
On the Judge Centredness of the International Legal Self

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Abstract

The judicial representation of international law enjoys a privileged status in international legal discourse. While this state of affairs is often acknowledged in the literature, the power of international adjudication in shaping the discipline of international law is rarely questioned. The objective of this article is to subject the status of the judicial representation of international law to a close scrutiny with a view to identifying its possible explanations and problematizing its epistemic and distributional implications.

1 Introduction

In *The Postmodern Condition*, Jean-François Lyotard famously characterized speech acts as part of ‘the domain of a general agonistics’ in which ‘to speak is to fight’ and each utterance is a ‘move’ in a ‘language game’.¹ If international law were to be considered as a language game, statements of law issued by international adjudicatory bodies could easily qualify as the best moves in the game given the central place of the judicial ‘point of view’ in international law.² Remarkably, no distinction is made in this regard between *ratio decidendi* and *obiter dicta* or essential and non-essential grounds of judicial decisions: as a party successfully argued before an international arbitral tribunal, ‘everything counts’.³

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¹ J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984), at 10.

² D.P. O’Connell, *International Law* (2nd edn, 1970), vol 1, at 32 (describing judicial decisions as the ‘sharpest and most valued tool’ that international lawyers can use).

³ ICSID, *Burlington Resources Inc. v. Republic of Ecuador – Decision on Liability*, 14 December 2012, ICSID Case no. ARB/08/5, para. 221. On the irrelevance of the *ratio decidendi* / *obiter dicta* distinction in international law, see Tams, ‘The ICJ as a “Law-Formative Agency”: Summary and Synthesis’, in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 389, at 390.

That international legal discourse largely revolves around what could be labelled ‘the judicial standpoint’ has not gone unnoticed in the literature. For instance, international lawyers openly acknowledge their favourable pre-disposition towards the judicial discourse,⁴ recognize that the latter is treated with ‘a truly astonishing deference’⁵ within the discipline and do not shy away from granting courts a ‘natural superiority’.⁶ Some scholars have expressed puzzlement at the extent of the power of the judicial discourse in shaping international law in view of the limited jurisdiction of international courts.⁷ However, such reflections have rarely prompted a critical examination of the status of the judicial discourse in international law.⁸ This may not be surprising: as Martti Koskenniemi pointed out, international adjudication has for long been an object of ‘religious faith’ in the discipline,⁹ and religion is more about unquestioned adherence than critical disputation. An illustrious international lawyer once came very close to acknowledging this, pointing out that ‘how the judicial decision ceases to be the application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to prey’.¹⁰

This article invites international lawyers to suspend their religious faith in international adjudication in order to appreciate the judge-centric nature of international legal discourse and its implications for the discipline of international law. It is the first to systematically map and critically reflect on possible explanations of the phenomenon of ‘judge centredness’ of international legal discourse and unpack the analytical and practical ramifications of the privileged status of the judicial representation of international law. While some explanations of the special position of the judicial discourse in international law have been attempted in the existing literature, they are mostly apologetic, defending that position.¹¹ Critical perspectives have been largely lacking or, when they have been offered, significantly incomplete.¹²

⁴ See, e.g., Pellet, ‘Communication’, in *La pratique et le droit international, Colloque de Genève, SFDI* (2004) 259, at 263.

⁵ O’Connell, *supra* note 2, at 32.

⁶ O’Connell, ‘The Natural Superiority of Courts’, in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 1040.

⁷ See, e.g., Verhoeven, ‘A propos de la fonction de juger en droit international public’, in P. Gérard, F. Ost and M. van de Kerchove (eds), *Fonction de juger et pouvoir judiciaire* (1983) 447, at 458.

⁸ Exceptions include Bianchi, ‘Gazing at the Crystal Ball (Again): State Immunity and *Jus Cogens* beyond *Germany v Italy*’, 4 *Journal of International Dispute Settlement (JIDS)* (2013) 457; D’Aspremont, ‘If International Judges Say So, It Must Be True: Empiricism or Fetishism?’, 4 *European Society of International Law Reflections* (2015).

⁹ Koskenniemi, ‘The Ideology of International Adjudication and the 1907 Hague Conference’, in Y. Daudet (ed.), *Topicality of the 1907 Hague Conference, The Second Peace Conference* (2008) 127, at 152.

¹⁰ H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 21. Interestingly, religious metaphors are widely used to describe the general attitude of international lawyers towards international adjudication. See, e.g., Jennings, ‘The Role of the International Court of Justice’, 68 *British Yearbook of International Law (BYIL)* (1997) 1, at 41; Arangio-Ruiz, ‘Comments’, in *La juridiction internationale permanente, Colloque de Lyon, SFDI* (1987) 309, at 416; Bianchi, ‘International Judgments as Holy Writs’, Conference on Sociological Perspectives on International Tribunals, Max Planck Institute for Procedural Law, Luxembourg, 9 November 2018 (unpublished manuscript on file with author).

¹¹ See Section 2 in this article.

¹² D’Aspremont, *supra* note 8 (focusing on ‘the contemporary inclination of international lawyers to invoke international judicial pronouncements as the ultimate validator of the fundamental structures of international legal argumentation’); Bianchi, *supra* note 8, (outlining some of the possible explanations behind the phenomenon of judge centredness of international legal discourse).

The main form that the judge centredness of international legal discourse takes is the rarely questioned priority given to the judicial representation of international law over other representations of international law. Consider the doctrine of sources of international law and how it is shaped by rules invocable before, and applicable by, international adjudicatory bodies. While Article 38(1) of the Statute of the International Court of Justice (ICJ Statute) traditionally serves as the mandatory reference point for discussions about the sources of international law, all it does is simply specify what the Court 'shall apply' when deciding 'such disputes as are submitted to it'.¹³ Why international law should be identified with what happens before an international court is rarely explained since the proposition is often presented as a self-evident truth in no need of explanation.¹⁴ But legal discourse can hardly be limited to the universe of the judge. For instance, as pointed out by Jean Combacau, the judicial pronouncements about the content of rules of international law coexist with, and compete against, the positions of states regarding the content of those rules.¹⁵ The problem becomes visible when there is a mismatch between the law as represented by judges and what the other relevant actors believe to be the law.

The international law of self-defence is an example in point. The International Court of Justice (ICJ) has developed a state-centric conception of self-defence that excludes self-defence against armed attacks launched by non-state actors with no state involvement.¹⁶ Even in the post-9/11 world, the ICJ has not changed its position and holds 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'.¹⁷ This interpretation has been challenged in many instances of state practice. The military

¹³ Statute of the International Court of Justice 1945, 33 UNTS 993.

¹⁴ A. Ross, *A Textbook of International Law* (1947), at 83 (stating that 'the sources of international law are ... the general factors ... that determine the concrete content of law in international judicial decisions'); L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed., 1979), at 42 (noting that 'the basic conception of lawfulness or unlawfulness in the behavior of nations' turns on 'whether a hypothetical impartial international tribunal would conclude that particular behavior violated some international rule, standard, or undertaking'); Hulsrøj, 'Three Sources – No River: A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and "General Principles of Law"', 54 *Zeitschrift für öffentliches Recht* (1999) 219, at 236 (expressing the view that 'law pragmatically must be understood to be the norms that an ultimate arbiter, the courts, will find to apply to a given legal conflict'); see also Kohen, 'La pratique et la théorie des sources du droit international', in *La pratique et le droit international, Colloque de Genève, SFDI* (2004) 81, at 83. For a different view, see Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law', 230 *Recueil de cours (RdC)* (1991) 9, at 43 (rejecting the view that 'international law is defined as that which the Court would apply in a given case' and observing that 'international law has to be identified by reference to what the actors (most often States), often without benefit of pronouncement by the International Court, believe normative in their relations with each other').

¹⁵ 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 les juges (Journées italiennes de Florence): Travaux de l'Association Henri Capitant* (1982) 392, at 401.

¹⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 195.

¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, para. 139.

operation launched by Israel against Hezbollah in July 2006 provides an illustration. This operation, partly carried out in Lebanon, was claimed by Israel to be grounded on the right of self-defence.¹⁸ Israel specified that its action was not directed against Lebanon, but against terrorists operating from Lebanon. The United Nations (UN) Security Council's debates about the Israeli military intervention showed that many states and the UN secretary-general endorsed or refrained from challenging the Israeli claim of self-defence.¹⁹ Yet many international law academics, especially those writing in Europe, persist in their claim that the law of self-defence is governed by the framework provided by the ICJ.²⁰ The claim made in this article is that such a privileged place occupied by the judicial representation of international law in international legal discourse has a series of epistemic and distributional implications that need to be problematized.

To be clear, what is described in this article as the judge centredness of the international legal self does not mean that international law or international legal scholarship is exclusively judge-focused. There are areas of international law where judicial precedents are scarce or downright inexistent. Similarly, international legal scholarship comes in many varieties, not all of which are equally interested in, or shaped by, the judicial discourse. For the purposes of this article, 'the judge centredness of the international legal self' refers to the privileged status of the judicial representation of international law in the mainstream international legal discourse, which shapes and informs standard international law textbooks and serves both as a basis for international legal arguments and as the benchmark against which the plausibility of those arguments is assessed. Putting it in Foucault's words, if saying what the international law is is a function of 'the general politics of truth' prevailing in international law, the premise of this article is that international judges enjoy a privileged status of actors 'charged with saying what counts as [international law]'.²¹

This article proceeds in four sections. Section 2 offers some possible explanations behind the privileged status of the judicial representation of international law. Section 3 focuses on the most significant epistemic and practical ramifications of the central place of the judicial representation in the discipline of international law. Section 4 concludes.

2 Possible Explanations

Two types of arguments are traditionally offered to explain the special status of the judicial discourse in international law: those related to the manner and context in

¹⁸ 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, 12 July 2006.

¹⁹ UN Security Council, 5493rd Meeting, UN Doc. S/PV.5493, 21 July 2006.

²⁰ See, e.g., O. Corten, *Le droit contre la guerre: l'interdiction du recours à la force en droit international contemporain* (2008).

²¹ Foucault, 'Truth and Power', in J.D. Faubion (ed.), *Power: Essential Works of Foucault 1954–1984*, translated by R. Hurley et al. (2001) 111, at 131.

which the judicial function is carried out and those having to do with some structural features of international law as a legal order. For instance, for the authors of the latest edition of *Oppenheim's International Law*, international judicial decisions are authoritative because they offer 'an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them'.²² Likewise, the Human Rights Committee highlighted its 'judicial spirit, including the impartiality and independence of Committee members' when justifying the authority of its views.²³ Also frequently emphasized are the adversarial character of judicial proceedings²⁴ and the technical assistance (for example, 'well equipped international law libraries') that international judicial bodies ordinarily receive.²⁵

Such arguments hardly resist critical scrutiny. Consider, for instance, the claim that the impartiality and independence of international adjudicators justify the privileged status of the judicial discourse. As will be developed later in this article, this claim is premised on the disputable epistemological assumption that if judges are free of any pressure from, bias in favour of or dependence on the parties, they can access international law as the latter truly is. The adversarial character of judicial proceedings is equally incapable of justifying the special status of international judicial discourse. While one can understand why a legal opinion in support of the interested views of a party should be regarded with suspicion, it is hard to see how exposure to interested views of both sides can justify the qualitative leap systematically associated with the outcomes of adversarial proceedings.²⁶ If anything, being only exposed to a binary choice is likely to anchor the adjudicator to a binary alternative oblivious to other possible options.²⁷ Finally, the intellectual standing of international adjudicators and the resources available to them can hardly distinguish them from many other similarly situated actors.²⁸

²² R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 1992), vol. 1, at 41.

²³ Human Rights Committee, General Comment no. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 11.

²⁴ For instance, the UN Office of the High Commissioner for Human Rights highlighted that the authority of the findings of the Working Group on Arbitrary Detention 'derive[d] from [*inter alia*] the adversarial nature of its findings'. See United Nations (UN) Office of the High Commissioner for Human Rights, 'Julian Assange Arbitrarily Detained by Sweden and the UK, UN Expert Panel Finds' (2016), available at <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17013&LangID=E>.

²⁵ G. Schwarzenberger and E.D. Brown, *A Manual of International Law* (6th edn, 1976), at 30.

²⁶ Schwarzenberger and Brown did not seem to see any tension here, as they made both points in the same breath. See *ibid.*, at 30 ('[t]he average lawyer shows probably a greater degree of detachment and care in his formulation of the relevant rules of international law when dealing with concrete and actual issues in a judicial capacity, as compared with situations in which he comments on purely hypothetical cases or actually represents overtly or otherwise interested parties. Moreover, before a decision is handed down, the case has been exhaustively argued by counsel from both sides').

²⁷ D. Kahneman, *Thinking, Fast and Slow* (2011), at 119–128.

²⁸ Gerald Fitzmaurice was candid in this regard and noted that 'the decisions of international tribunals [do not] necessarily possess a higher intrinsic value than, for instance, eminent juridical opinion'. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl: présentées au professeur J.H.W. Verzijl à l'occasion de son LXXième anniversaire* (1958) 172, at 173.

The arguments that draw on structural deficiencies of international law usually build on the potential of judicial decisions to remedy the problem of lacunae and contradictions – arising from the lack of a centralized legislative power in international law – and foster the intellectual coherence of the discipline.²⁹ Judicial decisions are also seen as a better behavioural guide than academic studies because judicial decisions directly deal with ‘the realities of international life’³⁰ and ‘concrete and actual issues’,³¹ ‘creating for international law an ampler stock of detailed rules, testing its abstract principles by their fitness to solve practical problems, and depriving it of the too academic character which has belonged to it in the past’.³² Like the justifications having to do with contextual features of the international judicial function, these arguments are easy to refute. Their most critical defect is that they simply assume that just because a particular state of affairs seems desirable, international judges are necessarily empowered to bring it about.³³

What is common to the foregoing arguments is that, while they purport to explain the special status of the judicial discourse in international law, they invariably adopt an apologetic posture, defending that status. I argue that this apologetic posture has to do with how international law is situated as a discipline, as a normative project designed to order the world and as a field of professional practice. In addition to

²⁹ Condorelli, ‘L’*autorité de la décision des juridictions internationales permanentes*’, in *La juridiction internationale permanente, Colloque de Lyon, SFDI* (1987) 277, at 277–313; see also Röben, ‘Le précédent dans la jurisprudence de la Cour internationale’, 32 *German Yearbook of International Law* (1989) 382, at 405; Treves, ‘Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?’, in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005) 587, at 589–590; Berman, ‘The International Court of Justice as an “Agent” of Legal Development?’, in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (2013) 7, at 21; G.I. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 245. An early iteration of this explanation was offered during the works of the Advisory Committee of Jurists in charge of drafting the Statute of the Permanent Court of International Justice, 1920, 6 LNTS 379, 390. See Statement of Fernandes, in Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920* (2006), at 346.

³⁰ Fitzmaurice, *supra* note 28, at 173.

³¹ Schwarzenberger and Brown, *supra* note 25, at 30.

³² H. Waldock (ed.), *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, 1963), at 64. The same point was made more vividly by Georg Schwarzenberger. See Schwarzenberger, ‘The Inductive Approach to International Law’, 60 *Harvard Law Review (HLR)* (1946–1947) 553, at 554 (stating that ‘[t]here is a world of difference between practicing shooting with dummy ammunition on a wooden target and firing in earnest with live ammunition on a living target’); see also Abi-Saab, ‘De la jurisprudence: quelques réflexions sur son rôle dans le développement du droit international’, in M. Pérez González *et al.* (eds), *Hacia un nuevo orden internacional y europeo: estudios en homenaje al profesor don Manuel Díez de Velasco* (1993) 19, at 21 (highlighting the high level of generality and ambiguity of most international legal rules and accounting for the special status of the case law in international law by referring to the fact that the latter transforms international legal rules that lack self-sufficiency into operational norms).

³³ Regan’s cogent criticism is on point here: ‘Many writers move too easily from the premise that we need a lot more effective international law than we currently have ... to the problematic conclusion that since no other institution is currently able to give it to us, judges should step in to supply our need.’ Regan, ‘International Adjudication: A Response to Paulus-Courts, Custom, Treaties, Regimes, and the WTO’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 225, at 241.

accounting for the privilege status of the judicial discourse in international law to a large extent, this argument also shows how different international law is in this regard from domestic laws, which is important since the phenomenon of judge centredness of legal discourse is widely acknowledged in domestic laws as well.³⁴

A International Law as a Legal Discipline

Since international law lacks centralized power structures that characterize domestic laws and since the latter are often taken as the paradigm of what it is like to be law, the comparison between international law and domestic laws has traditionally been 'humiliating' for the former.³⁵ International lawyers readily acknowledge their 'inferiority complex'³⁶ vis-à-vis their colleagues in domestic laws who, as Anthony D'Amato argued, tend to 'view international law as a hopeless attempt by quasi-lawyers ... to claim that, somehow, international political decisions follow legal standards instead of those of national self-interest'.³⁷ It is thus not surprising that international lawyers constantly feel the need to justify that international law is really law.³⁸ One consequence of this 'defensive ontology'³⁹ is that proving John Austin's famous thesis wrong by showing that international law is law 'properly so called' has been an integral part of the formation of the discipline of international law.⁴⁰ In this conceptual

³⁴ For instance, the marginalization of alternative representations of law to the benefit of the judicial discourse has been highlighted by legal scholars in the context of domestic law. See, e.g., Balkin and Levinson, 'The Canons of Constitutional Law', 111 *HLR* (1998) 964, at 1001–1002; Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', 97 *Georgetown Law Journal* (2009) 803. The fact that law is too often reduced to litigation is also something of which legal theorists have long taken notice in the context of domestic laws. See H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 40. Likewise, the comment of the chief justice of the US Supreme Court about the limited practical utility of much legal scholarship to judges shows that the judicial discourse acts as an important parameter in the assessment of domestic legal scholarship. See Adler, 'Chief Justice Roberts and Current Legal Scholarship', (2011), available at <http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship/> ('[p]ick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar').

³⁵ Virally, 'Le droit international en question', 8 *Archives de philosophie du droit* (1963) 145, at 152.

³⁶ Simma, 'Fragmentation in a Positive Light', 25 *Michigan Journal of International Law* (2004) 845, at 845.

³⁷ D'Amato, 'Public International Law as a Career', 1 *American University International Law Review* (1986) 5, at 7; see also Simpson, 'On the Magic Mountain: Teaching Public International Law', 10 *European Journal of International Law (EJIL)* (1999) 70, at 72 (pointing out that international lawyers 'are deemed not sufficiently like real lawyers by some of [their] colleagues in the law schools').

³⁸ Alland, 'Introduction', in D. Alland (ed.), *Droit international public* (2000) 17, at 18. A general course on public international law given at the Hague Academy of International Law in 2013 described the question whether international law is really law as one of 'the key unresolved problems of [the] discipline – problems which, unresolved, call into question its standing as a discipline'. Crawford, 'Chance, Order, Change: The Course of International Law', 365 *RdC* (2013) 19.

³⁹ T.M. Franck, *Fairness in International Law and Institutions* (1995), at 6.

⁴⁰ As early as the 18th century, a dissertation titled *Dissertatio inauguralis qua demonstratur jus gentium non dari* ('Dissertation to Demonstrate That International Law Does Not Exist') was defended at Leiden University. A. Rotgerius, 'Dissertatio inauguralis qua demonstratur jus gentium non dari' (1710) (dissertation on file at Leiden University, The Netherlands).

struggle, the international judge has come to be seen as a natural ally given what has been called ‘the ontological intimacy between the judge and law’.⁴¹ For most international lawyers, ‘international law becomes more law-like’ with ‘a greater possibility of peaceful dispute settlement by independent judicial bodies’.⁴²

B *International Law as a Normative Project*

Bringing about and maintaining some sort of order in what is otherwise thought to be an anarchical society has traditionally been seen as international law’s primary mission.⁴³ But international lawyers have also always appreciated that this is no mean feat. The often-mentioned lack of centralized enforcement mechanisms is not the only culprit. Equally decried is the fact that, owing to its decentralized nature, international society possesses no ‘authoritative law-declaring machinery’:⁴⁴ by virtue of its sovereignty, each state is considered to be the judge of its own rights and obligations.⁴⁵ This ‘boundless legal relativism’ has constantly preoccupied international lawyers.⁴⁶ Emer de Vattel’s famous distinction between ‘the necessary Law of Nations’⁴⁷ and ‘the voluntary Law of Nations’⁴⁸ bears witness to such preoccupation. The former is ‘that law which results from applying the natural law to Nations’.⁴⁹ Each nation must observe the prescriptions

⁴¹ Verhoeven, *supra* note 7; see also M.A. Kaplan and N.D. Katzenbach, *The Political Foundations of International Law* (1961), at 3 (stating that ‘[p]erhaps the purest analytical concept of “law” is that in which an impartial judge objectively applies a pre-established rule to decide a controversy’).

⁴² Crawford and Nevill, ‘Relations between International Courts and Tribunals: The “Regime Problem”’, in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012) 235, at 256; see also Kingsbury, ‘International Courts: Uneven Judicialization in Global Order’, in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (2012) 203, at 223 (noting that judicialization of international law ‘help[ed] ... to assuage Diceyan doubts about the law in international law’); Skouteris, ‘The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication’, 17 *Finnish Yearbook of International Law (FYIL)* (2006) 307, at 309 (stating that proliferation of international courts and tribunals is generally seen ‘as a process of disciplinary maturation’, furnishing ‘the missing “third pillar” of the international division of powers’).

⁴³ R. Müllerson, *Ordering Anarchy: International Law in International Society* (2000); P.-M. Dupuy, *Ordre juridique et désordre international* (2018).

⁴⁴ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (4th edn, 1949), at 76.

⁴⁵ *Lake Lanoux Arbitration (France v. Spain)*, Award, 16 November 1957, reprinted in 24 *International Law Reports* (1961) 101, at 132 (‘[i]t is for each State to evaluate in a reasonable manner and in good faith the situations and rules which will involve it in controversies’); *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, Award, 9 December 1978, reprinted in UNRIIAA, vol. 18, 417, at 443 (‘[u]nder the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States’).

⁴⁶ Reuter, ‘Principes de droit international public’, 103 *RdC* (1961) 425, at 440; see also H. Lauterpacht, *The Function of Law in the International Community* (1933), at 3; Gross, ‘States as Organs of International Law and the Problem of Autointerpretation’, in G.A. Lipsky (ed.), *Law and Politics in the World Community: Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law* (1953) 59.

⁴⁷ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, translated by C.G. Fenwick (1916), at 4.

⁴⁸ *Ibid.*, at 8.

⁴⁹ *Ibid.*, at 4.

of the necessary law of nations. However, given that nations are all free and independent, 'it is for each Nation to decide what its conscience demands of it, what it can or cannot do'.⁵⁰ The danger involved in such relativism was forcefully highlighted by Vattel:

But how shall this law be made to prevail in the quarrels of the Nations and sovereigns who live together in the state of nature? They recognize no superior who shall decide between them and define the rights and obligations of each, who shall say to this one, 'You have a right to take up arms, to attack your enemy and subdue him by force', and to that other, 'Your hostilities are unwarranted, your victories are but murder, your conquests are but the spoil of robbery and pillage'.⁵¹

This is why Vattel found that 'certain rules of more certain and easy application' were necessary – namely, rules that comprise 'the voluntary Law of Nations'.

The problem of self-judgment is not merely a historical problem. Consider, for instance, a well-known example from contemporary international law: the rule that a reservation made to a treaty is valid only if it is compatible with the object and purpose of that treaty. Who is to make that assessment in the absence of a centralized mechanism? As the ICJ made clear in its very advisory opinion in which the criterion of the compatibility of a reservation with the object and purpose of the treaty was introduced, while that criterion 'must guide every State in the appraisal which it must make ... of the admissibility of any reservation', each state is expected to make that assessment 'individually and from its own standpoint'.⁵² It is true that some limitations are commonly thought to be applicable to states' power of unilateral interpretation – for instance, every interpretation must be reasonable, honest and of good faith.⁵³ But what is reasonable, honest and of good faith is also subject to the same power of auto-interpretation. In sum, as Thomas Franck stated in his seminal article on Article 2(4) of the UN Charter, in the absence of a 'system for objective [assessment]', international law constantly runs the risk of becoming 'a convenient shield for self-serving ... conduct'.⁵⁴ In these circumstances, the judicial discourse has taken on a special significance in international law because, as an impartial and independent account of international law, it is thought to have a more superior claim to authority than 'interest-driven' accounts of international law by states.⁵⁵

⁵⁰ *Ibid.*, at 6.

⁵¹ *Ibid.*, at 304.

⁵² *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951) 15, at 24.

⁵³ *Lake Lanoux Arbitration*, *supra* note 45, at 132; Basdevant, 'Règles générales du droit de la paix', 58 *RdC* (1936) 471, at 589.

⁵⁴ Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', 64 *American Journal of International Law (AJIL)* (1970) 809, at 811.

⁵⁵ Simma, 'Comment', in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005) 581, at 582. The following reasoning adopted by the Nuremberg tribunal epitomizes this attitude: '[W]hether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.' *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945 – 1 October 1946* (1947), vol. 1, at 208. For a more recent example, see UN Office of the High Commissioner for Human Rights, Press Release: Human Rights Committee Considers Report of the United States (2014), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14383 ('Committee Members were very concerned at the United States' unilateral interpretation of the Covenant. For example, it had continuously been the view of the Committee that non-refoulement was covered by the Covenant. What would happen if all States parties had their own interpretation in that regard?').

C *International Law as a Profession*

Another possible explanation for the special status of the judicial discourse in international law that can be ventured has to do with professional opportunities offered by international law. As D'Amato famously pointed out, international law has long suffered from 'market undervaluation' – while it deals with matters that are considered to be of 'epochal significance', such as war, peace or the legal regime of the outer space, it has traditionally offered limited professional opportunities outside the academe and public service.⁵⁶ As observed in a book offering career guidance on international law, '[t]he experience of many students studying public international law at university is, "This is fascinating, but what can I do with it?"'.⁵⁷ This state of affairs may account for the fact that, while it is relatively rare for law schools to feel the need to explain that their graduates can secure professional careers in domestic laws, many intellectual associations of international law have initiated periodic publications about career paths that international law could possibly offer.⁵⁸ The situation has changed drastically in the last few decades,⁵⁹ but the public image of international law as a career remains relatively unaltered, which explains why the author of a 2014 *New York Times* article seemed surprised to find out that international legal training can lead to traditional legal careers.⁶⁰

In these circumstances, international judges have come to occupy the position of the most visible professional figures whose very official mission is to apply international law, which may partly account for the fetishization of the office of the international judge in many circles of international law: most students and international legal scholars see the prospect of international judgeship, arbitratorship or counsel work as the ultimate achievement that a career path in international law can possibly offer;⁶¹ numerous university programmes specialized in dispute settlement have been set up around the world with a special emphasis on adjudication, and clerkships with international courts and tribunals are in great demand.⁶² The fact that in the

⁵⁶ D'Amato, *supra* note 37, at 5.

⁵⁷ A. Smit and C. Waters, *A Guide to International Law Careers* (2009), at xiii.

⁵⁸ See, e.g., D. Wes Rist, *Careers in International Law: A Guide to Career Paths in International Law – A Resource of the American Society of International Law 2013–2014* (2013).

⁵⁹ See Treves, 'The Expansion of International Law: General Course on Public International Law (2015)', 398 *RdC* (2019) 9, at 45.

⁶⁰ Schuetze, 'A Bigger World of International Law', *New York Times* (6 October 2014), available at www.nytimes.com/2014/10/06/world/a-bigger-world-of-international-law.html.

⁶¹ Brownlie, 'The Calling of the International Lawyer: Sir Humphrey Waldock and His Work', 54 *BYIL* (1983) 7, at 68 ('[t]he International Court of Justice stands at the centre of the world of the professional international lawyer'); Kovacs, 'Développement et limites de la jurisprudence en droit international', in *La juridictionnalisation du droit international, Colloque de Lille, SFDI* (2003) 269, at 272 ('international judges are at the apex of their professional careers, somewhere on top of a legal Olympus') (author's translation from the French original); see also Pellet, 'The Role of the International Lawyer in International Litigation', in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000) 147, at 148.

⁶² Skouteris, *supra* note 42, at 324.

broader social imagery law is often associated with courts facilitates such professional projections.⁶³

3 Consequences of the Judge Centredness of the International Legal Self

A The Judicial Precedents as Basic Epistemic Units in the Intellectual Universe of International Lawyers

Jan Klabbers once described the belief that '[one] can engage in conceptual work by simply investigating judicial decisions' as 'one of the great mysteries of international legal methodology'.⁶⁴ The intellectual universe of international lawyers is indeed largely dominated by the judicial discourse. Consider, for instance, the extent to which the judicial discourse shapes knowledge in international law. As pointed out by Thomas Skouteris, '[f]luency with [the international case law] is the benchmark of one's initiation into the deeper secrets of the discipline and the usual material for student examinations'.⁶⁵ An enormous amount of international legal scholarship is dedicated to issues brought before international courts and tribunals and the latter's outputs in the form of judgments, awards or decisions. Specialized academic journals are dedicated to international courts and tribunals,⁶⁶ and many generalist outlets are replete with discussions of their decisions. In many academic traditions in international law, the existence of case law in a particular area is even a guiding criterion in the selection of a suitable topic for a doctoral dissertation.

The judicial discourse also determines and centrally shapes the international legal argument. Judicial pronouncements about the content of rules of international law are often treated not as normative propositions open to challenge but, rather, as conversation stoppers that can be used as indisputable premises for other propositions. The following discussion about the recent dispute between Qatar and its neighbours offers a good illustration:

[W]e can recall the ICJ's well-known passage on the principle of non-intervention in the *Nicaragua* judgment: 'A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. ... Intervention is wrongful when it uses methods of coercion in regard to such choices, which

⁶³ See D.R. Howarth, *Law as Engineering: Thinking about What Lawyers Do* (2013), at 3 (stating that for laypeople, lawyering is about cases and litigation). As Oscar Schachter once pointed out, 'to a shoe-maker there is nothing like leather, to a lawyer there is nothing like a court'. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, public sitting held on 15 October 1997, Doc. CR 1997/19 (1997), at 31.

⁶⁴ Klabbers, 'Book Review of Maurizio Ragazzi, The Concept of International Obligations *Erga Omnes*', 8 *FYIL* (1997) 409, at 409.

⁶⁵ Skouteris, *supra* note 42, at 313.

⁶⁶ Examples include *Law and Practice of International Courts and Tribunals*, the *Global Community Yearbook of International Law and Jurisprudence*, the *ICSID Review* and the *Journal of International Dispute Settlement*.

must remain free ones.’ The Court then adds that the element of coercion ‘forms the very essence of prohibited intervention’. Consequently, for the sanctions against Qatar to qualify as a violation of the principle they must (1) constitute coercive interference in (2) Qatar’s domaine réservé.⁶⁷

As the word ‘must’ in the last sentence shows, for the authors, the proper qualification of the measures issued against Qatar is simply a matter of applying the test set forth by the ICJ in 1986. It seems as if the reception of that test by the relevant actors or whether there had been any development between 1986 and 2017 that may have affected the test in any way were of total irrelevance.

What is even more remarkable is that this practice is not only limited to arguments about the content of legal rules but also extends to conceptual matters. Consider the paradox of the legally bound sovereign. How a sovereign can be bound at all if sovereignty means *suprema potestas* is theoretically puzzling. As Klabbers put it perspicaciously, ‘if a state can consent to be bound by a given rule on Monday because it is, after all, sovereign in its external dealings, would it not follow from the same sovereignty that on Tuesday or Wednesday that same state may deny being bound, or withdraw from the rule it accepted on Monday?’⁶⁸ International lawyers often think that they can resolve this puzzle simply by reiterating what the Permanent Court of International Justice (PCIJ) said in the *Wimbledon* case – namely, that, ‘the right of entering into international engagements’, rather than being an abandonment of sovereignty, is ‘an attribute of State sovereignty’.⁶⁹ It takes no long reflection to realize that this statement does nothing to resolve the sovereignty paradox: saying that undertaking an international obligation is an attribute of state sovereignty does not tell us why that same sovereignty could not also enable the state to renege upon the obligation in question whenever it deems fit. This is not to say that the PCIJ should have done better. As Pierre Schlag points out, judges are assigned specific pragmatic tasks, which inform and shape the discourse they produce: ‘The production of knowledge, the acquisition of insight, the achievement of intellectual edification are not high on [their] agenda.’⁷⁰ In other words, one cannot blame the PCIJ for not having supplied the kind of response that one has no reason to expect from a court. What is puzzling is how international legal scholars can think that reiterating that statement is all it takes to respond to a conceptual dilemma.

Attempts to look at every single utterance issued by courts as a conceptually meaningful statement are another manifestation of the tendency to treat judicial decisions as pieces of conceptual work. Consider, for instance, the characterization by the ICJ of fundamental rules of international humanitarian law as ‘intransgressible principles

⁶⁷ Hofer and Ferro, ‘Sanctioning Qatar: Coercive Interference in the State’s Domaine Réservé’, *EJIL: Talk!* (30 June 2017), available at www.ejiltalk.org/sanctioning-qatar-coercive-interference-in-the-states-domaine-reserve/.

⁶⁸ Klabbers, ‘Clinching the Concept of Sovereignty: Wimbledon Redux’, 3 *Austrian Review of International and European Law* (1998) 345, at 347.

⁶⁹ *Case of the S.S. ‘Wimbledon’*, Judgment, 1923 PCIJ Series A, No. 1, 15, at 25. See *ex multis*, Paulsson, ‘The Power of States to Make Meaningful Promises to Foreigners’, 1 *JIDS* (2010) 341, at 343.

⁷⁰ Schlag, ‘Anti-Intellectualism’, in P. Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (1996) 133, at 138.

of international customary law'.⁷¹ It is difficult to see how that phrase can possibly mean what it says since social rules, unlike laws of physics, are transgressible by nature; that is what makes them useful in the first place. According to a highly plausible rumour, this term was nothing more than a compromise reached within the Court for which the term *jus cogens* was apparently – at that point in time – a taboo.⁷² But this has not prevented some scholars from investigating what the ICJ could have possibly meant by that phrase and from endeavouring to incorporate what they took to be a new normative category into the conceptual apparatus of international law.⁷³

Treating court decisions as conceptual works also leads to a misguided search for ultimate coherence in those decisions. International legal scholars often see coherence as 'a heuristic rule, a procedural obligation, almost a moral constraint of research'.⁷⁴ What this 'law of coherence' entails is helpfully summarized by Michel Foucault:

[N]ot to multiply contradictions uselessly; not to be taken in by small differences; not to give too much weight to changes, disavowals, returns to the past, and polemics; not to suppose that men's discourse is perpetually undermined from within by the contradiction of their desires, the influences that they have been subjected to, or the conditions in which they live.⁷⁵

Take, for instance, Peter Haggemacher's well-known article on the doctrine of two constitutive elements of custom.⁷⁶ In a long study carefully and comprehensively reviewing all relevant instances, Haggemacher attempts to demonstrate that the jurisprudence of the PCIJ and, later, that of the ICJ have always been coherent in searching not so much for two distinct elements but, rather, for a composite substance. More recently, a book on treaty interpretation attempted to demonstrate that, despite tremendous differences in their powers and despite significant historical changes in their working environments, international courts and tribunals have never actually departed from the rule that treaty interpretation is about identifying the common intention of the parties.⁷⁷ To put it in Pierre Bourdieu's words, the international judge described in these examples 'is nothing other than the imaginary projection of the knowing subject ... into the acting subject, a sort of monster with the head of the thinker thinking his practice in reflexive and logical fashion mounted on the body of a man of action engaged in action'.⁷⁸ But the fact that no such conceptual

⁷¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 79.

⁷² See, e.g., Pellet, 'Cours général: le droit international entre souveraineté et communauté internationale', 2 *Anuário Brasileiro de Direito Internacional* (2007) 12, at 46.

⁷³ See, e.g., Condorelli, 'La Cour internationale de Justice sous le poids des armes nucléaires: *jura non novit curia?*', 823 *Revue internationale de la Croix-Rouge* (1997) 9, at 17–18; Kolb, '*Jus cogens*, intangibilité, intransgressibilité, dérogation "positive" et "négative"', 109 *Revue générale de droit international public* (RGDIP) (2005) 305.

⁷⁴ M. Foucault, *The Archeology of Knowledge*, translated by A.M. Sheridan Smith (1982), at 149.

⁷⁵ *Ibid.*

⁷⁶ Haggemacher, 'La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale', 90 *RGDIP* (1986) 5.

⁷⁷ E. Bjorge, *The Evolutionary Interpretation of Treaties* (2014).

⁷⁸ P. Bourdieu and L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (1992), at 123.

continuity can possibly exist in practice detracts nothing from the force of the paradigm: instances of deviation and irregularities are not seen as undermining the law of coherence because they push ‘to find, at a deeper level, a principle of cohesion that organizes the discourse and restores to it its hidden unity’.⁷⁹ In other words, it is enough for legal scholars to ‘presuppose’ the coherence and ‘pursue ... it far enough and for long enough’ to ‘find’ it.⁸⁰

Far from being contested, the paradigm in question is often proudly acknowledged as part of the very mission of international legal scholars.⁸¹ A former president of the ICJ once expressed his admiration for it in front of the members of the French Society of International Law:

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.⁸²

The excessive focus on the judicial discourse is also liable to promote anti-intellectualism.⁸³ The world of the judge is a world dominated by binary categories of ‘right versus wrong’, ‘lawful versus unlawful’, categories that are successful in bringing closure. Like Diogenes who is said to have tried to disprove the inexistence of motion by walking around, international lawyers can point to international judicial decisions to show that the claims about international law’s radical indeterminacy are empirically ill-founded: the very fact that disputes can intelligibly be framed as a clash between conflicting legal claims and persuasively decided on legal terms shows that international law is functional. In this regard, the judicial discourse acts as a powerful ‘plausibility structure’ protecting the official legal reality against ‘reality-disintegrating doubts’.⁸⁴ Indeed, the judicial decorum offers a setting where law seems at its purest and presents the closest thing to a Habermasian ‘ideal speech situation’: in a judicial forum, ‘all force’ seems excluded ‘except the force of the better argument’.⁸⁵ But the judicial setting leaves such an impression only because seeing like a judge means focusing on stable meanings, not on forces that stabilize those meanings. Thus, replicating a judge’s point of view means being oblivious to everything that judges do not see or have to ignore for one reason or another. A well-known French international law scholar once illustrated this point by observing that he had seen adherents of the schools of New Haven and international legal process argue cases before the ICJ

⁷⁹ Foucault, *supra* note 74, at 149.

⁸⁰ *Ibid.*

⁸¹ Dupuy, ‘L’unité de l’ordre juridique international: cours général de droit international public’, 297 *RdC* (2002) 205.

⁸² Bedjaoui, ‘La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens’, in *La juridictionnalisation du droit international, Colloque de Lille, SFDI* (2003) 529, at 531 (author’s translation from the French original).

⁸³ Schlag, ‘Anti-Intellectualism’, *supra* note 70, at 145.

⁸⁴ P.L. Berger and T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966), at 154.

⁸⁵ J. Habermas, *The Theory of Communicative Action* (1984), vol. 1, at 25.

and that none of them had argued their respective theories and all of them stuck to 'standard' legal arguments, suggesting that because those theories were of no interest before the judge, they were of no interest *tout court*.⁸⁶

There are still more direct ways in which the production of knowledge in international law is shaped by the judicial discourse. As Steven Ratner points out, 'many scholars write for an imagined [judicial] audience'.⁸⁷ The often voiced comment that law review articles look like appellate briefs is equally applicable to the mainstream international legal scholarship. The professed objective of most mainstream international legal scholarship is indeed to clarify the state of the law, clear up any confusion surrounding it and deliver a verdict on what the international law is on a particular issue,⁸⁸ which is a clear replication of the judicial task. This means that an enormous amount of time and energy in spaces dedicated to knowledge production in international law is being spent on practising what Schlag imaginatively called 'air guitar jurisprudence': by imitating the judge and replicating her universe, many international lawyers are 'pretending to play a non-existent guitar',⁸⁹ since they play the judge without having her office. The other side of the coin is that scholarly works are often assessed on the basis of their practical utility to international adjudication⁹⁰ and that being affirmatively quoted by a court or tribunal is seen as an instance of ultimate consecration.

B Limited 'Attentional Socialization'

The judge-centric perspective about what counts as international law is bound to preclude one from seeing international law in all its diversity and complexity.⁹¹ There is something in the very nature of the judicial discourse that makes it hermetic to the other.

⁸⁶ Cot, 'Tableau de la pensée juridique américaine', 110 *RGDIP* (2006) 537, at 590.

⁸⁷ S.R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015), at 20.

⁸⁸ Klabbers, 'On Epistemic Universalism and the Melancholy of International Law', 29 *EJIL* (2018) 1057, at 1060–1601. Such a mission statement was clearly formulated by Oppenheim in 1908. See Oppenheim, 'The Science of International Law: Its Task and Method', 2 *AJIL* (1908) 313, at 315 ('[t]he writers on international law ... have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not'). For some more recent examples, see Z. Douglas, *The International Law of Investment Claims* (2009) (offering a set of 54 rules regarding matters such as applicable law, jurisdiction and admissibility); U. Linderfak, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) (formulating 44 rules of treaty interpretation).

⁸⁹ Schlag, *supra* note 34, at 803. In another publication, Schlag refers to 'fully grown legal academics playing moot court'. Schlag, 'The Evaluation Controversy', in P. Schlag, *Laying down the Law: Mysticism, Fetishism, and the American Legal Mind* (1996) 60, at 71.

⁹⁰ See, e.g., Berman, 'Fair and Equitable Treatment: A Rejoinder to Martins Paparinskis', *EJIL:Talk!* (16 August 2013), available at www.ejiltalk.org/fair-and-equitable-treatment-a-rejoinder-to-martins-paparinskis/ (asking 'how [the author's] analysis helps in solving the individual dispute before the individual arbitral tribunal'). Another relevant example is the American Society of International Law's annually awarded certificate of merit for 'high technical craftsmanship and utility to practicing lawyers and scholars'.

⁹¹ For an original critique of the judicial monopoly over law, see Cover, 'The Supreme Court, 1982 Term: Foreword: Nomos and Narrative', 97 *HLR* (1983) 4.

The universe of the judge is ‘monological’ in the sense of Bakhtin – ‘[it] denies the existence outside itself of another consciousness with equal rights and equal responsibilities’.⁹² In other words, the judicial discourse does not see itself as one possible discourse among others; as a monologue, ‘it pretends to be the ultimate word’ and ‘closes down the represented world’.⁹³ Think about intellectual limitations that equating international law with such a perspective is liable to generate. There are ways of doing things that go without saying in the normal course of international relations without being capturable by formal legal categories that are the currency of the judicial discourse. Similarly, what is, technically, formal legality-wise plausible may not be socially sayable, and such discursive configuration is likely to shape the readings of law in real-life settings.

The impact of the judicialization of international law on law school curricula and the practice of textbook or treatise writing is another consequence of the inordinate role of the judicial discourse in shaping the knowledge production in international law.⁹⁴ Think about courses and books on international criminal law, international investment law or international trade law, all of which have been developed relatively recently as a result of the case law produced in these fields. The reason why this should invite reflection is that one cannot argue that there were no legally disciplined trade relationships among nations before the advent of the World Trade Organization’s (WTO) dispute settlement mechanisms or that no cross-border investment was being made before the investment arbitration had developed. The fact that these experiences were not considered worthy of attention as separate fields of international law before their judicialization shows that international lawyers’ ‘social norms of attention’ largely revolve around the judicial discourse.⁹⁵ One can even go further and claim that the real test of authentic internationality of a matter for international lawyers is its judicialization on the international plane. For example, heavily internationalized matters such as taxation and labour law are rarely seen as truly belonging to international law – arguably, because they are not among the traditional subjects of international adjudication.⁹⁶ If this is so, the discipline of international law faces a risk of intellectual myopia: if what is worthy of international lawyers’ attention is determined by what is judicialized, if what determines ‘the distribution of the sensible’ in international law is the judicial discourse,⁹⁷ major problems of global governance such as climate change, extreme poverty and development discrepancy could not receive as much attention as they deserve.⁹⁸

⁹² M. Bakhtin, *Problems of Dostoevsky’s Poetics* (1984), at 292.

⁹³ *Ibid.*, at 293.

⁹⁴ For a brilliant perspective about unarticulated assumptions of international law textbooks, see Bernardino, ‘Going by the Book: What International Law Textbooks Teach Us Not to Know’, in A. Bianchi and M. Hirsch (eds), *International Law’s Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (forthcoming).

⁹⁵ E. Zerubavel, *The Elephant in the Room: Silence and Denial in Everyday Life* (2006), at 23.

⁹⁶ I am grateful to Jan Klabbers for bringing this possible explanation to my attention.

⁹⁷ Jacques Rancière defines ‘the distribution of the sensible’ as a ‘symbolic constitution’ of what is visible, seen or worth noticing. J. Rancière, *Dissensus: On Politics and Aesthetics* (2010), at 36–37.

⁹⁸ As Zerubavel points out, ‘attentional socialization’ precisely consists in learning ‘to focus [one’s] attention on certain parts of [one’s] phenomenal world while systematically inattending or even disattending others in accordance with [one’s] community’s distinctive attentional tradition, conventions, biases, and habits’. E. Zerubavel, *Hidden in Plain Sight: The Social Structure of Irrelevance* (2015), at 63.

The experience of moot courts can be analysed along similar lines. In most law schools, the only encounter with the practice of international law is through moot court competitions. Intended or not, the implicit message that the experience of moot courts conveys seems to be that adjudication is the most important, if not the only, manifestation of the practical relevance of international law. Such a message drastically limits students' perspectives on the role that international law may actually play in the conduct of international affairs. Courts and tribunals are designed to deal with deviations and dysfunctions, while the day-to-day, relatively untroubled functioning of a legal order by definition does not make it into courtrooms. This focus on the 'extraordinary' is liable to make one lose sight of the 'ordinary' or 'infra-ordinary' life of international law.⁹⁹ Adding to this distorting outlook is the fact that the judicial remedy is not as readily available in international law as in domestic laws. As an arbitral tribunal aptly pointed out, while 'the inherent jurisdiction ... over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims'.¹⁰⁰ This distinction makes a significant difference: while the presence of a judicial remedy may pressurize the parties in domestic legal transactions into reaching an agreement,¹⁰¹ participants in international transactions rarely bargain in the shadow of international courts. This does not mean that international law plays no role in international disputes and transactions; what it means is that the role of international law in the ordering of international affairs – what H.L.A. Hart famously called 'the diverse ways in which the law is used to control, to guide, and to plan life out of court'¹⁰² – and its distributional consequences cannot be understood by exclusively focusing on courts.

C *The Judicial Representation of International Law as the Mirror of International Law*

In his article referenced above, Combacau criticizes the tendency of international legal scholars to equate the jurisprudential formulation of the rule with the rule itself.¹⁰³ But this seems to suggest that there is such a thing as a 'rule itself'. If what we

⁹⁹ The privileged claim of the extraordinary to human attention might be a general phenomenon. See Percec, 'Approaches to What?', in B. Highmore (ed.), *The Everyday Life Reader* (2002), at 177 ('[w]hat speaks to us, seemingly, is always the big event, the untoward, the extra-ordinary: the front-page splash, the banner headlines. Railway trains only begin to exist when they are derailed, and the more passengers that are killed, the more the trains exist. Aeroplanes achieve existence only when they are hijacked. The one and only destiny of motor-cars is to drive into plane trees. Fifty-two weekends a year, fifty-two casualty lists: so many dead and all the better for the news media if the figures keep going up! Behind the event there is a scandal, a fissure, a danger, as if life reveals itself only by way of the spectacular, as if what speaks, what is significant, is always abnormal: natural cataclysms or social upheavals, social unrest, political scandals').

¹⁰⁰ PCA (UNCITRAL), *ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina – Award on Jurisdiction*, 10 February 2012, PCA Case no. 2010–9, para 281.

¹⁰¹ Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* (YLJ) (1979) 950, at 994.

¹⁰² Hart, *supra* note 34, at 40.

¹⁰³ Combacau, *supra* note 15, at 401.

get is never the rule itself, but its representation from some perspective, the problem rather consists in considering ‘law to be identical to “law” as it is re-presented from the perspective of the judge’.¹⁰⁴ The point is not whether judicial pronouncements about the content of international law are to be given consideration – for obvious pragmatic reasons, the case law developed by international courts may assume significant importance.¹⁰⁵ But it is one thing to see a judicial statement of law as a move in a broader language game whose success depends on a series of contingent factors; it is quite another to see it as a winning move in all circumstances. In other words, what is problematical is to present the judicial representation of international law not as a particular angled account of international law but, rather, as mirroring international law as the latter really is – in other words, as what has been described as ‘a truthful snapshot of positive international law’.¹⁰⁶

To properly appreciate this nuance, the distinction introduced by the philosopher David Owen between ‘ideological captivity’ and ‘aspectival captivity’ is useful:

[W]hereas in the case of ideological captivity, the condition of captivity is necessarily tied to the falsity of the beliefs held by the agent, in the case of aspectival captivity, the condition of captivity is independent of the truth or falsity of the beliefs held by the agent. ... [The latter] systems of judgment/judging ... govern what is intelligibly up for grabs as true-or-false. They do not determine what is true or false, but rather what statements or beliefs *can count as* true-or-false.¹⁰⁷

Using Martin Heidegger’s telling vocabulary that describes truth as ‘disclosure’, one can say that aspectival captivity does not simply make us miss our horizon of disclosure but also the very fact that it is horizon-bound.¹⁰⁸ Seen in this light, equating the judicial representation of international law with international law is problematic not because the judicial representation of international law is false but because such an equation imposes the very terms on which judgments of truth and falsity are made. The independence and impartiality of judges is not a response here because independence and impartiality do not mean that judges are not situated. As Schlag points out, ‘the world of the judge is one whose contours and content are structured to produce satisfactory judicial resolutions. The judge has tasks to perform. His categories, idioms, and perspectives are shaped by those tasks’.¹⁰⁹ Consequently, the law applicable before an international court is normally subject to many constraints specific to court settings. For instance, it is well known that the category of ‘general principles of law’ in Article 38 of the ICJ Statute was inspired and shaped by the double

¹⁰⁴ Schlag, ‘Anti-Intellectualism’, *supra* note 70, at 135.

¹⁰⁵ For instance, a party appearing before an international court or tribunal would be well advised to carefully consider and rely on the case law of that court or tribunal as much as possible. See R. Higgins, *Problems and Process: International Law and How We Use It* (1995), at 202–203.

¹⁰⁶ G.P. Buzzini and G. Distefano, *Bréviaire de jurisprudence internationale* (2009), at vii. On the mirror imagery, see R. Rorty, *Philosophy and the Mirror of Nature* (1979), at 12–13, 392–393.

¹⁰⁷ Owen, ‘Criticism and Captivity: On Genealogy and Critical Theory’, 10 *European Journal of Philosophy* (2002) 216, at 217 (emphasis in original).

¹⁰⁸ J. Young, *Heidegger’s Later Philosophy* (2002), at 29.

¹⁰⁹ Schlag, ‘Anti-Intellectualism’, *supra* note 70, at 138.

preoccupation of avoiding decisions of *non liquet* and judicial legislation.¹¹⁰ What this example teaches us is that what can be applied within a courtroom is not necessarily the same as what passes for international law outside the courtroom and that, therefore, the assumption that the outputs of international judicial bodies can be analysed as if those bodies' situatedness had no impact on their operation is wrong.¹¹¹

As an illustration of the assumption in question, consider the largely representative position articulated by Robert Kolb with respect to the findings of the ICJ on issues of general international law. According to Kolb, such findings are valid *erga omnes*, which means that they state what the international law is on a particular issue for all states.¹¹² The unarticulated premise behind this conclusion is that there is no mediated relationship between the ICJ and international law: in other words, the fact that the finding comes from a particular institution situated in particular circumstances and having its particular history, constraints and interests is legally indifferent, a distinction without a difference. That there is something deeply troubling with such a position is shown by none other than a former president of the ICJ, Mohammed Bedjaoui, in his discussion of the conflicting views of the ICJ and the International Criminal Tribunal for the Former Yugoslavia (ICTY) regarding the standards of attribution to a state of a conduct of a group not formally affiliated with the governmental apparatus of that state. As is well known, the ICTY found the effective control test introduced by the ICJ in the *Nicaragua* case unnecessarily stringent and applied a test of its own making – namely, that of overall control.¹¹³ According to Bedjaoui, who was part of the drafting committee in the *Nicaragua* case, the Court deliberately articulated a 'rigid test' in that case because it 'wished to be very strict' with Nicaragua in order to avoid 'any reproach' by the USA (which had decided not to appear before the Court) in an effort to establish some balance between the applicant and the respondent.¹¹⁴

Consider another example. An entire new category of international legal normativity – unilateral acts – has been built in international law primarily on the basis

¹¹⁰ For a recent discussion on this point, see International Law Commission, First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, UN Doc. A/CN.4/732, 5 April 2019, at 25–30.

¹¹¹ For the view that there is no complete overlap between 'norms of conduct' applicable in international relations and 'norms of adjudication' applicable by international courts, see Onuma, 'The ICJ: An Emperor without Clothes?', in N. Ando, E. McWhinney and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 191; Onuma, 'A Transcivilizational Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts', 8 *International Community Law Review* (2006) 29.

¹¹² Kolb, 'General Principles of Procedural Law', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 793, at 826 ('[a]ccording to Art. 38, the Court bases its decisions on international law. Therefore its findings are expressive of international law. To the extent that the law upon which the Court expresses is general international law, there is an indirect *erga omnes* effect of the judgment in the sense that the Court establishes the content of general international law which binds all the States').

¹¹³ Judgment, *Prosecutor v. Dusho Tadic a/k/a 'Dule'* (IT-94-1-A), Appeals Chamber, 15 July 1999, paras 98–137.

¹¹⁴ Bedjaoui, 'Introduction from the Bench: The Fourteen Journeys of Nicaragua to The Hague', in E.S. Obregon and B. Samson (eds), *Nicaragua before the International Court of Justice* (2017) 3, at 9–10.

of the ICJ's judgments in *Nuclear Tests*.¹¹⁵ Is it not at least relevant to acknowledge that in that case the unilateral declarations made by France about the termination of nuclear tests conveniently allowed the Court to circumvent the massively more controversial question of the legality of nuclear tests, which the Court was specifically invited to address by the applicants but did not? Last but not least, the ICJ's choice not to take on the issue of nuclear disarmament in the *Marshall Island* cases,¹¹⁶ or the International Criminal Court's Pre-Trial Chamber's decision not to proceed with a requested investigation into alleged war crimes and crimes against humanity committed in Afghanistan,¹¹⁷ brutally illustrates that international judges are not immune from, or insensitive to, power dynamics prevailing in the international society. In one of Albert Cohen's novels, the main character Mangeclous points out that all the literary heroes since Homer have been suffering from a 'horrible retention' because the writers never let them go to the bathroom, which, according to Mangeclous, is utterly surprising given that those heroes keep eating and drinking.¹¹⁸ The mainstream scholars' unarticulated assumption that the judicial account of law is not perspectival as any other account should invite a similar surprise. But the very fact that it rarely does shows how deeply entrenched that assumption is. To use the subtitle of one of Steven Shapin's well-known books, a history of international case law 'as if it was produced by people with bodies, situated in time, space, culture, and society, and struggling for credibility and authority' is yet to be written.¹¹⁹

D Uneven Distributional Consequences

The equation of international law with the judicial representation of the latter has significant distributional consequences in terms of who has the power to shape the meaning of international law in the international society. Consider, for instance, the tendency to assume that every state has the constructive knowledge of, and is virtually

¹¹⁵ *Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, ICJ Reports (1974) 253; *Nuclear Tests (New Zealand v. France)*, Judgment, 20 December 1974, ICJ Reports (1974) 457.

¹¹⁶ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Judgment, 5 October 2016, ICJ Reports (2016) 255; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Judgment, 5 October 2016, ICJ Reports (2016) 552; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment, 5 October 2016, ICJ Reports (2016) 833.

¹¹⁷ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan (ICC-02/17)*, Pre-Trial Chamber II, 12 April 2019. On 5 March 2020, the Appeals Chamber of the International Criminal Court amended the decision of the Pre-Trial Chamber and authorised the Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in Afghanistan. Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan (ICC-02/17-138)*, Appeals Chamber, 5 March 2020.

¹¹⁸ Cohen, 'Mangeclous' in A. Cohen, *Oeuvres* (1993), vol. 2, 361, at 453, 455.

¹¹⁹ Shapin, *Never Pure. Historical Studies of Science as if It Was Produced by People with Bodies, Situated in Time, Space, Culture, and Society, and Struggling for Credibility and Authority* (2010).

under the obligation to react to, international judicial decisions, which is a logical corollary of the equation of international law with its judicial representation.¹²⁰ This tendency can be seen in action in the ICSID award rendered in *El Paso v Argentina*.¹²¹ Confronted with the issue of whether the 'essential security interests' clause of the USA–Argentina bilateral investment treaty is self-judging, the tribunal in *El Paso* held that since the judgment of the ICJ in *Nicaragua*, the USA had been on notice that an 'essential security interests clause' that did not refer to measures that the state 'considers necessary' was not self-judging.¹²² According to the tribunal, when entering into an investment protection treaty with Argentina, the USA knew – as a result of the ICJ judgment in *Nicaragua* – that 'if one wishes a treaty clause to be self-judging, one has to say so'.¹²³ Thus, the tribunal ruled that the 'essential security interests' clause of the USA–Argentina investment treaty was not a self-judging clause.

What is remarkable in this reasoning is the unarticulated premise on which it is based. The tribunal simply assumed that the ICJ's ruling in *Nicaragua* was not a situated reading of the law but, rather, the law *tout court*. On that assumption, the USA should have readjusted its treaty practice if it wanted to negotiate self-judging 'essential security interests' clauses. The fact that the USA was a party in the *Nicaragua* case hardly justifies such an assumption. But the latter becomes even more problematical when applied to non-parties. Assuming that every country in the world has enough resources in terms of legal expertise to follow and carefully study the case law of the international courts and tribunals and to assess and strategize about its ramifications is a flight of fantasy.

The uneven distributional consequences of the equation of international law with the latter's judicial representation are even more forcefully evident in the 'politics of precedent' in which resource-rich countries engage. Research on the WTO adjudication has shown that some countries initiate low-stake litigation with a view to securing favourable precedents so that they can use such precedents in high-stake cases.¹²⁴ The risk here is the transformation of adjudication into treaty negotiations by other means – a state can obtain through adjudication what it was unable to obtain through negotiations. Since those 'other means' are not equally distributed among states, 'when it comes to reshaping international rules after they have been set, "the haves" may come out ahead'.¹²⁵ In other words, international adjudication comes out of this experience not as a world of equality where power politics has no place but as a world of 'politics by other means'.

¹²⁰ On the assumed obligation of 'all the international subjects concerned' to react to the case law of international courts and tribunals, see Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, *In the Matter of El Sayed* (CH/AC/2010/02), Appeal Chambers, 10 November 2010, para. 47.

¹²¹ ICSID, *El Paso Energy International Company v. Argentine Republic*, Award, 31 October 2011, ICSID Case no. ARB/03/15.

¹²² *Ibid.*, para. 593.

¹²³ *Ibid.*, para. 594.

¹²⁴ Pelc, 'The Politics of Precedent in International Law: A Social Network Application', 108 *American Political Science Review* (2014) 547.

¹²⁵ *Ibid.*, at 548.

E *Treating Law as a Mummy*

Friedrich Nietzsche famously accused the philosophers of ‘Egypticism’, which he defined as ‘their hatred of the very idea of becoming’ and their tendency to treat things as ‘conceptual mummies’ not subject to change.¹²⁶ ‘Egypticism’ is the hallmark of the judicial discourse since the latter is in the business of stating what the law is. As Nietzsche points out, ‘[w]hatever is, does not *become*; whatever becomes, *is not*’.¹²⁷ Indeed, the verb ‘is’ does more than innocently link a subject and a predicate: it ‘essentializes’, ‘substantializes’ and ‘immobilizes’ the subject.¹²⁸ To their credit, international lawyers know that international law changes, and what is the international law on a given issue at one point in time may no longer be so seen at a later point in time. But pretending that one can find out what the international law is at any point in time is tantamount to treating international law as an object susceptible of moving but whose coordinates at any particular point in time can always be determined with a reasonable degree of precision. As exposed in a publication with a telling title ‘International Law on a Given Day’, in this approach:

one starts with international law as at a given time. If one is concerned to resolve a problem arising at that time, one applies the international law of that time. ... If one is concerned to resolve a problem arising after that time, one asks how it is that international law may have changed since then, and whether the change makes any difference. In either case, the starting point is clear, definite, unassailable international law at a given time.¹²⁹

If, by contrast, one looks at law as a process in which rules and their meanings are continuously negotiated, contested and renegotiated, the most an observer can say is which one of the competing claims has gained ascendancy over others. Such observations cannot be equated with determining the state of the law beyond specific temporal, spatial, political or social contingencies.

The tendency to treat judicial determinations as definitive statements of international law rather than as an integral part of a broader process in which every claim to authority, including those judicial determinations, can be contested and defeated is an example of the substantialization of international law. When generalized, such substantialization of international law is bound to cause international lawyers to miss how international law works, as any inquiry modelled on the judicial task of finding out what the law is would give a distorting picture of international legal processes. Interestingly, while international lawyers have traditionally expressed concerns that the codification of customary international law cannot freeze the latter and risks, with

¹²⁶ F. Nietzsche, *Twilight of the Idols, or How to Philosophize with a Hammer*, translated by D. Large (2009), at 16.

¹²⁷ *Ibid.*, at 16 (emphasis in original).

¹²⁸ J. Derrida, *Dissemination* (trans. B. Johnson, 1981), at 350.

¹²⁹ Crawford and Viles, ‘International Law on a Given Day’, in K. Ginther *et al.* (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek zum 65. Geburtstag* (1994) 45, at 45. While the authors seem willing to problematize this approach, the example they have chosen to make their point – namely, the Truman Proclamation on Continental Shelf – suggests that for them situations in which the state of international law on a given day could not be identified with precision are exceptional.

time, giving rise to a mismatch between the custom and its written formulation, no such concern is ever expressed with respect to judicial ‘immobilization’ of law, which once again shows that the judicial discourse enjoys a unique status in the collective imaginary of the discipline.

F *Expansion of the Domain of Judicial Violence*

Judicial decisions involve violence not only in the sense of causing pain or deprivation¹³⁰ but also in the sense of making choices that can never cease being that – mere choices. As practical agents, judges have to make decisions, and every decision must involve a more or less arbitrary end point if the case is ever to come to an end. As a former president of the ICJ candidly put it, ‘it is the court’s duty to decide, *irrespective of its doubts*’.¹³¹ No judicial institution can afford the luxury of an endless deliberation until every view entitled to be heard gets a fair hearing and is fully considered. As Bruno Latour pointed out, the French word for ‘judgment’ – ‘*arrêt*’, which literally means ‘a stop’ – reflects this logic marvellously: ‘[T]hat which we know without engaging in further discussion, we know because, quite simply, we have exhausted the discussion.’¹³² Article 46 of the 1899 Hague Convention is quite explicit in this regard: ‘[The agents and counsel of the parties] have the right to raise objections and points. The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.’¹³³

One practical explanation for this state of affairs is that there are no endless time and resources available to judicial institutions. But as Jacques Derrida famously observed, ‘even if time and prudence, the patience of knowledge and the mastery of conditions were hypothetically unlimited, the decision would be structurally finite’, incapable as it is of taking every conceivably relevant point into account.¹³⁴ Law’s ‘vigorous drive for closure’,¹³⁵ which prevents it from remaining endlessly open, may

¹³⁰ Cover, ‘Violence and the Word’, 95 *YlJ* (1986) 1601, at 1601.

¹³¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012. ICJ Reports (2012) 624, at 733, Separate Opinion of Judge Abraham (emphasis added). The passage from which this extract comes from is worth quoting in its entirety: ‘[T]he difficulty of interpreting a legal text is not – is never – a valid reason for a failure to do so by the court which is responsible for applying it. A text’s obscurity is a sign that it needs to be interpreted, never an obstacle to that interpretation. The court may not be certain about the meaning of the text, it may hesitate over the solution to adopt; that is not unusual. But it is the court’s duty to decide, irrespective of its doubts – doubts which it is moreover perfectly entitled to express at the very moment when it does decide.’ *Ibid.*, para. 10.

¹³² Latour, ‘Scientific Objects and Legal Objectivity’, in A. Pottage and M. Mundy (eds), *Law, Anthropology, and the Constitution of the Social* (2004) 73, at 109. Similarly, the word ‘decide’ comes from the Latin word ‘*decidere*’, which means ‘cut off’, ‘cut the knot’. C.R. Onions (ed.), *The Oxford Dictionary of English Etymology* (1966), at 248.

¹³³ Convention for the Peaceful Adjustment of International Differences 1899, 1 *AJIL* 107 (1907).

¹³⁴ Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’, in D. Cornell, M. Rosenfeld and D.G. Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 3, at 26. It should be noted that Derrida’s point here is not that law is indeterminate but, rather, that it is undecidable. See J. Derrida, *Limited INC* (1988), at 144–145.

¹³⁵ Schlag, ‘A Brief Survey of Deconstruction’, 27 *Cardozo Law Review* (2005) 741, at 750.

go unnoticed thanks to judicial rhetoric that attempts to make judicial choices seem logically necessary, but it is no less present in every judicial decision.

In the same vein, like every discourse, the judicial discourse does violence to things it deals with.¹³⁶ Once a dispute is framed in judicial terms, its protagonists may not fully recognize it as the dispute they were experiencing. Law captures only what it finds relevant based on its judgments of relevance and irrelevance. Reductionism may even be part of the definition of the legal mind. ‘If you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind’, Thomas Reed Powel famously stated.¹³⁷ David Kennedy provides a telling illustration of such discursive violence inflicted by the judicial perspective:

One can read the *Nuclear Tests* case almost without noticing that the French unilateral declaration whose binding force was ‘at issue’ related to nuclear weaponry. The case seems obviously to be about consent, unilateral declarations and the sources of law, and only incidentally to have arisen out of conflict about weaponry.¹³⁸

This point can be generalized beyond the *Nuclear Tests* case. Political disputes are indeed often approached by international judges on the assumption that, as long as a matter is governed by international law, the fact that it is part of a broader political dispute cannot prevent them from dealing with it. The lack of compulsory jurisdiction explains that efforts to ‘squeeze a rather large, perhaps ungainly force, into the glass slipper of a jurisdictional clause that really is far too small for the case’ are all too common in international practice.¹³⁹ It should take a special power of imagination to think of the Iran–US dispute in the late 1970s as a dispute over the inviolability of diplomatic and consular premises. Likewise, laymen would be surprised to learn that the Georgia–Russia incident in the summer of 2008 or the Ukraine–Russia dispute

¹³⁶ Foucault, ‘The Order of Discourse’, in R. Young (ed.), *Untying the Text: A Post-Structuralist Reader* (1981) 48, at 67.

¹³⁷ Cited in P. Schlag, *The Enchantment of Reason* (1998), at 121. A similar thought was offered by Gerald Fitzmaurice for whom ‘the value of the legal element depends on its being free of other elements or it ceases to be legal’. Fitzmaurice, ‘The United Nations and the Rule of Law’, 38 *Transactions of the Grotius Society* (1953) 135, at 149. See also the further thought by Fitzmaurice, *ibid.*, at 142 (‘the real fault of the lawyers ... probably is that they have not, as lawyers, been single-minded enough, and have not resisted the temptation to stray into other fields’). More recently, Vaughan Lowe elaborated on law’s drive for simplification: ‘[T]he law strips away all of the ostensible justifications and arguments that are regarded as irrelevant. ... It may be that the neighboring State has more oil than it needs and could develop with greater economic efficiency if it were incorporated in a larger State. ... If the law does not admit them as defences, such justifications are, broadly speaking, irrelevant to a legal analysis of the question. A court does not have to ponder the question whether the beneficial redistributive effects of bank robberies and foreign invasions outweigh the social costs of such activities. The law strips away irrelevant arguments about need or efficiency or ignorance or mistake or whatever, and simplifies the question. Did you take their money? Did you invade their territory? That is all that matters.’ Lowe, ‘The Function of Litigation in International Society’, 61 *International and Comparative Law Quarterly* (2012) 209, at 211–212.

¹³⁸ D. Kennedy, *International Legal Structures* (1987), at 251. I am grateful to Ana Luísa Bernardino for bringing this reference to my attention.

¹³⁹ Greenwood, ‘Friday Lunchtime Lecture, Lauterpacht Centre for International Law, “Challenges of International Litigation”, Friday 7th October 2011’, cited in Waibel, ‘Investment Arbitration: Jurisdiction and Admissibility’, University of Cambridge Legal Studies Research Paper Series no. 9/2014 (2014), at 11, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789.

arising out of the 2014 Russian invasion of Crimea were disputes over allegations of racial discrimination. Yet that is how these disputes tend to be framed and discussed in international legal scholarship simply because that is how they ended up before the ICJ due to the vagaries of available jurisdictional bases.¹⁴⁰

The problem with the equation of international law with the latter's judicial representation is that the violence described above can hardly be replicated outside the judicial context. The default setting of international relations is the absence of an authoritative decision-maker with the power to bring disputes to a closure. Replicating the judicial approach in such a context will lead nowhere since every argument will only direct the protagonists to choices, and no choice may appear superior to others, unlike in a judicial setting. Similarly, disputes rarely come in separate compartments with their exclusively legal aspects neatly segregated from their exclusively political aspects. Attempts at replicating such compartmentalization in a non-judicial context are often responsible for a lack of appreciation of the complexity of international disputes and the realistic role that international law can play in their resolution.

G Promotion of an Inflated View of the Role of International Law in the World

Judges tend to believe in the power of law.¹⁴¹ They often think that merely stating where the law stands on a particular point and adjudicating the rights and obligations of the parties accordingly is sufficient to make a dispute disappear and prevent other potential disputes from arising. The ICJ, for instance, has observed that its function is to decide – 'that is to bring to an end' – the disputes submitted to it.¹⁴² More recently, a former president of the ICJ expressed the view that the 1979 Iranian revolution and the Iran–US dispute arising out of it could have been avoided if the Mossadegh government had agreed to arbitrate the dispute relating to the Anglo-Iranian Oil Concession several decades earlier.¹⁴³ But since it is exceedingly rare for international disputes to

¹⁴⁰ Laymen would also be surprised to hear that until very recently there was a Treaty of Amity formally in force between Iran and the USA on the basis of the jurisdictional clause of which Iran had sued the USA before the International Court of Justice (ICJ) several times. As was pointed out by a commentator, that treaty, entered into in 1955, was 'predicated on the existence of an amicable relationship – indeed, a relationship – between Iran and the United States', which has been virtually non-existent since 1979. See Chachko, 'Treaties and Irrelevance: Understanding Iran's Suit against the U.S. for Reimposing Nuclear Sanctions', *Lawfare* (2018), available at www.lawfareblog.com/treaties-and-irrelevance-understanding-irans-suit-against-us-reimposing-nuclear-sanctions. The USA decided to withdraw from the treaty in October 2018.

¹⁴¹ Schlag, 'Anti-Intellectualism', *supra* note 70, at 140–141.

¹⁴² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, para. 116 (emphasis added).

¹⁴³ Schwebel, 'In Defense of Bilateral Investment Treaties', 31 *Arbitration International* (2015) 181, at 182 ('if, in 1951, the then Iranian Government had abided by its contractual, and international legal, obligation to arbitrate disputes arising under the Anglo-Iranian Concession, much that is deplorable that has taken place since very probably would not have happened. Foreign subversion would not have occurred. The position of secular and democratic elements of Iranian society, and Iran's national and international policies and relations, would be very different. For these and other reasons, the history of the Anglo-Iranian Oil Company expropriation is an object lesson demonstrating that the displacement of gunboat diplomacy by international arbitration is a very real achievement').

arise out of mere legal technicalities, the ‘mission statement’ of bringing disputes to an end or precluding the emergence of new disputes simply by applying international law in a given case is disconnected from the realities of international life.¹⁴⁴ The contrast between the importance attached to canonical cases of international law such as *Mavrommatis* or *Barcelona Traction* and their relative insignificance from the standpoint of global governance is an apt illustration of the experience in question.¹⁴⁵

Such unqualified trust in the power of international adjudication also explains the naïf belief that complex political problems such as the possession or potential use of nuclear weapons can be resolved by judicial decisions merely by stating the relevant law. It is possible for the judiciary to wield such a power in a system where political authorities let such things happen.¹⁴⁶ For instance, political actors may find it in their interest to let judges resolve controversial issues in order to avoid the political cost of taking sides on those issues. But there is no sign that this is happening on the international scene to any meaningful extent. The cases submitted to international adjudicatory bodies are largely ‘technical or low-politics’ cases,¹⁴⁷ and high-stake disputes between big powers are unlikely to come before international adjudication. Equally meagre is the broader social impact of international adjudication. The claims that international courts have been instrumental in establishing historical record, developing collective memories or achieving peace and reconciliation are often little more than armchair speculations largely disconfirmed by empirical data.¹⁴⁸ As Koskenniemi put it in the form of a rhetorical question, ‘[w]ho will remember the latest maritime delimitation from the International Court of Justice?’¹⁴⁹ Over-identification with the perspective of

¹⁴⁴ For an unusually frank acknowledgement of this point, see Declaration of President Yusuf, in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018, ICJ Reports (2018) 507, paras 6, 7, 9 Declaration of President Yusuf (‘[t]he law cannot ... claim to apprehend all aspects of disputes or the reality of all types of relations between States. There are certain differences or divergence of opinions between States which inherently elude judicial settlement through the application of the law. Even when these divergences have a legal dimension, tackling those legal aspects by judicial means may not necessarily lead to their settlement ... [R]elations between States cannot be limited to their bare legal aspects’). This does not mean that prior rulings can never incentivize disputing parties to settle but, rather, that such a thing is likely to happen in circumstances where the parties bargain in the shadow of an international court with a binding jurisdiction, which, as was pointed out above, is not a frequent occurrence in international law. For a discussion of this experience in the context of the World Trade Organization (WTO), see Kucik, ‘How Do Prior Rulings Affect Future Disputes?’, 63 *International Studies Quarterly* (2019) 1122, at 1122–1132.

¹⁴⁵ *Mavrommatis Palestine Concessions*, Judgment, 1924 PCIJ Series A, No. 2, 4; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, judgment, 5 February 1970, ICJ Reports (1970) 3.

¹⁴⁶ Decencière-Ferrandière, ‘Essai critique sur la justice internationale’, in A. Decencière-Ferrandière, *Mélanges A. Decencière-Ferrandière* (1940) 177, at 201.

¹⁴⁷ Alter, Helfer and Madsen, ‘How Context Shapes the Authority of International Courts’, 79 *Law and Contemporary Problems* (2016) 1, at 21; see also Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’, 20 *EJIL* (2009) 73, at 90–91.

¹⁴⁸ See, e.g., Milanović, ‘The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem’, 110 *AJIL* (2016) 233.

¹⁴⁹ Koskenniemi, ‘What Should International Legal History Become?’, in S. Kadelbach, T. Kleinlein and D. Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (2017) 381, at 384.

the judge is thus bound to distort the perception of the place of international law in the world, giving international lawyers a false 'sense that their work is of immediate, intense relevance'.¹⁵⁰

4 Conclusion

When explaining his judicial philosophy during his Senate confirmation hearing, Chief Justice John H. Roberts compared judges to umpires and stated that '[n]obody ever went to a ball game to see the umpire'.¹⁵¹ The place granted to adjudication in the discipline of international law may leave the impression that the whole ball game of international law is about the umpire. It is, for instance, telling that the currently proliferating academic programmes in international dispute settlement around the world virtually exclusively focus on international adjudication and do not seem to dedicate any serious attention to negotiations, mediation, conciliation or *bons offices*. This choice is conceptually hard to justify, as the judicial or arbitral settlement of disputes is one among many modes of settlement of international disputes. It is even harder to justify empirically, as a tiny fraction of international disputes end up in courtrooms.

But, as pointed out above, the phenomenon of judge centredness is not limited to international law and is also widely present in the context of domestic law discourse. Does this mean that there is something natural about the centrality of the judicial discourse in law? Some scholars, including in international law, are not far from thinking so.¹⁵² But the history of international law shows that this essentialist view is empirically wrong. As highlighted by Benedict Kingsbury, the founding fathers of international law had no trouble conceiving of 'law without courts' in international relations.¹⁵³ It is also a fact that Soviet textbooks of international law contained no references to the case law of international courts and tribunals.¹⁵⁴ As this article has attempted to show, the privileged status of the judicial representation of international law has much to do with the historical positioning of international law as a discipline, as a profession and as a normative project.

The point of this article is, however, not to encourage international lawyers to go back to 'international law without courts'. Doing so would obviously be as distorting as treating international judicial discourse as the only game in town. What this article has aimed for is a critical analysis of the power of the judicial discourse in international law on the assumption that 'no power goes without saying, that no power, of whatever kind, is obvious or inevitable, and that consequently no power warrants

¹⁵⁰ Charlesworth, 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2002) 377, at 377.

¹⁵¹ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary, 109th Cong. 55 (2005), at 55, available at www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.

¹⁵² Leben, 'Droit: quelque chose qui n'est pas étranger à la justice', 11 *Droits* (1990) 35; Wyler, 'Le médiateur, tiers impartial au cœur du droit', in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (2007) 973, at 973–992.

¹⁵³ Kingsbury, *supra* note 42, at 203.

¹⁵⁴ L. Mälksoo, *Russian Approaches to International Law* (2015), at 96–98.

being taken for granted'.¹⁵⁵ Such an analysis is particularly necessary in international law where, unlike in domestic legal systems, the default rule is the lack of a judicial remedy for a wrong, which shows that there is nothing 'natural' about the central place of the judicial discourse in international law. Paraphrasing Foucault, one can say that this centrality is a social construction the justifications and consequences of which must be carefully scrutinized.¹⁵⁶

¹⁵⁵ M. Foucault, *On the Government of the Living: Lectures at the Collège de France 1979–1980*, translated by G. Burchell (2012), at 77.

¹⁵⁶ Foucault, *supra* note 74, at 25.