. Mysticism, Fetishism, and the American Legal Mind* (NYU Press 1996) 135.

¹³³ *Marbury v Madison*, 5 US 137, 178 (1803).

¹³⁴ Even in the context of domestic law the supremacy of judicial interpretation is not so obvious. See *City of Boerne v Flores*, 521 US 507 (1997). For a general discussion of the point, see Michael W McConnell, ‘Institutions and Interpretation’ (1997) 111 *Harv L Rev* 153, 173–74.

¹³⁵ *Military and Paramilitary Activities in and against Nicaragua* (n 89).

¹³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, 194.

¹³⁷ See Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937, S/2006/515.

¹³⁸ See S/PV.5493 (2006).

¹³⁹ See Olivier Corten, *Le droit contre la guerre* (Pedone 2008). For a deeply enlightening critical analysis of this issue, see Bianchi (n 120).

why this is worth stressing is not that judicial decisions are not to be given consideration. To be sure, international judges are clearly important actors in the international legal system and the case law that they develop is an important part of international legal discourse. But international judges are certainly not the only actors taking part in the international legal conversation, let alone the most important ones. As Robert Cover famously asserted, judicial interpretation implies violence against competing alternative interpretations.¹⁴⁰ What makes international law peculiar is, however, the fact that, contrary to what happens in domestic laws, those competing interpretations are not killed by virtue of judicial interpretation. Indeed, as a preeminent international lawyer put it, what other actors think to be normative is more important than what the ICJ or any other court may say.¹⁴¹

The relevance of the scholastic disposition just described for judicial behaviour needs no elaboration. International law scholars display a real complicity with international judges, supplying them the rationalization that glosses over the tensions, arbitrariness, contingencies, and contradictions running through legal practice. James Brierly once observed that there was a ‘conspiracy’ to represent judicial decisions as ‘something less’ than ‘creative’ acts.¹⁴² Precisely because of such a ‘conspiracy’, judicial creativity goes unnoticed¹⁴³ and judicial behaviour is legitimized as a matter of principle since, as Bourdieu stated, the recognition of legitimacy rests upon ‘the misrecognition of arbitrariness’.¹⁴⁴ The game is so taken for granted and its rules so well established and unchallenged that the players do not even need to hide it. The following statement by the former President of the ICJ in front of a group of international legal scholars is a clear testimony to this state of affairs:

Ladies and gentlemen, your analyses and comments in fact delight us... In our judgments you find depths of meaning which were unbeknown to us! And for all that, you do not shy away from attributing us your own thoughts, and perform psycho-analytical miracles which massage our egos and fill us with pride.¹⁴⁵

G. *The Nature of the Proceedings*

It is often assumed that the advisory procedure is more conducive to judicial activism than the contentious one.¹⁴⁶ As a matter of theory, this might be true given that the advisory procedure does not take the form of an adversarial

¹⁴⁰ See Robert Cover, *Narrative, Violence and the Law. The Essays of Robert Cover* (University of Michigan Press 1995) 203–38.

¹⁴¹ Rosalyn Higgins, ‘International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law’ (1991) 230 *Recueil des cours* 43.

¹⁴² Sir Hersch Lauterpacht and CHM Waldock, *The Basis of Obligation in International Law and other Papers of the late James Leslie Brierly* (OUP 1958) 98.

¹⁴³ For the claim that European law scholars have always consistently denied the judicial activism of the ECJ in order to enhance the legitimacy of the latter, see Shapiro (n 41) 542.

¹⁴⁴ Bourdieu (n 37) 168.

¹⁴⁵ Mohammed Bedjaoui, ‘La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens’ in *La juridictionnalisation du droit international* (Pedone 2003) 531 (author’s translation from the French original).

¹⁴⁶ See, among others, Shelton (n 59) 537, 542, 554; Manfred Lachs, ‘Some Reflexions on the Contribution of the International Court of Justice to the Development of International Law’ (1983) 10 *Syracuse J Intl L* 239, 262.

confrontation and that the final decision—the advisory opinion—does not have to meet the concerns of compliance, being by definition ‘advisory’. This assertion, however, seems insufficiently nuanced. To begin with, it is not true that advisory proceedings do not have to face, at least, in the background, an adversarial confrontation of legal arguments. More often than not advisory cases so clearly imply a clash of legal thesis between two parties that they can be recharacterized as disguised contentious cases.¹⁴⁷ Further, it is an exaggeration to say that advisory proceedings do not involve any compliance-related concerns. Judges clearly want their decisions to be taken seriously whatever the formal nature of the proceedings. In other words, advisory proceedings imply a reputational cost for judges as do contentious cases.

There is, however, a convincing reason why advisory proceedings may provide more opportunities for judicial activism than contentious cases. Even when they are generated by a contentious background, the questions that international courts have to answer in their advisory capacity tend to take a more ‘theoretical’ and abstract, almost academic, formulation. One can hardly resist the impression that judges in this context are really ‘oracles of the law’¹⁴⁸ tasked with the mission of saying what the law is as a matter of principle, without having to inscribe their decision in the contingencies of any particular case. It is arguable that this additional ‘psychological’ source of legitimacy gives judges more room for judicial innovations of law.

Another relevant and frequently established distinction relates to the origin of the dispute-settlement body. ‘Party-originated’,¹⁴⁹ arbitration bodies are usually considered more a common organ of the parties¹⁵⁰ than a truly independent ‘organ of international law’.¹⁵¹ The conclusion, which is traditionally drawn from such a characterization, is that an arbitral body cannot be expected to be activist. While there may be some truth to this claim, it would be wrong to assume that arbitral bodies are ‘mere servants’ of the parties. As the example of investment arbitration clearly shows, *ad hoc* arbitral tribunals often pay careful attention to the systemic considerations even though what they are primarily called upon to interpret are purely bilateral treaties. A clear example is consideration given to other investment awards in the interest of a coherent development of the international investment law.¹⁵² Sometimes

¹⁴⁷ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, 65; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 136).

¹⁴⁸ John P Dawson, *Oracles of the Law* (William S Hein & Co 1986).

¹⁴⁹ See Caron (n 129) 403.

¹⁵⁰ *ibid* 404 (noting that ‘[m]embers of a party-originated tribunal believe themselves to be working for the parties’). See also Shelton (n 59) 543.

¹⁵¹ This is how the PCIJ once characterized itself. See *Certain German Interests in Polish Upper Silesia* (Merits) 1926 P.C.J.I. (ser A) No 7, 1, 19.

¹⁵² *Saipem SpA v Bangladesh*, ICSID Case No ARB/05/7, Award, 30 June 2009, para 90 (‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, 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’); *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, para 145. This trend is not unanimous, however. See *Romak SA v Uzbekistan*, PCA Case No AA280, Award, 26 November 2009, para 171 (‘Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of “arbitral jurisprudence.” The Arbitral Tribunal’s mission is more mundane, but no less

arbitrators go even further and almost rewrite treaty provisions in light of what they consider to be an inherent rule of general international law.¹⁵³

Procedure matters for a further reason. Courts with different procedures do not have the same kind of constituencies depending on how their procedure relates to the domestic interest groups and the extent to which access to the court and the enforcement of the decisions of the latter are 'legally insulated from the will of individual national governments'.¹⁵⁴ This is one of the keys to understanding the difference between the judicial behaviour of the ICJ and that of the Court of Justice of the European Union or the ECtHR.

Although the nature of the proceedings is a powerful parameter, much depends on what is made of that nature in the course of the functioning of the system concerned. Whatever particularities the European Convention might have, the European Court of Human Rights would not have been what it is today had it followed the judicial philosophy suggested by Sir Gerald Fitzmaurice when he was sitting at that Court.¹⁵⁵ In this regard it is highly relevant to note that the Court of Justice of the European Union and the ECtHR, which are often described as the most activist international tribunals, have both constructed a judicial philosophy around the special nature of, respectively, the law of the European Union and the ECHR. As early as in 1963, the ECJ stated that the Community constituted 'a new legal order of international law'.¹⁵⁶ The following year the difference between 'ordinary international treaties' and the EC Treaty was strongly emphasized¹⁵⁷ and the Court went so far as to state that the Treaty had established 'a new legal order'.¹⁵⁸ Another strategy to achieve the same effect has been the attitude of the ECJ toward the rules on interpretation codified in the Vienna Convention on the Law of Treaties. While the ECJ had recourse to those rules when it was called to interpret external agreements of the EC, it does not seem to have ever used the Vienna interpretive regime explicitly when interpreting the constituent treaties of the EU.¹⁵⁹

The ECtHR has followed a similar path. Already in 1961 the former European Commission on Human Rights stressed that, unlike reciprocity-based ordinary agreements, the European Convention was designed 'to

important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general').

¹⁵³ The decision in the case of *Victor Pey Casado and President Allende Foundation v Republic of Chile* (Decision on Provisional Measures, ICSID Case No ARB/98/2, 25 September 2001), is a good example. In this case, building essentially on the *LaGrand* Judgment of the ICJ, the Tribunal concluded that provisional measures indicated by ICSID tribunals were binding even though the ICSID Convention grants the ICSID Tribunals only a recommendatory power in this regard (art 47).

¹⁵⁴ Keohane and others (n 42) 458.

¹⁵⁵ See in particular, his dissents in *Golder v United Kingdom*, ECtHR, Judgment of 21 February 1975, Series A, No 18 and *Ireland v United Kingdom* (n 55).

¹⁵⁶ *van Gend & Loos v Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1, 12.

¹⁵⁷ *Flaminio Costa v ENEL*, Case 6/64 [1964] ECR 585, 593.

¹⁵⁸ *Commission v Luxembourg and Belgium*, Joined Cases 90, 91/63 [1964] ECR 625, 631.

¹⁵⁹ Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1997) 20 *Fordham International LJ* 656, 669; Richard K Gardiner, *Treaty Interpretation* (OUP 2008) 121 ('Distinguishing the legal order of the Community... from public international law has generally resulted in the ECJ not applying the Vienna rules to these treaties').

establish a common public order of the free democracies of Europe'.¹⁶⁰ The ECtHR confirmed in its turn such characterization of the Convention¹⁶¹ and described the Convention as 'a constitutional instrument of European public order'.¹⁶²

To understand why such discursive strategies are important for assessing judicial activism it might be useful to resort to the notion of 'arbitrary coherence' introduced by the behavioural economist Dan Ariely.¹⁶³ According to Dan Ariely market prices are not always dictated by rational calculations or the law of demand and supply, but are also governed by some behavioural patterns which may seem irrational at first sight. For instance, we tend to become 'anchored' to the price of a newly introduced product whatever that price happens to be.¹⁶⁴ It is to account for this irrational behaviour that Dan Ariely introduces the concept of 'arbitrary coherence': 'although initial prices... are "arbitrary", once those prices are established in our minds they will shape not only present prices but also future prices'.¹⁶⁵ Market actors are well aware of the tremendous impact that anchoring has on the price that customers are ready to pay for a given product and deploy appropriate strategies to take benefit of it. For instance, when a new product is introduced into a market of similar products at a relatively higher price, the best marketing strategy to make this price look like a 'natural' one is to differentiate that product to the point that the prices of similar products could not be used by customers as an anchor. As Ariely illustrates, when the coffeehouse chain Starbucks was launched, 'Starbucks did everything in its power... to make the experience feel different – so different that we would not use the prices at Dunkin' Donuts as an anchor, but instead would be open to the new anchor that Starbucks was preparing for us'.¹⁶⁶

The insight provided by Ariely seems highly relevant to a proper assessment of the discursive strategies deployed by the two European courts. Both Courts tried to convince that what they were doing was not 'international law as traditionally understood', but something new. This strategic move helped to delegitimize the recourse to the traditional understanding of what an international judge could do as an anchor and thus, facilitated the reception of the activist judicial philosophy developed by these courts.¹⁶⁷

¹⁶⁰ *Austria v Italy* (the Pfunders case), Application No 788/60, 4 *Yearbook* (1961), 112, 138.

¹⁶¹ 'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"' (*Ireland v United Kingdom* (n 55) para 239).

¹⁶² *Loizidou v Turkey*, ECtHR, Judgment of 23 March 1995, para 75; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, ECtHR, Grand Chamber, Judgment of 30 June 2005, para 156; *Behrami and Behrami v France and Saramati v France, Germany and Norway*, ECtHR, Grand Chamber, Decision of 2 May 2007, para 145.

¹⁶³ Dan Ariely, *Predictably Irrational* (Perennial 2009) 23–48.

¹⁶⁴ *ibid* 25–26.

¹⁶⁵ *ibid* 26.

¹⁶⁶ *ibid* 39.

¹⁶⁷ The ECtHR has, for instance, explicitly stated that the analogy between itself and the ICJ was misplaced: '[T]he context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention

H. Discursive Constraints

Judges rarely acknowledge that they are making law. International judges are no exception to that. They consistently deny, for instance, that they have the power to revise a treaty¹⁶⁸ or ‘anticipate the law before the legislator has laid it down’.¹⁶⁹ Crucially important for the appearance of legitimacy of judicial decisions, this claim is bound to exercise a powerful constraint on judicial activism, the reason being that, as the sociologist Erving Goffman suggested, ‘an individual who implicitly or explicitly signifies that he has certain social characteristics ought in fact to be what he claims he is’.¹⁷⁰

A clear consequence of this claim is that judges usually avoid suggesting interpretations which patently contradict the claim in question. This is the reason why, for instance, the ECtHR has consistently rejected the interpretation that the death penalty is prohibited by the Convention itself, considering that the death penalty is explicitly mentioned and tolerated in the Convention.¹⁷¹

But it would be wrong to assume that discursive constraints work solely in one direction, as they can also facilitate judicial audacity. Consider, for instance, the evolutive interpretive approach adopted by the WTO Appellate Body in the *US-Shrimp* case. There, the Appellate Body held that the phrase ‘exhaustible natural resources’ in GATT Article XX (g) had to be ‘read by a treaty interpreter in light of contemporary concerns of the community of nations about the protection and conservation of the environment’.¹⁷² Pakistan criticized this approach, describing it as ‘a recipe for adding to and diminishing the rights and obligations of Members’.¹⁷³ India¹⁷⁴ and Mexico¹⁷⁵ endorsed this charge. But these criticisms did not prevent the Appellate Body from reproducing a similar reasoning in a subsequent case.¹⁷⁶ Formally speaking, the Appellate Body’s attitude in the second case can be described as an illustration of the operation of discursive constraints: after all, the Appellate Body merely followed a precedent.¹⁷⁷ As a matter of substance, however, it is clear that the Appellate Body enhanced its own interpretive power.

institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention’ (*Loizidou v Turkey* (n 162) para 84).

¹⁶⁸ *Acquisition of Polish Nationality*, Advisory Opinion, 1923 P.C.I.J. (ser B) No 7, 6, 18; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, 221, 229; *Johnston and others v Ireland*, ECtHR, Judgment of 18 December 1986, para 53.

¹⁶⁹ *Fisheries Jurisdiction*, ICJ Reports 1974, 175, 192.

¹⁷⁰ Erving Goffman, *The Presentation of Self in Everyday Life* (Anchor 1959) 13.

¹⁷¹ See *Soering v United Kingdom*, ECtHR, Judgment of 7 July 1989, para 103; *Ocalan v Turkey*, ECtHR (Grand Chamber), Judgment of 12 May 2005, paras 162–63.

¹⁷² *United States – Shrimp* (n 113) para 129.

¹⁷³ Minutes of Meeting Held in the Centre William Rappard on 6 November 1998, WT/DSB/M/50, 5.

¹⁷⁴ According to India, the Appellate Body exercised a power that states had reserved for themselves: ‘This notion expounded by the Appellate Body based on its evolutionary approach to interpretation was dangerous and not agreed by Members. Reference to “contemporary concerns” to justify a changed interpretation of the words “exhaustible natural resources” had amounted to either an amendment or an authoritative interpretation of the existing agreement which could only be done by Members’ (ibid 9).

¹⁷⁵ The Mexican representative stated that ‘the Appellate Body had overstepped its authority in a manner that was damaging to the dispute settlement system’ (ibid 13).

¹⁷⁶ *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, Appellate Body Report of 21 December 2009, para 396.

¹⁷⁷ See *ibid*, footnote 705 (‘We consider such reading of the terms in China’s GATS Schedule to be consistent with the approach taken in *US – Shrimp*’).

A further reason why discursive constraints should be viewed as capable of operating in different directions with regard to the question of judicial activism is that discursive constraints bind not only judges, but also other actors. Due to what Jon Elster termed ‘the civilizing force of hypocrisy’,¹⁷⁸ it is not always easy for a dissatisfied actor publicly to oppose a judicial expansion of the scope of publicly valued causes: when an actor takes public commitments to certain principles, its reputation would be seriously damaged if it did not accept what can pass for rational consequences of those principles. This is certainly one of the explanations of the judicial ‘courage’ of the ECtHR.

I. Social Legitimacy Considerations

It would be naïve to think of international judges as value-neutral actors completely indifferent to the way in which their decisions are received by the affected societal body. International judges are human beings, and like any human being they are concerned with their image.¹⁷⁹ It therefore comes as no surprise that they too engage in ‘appearance management’ strategies that might express themselves through judicial activism or judicial self-restraint.

It is, for instance, arguable that judges are responsive to grand societal concerns. The reaction of the ECJ to several national courts’ criticism of a human-rights deficit of the European institutions has already been mentioned above. Along the same line it might be argued that the Appellate Body’s environment-friendly report in the *US-Shrimps* case has something to do with its desire to enhance its social legitimacy by showing that the WTO is not just about trade and money.¹⁸⁰ The *Hormones* report of the Appellate Body can at least partially be characterized in the same way considering that the Appellate Body tried in that report to temper the exclusively science-based approach of the risk assessment, by emphasizing the indeterminate nature of scientific findings¹⁸¹ and the real-life contexts of the risk-assessment exercises.¹⁸²

Being responsive to social legitimacy concerns does not necessarily imply responding to underlying problems as a matter of substance. An international court may show its sensitiveness to those concerns in purely theoretical terms. A good example is the famous *obiter dictum* about *erga omnes* obligations in the *Barcelona Traction* judgment of the ICJ. Absolutely superfluous as far as the facts and the outcome of the case are concerned, that *dictum* was most probably introduced as a PR exercise to respond to the vivid criticisms levelled

¹⁷⁸ Jon Elster, ‘Strategic Uses of Arguments’ in Kenneth Arrow and others (eds), *Barriers to Conflict Resolution* (W. W. Norton 1995) 251.

¹⁷⁹ On ‘human qualities’ of judges, see Richard Posner, ‘What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)’ (1993) 3 *The Supreme Court Economic Rev* 1.

¹⁸⁰ *United States – Shrimp* (n 113).

¹⁸¹ *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Appellate Body Report of January 16, 1998, para 194 (‘In most cases, responsible and representative governments tend to base their legislative and administrative measures on “mainstream” scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources’).

¹⁸² *ibid* para 187 (‘It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die’).

against the Court by third-world countries after its 1966 *South-West Africa* judgment.¹⁸³

Concerns of social legitimacy might, however, just as easily point in the opposite direction and lead international judges to practice judicial self-restraint. Some commentators suggest that since the German Constitutional Court raised concerns of democratic legitimacy as to the extension of the powers of European institutions through judicial interpretations, the case law developed by the ECJ has by and large been responsive to those concerns.¹⁸⁴ Several pertinent examples can be found in the case law of the ECtHR as well. It is striking that this otherwise creative Court has been reluctant to be too intrusive about questions of society that divide European or particular national societies in an important way. The Court has, for instance, declined to recognize the right to euthanasia,¹⁸⁵ the right to same-sex marriage¹⁸⁶ or the right to divorce.¹⁸⁷ The likely explanation for this is that settling these complex societal issues by judicial decrees could damage the Court's social legitimacy. The recent decision of the Grand Chamber of the Court¹⁸⁸ to the effect that the display of crucifixions in public schools' classrooms does not violate the ECHR, rendered after a significant protest launched in a number of European countries against the judgment of the Chamber reaching the opposite conclusion, can presumably be explained along similar lines.

4. Conclusion

The above remarks enable us to draw a provisional conclusion to which proponents of 'legalism' could hardly subscribe: formal considerations are never dispositive of the role of judges, and the real influence that judges end up having in any legal system depends on the environment in which they work, the reception of their decisions and on a number of other parameters examined above. This is particularly true in international law, where the delimitation of powers is notoriously unclear. The suggested approach also accounts for a seeming paradox, namely the relatively significant power of judges in a system in which the structural logic of the normativity game does not at first sight seem to leave much room for a truly influential judicial power.

Given that the contours of judicial power do not depend on formal rules agreed upon once and for all, judicial power as defined in this study is a constantly shifting phenomenon.¹⁸⁹ Without doubt, some international courts

¹⁸³ As James Crawford recently put it, the *South-West Africa* decision was a disaster 'from a public relations point of view' (James Crawford, 'Preface', in Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) xiii).

¹⁸⁴ See Laurence Burgorgues-Larsen, 'Les résistances des Etats de droit' in Joël Rideau (ed), *De la communauté de droit à l'Union de droit. Continuités et avatars européens* (L.G.D.J. 2000) 423.

¹⁸⁵ *Pretty v United Kingdom*, ECtHR, Judgment of 29 April 2002.

¹⁸⁶ *Schalk & Kopf v Austria*, ECtHR, Judgment of 24 June 2010.

¹⁸⁷ *Johnston and others v Ireland* (n 168).

¹⁸⁸ *Lautsi v Italy*, ECtHR, Grand Chamber, Judgment of 18 March 2011.

¹⁸⁹ It is, for instance, instructive to compare the extremely cautious discourse the ECtHR held in *Goldder* (n 155, para 36) to support its extensive interpretation of the Convention ('This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1') with a decidedly more assertive language adopted by the same Court in a more recent *Société Colas Est* case (*Société Colas Est and others v France*, Judgment of 16 April, 2002, para 41) ('Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain

are more frequently described as activist than others. However, no international court could afford the luxury of logical consistency in this regard. Identifying the relevant variables and assessing their respective influence on judicial activism against the background of international legal practice has been the main purpose of this article.

circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises').