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INTERNATIONAL JUDICIAL PRACTICES: OPENING THE “BLACK BOX” OF INTERNATIONAL COURTS

*Jeffrey L. Dunoff & Mark A. Pollack**

INTRODUCTION

Until recently, relatively few international courts existed, and those tribunals decided relatively few cases. Today, international courts and tribunals are flourishing. More than two dozen permanent international courts are operational, and over one hundred judicial bodies and mechanisms hear international disputes. And these entities are increasingly busy; over 90 percent of the more than 37,000 binding judgments rendered by international courts have been issued since the fall of the Berlin Wall.¹ Moreover, international courts increasingly hear disputes involving contentious political, economic, and security issues.² As a result, many scholars view the rise of

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1. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 4 (2014).

2. *See, e.g.,* *Zakharov v. Russia*, 2015-VIII Eur. Ct. H.R. 205 (judgment of the Grand Chamber finding unlawful Russian surveillance law permitting interception of phone communications without judicial warrant); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (convicting former Bosnian Serb leader of genocide, war crimes, and crimes against humanity); *South China Sea Arbitration*, PCA Case No. 2013-19, Award (July 12, 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf> (rejecting China’s claim of “historic rights” to resources in the South China Sea).

international adjudication as one of the most important developments in international affairs in recent decades.³

The dramatic upswing in the number and use of international courts has attracted scholars eager to systematize and understand the role of these bodies in contemporary international affairs. International law (“IL”) scholars approach these questions from a variety of perspectives and explore, inter alia, the interpretative strategies and jurisprudence of various courts, diverse jurisdictional and procedural matters, and the law-making function of international tribunals.⁴ International relations (“IR”) scholars generally focus on international courts’ relations with states and other actors in their political environment, seeking to establish correlations between inputs (such as the identity and relative power of the parties, or the backgrounds of the judges) and outputs (who wins, who loses), with important literatures exploring judicial independence and institutional design.⁵ More recently, scholars from both disciplines have pursued common issues, such as inquiries into the legitimacy and effectiveness of courts and the professional backgrounds of those who serve on these tribunals.⁶

More importantly, however, both literatures share an important blind spot. Specifically—and surprisingly—they demonstrate little interest in exploring *how international courts actually function*. Scholars rarely study the internal, day-to-day workings of courts, such as their decision-making practices, including processes of judicial deliberation; the practices that shape how opinions are drafted, revised, and translated; or the practices that inform the complex relationships between judges, on the one hand, and members of registries and other court officials, on the other. In sum, despite generating substantial advances in our knowledge regarding the *outputs* of international tribunals, both IL and IR scholars have largely neglected the *inner workings* of the courts themselves and, in particular, have not explored the everyday practices and social relationships through which international judicial decisions are produced.

3. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 457 (2000).

4. See, e.g., INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE (Armin von Bogdandy & Ingo Venzke eds., 2012); THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS (Chiara Giorgetti ed., 2012).

5. Erik Voeten, *International Judicial Independence*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 421 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2013) [hereinafter Dunoff & Pollack, INTERDISCIPLINARY PERSPECTIVES]; LESLIE JOHNS, STRENGTHENING INTERNATIONAL COURTS: THE HIDDEN COSTS OF LEGALIZATION (2015).

6. See, e.g., Leigh Swigart & Daniel Terris, *Who are International Judges?*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 619 (Cesare P.R. Romano et al. eds., 2013) [hereinafter OXFORD HANDBOOK]; Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing before the International Court of Justice, 1999–2012*, 25 EUR. J. INT’L L. 893 (2014).

This remarkable oversight results from another feature common to scholarship in both disciplines. In particular, the dominant methodological approaches in mainstream IL and IR scholarship conceptualize international courts as unitary actors whose interests and strategies are best understood by examining judicial decisions.⁷ This approach has the unintended effect of rendering courts' inner workings outside the scope of mainstream scholarly inquiry.

This paper is a call to shift scholarly approaches to the study of international courts. In particular, it is time for scholars to open up the "black box" of international tribunals by studying what international judges do and how they do it. As a first step in this process, this article represents a preliminary effort to identify and examine the everyday practices of international judges, with particular focus on practices associated with judicial decision-making. To do so, we draw selectively upon a large literature on "practice theory" that has been influential across the social sciences,⁸ but that has, with few exceptions, not been applied to international law in general⁹ or to international courts in particular.¹⁰ As we discuss more fully below, practice theory "focuses on the everyday, highlighting embodied capacities such as know-how, skills and tacit understandings, i.e., shared social practices."¹¹ This approach provides a conceptual framework and a set of analytic tools that enable scholars to identify patterns of judicial behavior that have heretofore escaped scholarly notice.

The most immediate benefit of focusing on judicial practices is the opening of a wide range of otherwise hidden activities that illuminate international tribunals' inner workings and decision-making processes. Given the increasing judicialization of international affairs, we believe that the *descriptive* task of excavating these judicial practices is important in its own right. The study of judicial practices, however, lends itself to a variety of uses by scholars with diverse aims beyond that of richer and more accurate descriptions. For example, practice theory provides a pathway toward un-

7. Recent works that expand our understanding of international courts, but nevertheless treat courts as unitary actors and "black-box" their internal workings include ALTER, *supra* note 1 and most of the essays in OXFORD HANDBOOK, *supra* note 6.

8. See, e.g., THE PRACTICE TURN IN CONTEMPORARY THEORY (Theodore Schatzki et al. eds., 2001).

9. Notable exceptions, discussed below, include JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010); Tanja E. Aalberts & Ingo Venzke, *Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice*, in INTERNATIONAL LAW AS A PROFESSION 287 (Jean d'Aspremont et al. eds., 2017).

10. An important exception, discussed below, is Symposium, *The Practices of the International Criminal Court*, 76 LAW & CONTEMP. PROBS. 1 (2013) [hereinafter *ICC Symposium*].

11. Rebecca Adler-Nissen, *Why International Relations Theory Needs Bourdieu*, E-INT'L REL. (Oct. 23, 2012), <http://www.e-ir.info/2012/10/23/why-international-relations-theory-needs-bourdieu/>.

covering the subjective understandings that international judges attach to their own behaviors and actions that will be of interest to interpretivist scholars, as well as those who emphasize the socially constructed nature of meaning and knowledge. For these individuals, the turn to practice promises a rich set of insights into judicial understandings not readily available through more conventional approaches.

Moreover, for positivist scholars seeking to *explain* judicial outcomes, the study of practices promises to reveal underlying causal processes and mechanisms that influence judicial decisions. Although practice theory in international relations has thus far taken a primarily interpretivist approach, our research suggests that international judicial practices have systematic impacts on judicial outputs, and we propose to expand conventional uses of a practice approach to include a positivist research agenda for the study of the causes and consequences of various judicial practices.¹²

Finally, the application of practice theory to international courts would bring an important collateral benefit. The study of international courts represents an area where IL and IR scholars engage in largely complementary endeavors, yet where a truly interdisciplinary research agenda has yet to emerge. We have argued that the gaps between IL and IR writings reflect, in part, different goals and aims in scholarship, and, in part, different ontological and epistemological commitments associated with different disciplinary traditions.¹³ Notably, however, a practice approach is relatively agnostic regarding many of the specific epistemological or ontological commitments that divide other approaches to the study of the international legal order.¹⁴ Thus, a practice approach can sidestep many of the thorny methodological issues that have stymied interdisciplinary efforts in the past. For this reason, use of practice theory can facilitate productive inter-disciplinary and inter-paradigmatic dialogue.

The remainder of this paper proceeds in four parts. Part I provides a brief introduction to practice theory, with particular attention to the writings of Emanuel Adler and Vincent Pouliot, whose work strongly influenced subsequent IR scholarship.¹⁵ We then review the limited use of practice theory to study international legal phenomena. As we explain, these writings do not analyze the practices of international courts and tribunals, with the one notable exception of a project analyzing the workings of the Interna-

12. Jeffrey L. Dunoff & Mark A. Pollack, *The Shape of Judgment* (unpublished manuscript) (on file with authors).

13. Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, in DUNOFF & POLLACK, *INTERDISCIPLINARY PERSPECTIVES*, *supra* note 5, at 3.

14. Emanuel Adler & Vincent Pouliot, *International Practices*, 3 *INT'L THEORY* 1, 14–16 (2011) [hereinafter *International Practices*].

15. *See, e.g., id.*; *INTERNATIONAL PRACTICES* (Emanuel Adler & Vincent Pouliot eds., 2011) [hereinafter *INTERNATIONAL PRACTICES*].

tional Criminal Court (“ICC”).¹⁶ While useful, this project highlights many practices that are unique to international *criminal* tribunals,¹⁷ and the contributions to this project do not undertake comparative analysis. We believe, in contrast, that it is precisely in comparative contexts that practice theory can be of particular use, and we demonstrate this claim below.

Having surveyed leading approaches to practice theory and differentiated our approach from previous efforts in Part I, we proceed in Part II to an examination of international judicial practices. We argue that international judicial practices, like other practices, are related to both legal structures and individual agents, but reducible to neither. We then provide a synoptic overview of international judicial practices. We divide these practices into two broad categories—those not directly related to the litigation process, and those directly related to the litigation process—and describe a number of practices in each category. In virtually every area of practice that we examine, we see substantial, even dramatic, variation across courts.

The study of international judicial practices raises difficult methodological issues, which we explore in Part III. Many of the practices we highlight are not directly accessible. For example, judicial deliberations occur behind closed doors, and international judges are bound by a duty of confidentiality not to reveal the content of these deliberations. Given the particular difficulties of accessing judicial practices, we adopt a multi-method approach, drawing on a combination of interviews with current and former international judges, current and former court officials, and lawyers who appear before international tribunals; archival research into drafting histories of the statutes of various courts; extensive review of international judges’ off-the-bench writings and speeches; and secondary literature on the court in question.

In Part IV, we report on our own multi-method investigation into the use, or non-use, of separate concurring and dissenting opinions at various international courts. While separate opinions are quite common at some international tribunals, such as the International Court of Justice (“ICJ”), International Tribunal for the Law of the Sea (“ITLOS”), and European Court of Human Rights (“ECtHR”), other international courts, such as the Court of Justice of the European Union (“CJEU”), never issue concurring or dissenting opinions. At still other tribunals, such as the World Trade Organization’s (“WTO”) Appellate Body, separate opinions are rare but not unheard of. While a complete analysis of dissent practices at all these courts is beyond the scope of this paper, we illustrate the promise of a practice approach through an empirical analysis of dissent practices at two leading tribunals, the CJEU and ECHR, focusing not only on their material behavior

16. *ICC Symposium*, *supra* note 10.

17. Karim A.A. Kahn & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Court*, 76 *LAW & CONTEMP. PROBS.* 191 (2013); Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 *LAW & CONTEMP. PROBS.* 163 (2013).

(the issuing or non-issuing of separate opinions) but also on the intersubjectively shared norms and subjective motivations of judges in each court. A brief conclusion follows.

Taken as a whole, this Article—and the larger project of which it is part—represents a call for a new, third generation of scholarship on international courts and tribunals. First-generation writings “focused primarily on legal documents and single-institution studies,” “described in formal terms how new adjudicative bodies were supposed to operate”—as opposed to how they actually operate—and were rooted in a single disciplinary approach.¹⁸ An emerging second generation of scholarship has moved from approaching each court as “sui generis, unique and isolated” to comparative studies of multiple adjudicative mechanisms.¹⁹ Second-generation scholarship often draws on inter- and cross-disciplinary perspectives, with particular focus on quantitative research. We endorse these moves, yet by way of example seek to build on and extend these earlier works by adopting an approach that can open up the black box of international courts and tribunals, shed light on their actual operations and workings (i.e., their practices), and thereby enrich our understanding of these increasingly important bodies.

I. AN INTRODUCTION TO PRACTICE THEORY

As practice theory is not frequently employed in the analysis of international legal phenomena, we begin with a brief introduction to “the practice turn” in social theory. Our discussion proceeds in three parts. First, we situate practice theory within larger currents of social thought. Next, we review the use of practice theory in the international relations literature and the analysis of international legal phenomena. Finally, we explain how our approach draws from and extends previous efforts.

A. *What is Practice Theory?*

Broadly speaking, contemporary social theory can be understood as consisting of three broad research traditions: rationalism, norm-based theorizing, and cultural theory (including practice theory).²⁰ For current purposes, these theories can be usefully distinguished by reference to their approaches to human action, or agency, and social order, or structure. Rationalist theories conceptualize individuals as self-interested actors with exogenously given preferences, whose behavior is guided by instrumental rationality. Rationalist approaches thus explain human action as the result of individual

18. Cesare Romano et al., *Editors' Preface* to OXFORD HANDBOOK, *supra* note 6, at viii.

19. *Id.*

20. We draw this typology from Christian Bueger & Frank Gadinger, *The Play of International Practice*, 59 INT'L STUD. Q. 449 (2015); Andreas Reckwitz, *Toward a Theory of Social Practices: A Development in Culturalist Theorizing*, 5 EUR. J. SOC. THEORY 243 (2002).

purposes, intentions, and interests and view social structures as reflecting the aggregated actions of individual agents.

Norm-oriented theories, in contrast, focus on underlying norms that create the conditions for action in the first place. From this perspective, human activity is best understood as reflecting widely shared social norms, considered in light of an individual's identity and context. Focusing largely on how social norms channel human action, these approaches often suggest the ontological priority of structures over agents.

These two competing perspectives have been challenged more recently by a third approach, which has roots in the "culturalist revolution" in 20th century social philosophy.²¹ Cultural theories, which find roots in a diverse set of writers including Bourdieu, Foucault, Giddens, and Lévi-Strauss,²² offer yet a third way "of explaining and understanding action, namely by having recourse to symbolic structures of meaning."²³ That is, to understand and explain human action, cultural theories focus on "the symbolic structures of knowledge which enable and constrain the agents to interpret the world according to certain forms, and to behave in corresponding ways."²⁴ Cultural theories emphasize the "the implicit, tacit or unconscious layer of knowledge which enables a symbolic organization of reality."²⁵

Cultural theories come in many varieties, with practice theory being one subtype. Moreover, the term "practice theory" itself captures a diverse set of thinkers and approaches and is used more as an umbrella term than as a label that identifies a narrowly circumscribed theoretical approach. For this reason, practice theory as such does not provide a prescribed theoretical framework that can be transposed to specific empirical cases for empirical testing and validation.

Despite their theoretical diversity, however, all practice approaches "put[] social practice—as an actual, contingent, evolving and productive set of activities—cent[er] stage."²⁶ As one useful discussion explains:

[P]ractice connotes doing, but not just doing in and of itself. It is doing in a historical and social context that gives structure and meaning to what we do. In this sense, practice is always social

21. Reckwitz, *supra* note 20, at 245.

22. For foundational writings in this tradition, see generally PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977); MICHEL FOUCAULT, *L'ARCHÉOLOGIE DU SAVOIR* (1969); ANTHONY GIDDENS, *CENTRAL PROBLEMS OF SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS* (1979); CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* (1962).

23. Reckwitz, *supra* note 20, at 244.

24. *Id.* at 245–46.

25. *Id.* at 246.

26. Nikolas M. Rajkovic et al., *Introduction* to *THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS* 1, 12 (Nikolas M. Rajkovic et al. eds., 2016); *see also* DAVIDE NICOLINI, *PRACTICE THEORY, WORK AND ORGANIZATION: AN INTRODUCTION* 219 (2012).

practice. Such a concept of practice includes both the explicit and the tacit. It includes what is said and what is left unsaid; what is represented and what is assumed. It includes the language, tools, documents, . . . regulations, and contracts that various practices make explicit for a variety of purposes.²⁷

By foregrounding practices as the central unit of social life, these approaches attempt to overcome several of the classic dualisms that have received substantial attention in social theory, including those between *agency and structure*, *ideational and material phenomena*, and *continuity and change*.

Starting with *agency and structure*, most practice approaches elide the question of whether agents or structure are ontologically prior and “restor[e] the actor to the social process without losing sight of the larger structures that constrain (but also enable) social action.”²⁸ Indeed, practice theorists seek to overcome the agency-structure divide by rethinking both concepts in relation to the practices in which agency and structure meet. In this view, social structures—ranging from families to governmental organizations to professional fields—are all kept in existence through the recurrent performance of material activities, and to a large extent, they only exist as long as those activities are performed.²⁹ Structures, therefore, are decentered and made contingent on their underlying practices. Agency is similarly decentered and related to practice. “While *homo economicus* is conceived as a (semi) rational decision maker and *homo sociologicus* is depicted as a norm-following, role-performing individual, *homo practicus* is conceived as a carrier of practices, a body/mind who ‘carries,’ but also ‘carries out,’ social practices.”³⁰

In a similar fashion, practice theory also seeks to reconcile another classic dualism in social theory, between *the ideational and the material*, i.e., ideational or discursive phenomena on the one hand and material phenomena on the other. As we shall see below, knowledge (sometimes called background knowledge) is central to practice theory, and actions become practices—rather than merely physical activity or behavior—through the shared knowledge that practitioners use to imbue their actions with meaning. At the same time, however, the practice-theoretical conception of knowledge is not purely abstract, but defined (at least in part) in relation to practice. “From a practice perspective, knowledge is conceived largely as a form of mastery that is expressed in the capacity to carry out a social and material activity.”³¹

27. ETIENNE WEGNER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 47 (1998).

28. SHERRY B. ORTNER, ANTHROPOLOGY AND SOCIAL THEORY: CULTURE, POWER AND THE ACTING SUBJECT 3 (2006).

29. NICOLINI, *supra* note 26, at 3.

30. *Id.* at 4 (citing Reckwitz, *supra* note 20, at 256).

31. NICOLINI, *supra* note 26, at 5.

Practices, in other words, are never purely discursive but also material and embodied and must be studied accordingly, with due attention paid both to bodies and objects as well as to discourse and texts.

A final dichotomy that practice theory arguably attempts to overcome is *continuity and change*. Like many norm-oriented and cultural theories, practice theories often focus on the ways in which, and the individuals through which, existing practices are reproduced over time through socialization, learning, and repetition. In this sense, practice theory seems to emphasize continuity. Yet practice theories also allow for change, as individual actors can and do contest practices that are themselves infused with, and tend to reproduce, certain distributions of power. In this view:

[Practices] literally put people (and things) in place, and they give (or deny) people the power to do things and to think of themselves in certain ways. As a result, practices . . . produce and reproduce differences and inequalities. . . . Practices are thus always necessarily open to contestation and this keeps them continuously in a state of tension and change.³²

Hence, practice theories, while sometimes perceived to focus on the reproduction of unchanging social practices, are in fact highly attentive to the realities of *power* that infuse social relations and provide for endogenous sources of contestation and change.

B. Practice Theory's Path to International Law

1. The Practice Turn in IR

By the early 2000s, IR scholars discovered practice theory, with Emanuel Adler and Vincent Pouliot's work being among the most influential in popularizing use of practice theory in the study of international relations.³³ In Adler and Pouliot's conceptualization, "[p]ractices are competent performances. More precisely, practices are socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world."³⁴

From this point of departure, Adler and Pouliot foreground five critical dimensions of practice. First, and most fundamentally, "a practice is a *performance* . . . , that is, a process of doing."³⁵ Second, they argue:

32. *Id.* at 6.

33. See sources cited *supra* notes 14–15.

34. *International Practices*, *supra* note 14, at 4; see also Emanuel Adler & Vincent Pouliot, *International Practices: Introduction and Framework*, in INTERNATIONAL PRACTICES, *supra* note 15, at 3, 6 [hereinafter *Introduction and Framework*].

35. *International Practices*, *supra* note 14, at 6 (emphasis in original).

[P]ractice tends to be *patterned*, in that it generally exhibits certain regularities over time and space. . . . These patterns . . . are part of a socially organized context, which not only gives them meaning, but also structures interaction. This is not to say that practice is strictly iterative, however, as there is always wiggle room for agency even in repetition³⁶

Third, “practice is more or less *competent* in a socially meaningful and recognizable way,” as assessed by audiences who possess a set of shared standards.³⁷ Fourth, “practice rests on *background knowledge*,” which is intersubjective and practice-oriented rather than abstract or theoretical.³⁸ Fifth and finally, “practice weaves together the *discursive* and *material* worlds,” featuring a linguistic element that gives practices their meaning, and a material element, as practices act in and upon the world.³⁹

As an illustration of these five elements, Adler and Pouliot offer the example of international summitry, such as the annual G8 (now G7) summit meetings:

These meetings of state officials constitute an international practice insofar as they conform to the five dimensions that we have just laid out. First, G8 summits are performances: they consist of a number of actions and processes that unfold in real time. . . . Second, these performances are patterned from one year to the next. . . . Third, participating state officials generally exhibit a variable degree of competence as they attend the summit. . . . Fourth, much of the performance rests on a form of background knowledge that is bound up in practices. . . . Fifth and finally, G8 summits are both ideational and material. Participants spend a lot of their time publicly and privately talking about their meetings in order to represent preferences and policies. To do so, they make use of a variety of materials—conference rooms, ceremonial artifacts, the Internet, note exchanges with Sherpas, etc.⁴⁰

As this example suggests, international diplomacy has been a central focus of practice-based analysis in IR scholarship.⁴¹ Practice-theoretical studies differ from more traditional studies of diplomacy, which often highlight the pursuit of state interests, underlying power asymmetries, or the characteris-

36. *Id.* (emphasis in original).

37. *Id.* at 6–7 (emphasis in original).

38. *Id.* at 7 (emphasis in original).

39. *Id.* (emphasis in original).

40. *Id.* at 7–8.

41. See IVER B. NEUMANN, AT HOME WITH THE DIPLOMATS: INSIDE A EUROPEAN FOREIGN MINISTRY (2012); VINCENT POULIOT, INTERNATIONAL SECURITY IN PRACTICE: THE POLITICS OF NATO–RUSSIA DIPLOMACY (2010); Ole Jacob Sending et al., *The Future of Diplomacy: Changing Practices, Evolving Relationships*, 66 INT’L J. 527 (2011) (special issue on diplomacy as a practice).

tics of successful bargaining strategies in their goal of illuminating “what practitioners actually do when they interact on the diplomatic floor.”⁴² The practice approach, in various guises, has been adopted by IR scholars to analyze European security,⁴³ the early Cold War,⁴⁴ international organizations,⁴⁵ and humanitarian intervention,⁴⁶ among other issue areas.

2. Practice Theory and International Law

As noted, the use of practice theory to analyze international law has, to date, been relatively rare.⁴⁷ Perhaps the first use of practice theory to analyze international law is found in the joint work of international lawyer Jutta Brunnée and political scientist Stephen Toope. In a series of writings, these authors draw upon the legal theory of Lon Fuller and practice-oriented constructivist approaches to identify and explore an “interactional theory of international law” that centers upon the “practice of legality.”⁴⁸ Other scholars subsequently explored the “practice of legality” in the context of international law, and a much smaller number applied practice theory to international courts. We explore each of these moves in the literature in turn.

In *Legitimacy and Legality in International Law: An Interactional Account*, Brunnée and Toope explore what distinguishes legal norms—and, we might add, legal practices—from other social norms and practices. In contrast to approaches that emphasize law’s form or pedigree, Brunnée and Toope argue that law’s distinctiveness consists in adherence to specific criteria of legality.⁴⁹ In particular, norms are distinctively legal when they satisfy eight criteria identified by Lon Fuller: generality, promulgation, non-

42. POULIOT, *supra* note 41, at 5.

43. Trine Villumsen Berling, *Bourdieu, International Relations, and European Security*, 41 THEORY & SOC’Y 451 (2012).

44. TED HOPF, *RECONSTRUCTING THE COLD WAR: THE EARLY YEARS, 1945–1958* (2012).

45. Sebastian Schindler, *Man versus State: Contested Agency in the United Nations*, 43 MILLENNIUM 3 (2014).

46. Rebecca Adler-Nissen & Vincent Pouliot, *Power in Practice: Negotiating the International Intervention in Libya*, 20 EUR. J. INT’L REL. 889 (2014).

47. A Westlaw search of (Adler w/5 Pouliot) and “international practices” in the Law Reviews and Journals database performed on May 28, 2018 generated a grand total of nine hits. This period of underutilization may be near its end, however, as a number of recent projects make use of this approach. *See, e.g.*, THE CHANGING PRACTICES OF INTERNATIONAL LAW (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018); THE POWER OF LEGALITY: PRACTICES OF INTERNATIONAL LAW AND THEIR POLITICS, *supra* note 26.

48. Jutta Brunnée & Stephen J. Toope, *Interactional International Law and the Practice of Legality*, in INTERNATIONAL PRACTICES, *supra* note 15, at 108 [hereinafter *Interactional International Law*]; JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010) [hereinafter LEGITIMACY AND LEGALITY].

49. LEGITIMACY AND LEGALITY, *supra* note 48, at 351.

retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.⁵⁰

Significantly, Brunnée and Toope argue that “law’s influence is not explained simply by identifying social norms that meet the criteria of legality.”⁵¹ Rather, they argue, legal norms are built, maintained, and evolve through a “robust practice of legality” undertaken by “communities of practice.” These communities of practice—a phrase and concept drawn from practice theory—consist of individuals who, through engagement in a shared domain, develop a shared repertoire of resources, including cases, stories, tools, vocabularies, and ways of addressing recurring problems—in short, practices. Thus, for Brunnée and Toope, “[p]ractice resides in a community of people and the relations of mutual engagement by which they can do whatever they do.”⁵² Similarly, communities of practice provide the settings in which “the knowledge or norms that shape actors’ understandings of the world are generated and practices evolve.”⁵³ Indeed, for Brunnée and Toope, it is precisely the ongoing, day-to-day practice of legality in communities of practice, and not simply the formal source of law, that determines whether a given norm generates a sense of legal obligation or falls into desuetude.⁵⁴

Brunnée and Toope’s work represents a groundbreaking effort to apply practice theory to international law and opened the door to later efforts to examine the practice of legality as it relates to international law.⁵⁵ One recent notable effort along these lines is a contribution by political scientist Tanya Aalberts and international legal scholar Ingo Venzke.⁵⁶ Starting from the observation that international law “is an activity, not a thing,” Aalberts and Venzke argue that “international law [is] a separate field established through its professional practices and modes of reasoning, rather than

50. See LON L. FULLER, *THE MORALITY OF LAW* (1964).

51. *Interactional International Law*, *supra* note 48, at 109.

52. LEGITIMACY AND LEGALITY, *supra* note 48, at 63 (quoting WEGNER, note 27, at 73).

53. *Id.* at 63.

54. *Interactional International Law*, *supra* note 48, at 109.

55. A related but distinguishable body of work by Yves Dezalay and collaborators develops sophisticated sociological accounts of various aspects of international legal practice, although without using the vocabularies and conceptual frameworks associated with practice theory. See generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (William M. O’Barr & John M. Conley eds., 2002); Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANN. REV. L. & SOC. SCI. 433 (2012); Guillaume Sacriste & Antoine Vauchez, *The Force of International Law: Lawyers’ Diplomacy on the International Scene in the 1920s*, 32 LAW & SOC. INQUIRY 83 (2007).

56. Aalberts & Venzke, *supra* note 9, at 287.

through law as a body of rules[.] . . . These practices constitute both the professionals and international law as a particular field of (argumentative) practice.”⁵⁷ As an argumentative practice, they continue, international law “contains within itself the yardstick of what counts as a valid argument or, put differently, ‘competent performance’.”⁵⁸

While the works surveyed above draw upon practice theory to analyze international law and international legal obligation, they do not discuss the practices of international courts. Others, however, have taken this step. In particular, Jens Meierhenrich and his colleagues undertook a close examination of the specific practices engaged in and around the ICC.⁵⁹ In this project, Meierhenrich defines practices as “recurrent and meaningful work activities—social or material—that are performed in a regularized fashion and that have a bearing, whether large or small, on the operation of the ICC.”⁶⁰ The project contributors focus not only on the practices of ICC judges, but also on those of other ICC organs (including the Registry and the Office of the Prosecutor), interstate negotiators, lawyers representing the defendants before the court, and other members of the broader international criminal law community. Both individually and in the aggregate, these papers provide a fine-grained analysis that illuminates previously unexplored aspects of the ICC’s operations and substantially enrich our understanding of “the daily grind of investigating, prosecuting, defending, adjudicating, and administering those who stand accused of having perpetrated the most serious of international crimes.”⁶¹

We seek to build upon and extend these pioneering works in several respects. First, unlike most previous writings that apply practice theory to international law, we situate judicial practices at various international courts at the center of the analysis. As demonstrated in Part II, *infra*, international tribunals provide a particularly rich environment for those interested in the study of practices. Second, and relatedly, we depart from the scholars discussed above with respect to the “level of aggregation,” or level of abstraction, at which we identify specific practices. In particular, our examination

57. *Id.* at 290, 305. Similar claims regarding international law as an argumentative practice have been advanced by others. *See, e.g.*, Martti Koskenniemi, *Methodology of International Law*, in 7 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 124, 124 (Rüdiger Wolfrum ed., 2012).

58. Aalberts & Venzke, *supra* note 9, at 307 (quoting *Introduction and Framework*, *supra* note 34, at 3).

59. *ICC Symposium*, *supra* note 10.

60. Jens Meierhenrich, *Foreword: The Practices of the International Criminal Court*, 76 LAW & CONTEMP. PROBS. i, i (2013). Subsequent work has focused on other practices at international criminal tribunals, including opening statements by prosecutors, see Sofia Stolk, *‘The Record on Which History Will Judge Us Tomorrow’: Auto-History in the Opening Statements of International Criminal Tribunals*, 28 LEIDEN J. INT’L L. 993 (2015), and citation practices. *See* Nora Stappert, *A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals*, 31 LEIDEN J. INT’L L. 963 (2018).

61. Meierhenrich, *supra* note 60, at iii.

of judicial practices across international tribunals represents a *via media* between more abstract conceptualizations of the entirety of international law as a practice and a more particularized study of practices at one specific court. Let us briefly elaborate each of these points.

International Courts and Judges. Brunnée and Toope performed the important service of introducing practice theory to international legal scholarship, yet their work contains a notable gap. Specifically, international courts are virtually absent from their analysis. Thus, *Legitimacy and Legality* contains detailed case studies of climate change negotiations; disputes over the legality of U.S. interrogation techniques employed after 9/11; and debates over the use of force, with particular attention devoted to the second Gulf War. In each case, many actors and events receive attention, ranging from diplomatic conferences to street demonstrations to the TV show *24*. However, none of Brunnée and Toope's detailed case studies discuss the role of international tribunals. To be sure, international courts have not been at the center of debates over climate change and were not at the center of debates over the legality of the U.S. invasion of Iraq in 2003. Yet, by focusing on these specific case studies, Brunnée and Toope elide a wide range of other issue areas in which international courts and judges play central roles.

In one sense, the Aalberts and Venzke paper starts conceptually where Brunnée and Toope's work ends. It focuses not on the genesis or maintenance of legal norms, but rather on legal interpretation and argumentation. Given this shift in focus, and given that courts are a highly visible site for legal interpretation and argumentation, one might expect international tribunals to feature prominently in the analysis. However, the Aalberts and Venzke paper does not mention international courts and tribunals.⁶² Our focus on international judicial practices thus complements and extends Brunée and Toope's and Aalberts and Venzke's research into a previously unexplored domain.

Shifting the Level of Aggregation. Our work also diverges from previous writings in that our interest in international judicial practices reflects a different level of aggregation, or level of abstraction, at which we identify and analyze practices. As Adler and Pouliot note, "[c]onceptually, any given practice can be appraised through different levels of aggregation. For example, the practice of international summitry is an aggregate of several competent performances, including formal dining, press conference delivery, bilateral work meetings, etc."⁶³ Brunnée and Toope's practice of legality can similarly be understood as being composed of multiple, smaller practices undertaken by various, overlapping communities of practice.

If there is no single, correct level of aggregation for the study of practices then, as Adler and Pouliot suggest, the appropriate level of aggregation

62. Venzke has extensively addressed international courts in other writings. See, e.g., ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION (2014).

63. *International Practices*, *supra* note 14, at 9.

should be based on the specific research question at issue, informed by the experience and intersubjective understandings of those who engage in the practices under study. For Brunnée and Toope, a high level of aggregation, and the focus on a single “practice of legality,” are sensible given their efforts to construct a synoptic theory of international legal obligation. Their omission of courts and judges is likewise understandable given the limited role of courts in the issue areas that they analyze. Similarly, the effort to conceptualize the entirety of international law as a practice, as Aalberts and Venzke do, quite naturally leads them to a high level of aggregation.

If we shift from grand theory to mid-range theory, however, and direct attention to issue areas in which courts are more prominent, it makes more sense to disaggregate the practice of legality into a number of discrete practices undertaken by different actors, including especially international judges. This is particularly true with respect to issue areas—including trade law, human rights law, investment law, and international criminal law—in which international tribunals hear many cases and are increasingly critical actors.

Our approach to *comparative* international judicial practices also differs from the level of aggregation found in Meierhenrich’s ICC project. In one sense, our approach is narrower than Meierhenrich’s in that we focus on *judicial* practices, analyzing how judges organize and carry out their day-to-day work of receiving and ruling on the admissibility and merits of cases, considering arguments, conducting hearings, and deliberating and drafting opinions. By contrast, most of the contributions to the ICC project focus on the practices of actors *other* than judges, including the member states that negotiated the Rome Statute,⁶⁴ the Prosecutor and defense counsel,⁶⁵ documentary filmmakers whose work represents the ICC to the public,⁶⁶ and the broader international community.⁶⁷ The various practices highlighted in these papers are important in their own right. Nevertheless, they fall largely outside the scope of our inquiry, as we consider non-judicial practices only insofar as these inform our primary focus on judges and judicial practices.

In another sense, however, our approach is substantially broader than that of the ICC project, in that we seek to understand the practices not of a single court in a single area of substantive law, but of a variety of courts (ICJ, WTO, CJEU, ECtHR, etc.) that operate across a wide variety of issue areas. Moreover, the papers in the ICC project explicitly disavow any interest in generalizing beyond the ICC and do not compare that court to other international criminal tribunals or the broader universe of international

64. Noah Weisbord, *Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court*, 76 LAW & CONTEMP. PROBS. 85 (2013).

65. Whiting, *supra* note 17; Kahn & Shah, *supra* note 17.

66. Wouter G. Werner, “We Cannot Allow Ourselves to Imagine What it All Means”: *Documentary Practices and the International Criminal Court*, 76 LAW & CONTEMP. PROBS. 319 (2013).

67. Frédéric Mégret, *Practices of Stigmatization*, 76 LAW & CONTEMP. PROBS. 287 (2013).

courts.⁶⁸ Our approach, in contrast, is explicitly *comparative*, analyzing practices such as deliberation and opinion-drafting that are found at many or all international courts, yet take different forms across different courts.

Without further ado, we turn to this effort. In the next section, we offer what we believe is the first attempt to identify and analyze international judicial practices across different international courts.

II. INTERNATIONAL JUDICIAL PRACTICES

Having reviewed past applications of practice theory to international law, we now seek to extend this literature by developing a preliminary analysis of *international judicial practices*. For these purposes, we follow Adler and Pouliot in conceptualizing practices as “socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world.”⁶⁹ International judges undertake many activities that exhibit the five dimensions of practice that Adler and Pouliot highlight.

More specifically, international judges (1) engage in multiple *performances*, both private (when deliberating with other judges) and public (in their conduct of trials and arguments, composition of judicial decisions, off-the-bench writings, etc.). Moreover, these judicial practices are (2) highly *patterned*: they occur within the highly organized context of international law and litigation, while still leaving individual judges with “wiggle room for agency.”⁷⁰ In addition, judicial practices are (3) performed in a more or less *competent* manner, as evaluated by relevant audiences—be they litigants, member states, “the invisible college of international lawyers,”⁷¹ or a general public—against some set of intersubjective standards. Judicial decisions, and other actions, also rest on (4) *background knowledge* of treaties, customary international law, case law, rules of court, and informal norms of “appropriate” judicial behavior. Finally, judicial practices (5) implicate and impact both the discursive and material worlds, taking the form of legal discourse but drawing upon material resources and having material consequences for the litigants.

This section consists of two parts. First, we explain how judicial practices exist in the liminal space between structure and agency, but are reducible to neither. Next, we provide a typology of these practices, distinguishing between those that are not directly related to the litigation process and those

68. See, e.g., Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 LAW & CONTEMP. PROBS. 1, 78 (2013) (counseling “a deliberate eschewing of generalization about the practice of international law,” in favor of detailed, interpretive, site-specific research); see also *infra* Section IV.

69. *International Practices*, *supra* note 14, at 4.

70. *Introduction and Framework*, *supra* note 34, at 7.

71. Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

that are. In each category, we briefly set forth a number of examples and, by way of illustration, provide more detailed analyses of a few specific practices at multiple international courts. Although a comprehensive analysis of judicial practices is beyond the scope of this paper, we attempt in each case to highlight the diversity of practices across different international courts.

A. Judicial Practices: Between Structure and Agency

Practice theorists repeatedly emphasize that practices exist between structure and agency, but are reducible to neither. As Adler and Pouliot explain, “[p]ractices . . . are not merely descriptive ‘arrows’ that connect structure to agency and back, but rather the dynamic material and ideational processes that enable structures to be stable or to evolve, and agents to reproduce or transform structures.”⁷² Similarly, Meierhenrich argues that a practice approach presents an alternative to both the structuralist approaches that long dominated anthropology and sociology, as well as the agentic or methodologically individualist approaches that have dominated political science.⁷³ We likewise understand practices as occurring in the liminal space between structure and agency, and we view a practice approach to international judicial behavior as complementing both structuralist and agentic approaches.

A purely structural approach to international courts, for example, might focus on the structural constraints imposed on judges by court statutes or by rules of procedure, which define the jurisdiction and composition of the court, the processes of judicial appointment and reappointment, and rules governing the conduct of judicial activity. Court statutes and rules do indeed establish broad parameters for judicial behavior. These structural constraints, however, are in most cases *underdetermining*, leaving considerable latitude for judges to enact a variety of possible practices.

For example, the Statute of the ICJ and the CJEU Statute each provide that the procedure of these courts “shall consist of two parts: written and oral.”⁷⁴ ICJ judges have read this language to *require* holding an oral hearing at the merits phase in every dispute—even when the litigants agree that a hearing is not necessary.⁷⁵ CJEU judges, in contrast, read the identical language in their court’s Statute as authorizing them to decide in each case whether an oral hearing is necessary.⁷⁶ This example highlights the more general point that, within the more or less precise provisions of relevant

72. *Introduction and Framework*, *supra* note 34, at 4–5.

73. Meierhenrich, *supra* note 60, at i–ii.

74. Statute of the International Court of Justice art. 43, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]; Protocol No. 3: On the Statute of the Court of Justice of the European Union, art. 20, 2010 O.J. (C 83) 210, 215 [hereinafter CJEU Statute].

75. SHABTAI ROSENNE, 3 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 1920–2005, at 1290 (4th ed. 2006).

76. Allan Rosas, *Oral Hearings Before the European Court of Justice*, 21 *MAASTRICHT J.* 596, 598–99, 606 (2014).

statutes and rules of court, international judges face and make real *choices* about how to organize their professional activities. The resulting judicial practices cannot be reduced to or “read off” a given court’s statute or rules of procedure. Thus, at international courts, as elsewhere in international law, “it is not unusual to discover . . . that the authority formally provided in a written constitutional charter may be ignored, or totally redefined by unwritten practice.”⁷⁷ The practices we discuss below arise out of individual and collective choices by judges, constrained, but not determined, by legal and political structures.

Neither, however, can judicial practices be reduced to individual rational choices by utility-maximizing judges, as purely agentic approaches might suggest.⁷⁸ To be sure, agentic approaches, which begin by identifying the judges’ presumed preferences and individual characteristics and then look for correlations between judicial characteristics and behavior, are capable of opening the “black box” of any court. Erik Voeten, for example, has undertaken several exemplary studies of individual judges’ characteristics and voting patterns at the ECtHR.⁷⁹ This empirical research reveals that judges’ professional backgrounds are systematically correlated with their voting in human rights cases, with former government diplomats and bureaucrats less likely to find a violation, and former private practitioners more likely to find a violation of human rights by a defendant state.⁸⁰ This powerful approach demonstrates that extra-legal factors, such as individual judicial preferences and backgrounds, clearly shape judicial behavior at international courts.

Nevertheless, such purely agentic approaches have at least two important limitations. First, they fail to take adequate account of the strong influence exercised by informal norms and standards and the collective background knowledge embedded in judicial practices. Judges can, of course, violate these norms and practices, for example by frequently publishing long and impassioned dissents against the opinion of the majority, but doing so will likely trigger certain reputational costs among fellow judges and others in the relevant communities of practice.⁸¹

Second, the correlations revealed by purely agentic approaches may allow scholars to predict judicial votes and thereby which party is likely to prevail in an action. But the notion that an international court’s exclusive, or

77. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 260 (1967).

78. For one influential example of this approach, see Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

79. Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008) [hereinafter Voeten, *Impartiality*]; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT’L ORG. 669 (2007) [hereinafter Voeten, *Politics*].

80. Voeten, *Impartiality*, *supra* note 79, at 430.

81. See, e.g., Marko Milanovic, *Judging Judges: A Statistical Exercise*, EJIL: TALK (Mar. 12, 2012), <http://www.ejiltalk.org/judging-judges-a-statistical-exercise/>.

at least predominant, role is dispute resolution *simpliciter* elides other important functions that contemporary international courts play.⁸² For example, among other functions, international courts serve to control and legitimate the exercise of public authority and to stabilize normative expectations.⁸³ Moreover, and perhaps most importantly, international courts exercise a law-making function.⁸⁴ Through the processes of articulating and interpreting relevant norms and principles, applying abstract principles to concrete cases, and analogizing and distinguishing present from past cases, international courts contribute significantly to the development of international law across a wide variety of doctrinal areas.⁸⁵ Attention to judicial practices, such as the process of deliberation and modalities of drafting opinions, in contrast, holds the promise of illuminating more of the “real life” of the law, which is rooted in the scope, style, and reasoning of judicial opinions. For all of these reasons, we see scholarly attention to judicial practices as a necessary complement to existing structural and agentic studies of international courts.

B. A Typology of International Judicial Practices

We now turn to an identification and analysis of these practices.⁸⁶ This mapping exercise represents a preliminary effort to illustrate how many and what kind of judicial practices exist. We readily concede that our listing is hardly exhaustive and that other categories could be used; indeed, we encourage other scholars to develop alternative classification schemes. Moreover, given the range and number of international judicial practices, our descriptions are necessarily brief, although, by way of illustration, we provide a more detailed analysis of a few practices at several of the most prominent international tribunals.

The overview that follows distinguishes among several broad categories of judicial practices. At a relatively high level of generality, we begin by characterizing international judicial practices as falling within one of two broad categories: those that *are not* directly related to the litigation process

82. Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in Dunoff & Pollack, *INTERDISCIPLINARY PERSPECTIVES*, *supra* note 5, at 345 (analyzing multiple functions of international courts).

83. Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 *LEIDEN J. INT'L L.* 49, 54 (2013).

84. The classic articulation of this claim remains HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

85. *E.g.*, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* (Christian J. Tams & James Sloan eds., 2013).

86. The analysis that follows elaborates and expands a preliminary typology found in Jeffrey L. Dunoff & Mark A. Pollack, *A Typology of International Judicial Practices*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING?* 86 (Andreas Follesdal & Geir Ulfstein eds., 2018).

(such as those concerning interactions with coordinate treaty bodies or with judges at other tribunals) and those that *are* directly related to the litigation process (such as those concerning pleadings, deliberations, and opinion-writing). To orient the reader to the discussion that follows, Table 1 provides a simplified typology of international judicial practices common to most, if not all, international courts.

TABLE I. A TYPOLOGY OF SELECTED INTERNATIONAL JUDICIAL PRACTICES

Practices not directly related to litigation	Practices directly related to litigation
<ul style="list-style-type: none"> • Interactions with coordinate treaty bodies • Interactions with other court staff and officials • Interactions with judges of other international tribunals • Interactions with domestic officials • Law-related but non-judicial activities such as lecturing, teaching, and publishing • Internal organization and administration of tribunal • Training of new judges • Appointment and reappointment to bench 	<ul style="list-style-type: none"> • Background features of litigation, including official and unofficial languages • Case management, including role of judges in facilitating settlement • Receipt and response to written pleadings • Conduct of oral pleadings • Receipt and evaluation of evidence, including practices concerning experts • Format of judicial deliberations • Drafting of judgment

This table suggests several preliminary observations regarding international judicial practices. First, the table demonstrates the breadth and diversity of practices that international judges engage in, concerning litigation as well as other aspects of a court's activities. Second, practices concerning the litigation process exist throughout a litigation's life cycle, from the moment a case is filed to the release of a final judgment. Third, judicial practices are not freestanding or isolated activities. Rather, the nature and character of any particular practice is interdependent with a court's other judicial practices. Thus, a court's practices regarding oral proceedings will be, in part, a function of its practices regarding written proceedings. Finally, as detailed

below, there is considerable, and even dramatic, variation across courts in the specific content of their practices.

1. Practices Not Directly Related to the Litigation Process

Judicial practices most obviously occur in connection with the disposition of cases. But international judges often find themselves engaged in repeated and structured interactions with actors outside of the litigation context. By way of illustration, we provide an extended discussion of one of these practices, concerning relations with coordinate treaty bodies, and much briefer treatments of practices concerning relations between judges and other court officials, relations with judges of other international courts, relations with domestic officials, practices concerning extra-judicial activities, and the nomination, election, and reelection of international judges.

a. Practices Concerning Relations with Coordinate Treaty Bodies

Many international courts are embedded within larger treaty-based institutional structures.⁸⁷ Constitutive treaties typically provide little guidance regarding the relations between international courts and coordinate treaty bodies. Nonetheless, international judges interact with coordinate bodies in myriad ways that are unrelated to specific litigations. Consider, for example, the ICJ's practice of preparing and submitting annual reports to the UN General Assembly and the related practice of the ICJ President's annual speech to the General Assembly. These patterned activities have analogues in the practices of other international tribunals, many of which likewise prepare and submit annual reports.⁸⁸ Legal scholars understand these annual reports as a convenient compendium of a court's recent activity, as a formal opportunity for judges to justify budgetary requests before bodies that have budgetary authority, and/or as a useful mechanism for promoting oversight by the bodies that receive these reports.

What is gained by considering these reports through the lens of practice theory? To begin, we note that nothing in the ICJ's Statute or Rules requires

87. Thus, for example, the ICJ is the principal judicial organ of the United Nations, which also consists of the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, Secretariat, and any number of subsidiary bodies; the Uruguay Round Agreements create, in addition to the WTO's Appellate Body, a Secretariat, Ministerial Conference, General Council and a variety of standing committees and other subsidiary bodies; and the ECtHR is part of a larger institutional structure including the Council of Europe, Commissioner for Human Rights, Parliamentary Assembly, and Secretary-General.

88. Sometimes, an annual report is required by treaty. For example, ICC submits an annual report to the UN General Assembly pursuant to the relationship agreement between the United Nations and the International Criminal Court. *See* Rep. of the Int'l Crim. Ct., U.N. Doc. A/69/321 (Sept. 18, 2014). The ICTR and ICTY submit annual reports pursuant to provisions in the Statutes creating these courts. *See, e.g.*, Rep. of the Int'l Crim. Tribunal for Rwanda, U.N. Doc. A/69/206-S/2014/546 (Aug. 1, 2014); Rep. of the Int'l Tribunal for the Former Yugoslavia, U.N. Doc. A/69/225-S/2014/556 (Aug. 1, 2014).

submission of an annual report and that the judges did not always prepare annual reports. Indeed, the judges of the Permanent Court of International Justice (“PCIJ”), the ICJ’s predecessor, did not submit annual reports to the Assembly of the League of Nations, and ICJ judges did not prepare annual reports until 1968. This thumbnail history begs the questions of what motivated judges to institute this practice and what purpose it serves.

We believe that the roots of this practice can be found in the highly critical reaction to the ICJ’s 1966 judgment in the *South West Africa* cases, which held that Ethiopia and Liberia lacked standing to challenge South Africa’s alleged violations of the League of Nations’ Mandate for South West Africa.⁸⁹ The decision triggered a political firestorm, but “[p]erhaps the most significant consequence of this crisis was a new self-awareness and change of attitude on the part of the Court itself.”⁹⁰ In response to an acute “crisis of confidence” in the Court, the judges undertook several efforts to improve relations with the UN system.

In particular, in April 1967, the Court created a “Committee on Relations,” consisting of three judges responsible for the development of the Court’s relations with other UN organs and international bodies.⁹¹ Shortly thereafter, the Court launched various efforts designed to address the political fallout resulting from the *South West Africa* decision.⁹² In 1967, for the first time, members of the Court visited and addressed the International Law Commission. In 1968, the ICJ issued its first annual report and hosted, for the first time, a visit by the UN Secretary General. Also, since 1968, a delegation from the Court, headed by its President, has attended and presented an oral report to the General Assembly’s regular sessions.⁹³ In these oral reports, the President describes the Court’s decisions of the preceding year and often requests continued or increased budgetary support. In 2000, the ICJ President initiated a practice of providing a private briefing to the Secu-

89. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. Rep. 6 (July 18). This dispute involved a challenge by Ethiopia and Liberia to South Africa’s efforts to impose its apartheid system on South West Africa. In a 1966 judgment, the Court ruled by a vote of 8-7 that Ethiopia and Liberia lacked standing to pursue this action, notwithstanding that the Court previously rejected South Africa’s efforts to contest the Court’s jurisdiction. For a critical assessment, see Wolfgang G. Friedmann, *The Jurisprudential Implications of the South West Africa Case*, 6 COLUM. J. TRANSNAT’L. L. 1 (1967).

90. Georges Abi-Saab, *The International Court as a World Court*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 3, 6 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

91. *Work of the Court in 1967-1968*, 1967-1968 I.C.J. Y.B. 82, 92-93.

92. For reactions, see, e.g., D.P. Forsythe, *The International Court of Justice at Fifty*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 385, 393 (A.S. Muller et al. eds., 1997) (“*South West Africa* was the ICJ’s Dred Scott decision.”); Richard A. Falk, *The South West Africa Cases: An Appraisal*, 21 INT’L ORG. 1, 1 (1967) (“[The decision generated] widespread hostility to the ICJ and indirectly seem[s] to have damaged the cause of international law in general.”).

93. Salo Engel, *Annual Reports of the International Court of Justice to the General Assembly*, 44 BRIT. Y.B. INT’L L. 193 (1970).

rity Council, where he or she describes pending proceedings and the Court's role in the peaceful settlement of disputes.⁹⁴

The ICJ's annual report, the President's annual visit to the General Assembly, and the now-annual briefing of the Security Council are repetitive and patterned performances that occur within the highly organized setting of UN politics and procedures. Moreover, these practices can be performed more or less competently, referring *not* to whether the report accurately summarizes the Court's recent activities, but rather to the report's efficacy in communicating a message that enhances the Court's stature or legitimacy with the General Assembly, Security Council, and related audiences. These practices likewise weave together discursive and material worlds. The annual report's text and President's speeches are discursive practices which, if performed competently, can impact the political and material support the UN's political bodies provide to the Court.

Finally, these practices exist in the liminal space between agency and structure. The structure includes the rules surrounding the timing and organization of the General Assembly's annual sessions as well as informal rules regarding the diplomatic protocol associated with UN proceedings. Within these various structural constraints, ICJ judges exercise substantial agency, as they have wide discretion regarding whether and how to frame requests for material support or to signal how the UN's political bodies can best enhance the likelihood of compliance with ICJ decisions. Thus, these practices convey "social meanings," which have much more to do with efforts by judges to enhance their court's stature and reputation among relevant constituencies than it does with the ostensible informational purpose of describing the court's activities over the preceding year.

b. Practices Concerning Relations Between Judges and Other Court Officials, Particularly the Registry

Just as international organizations are typically comprised of several organs, international courts themselves are often comprised of various bodies as well. For example, every international court has a registry, which is responsible for providing general administrative support to the court.⁹⁵ In addition to processing cases and communicating with counsel, registries are variously responsible for translating judgments into a court's official languages; facilitating judges' access to information technology; conducting media and public relations; maintaining the court library; and other administrative matters. Significantly, at some courts, registry officials play im-

94. An unclassified summary of Judge Higgins' November 2007 briefing can be found at: *President of the International Court of Justice Briefs the Security Council on Recent Cases*, WIKILEAKS (Nov. 14, 2007), https://wikileaks.org/plusd/cables/07USUNNEWYORK1012_a.html.

95. At the AB, these services are provided by the Appellate Body Secretariat.

portant roles in the drafting of opinions.⁹⁶ Although registries are formally independent, they often function under the authority of the court, and registry officials engage in sustained and regularized interactions with the judges, both individually and collectively. These interactions can be analyzed under the rubric of practice theory.

c. Practices Concerning Relations with Judges of Other International Courts

Unlike domestic courts, international courts operate in a highly decentralized and nonhierarchical setting. Thus, as a matter of formal legal doctrine, different international tribunals rarely have formal, treaty-based relations with one another. Nevertheless, judges from different international courts often engage with each other in highly patterned ways. At a very basic level, international judges have developed and institutionalized practices of sharing opinions and other information.⁹⁷ More significantly, judges from different international courts also regularly engage in face-to-face interactions in various workshops, conferences, seminars, and a variety of other forums. For example, the ICJ hosts seminars on topics of mutual interest with judges from other international and regional courts.⁹⁸ The ECtHR hosts an annual “Seminar-Dialogue between Judges” involving judges from multiple courts,⁹⁹ and the judges from the Inter-American Court of Human Rights and ECtHR exchange visits to discuss issues of mutual concern.¹⁰⁰ Similar undertakings are also organized by international organizations¹⁰¹ and nongovernmental bodies.¹⁰² The participation of judges from different international courts in these various forums has given rise to a set of patterned

96. See, e.g., Hugh Thirlway, *The Drafting of ICJ Decisions: Some Personal Recollections and Observations*, 5 CHINESE J. INT'L L. 1, 15 (2006).

97. For example, in 2006, the ICJ's President initiated a system whereby the Court sent summaries and excerpts of relevant ICJ judgments to judges at the CJEU, ECHR, ICC, ICTR, ICTY, and WTO AB. Judges at these courts, in turn, reciprocated and sent summaries or excerpts of decisions to their brethren at the ICJ. See PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 220 (2013).

98. In 2014, for example, the ICJ held a seminar for judges of the East African Court of Justice. Rep. of the Int'l Court of Justice, ¶ 236, U.N. Doc. A/69/4 (Aug. 1, 2014).

99. The proceedings of these seminars are available at: Video Recording: Dialogue between Judges Seminar, held by the European Court of Human Rights, <https://www.echr.coe.int/Pages/home.aspx?c=&p=court/events> (last visited Nov. 28, 2018).

100. See, e.g., 2012 INTER-AM. CT. H.R., 90 (describing 2012 visit by ECHR judges to ICHR, corresponding to 2011 visit by ICHR judges to ECHR).

101. See, e.g., *International Courts and Tribunals - The Challenges Ahead*, COUNCIL EUR. (Oct. 6–7, 2008), <https://www.coe.int/en/web/cahdi/international-courts-and-tribunals-the-challenges-ahead> (involving judges from ICC, ICJ, ICTR, ICTY, ITLOS, ECtHR, CJEU, IACHR, African Court of Human and Peoples' Rights, WTO AB, EFTA Court).

102. See, e.g., Brandeis Inst. for Int'l Judges, *Judicial Dialogue in Action: International Judges Reflect*, Brandeis U., http://www.brandeis.edu/ethics/internationaljustice/bijj/BIIJ_articles.html (last visited Nov. 28, 2018).

interactions with strong performative dimensions that can be analyzed under the vernacular of practice theory.

d. Practices Concerning Relations with Domestic Officials

Many international judges engage in patterned interactions with their domestic counterparts. The most prominent and developed set of relationships is that between the CJEU and national courts of EU member states. A large literature details how the CJEU used the mechanism of the preliminary ruling to build a body of case law that created domestic constituencies for EU law and skillfully “recruited” domestic courts to help drive European integration.¹⁰³

Scholars pay substantially less attention, however, to other types of patterned interactions involving the CJEU and domestic legal actors, including domestic judges. For example, over the years, the CJEU has organized and run a number of seminars and other training sessions for domestic judges from member states.¹⁰⁴ These sessions provide an opportunity for CJEU judges to present their understanding of EU law, to explain the preliminary reference system, to develop professional networks, and, indirectly, to encourage the referral of additional cases. ITLOS similarly organizes capacity-building and training sessions for judges and government officials at the seat of the court and in the field.¹⁰⁵ These sessions not only educate domestic officials about the court’s role and functions, but also implicitly invite greater use of the court. Notably, the division of responsibility for training sessions between judges and registry officials varies across international courts, and this variation in the “outsourcing” of training functions can itself be viewed as a judicial practice.¹⁰⁶

e. Practices Concerning Extra-Judicial Activities

International judges undertake significant off-the-bench, law-related activities including teaching courses, delivering lectures, participating in academic seminars, and drafting scholarly papers. They undertake these varied activities subject to a shared body of background knowledge with which judges and their interlocutors are presumably familiar. In this community of practice, international judges are expected not to comment on pending dis-

103. See, e.g., Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993); Joseph H.H. Weiler, *A Quiet Revolution: The European Court and Its Interlocutors*, 26 COMP. POL. STUD. 510 (1994).

104. A number of other institutions also provide training in EU law to domestic judges, including the Academy of European Law and the European Judicial Training Network.

105. See, e.g., *Training*, ITLOS, <https://www.itlos.org/the-registry/training/> (last visited Nov. 28, 2018).

106. For a theoretically informed survey of the “socialization” activities of international courts, see Nicole De Silva, *International Courts’ Socialization Strategies for Actual and Perceived Performance*, in THE PERFORMANCE OF INTERNATIONAL COURTS 288 (Theresa Squatrito et al. eds., 2018).

putes. Likewise, in public settings, an international judge will only rarely criticize the judicial reasoning of another judge. Even then, they only do so discreetly and indirectly. In off-the-bench writings, it is expected that judges will, from time to time, criticize a particular holding or doctrinal development, but do so diplomatically and constructively and not in a way that could draw the court into disrepute. Thus, judges' off-the-bench activities are *constrained* by a substantial body of background knowledge, much of which is tacit and not recorded in Rules of Court.

Just as importantly, judges' off-the-bench activities serve to *create* background knowledge. For example, Antoine Vauchez perceptively argues that the regularized and frequent participation of CJEU judges in various "Festschriften, tributes, eulogies, [and] Courts' jubilees" constitute a form of "institutional rites" whereby the participating judges define and maintain the Court's symbolic community and revive and transmit the Court's "institutional identity" to the relevant community of practice.¹⁰⁷ Judges at other tribunals undertake many of the same activities. ICJ judges, for example, frequently participate in (and are the subject of) festschriften and other events that, at least implicitly, celebrate the Court as an institution¹⁰⁸ and both reflect and propagate the judges' self-understanding of the meaning of their professional undertakings. Similarly, a substantial number of current and former WTO Appellate Body ("AB") members have, in off-the-bench writings, described the AB's birth and analyzed efforts by early AB members to establish the authority and legitimacy of their fledging tribunal.¹⁰⁹

f. Practices of Nomination, Election, and Reelection

Of course, prior to engaging in judicial practices, an individual must first become a judge on an international tribunal. Although judicial nomination and election procedures vary across international courts, in almost every case, member states nominate potential judges. These judicial candidates then participate in an election conducted by an intergovernmental body. These elections are often accompanied by various forms of campaigning, and over time, "a collection of practices and activities . . . have developed" in this area.¹¹⁰ While officials from the candidate's home state undertake

107. Antoine Vauchez, *Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 EUR. POL. SCI. REV. 51 (2012).

108. See, e.g., FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA, (Ulrich Fastenrath et al. eds., 2011) (featuring contributions by several past, current, and future international judges).

109. For example, several current and former AB members contributed to A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM (Gabrielle Marceau ed., 2015).

110. The fullest account of these practices, focused on ICJ and ICC elections is found in RUTH MACKENZIE, ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS 110 (2010); see also Ruth Mackenzie, *The Selection of International Judges*, in OXFORD HANDBOOK, *supra* note 6, at 737.

much of the campaign work, judicial candidates themselves are increasingly involved in the campaign process. ICJ nominees are expected to visit the General Assembly, meet with various national groups and government officials, pay courtesy visits to embassies, attend Permanent Mission functions, and speak at regional and international forums.¹¹¹

Candidates for the WTO's AB likewise engage in extended campaigns. In particular, among AB candidates, "a practice has developed whereby [nominees] call on various diplomatic missions in Geneva with a view to securing support in the selection process."¹¹² Over time, as states have become more concerned about judicial activism, the nature of this practice has evolved. AB candidates have become subject to ever more intensive screening and detailed questioning by Geneva-based delegates, who seek to determine the candidate's orientation toward judicial decision-making.¹¹³

Judicial elections are often closely contested;¹¹⁴ candidates who perform the practices surrounding elections less competently risk losing the opportunity to become international judges. Nevertheless, the practices surrounding campaigning for seats on international tribunals remain a largely unexplored topic ripe for scholarly attention.

There are, of course, many more practices not directly related to the litigation process, but even this abbreviated discussion should be sufficient to indicate the wide range of practices that could productively be explored by students of international courts. For now, however, let us now turn to practices that are more directly related to the litigation process.

2. Practices Related to the Litigation Process

International judges engage in a diverse array of practices at different stages of the litigation process. For ease of exposition, we organize these practices in terms of the stage of the litigation process to which they are most relevant. Thus, we discuss judicial practices that contribute to the "institutional" or "background" features of the litigation environment, judicial practices concerning the written and oral pleadings, judicial practices concerning evidence and fact-finding, judicial practices concerning evidentiary burdens, and judicial practices concerning deliberation and opinion-writing. These categories are necessarily imprecise, as many practices are relevant to

111. MACKENZIE, *supra* note 110.

112. Valerie Hughes, *The Institutional Dimension*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 269, 281 (Daniel Bethlehem et al. eds., 2009).

113. Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 407–08 (2014).

114. See Dapo Akande, *General Assembly and Security Council Elect Four Judges to the ICJ but Fail to Agree on Fifth Judge. What Happens Next?*, EJIL: TALK!, (Nov. 17, 2011), <http://www.ejiltalk.org/general-assembly-and-security-council-elect-four-judges-to-the-icj-but-fail-to-elect-fifth-judge/>.

more than one stage of the litigation process. The discussion that follows is intended to be illustrative, rather than exhaustive.

a. Judicial Practices That Contribute to the “Institutional” or “Background” Features of the Litigation Environment

- *Orientation and Training of New Judges.* Newly appointed international judges bring a wide range of professional backgrounds and cultural understandings, and international courts face the challenge of melding a diverse group of individuals into a well-functioning bench. To do so, incoming judges at most courts undergo training or orientation designed to familiarize them with how the court functions. Significantly, neither the structure nor the content of these training efforts is mandated by treaty, but rather reflects decisions made over time by judges at each court and practices regarding training for new judges vary across courts. At some courts, more experienced judges are expected to take newer judges under their wings and “show them the ropes,” a process colloquially known at the CJEU as the “godfather system.”¹¹⁵ At others, training and orientation is largely the responsibility of registry officials rather than incumbent judges. Judicial socialization at international tribunals remains largely uncharted territory,¹¹⁶ and practice theory provides a useful theoretical framework for exploring this topic.
- *Linguistic Practices.* International tribunals are, by design, populated by individuals from different regions of the world. As these individuals often speak different languages, international tribunals have specified working or official languages. The selection of official languages helps determine which individuals are qualified to serve as judges, the effectiveness of different judges, which counsel will appear before a tribunal, and even the way that different legal concepts are understood and used.

Paradoxically, courts with global geographic reach are often the most restrictive when it comes to languages. Thus, at the ICJ and ITLOS, submissions are accepted, proceedings carried out, and judgments rendered only in the official languages of French and English. Judges at regional courts adopt a variety of approaches. At one end of the spectrum, the CJEU and ECtHR accept applications in any of the languages spoken in the member states. At the other end of spectrum, the European Free Trade Association (“EFTA”)

115. DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE* 66 (2007).

116. *But see* De Silva, *supra* note 106. The seminal work concerning training of judges on U.S. federal courts remains Beverly Blair Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L.Q. 253 (1971).

Court's only working language is English, and all documents are required to be submitted in English.

Moreover, courts often distinguish between the language(s) of the proceedings and those of the Court's internal workings. Thus, while the CJEU and ECtHR accept pleadings in many languages, CJEU judges deliberate in French, and ECtHR judges deliberate in French or English. At the WTO, the official languages are English, French, and Spanish, but as a matter of practice, panel and AB proceedings are conducted in English,¹¹⁷ whereas reports are typically drafted in English and then translated into French and Spanish. The ICC's official languages are Arabic, Chinese, English, French, Russian, and Spanish, although its working languages are English and French.¹¹⁸

Language practices impact a court's internal workings. A judge fluent only in a less frequently used official language is likely to be less influential than her peers given her limited ability to communicate with colleagues. A court's language practices also impact the judicial interactions with parties and witnesses. The International Criminal Tribunal for the former Yugoslavia's ("ICTY") working languages are French and English, yet many witnesses and defense counsel speak only Bosnian, Croatian, and/or Serbian. In such cases, judges cannot directly communicate with counsel or witnesses. Language practices likewise affect a court's communications with other audiences as well. ICTY judgments are issued in English and French; hence, the official versions of these texts cannot necessarily be read by many who live in the Balkans, the tribunal's primary regional audience. Finally, and perhaps most significantly, a court's language practices can substantially impact its jurisprudence. The use of different languages may, in turn, produce differences in style, emphasis, and terminology in judicial opinions.¹¹⁹ As Carlo Focarelli explains:

Language is key to the construction of reality, including the reality of international law. The fact that the lingua franca today is English implies that the English logic, worldview, and preferences are more likely to prevail and shape what 'reality' is taken to mean. The dominance of the English language forces the international law debate into a specific mode of thought which is far from being as uni-

117. Bradley J. Condon, *Lost in Translation: Plurilingual Interpretation of WTO Law*, 1 J. INT'L DISP. SETTLEMENT 191, 191–92 (2010) (first panel proceeding argued in Spanish took place in September 2006).

118. Rome Statute of the International Criminal Court art. 50, ¶¶ 1–2, July 17, 1998, 2187 U.N.T.S. 3.

119. See James Crawford & Alain Pellet, *Anglo Saxon and Continental Approaches to Pleading Before the ICJ*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 831 (Isabelle Buffard et al. eds., 2008).

versal as English itself apparently is, and reinforces the Western bias in its Anglo-American variant.¹²⁰

In short, the rise of English as the dominant language at many international tribunals is thought to result in an overrepresentation of native, or, at least fluent, English speakers as lawyers, judges, and international civil servants; an infusion and privileging of common law orientations and concepts over civil law analogues; and an increasing “Americanization” of international litigation practices and strategies.¹²¹

b. Judicial Practices Concerning the Written Pleadings

At virtually every international court, it is expected that written pleadings will develop a full account of the facts, the pleas and arguments of the parties, and the relief sought. Courts have developed written and unwritten norms governing the structure, format, and content of these written submissions. Courts differ, however, with respect to many issues that impact the written pleadings, including the number of submissions; the sequencing and order of submissions (seriatim or simultaneous); the lengths of and time limits for pleadings; the role of written pleadings in the fact-finding process; and whether written submissions are treated as public documents. In addition, courts vary widely on whether third parties or *amicus curiae* are permitted to submit written pleadings. Moreover, courts differ as to the relative importance of the written and oral pleadings; they also differ as to whether an oral hearing is required. Thus, in some instances, the written pleadings may be the only opportunity a litigant has to attempt to persuade the court of the merits of its case. Court statutes only rarely address these issues; in most instances these issues are governed by judge-made rules and practices, which vary across courts. Different judicial approaches to each of these issues will substantially impact the nature and content of parties’ submissions that, in turn, will frame the judges’ disposition of the action.

Finally, we note that judicial practices regarding oral proceedings, discussed below, are deeply intertwined with those regarding written pleadings. For example, at international criminal tribunals, parties introduce evidence at trial. In WTO proceedings, in contrast, parties introduce the bulk of the evidence through written pleadings, and oral proceedings serve as an opportunity to explore issues the panel deems most important. In this context, as elsewhere, practices relevant to one aspect of the litigation process

120. CARLO FOCARELLI, INTERNATIONAL LAW AS SOCIAL CONSTRUCT: THE STRUGGLE FOR GLOBAL JUSTICE 93 (2012) (italicization omitted).

121. TERRIS ET AL., *supra* note 115, at 78; Gleider I. Hernández, *On Multilingualism and the International Legal Process*, in 2 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 441, 452 (Hélène Ruiz Fabri et al. eds., 2008). For a more general analysis of the rise of English, see ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 260–68 (2017).

are not free-floating or isolated, but are a function of practices that are relevant to other aspects of the litigation process.

c. Judicial Practices Concerning the Oral Proceedings

The performative dimension of oral proceedings is, if anything, even more pronounced than that associated with written proceedings. In the words of one experienced counsel, “[t]he oral pleadings are the last act of a long play.”¹²² And the variation in judicial practices across international courts with respect to oral proceedings is likewise even larger than the variation regarding written pleadings—including whether or not oral hearings are even held. For current purposes, we focus only on variations in the length, structure, and format of the oral proceedings, although many other variations exist.

At the ICJ, the length of merits hearings varies considerably by case, but often occupies between two and six weeks.¹²³ Historically, ICJ oral proceedings often featured counsel reading prepared texts that replicated the content of the written submissions.¹²⁴ In recent years, however, the Court has made efforts to limit the time devoted to counsel’s oral presentations, and hearings today often allot considerable time to the examination of witnesses and other processes for receiving evidence.

Oral hearings at the WTO’s AB, in contrast, often last only one or two days. Apart from brief opening and closing statements from counsel, hearings consist primarily of questions from AB members and responses.¹²⁵ At other tribunals, oral proceedings are often considerably shorter. The CJEU recently reduced the normal speaking time of the initial oral submissions from twenty to fifteen minutes¹²⁶ and—in a substantial change from past practice—now devotes a substantial part of the hearing “to questions that the members of the Court wish to put to the participants after their initial oral submissions and eventually also to a discussion between the parties or interested persons with respect to the questions raised.”¹²⁷ At the ECtHR, finally, the procedure in most cases is entirely written, but the Court can de-

122. Alain Pellet, *The Role of the International Lawyer in International Litigation*, in *THE INTERNATIONAL LAWYER AS PRACTITIONER* 161 (Chanaka Wickremasinghe ed., 2000).

123. *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1007 (Andreas Zimmermann et al. eds., 2006).

124. ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 971 (2013).

125. Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 *CORNELL INT’L L.J.* 1, 4 (2009).

126. Rules of Procedure: Practice Directions to Parties Concerning Cases Brought Before the Court, 2014 O.J. 12, ¶52 (L 31); E.C.J., Notes for the Guidance of Counsel (Feb. 2009).

127. Rosas, *supra* note 76, at 609.

cide to hold oral hearings, which are in principle public.¹²⁸ In practice, there is a sharp disparity between the small number of Grand Chamber hearings, where half-day hearings are generally held and webcast, and the much larger number of cases before smaller chambers, where oral hearings are the very rare exception.

d. Judicial Practices Concerning the Production and Receipt of Evidence and Fact-Finding

The determination of facts is at the heart of the litigation process and of decisive importance in many cases. Fact-finding serves at least two important functions. First, “the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States.”¹²⁹ Second, the accurate determination of facts enables international courts to establish authoritative and truthful historical accounts of events and facts.¹³⁰ Notwithstanding the importance of evidentiary practices, international tribunals’ performance in this area has been subject to sustained criticism.¹³¹

Court statutes generally contain only vague provisions regarding evidentiary matters. Thus, the ICJ Statute simply provides that the Court shall “make all arrangements connected with the taking of evidence,” leaving judges with broad discretion to develop whatever modalities they consider necessary to collect evidence.¹³² The Court has admitted various types of evidence, including maps, photographs, recordings, videotapes, and satellite-generated imagery. It may call (but not compel) witnesses or experts to give evidence and may make site visits.¹³³ On occasion, the ICJ has held *in camera* proceedings.¹³⁴

Judges at different international courts adopt widely varying practices with respect to fact-finding. As might be expected of tribunals consisting of individuals from diverse legal traditions, these practices do not always correspond to familiar domestic law categories, such as “adversarial” or “in-

128. Christiane Bourloyannis-Vrailas, *The European Court of Human Rights, in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 323, 334 (Chiara Giorgetti ed., 2012).

129. Peter Tomka, President of the Int’l Court of Justice, Speech to the Sixth Committee of the General Assembly (Oct. 31, 2014), <https://www.icj-cij.org/files/press-releases/8/18398.pdf>.

130. *Id.*

131. See, e.g., ANNA RIDDELL & BRENDAN PLANT, *EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (2009); NANCY A. COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010).

132. ICJ Statute, *supra* note 74, art. 48.

133. Although not addressed in their statutes, the ITLOS and ECtHR judges have also determined that they possess authority to conduct site visits.

134. See HUGH THIRLWAY, *THE INTERNATIONAL COURT OF JUSTICE* 101–02 (2016).

quisitorial” styles of fact-finding. For example, the ICTY’s early trials used processes that were predominantly adversarial in nature, but over time the judges incorporated elements of civil law proceedings, producing a system that was neither wholly adversarial nor wholly inquisitorial.¹³⁵

WTO panelists often examine whether domestic administrative proceedings are consistent with procedural and substantive obligations in the relevant WTO agreements. In such disputes, panelists sit more as a court of review than as finders of fact. In other disputes, panelists do sit as triers of fact. Since there is no “trial” at which parties present their evidence, evidence is introduced through written submissions, and panelists have developed a practice of “participat[ing] actively in and shap[ing] the process of fact finding.”¹³⁶

e. Judicial Practices Regarding Experts

International litigations increasingly involve highly complex and technical issues.¹³⁷ In such cases, parties or the court may seek expert opinion. Virtually every court permits parties to present evidence through expert witnesses. In addition, many international tribunals, including the ICJ, CJEU, ITLOS, and WTO panels, have authority to appoint their own experts.¹³⁸ But courts vary in their use of this authority. The ICJ and CJEU, for example, rarely appoint experts.¹³⁹ The reason for this practice may be to avoid the associated expenses, which would fall on the court; a fear of delaying proceedings; or a desire to avoid the perception that part of the judicial function has been delegated to an outside party.

Other tribunals, in contrast, are more open to appointing experts. For example, over a dozen WTO panels have used scientific experts, and input was sought from other international organizations—presumably because of their expertise—in an additional nineteen disputes.¹⁴⁰ Panels developed a practice of appointing experts even when the parties have not so requested

135. See, e.g., Kai Ambos, *International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed?*, 3 INT’L CRIM. L. REV. 1 (2003).

136. MICHELLE T. GRANDO, EVIDENCE, PROOF, AND FACT-FINDING IN WTO DISPUTE SETTLEMENT 249 (2009).

137. See Jean D’Aspremont & Makane Moïse Mbengue, *Strategies of Engagement with Scientific Fact-Finding in International Adjudication*, 5 J. INT’L DISP. SETTLEMENT. 240, 246 (2014).

138. United Nations Convention on the Law of the Sea art. 289, Dec. 10, 1982, 1833 U.N.T.S. 397; Understanding on Rules and Procedures Governing the Settlement of Disputes art. 13, ¶ 1, Apr. 13, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; CJEU Statute, *supra* note 74, art. 25; ICJ Statute, *supra* note 74, art. 50.

139. See, e.g., Daniel Peat, *The Use of Court-Appointed Experts by the International Court of Justice*, 84 BRIT. Y.B. INT’L L. 271 (2014).

140. Gabrielle Z. Marceau & Jennifer K. Hawkins, *Experts in WTO Dispute Settlement*, 3 J. INT’L DISP. SETTLEMENT. 493, 494–95 (2012).

or agree that an outside expert is not needed,¹⁴¹ and it appears that panels often afford substantial weight to the opinions of panel-appointed experts.¹⁴² Courts' divergent practices with respect to experts have implications for the quality of the court's fact-finding and judgment, as well as for the parties' litigation strategies.

f. Judicial Practices Regarding the Burden of Proof and Standard of Proof

In any legal dispute, the allocation of the burden of proof and selection of the standard of proof can be outcome determinative. Again, international courts exhibit wide variation on these matters. At the ICJ, it is clear that the party alleging a fact bears the burden of proving it; the Court has been notably reluctant, however, to set out a general standard of proof. For example, in *Oil Platforms*, the Court simply noted that the evidence on a certain matter was "insufficient," without specifying what quantum of proof would be sufficient.¹⁴³ In other cases, the Court has indicated that the standard of proof will vary based on the subject matter and nature of each dispute.¹⁴⁴ The WTO's Dispute Settlement Understanding ("DSU") does not address the burden of proof. The AB has decided that the party who asserts a fact, whether complainant or respondent, has the burden of coming forward with evidence sufficient to make a prima facie case. Once this happens, the burden shifts to the opposing party, who will fail to discharge its burden unless it submits sufficient evidence to rebut the presumption.¹⁴⁵ The ECtHR's case law establishes a shift of the burden of proof to the State party in situations in which it is impossible for the Court—and nearly impossible for the applicant—to establish the facts, e.g., in cases concerning ill-treatment in prison or forced disappearances.¹⁴⁶ Finally, at the international criminal tribunals, the prosecution bears the burden of proof, and conviction requires proof beyond a reasonable doubt.¹⁴⁷

141. Caroline E. Foster, *New Clothes for the Emperor? Consultation of Experts by the International Court of Justice*, 5 J. INT'L DISP. SETTLEMENT. 139, 145 (2014).

142. See GRANDO, *supra* note 136, at 340 (with particular reference to SPS disputes).

143. *Oil Platforms (Iran v. US)*, Judgment, 2003 I.C.J. Rep. 90, ¶ 57 (Nov. 6).

144. Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgment, 2010 I.C.J. Rep. 639, ¶54 (Nov. 30).

145. See Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 14, WTO Doc. WT/DS33/AB/R (adopted May 23, 1997).

146. See, e.g., *Akkum v. Turkey*, 2005-II Eur. Ct. H.R. 247, 265, ¶ 211 (2005); *Toğcu v. Turkey*, App. No. 27601/95, Eur. Ct. H.R., ¶ 95 (2005), <http://hudoc.echr.coe.int/eng?i=001-69214>; *Bazorkina v. Russia*, App. No. 69481/01, Eur. Ct. H.R. ¶ 110 (2006), <http://hudoc.echr.coe.int/eng?i=001-76493>.

147. For the ICC, this burden is set out in the court's statute, while at the ICTY and ICTR, this standard was adopted by the judges.

These differences in judicial articulations of burden of proof and standard of proof by different courts surely reflect, in part, the different types of cases heard, with individual criminal liability cases involving particularly high burdens of proof. In addition, Judge Higgins suggested that the ICJ's reluctance to articulate a clear standard of proof "is caused by the gap between the explicit standard-setting approach of the common law and the '*in-time conviction du juge*' familiar under civil law."¹⁴⁸

To be sure, one can appreciate the importance of evidentiary burdens without the use of practice theory, and burden-shifting can be analyzed in straightforward doctrinal terms. Practice theory is a useful supplement to more conventional analyses of these issues insofar as it highlights that the allocation of evidentiary burdens frequently results from judicial practices that are often not mandated by statute or procedural law, but which reflect shared norms and background knowledge among the judges at each court.

g. Judicial Practices Regarding Deliberations and Opinion-Writing

International judicial deliberations and opinion-writing are characterized by a wide range of judicial practices across different courts, ranging from interpretative strategies to citation practices to the use or non-use of dissenting and separate opinions. For current purposes, we limit ourselves to a discussion of selected deliberation and opinion-writing practices at the ICJ, with occasional brief mention of practices at other courts.¹⁴⁹ We engage in a comparative analysis of opinion-writing practices in Part IV, with a detailed analysis of the use (and non-use) of separate and dissenting opinions at the CJEU and ECtHR.

Following the close of oral hearings, ICJ judges meet privately for a brief exchange of preliminary views. Thereafter, the President circulates a written list of the issues that he or she thinks should be addressed in the judgment. Each judge then prepares a written "note" outlining his or her tentative views regarding how the case should be resolved. These "notes" typically contain "considerable studies of the issues and the law involved in the entire case" and often amount to "several score of pages."¹⁵⁰ The notes are anonymized and distributed to the other judges.

148. Rosalyn Higgins, *The Judicial Determination of Relevant Facts*, Speech to the Sixth Committee of the General Assembly (Nov. 2, 2007), in ROSALYN HIGGINS, *THEMES AND THEORIES* 1369, 1374 (2009) (referring to a civil law standard based upon the "intimate" or "personal" conviction of the judge).

149. The discussion that follows is drawn largely from the Resolution Concerning the Internal Judicial Practice of the Court, I.C.J. Acts & Docs. No. 6, at 174; THE INTERNATIONAL COURT OF JUSTICE: HANDBOOK (6th ed. 2014); ROBERT KOLB, *THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE* 216 (2014). These practices are largely unchanged since the time of the Court's founding.

150. Sir Robert Jennings, *The Internal Judicial Practice of the International Court of Justice*, LIX BRIT. Y.B. INT'L L. 31, 39 (1988).

Preliminarily, we note three implications of the practice of preparing and circulating notes prior to deliberation (a practice not followed by other international courts). First, the practice of having each judge prepare a detailed analysis of each issue ensures that all of the judges “study the materials before them, that they are familiar with the views of their colleagues, and that [the subsequent] deliberations are a true judicial dialogue”¹⁵¹ Second, the notes provide an initial impression of where a preliminary majority of judges may lie on each issue before the court. They therefore help judges identify lines of argument to pursue in deliberations. Third, the process of having researched and drafted a detailed note helps judges crystallize and refine their individual positions regarding the issues raised by the case. In this sense, notes can also serve as the basis for an individual opinion if the judge is in a minority.

After reviewing one another’s notes, the judges meet to deliberate. At this meeting, each judge speaks, beginning with any judges ad hoc and proceeding in inverse order of seniority, from most junior to most senior. After each intervention, discussion follows regarding how the comments impact the rationale underlying the judgment. The *seriatim* interventions and ensuing discussions thus serve to hone the judgment’s arguments and content. The President speaks last and indicates his view of the arguments and rationales that enjoy majority support. At the conclusion of this process, which might span several meetings, the main lines of argument are identified.

At this point, a three-person drafting committee is formed,¹⁵² which prepares and circulates a draft judgment. Other judges can offer suggestions for consideration by the drafting committee, which then circulates a revised draft judgment.¹⁵³ The revised draft receives a “first reading,” which consists of a paragraph-by-paragraph review of the text. A member of the drafting committee will explain each paragraph, and a general conversation follows, with judges offering changes and amendments. The first reading provides the opportunity “for an examination in depth and detail of the draft, by the whole Court.”¹⁵⁴ After the first reading, which often spans several meetings, judges who wish to deliver separate or dissenting opinions are identified.

An amended draft is then distributed to the judges and given a second reading, where it is adopted with or without amendments. At the end of the second reading, a final vote is taken on the operative part of the judgment. On each point, each judge orally votes “yes” or “no,” in order of inverse

151. GLEIDER I. HERNÁNDEZ, *THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION* 106 (2014).

152. Two members are elected by secret ballot by an absolute majority of the judges present. The third member is the President, unless he or she is in the minority, in which case the Vice President will join the committee.

153. The drafting process is described in Resolution Concerning the Internal Judicial Practice of the Court, *supra* note 149, at 176–179, art. 6.

154. Jennings, *supra* note 150, at 42.

seniority, and the decision on each issue is taken by absolute majority of the judges present.

There are several notable features of this process. First, this highly labor- and time-intensive process is *not* required by the ICJ Statute. Rather, the multi-stage process reflects a set of practices developed and refined over the years by the judges themselves. While judges have periodically reviewed and tweaked this process (e.g., in 1931, 1936, 1946, 1968, 1976, 1998, and 2002), its essence remains unchanged since the time of the PCIJ.¹⁵⁵

The modalities of deliberation are the result of judicial practice, rather than treaty rule, at most other international courts as well. Thus, at the WTO, the AB members themselves developed a system for deliberation that uniquely involves not only the three AB members assigned to the case, but also the other four members of the AB. Once again, the WTO DSU did not require this innovation, but the founding members of the AB developed it, and it has persisted since then. Likewise, judges at the CJEU, ECtHR, ICC, and other international tribunals developed their own practices regarding judicial deliberation and opinion-drafting, and these vary dramatically across courts.

Second, the processes of deliberation and opinion-writing at the ICJ, as well as at other international courts, can be fruitfully understood as a “practice,” as the term is used by Adler and Pouliot. ICJ drafting procedures constitute a sustained and highly patterned set of activities that take place against the backdrop of shared background understandings. Numerous aspects of these procedures have substantial performative aspects, including the seriatim articulation of positions during deliberations, the advocacy for or against certain doctrinal claims, and the oral voting for or against each paragraph of the *dispositif*. The content and form of the judicial opinion likewise have performative aspects. The judicial opinion is the public face of the Court. The Court majority self-consciously crafts the judgment’s structure and content to convey judicial authority and persuade readers of its legal analysis.

In addition, although these activities are shaped by structure and are highly patterned, there is ample room for the exercise of agency regarding both process and substance. Regarding process, the judges maintain flexibility over and can modify procedures. For example, ICJ judges reserve the right to dispense with the note-drafting process in preliminary stages of proceedings.¹⁵⁶ And, on substance, each judge exercises discretion in considering which arguments to urge upon his or her judicial colleagues and how they can best be framed.

Judges can undertake these deliberative and opinion-writing practices more or less competently. Judicial opinions are evaluated and judged by the

155. HERNÁNDEZ, *supra* note 151, at 104.

156. Bardo Fassbender, *Article 54*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, *supra* note 123, at 1173 n.13.

conventions of the genre.¹⁵⁷ Any particular opinion will contain more or less elaborate reasoning, more or less artfully describe and distinguish previous cases, and do a better or worse job of applying the law to the facts before it. Opinions are subject to intensive scrutiny by other judges, the invisible college of international lawyers, and broader publics along these and related metrics.¹⁵⁸

Third, the ICJ decision-making practices evidence a “strong preference for the active participation of every judge both in the deliberations and in the formulation of judgments.”¹⁵⁹ The Court’s rather formal and structured deliberations reflect the principle that “the judgment or opinion of the Court is always the result of the work of *all* its members.”¹⁶⁰ Rather remarkably, ICJ deliberation and opinion-writing practices result in dissenting judges working with their colleagues to improve and clarify the Court’s judgment. This collaborative process runs in the other direction as well, as separate opinions are circulated after the first reading and are thereafter discussed in deliberations, often prompting changes in both the majority and separate opinions. As a result, “the whole Court is much involved in the separate, even in dissenting, opinions, just as the judges making separate opinions are all the time involved in the Court’s own decision.”¹⁶¹

By contrast with the ICJ, many other international courts, particularly those with higher caseloads such as the AB, CJEU, and ECtHR, proceed very differently, with “chambers” of various sizes (but consisting of fewer than all members of the court) deciding the vast majority of cases. Such courts vary considerably among themselves, however, on whether their deliberative processes make it more or less likely for the final judgment or opinion to reflect the thinking of all the judges. For example, WTO AB members developed a unique practice called the “exchange of views,” where the “division” of three AB members assigned to the dispute meet with the other four AB members, who examine the full record of the case, and all AB members discuss the issues raised by the case. While only the members of the division are responsible for drafting the AB report, the exchange of views provides each AB member an opportunity to express her

157. Robert A. Ferguson, *The Judicial Opinion as a Literary Genre*, 2 YALE J.L. & HUMAN. 201, 202 (1990).

158. Important judgments are often the subject of monographs, edited volumes, or symposia. See, e.g., THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION (Marko Milanović & Michael Wood eds., 2015); INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS (Laurence Boisson de Chazournes & Philippe Sands eds., 1999); Lori Fisler Damrosch & Bernard H. Oxman, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT’L L. 1 (2005).

159. HERNÁNDEZ, *supra* note 151, at 105.

160. Jennings, *supra* note 150, at 43.

161. *Id.* To be sure, the time-consuming and labor-intensive practices employed by the ICJ reflect, in part, the Court’s relatively light docket. The number of cases at the ECtHR and WTO AB would preclude using similar procedures.

views, and these exchanges “maximize[] the consistency and coherence of the jurisprudence.”¹⁶²

More commonly, however, deliberation practices are *not* designed to ensure that judicial opinions reflect the views of the entire bench. At both the CJEU and the ECtHR, the first drafts of opinions are prepared by a single *judge rapporteur*, and although there are deliberations among the members of the chamber, the final opinion often bears the strong influence of the *judge rapporteur*, and other members of the court, outside the chamber, are not included in the process of deliberation or drafting.¹⁶³

Fourth, and relatedly, the ICJ’s inclusive deliberative and opinion-writing practices, like all practices, convey a “social meaning.” In particular, they reflect a judicial understanding that, to be effective, the ICJ must be a “world court” in its decision-making processes as well as in its composition. From this perspective, judicial practices intended to ensure that the entire bench fully participates in all aspects of the deliberation and drafting of a judgment are not simply techniques intended to improve the quality of the Court’s judgment. Rather, these inclusive practices communicate that the Court’s judgments reflect a bench that is “universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety, and not dominated by the legal or social culture or special interests of any segment thereof.”¹⁶⁴ In short, these practices are intended to ensure that “the Court and its judgments command the confidence of all the nations of the world.”¹⁶⁵

* * *

This incomplete and partial overview provides a sense of the range and number of international judicial practices. For now, we draw attention to two features of these activities. First, these activities exhibit the characteristics of practices as identified by Adler and Pouliot. In particular, they have a marked performative dimension, most visibly in the oral proceedings, but also in the privacy of deliberations, in the making of extrajudicial pronouncements, and in the rhetorical style and argumentative techniques of the judicial opinion. These practices are strongly patterned, as they regularly and repeatedly occur within the litigation context and yet permit judges to exercise considerable agency. These practices can be, and are, performed more or less competently, as ascertained by the relevant communities of practice. Thus, over time, international judges develop reputations for their abilities to craft arguments, draft opinions, or manage a trial courtroom. The

162. Georges Abi-Saab, *Comment, in* INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? 13, 16 (Rüdiger Wolfrum & Ina Gätzschmann eds., 2013).

163. NINA-LOUISA AROLD, THE LEGAL CULTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS 75 (2007).

164. Abi-Saab, *supra* note 90, at 3.

165. *Id.*

practices rest upon, and instantiate, background knowledge of international law as well as tacit norms of appropriate judicial behavior. And, finally, these practices implicate both discursive and material realms. Judicial dialogue and opinions are discursive practices that have substantial material ramifications for litigants and potentially other actors as well.

Second, these practices vary across international tribunals in quite significant ways. Although international courts engage in similar tasks—namely, the interpretation of authoritative legal text to determine if one actor breached the legal rights of another—courts perform these tasks in substantially different ways. This variation underscores our commitment to a study of *comparative* international judicial practice.

Of course, many international judicial practices are unofficial and often unpublicized. Many of the most important practices occur in the private confines of the judges' chambers and are therefore inherently difficult to identify and analyze. Thus, any claim for the centrality of judicial practices to the functioning of international courts inescapably raises the question of *how* one studies international judicial practices, the subject to which we now turn.

III. EPISTEMOLOGY AND METHODOLOGY IN THE STUDY OF INTERNATIONAL LEGAL PRACTICES

Thus far, we have introduced practice theory and provided a synoptic overview of international judicial practices. These discussions raise important questions of epistemology and methodology. While the study of international legal texts (such as treaties or judicial decisions) presents considerable challenges, by and large the texts themselves are readily available. By contrast, “practice is perfectly happy to stay in the background, supporting our daily commerce in the world without the need to come under the spotlight.”¹⁶⁶ The empirical study of practice, therefore, raises a series of interrelated questions concerning how best to access, interpret, and understand social practices that comprise often hidden behaviors.

Practice theorists do not speak with one voice on these questions of epistemology and methodology. Some authors believe that the study of practices is consistent with a broad range of epistemological and methodological approaches. Adler and Pouliot, for example, claim that one of practice theory's virtues is its ability to accommodate multiple ontological, epistemological, and methodological views and approaches.¹⁶⁷ Other scholars associate practice theory with a particular set of epistemological and methodological “commitments.” For example, Bueger and Gadinger argue that practice theory necessarily entails a commitment to an interpretivist, rather

166. NICOLINI, *supra* note 26, at 217.

167. *Introduction and Framework*, *supra* note 34, at 14–15.

than a positivist, epistemology.¹⁶⁸ Meierhenrich similarly argues in favor of an interpretivist epistemology and an ethnographic methodology. In this view, “practice theorists are not interested in developing theories as conventionally understood in positivist social science, that is, as testable propositions that explain classes of events in the pursuit of generalization.”¹⁶⁹ Instead, the goal of the interpretivist epistemology associated with practice approaches is to uncover the *meanings* that practitioners attach to their actions. In Meierhenrich’s words, “[i]n order to truly grasp international law, in the Weberian sense of achieving an ‘empathetic understanding’ thereof, we have no choice but to enter, as deeply as we can, the webs of significance that practitioners spin.”¹⁷⁰

Moving from epistemology to methodology, Meierhenrich calls on researchers to leave their academic offices and undertake ethnographic fieldwork. Specifically, he urges scholars to engage in “shadowing[,]” following practitioners in their day-to-day activities, and views this as a useful technique for producing thick, contextual understandings of specific practices.¹⁷¹ A “focus on the micropolitics of international law,” Meierhenrich argues, “will, at a minimum, generate more fine-grained empirical observations than can be collected from hundreds or thousands of miles away and by way of what, not infrequently, are crude quantitative indicators.”¹⁷²

Meierhenrich’s approach is in many ways representative of practice theorists more generally, e.g., in its epistemological rejection of positivism and embrace of interpretivism and in its commitment to ethnography as the most appropriate methodology with which to study practices.¹⁷³ These methods, however, are of limited utility in contexts where access is partial and limited. These limits of ethnography and participant observation are particularly clear in the study of international courts, many of whose most important activities take place in non-public settings. By statute and tradition, international courts are bound to deliberate in secret, and much of the business of international courts is similarly conducted in private. Academic observers, therefore, are unlikely to be able to “shadow” judges through more than a fraction of their work lives. For this reason, we argue, students of international legal and judicial practices are called upon to be more catholic in their epistemological and methodological stances.

We agree with the claim that the study of practices involves some degree of interpretation in order to identify the intersubjective norms and background knowledge that inform judicial practices, and the meanings that practitioners, including judges, assign to their own and others’ behaviors.

168. Bueger & Gadinger, *supra* note 20, at 457.

169. Meierhenrich, *supra* note 68, at 3 n.9.

170. *Id.* at 28.

171. *Id.* at 77.

172. *Id.* at 71.

173. See, e.g., Bueger & Gadinger, *supra* note 20, at 457 (urging participant observation).

That said, however, we disagree with the further claim that the study of practices necessarily entails a rejection of social scientific positivism, with its aims of causal explanation and generalization. We argue that interpretive efforts to understand intersubjectively shared norms as well as subjective motivations of actors are consistent with the positivist project of explaining the causes and consequences of particular practices and generalizing those explanations through inference beyond the immediate objects of study. Put simply, we do not accept that there exists a stark “either-or” choice between interpretive understanding on the one hand, and positivist explanation on the other hand, although we recognize that, in practice, any particular study will face trade-offs between these two potential aims of scholarship. We believe, instead, that scholars can undertake closely observed studies of international courts that seek *both* to do justice to the distinctiveness of each case *and* to formulate and test generalizable, causal claims about practices across cases.

In methodological terms, because direct ethnographic or participant observation of many international legal practices may be impossible, international legal scholars would be wise to adopt a *multi-method approach*, in which practices are accessed and interpreted through a variety of methods and sources. These *may* include ethnographic direct observation, but are also likely to rely on other methods and sources, including ethnographic or semi-structured interviewing with practitioners and examination of a broad range of texts, including international legal agreements, *travaux préparatoires*, judicial opinions, and archival and biographical materials.¹⁷⁴

Particularly controversial in this regard is the use of interviews to attempt to recreate practices that cannot be directly accessed by researchers. Interpretivists note that, while practitioners might be able to recount, or represent, to an interviewer the material and social nature of practices after the fact, respondents’ accounts may suffer from poor or incomplete recall, or even dishonesty, and are thus inferior to the direct observation and “insider” perspective afforded by participant observation.¹⁷⁵ And for positivists—who seek to test hypotheses about causal relationships often on the basis of statistical analysis of large, random data samples—interviews raise fundamental questions about selection, validity, and reliability. Despite these reservations, a growing number of interpretivist scholars acknowledge that ethnographic and semi-structured interviews can provide a valuable window onto otherwise unobservable practices, as well as the meanings that actors

174. *Id.* (where participant observation is impossible, scholars should use interviews and textual or survey analysis to reconstruct practices or map social and professional fields); see also NICOLINI, *supra* note 26, at 213–40 (advocating an eclectic “tool kit” approach employing multiple methods and sources).

175. Layna Mosley, “Just Talk to People”? *Interviews in Contemporary Political Science*, in INTERVIEW RESEARCH IN POLITICAL SCIENCE 1, 11 (Layna Mosley ed., 2013) (“[I]nterview data has its limitations: it does not allow for immersion, nor for the ‘insider’ perspective that is a hallmark of ethnographic approaches.”).

attribute to those practices.¹⁷⁶ A growing body of political science scholarship has accordingly begun to explore and establish best practices for the use of interview research, alongside other sources, to understand the causes and consequences of such practices.¹⁷⁷

In the next section, we employ a multi-method approach to identify the material and ideational elements of international judicial practices surrounding judicial dissent, as well as international judges' intersubjective understandings of these practices.

IV. THE PRACTICE OF DISSENT: THE LUXEMBOURG AND STRASBOURG COURTS COMPARED

In Part II of this paper, we provided a typology of international judicial practices and noted that courts differ dramatically in terms of one such practice: the publication of separate dissenting or concurring opinions alongside a court's collective judgment. At some courts, including the CJEU, judges deliberate and vote in strict secrecy, issue collective decisions on behalf of the court, and never issue separate dissenting or concurring opinions. At other courts, including the ICJ, virtually all judgments are accompanied by multiple dissenting and concurring opinions. Still other courts, including the ECtHR and the WTO's AB, occupy intermediate points on this continuum.

In this section, we use this variation across different international courts as a vehicle to illustrate the utility of studying judicial practices. Specifically, we analyze dissent practices of two of the busiest and most influential international courts: the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg. These two European courts are often mentioned in the same breath as "supranational" courts that feature direct or indirect access by individuals, activist jurisprudence, and high compliance rates.¹⁷⁸ Yet for all their similarities, the two European courts adopted strikingly different practices with respect to dissent, which is commonplace at the ECtHR but entirely absent from the CJEU.

From a purely behavioral perspective, the contrast between the Luxembourg and Strasbourg courts is clear and measurable. A study of judicial *practices* requires us to dig deeper, however, to understand the day-to-day workings of both courts, the intersubjectively shared norms that undergird and help to reproduce each court's practices, and the subjective perceptions and motivations of the judges. In light of the epistemological and methodo-

176. See Robert S. Weiss, *In Their Own Words: Making the Most of Qualitative Interviews*, 3 CONTEXTS 44, 45 (Fall 2004); see also ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES* (1994); JAMES P. SPRADLEY, *THE ETHNOGRAPHIC INTERVIEW* (1979).

177. See, e.g., Dunoff & Pollack, *INTERDISCIPLINARY PERSPECTIVES*, *supra* note 5, at 57–70; *INTERVIEW RESEARCH IN POLITICAL SCIENCE*, *supra* note 175 *passim*.

178. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

logical issues discussed in the previous section, we have undertaken a multi-method study of these practices, including review of primary legal materials such as Statutes and Rules of Court, judgments from both courts, off-the-bench writings of judges, and a series of semi-structured interviews with current and former judges.¹⁷⁹

To preview our findings, at the ECtHR, we find a material practice of relatively frequent dissent, undergirded by intersubjectively shared norms that are highly permissive and even encouraging of dissent, subject only to very broad norms about appropriate length and tone of separate opinions. We also find a widespread belief among Strasbourg judges that the practice of dissent increases the legitimacy of the court and the quality of its case law, without endangering judicial collegiality or independence. At the CJEU, by contrast, we find a long-standing material practice of suppressing dissent, coupled to a strong norm of consensus decision-making, whereby judges pride themselves on deliberating and reasoning collectively rather than breaking apart to compose separate opinions. Luxembourg judges, moreover, nearly unanimously believe that their *de facto* ban on public dissent increases judicial collegiality, legitimacy, and, above all, independence, although some concede that the search for consensus can sometimes compromise the clarity of the Court's legal reasoning.

A. *The European Court of Human Rights*

The European Court of Human Rights was established by the European Convention of Human Rights ("ECHR") in 1950, began operations in 1959, and has grown today to a 47-member body whose annual caseload is greater than that of any other international court.¹⁸⁰ The Court enjoys compulsory jurisdiction over claims that member states have violated the ECHR and a right of individual petition from private litigants. Like the CJEU examined below, the Strasbourg court is considered a powerful and frequently activist body whose judges interpret the Convention as a "living instrument" and expanded the meaning of the Convention's core rights beyond those intend-

179. Specifically, we interviewed eight current and former CJEU judges, and eight current and former ECtHR judges, over a period from December 2014 to July 2016. All judges interviewed in this study were promised anonymity in our interviews with them. We therefore denote these judges as Judges S1 through S8 for our Strasbourg/ECtHR interview subjects, and L1 through L8 for our Luxembourg/CJEU subjects. At both courts, we interviewed a mix of judges from civil- and common-law countries and from western and eastern Europe, and a mix of female and male judges; hence, while not strictly representative, our samples include a range of variation across several important dimensions. To preserve the anonymity of the judges, we refer to all of our interview subjects using the male pronoun he, reflecting the large majority of male judges on both courts.

180. For a good general introduction, see generally ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* (2010).

ed by the founders.¹⁸¹ Unlike the CJEU, however, ECtHR judges have, from the earliest days of the Court, engaged in the frequent practice of adopting separate, public dissenting and concurring opinions. Between 1959 and April 2001, the Court issued just over 2,000 judgments, of which 602, or roughly 30 percent, were accompanied by one or more dissenting or concurring opinions.¹⁸²

In this section, we explore both the material manifestations of this judicial practice, as well as the intersubjective norms and subjective motivations of the Strasbourg judges. This discussion draws upon primary source materials (e.g., the 1950 Convention, the *travaux préparatoires*, subsequent Protocols amending the Convention, and Rules of Court), off-the-bench writings of judges, secondary literature on the Court, and our own semi-structured interviews with current and former ECtHR judges. As we shall see, these sources reveal a highly permissive attitude toward dissent, subject to informal norms about the length and respectful tenor of such opinions.

1. Statute, Procedural Law, and Practice

Both the Convention and the Court were products of post-war Europe: the first formal proposal for a European human rights convention came from the European Movement, whose members issued a draft Convention and a draft statute for a European court of human rights in December 1948.¹⁸³ This proposal was then taken up by the Parliamentary Assembly of the newly founded Council of Europe, which pressed the member states to negotiate and ultimately adopt a watered-down version of the European Movement's proposal in November 1950.¹⁸⁴ The negotiation of the Convention proved to be highly contentious, with controversy centering upon the specific list of rights to be protected as well as on the design of the Court.¹⁸⁵

181. Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOC. INQUIRY 137 (2007).

182. AROLD, *supra* note 163, at 91 n.249. Interestingly, these patterns did not significantly change in the aftermath of Protocol 11. Erik Voeten, examining a comprehensive dataset of all cases decided between 1960 and 2006, reports dissent rates according to the Court's three-level scale of legal significance, with judgments of level 1 making a significant contribution to ECtHR case law, while level 3 judgments are straightforward applications of existing case law. He found that 6% of level 3 judgments, 26% of level 2 judgments, and 53% of level 1 judgments were accompanied by at least one separate opinion. Voeten, *Impartiality*, *supra* note 79, at 425.

183. European Movement, *Draft Convention on Human Rights and draft Statute of the European Court of Human Rights prepared by the International Juridical Section of the European Movement and submitted to the Committee of Ministers of the Council of Europe on 12 July 1949*, reproduced in 1 COLLECTED EDITION OF THE 'TRAVAUX PRÉPARATOIRES' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 296 (1975) [hereinafter TRAVAUX].

184. BATES, *supra* note 180, at 58–62.

185. TRAVAUX, *supra* note 183, at xxiv.

For current purposes, the most interesting questions in the negotiation of the Convention concern the design of the proposed Court. The European Movement proposal called for a strong court with compulsory jurisdiction over member states and a right for individuals who exhausted domestic remedies to file claims against the member governments.¹⁸⁶ These features would prove controversial in the subsequent negotiations, with a number of member states opposing the creation of any court at all.¹⁸⁷ In the end, both compulsory jurisdiction and individual petition were made optional through opt-in clauses in the treaty.¹⁸⁸ Outside of these two controversial areas, the Court's Statute was "modelled, with the minimum of adaptation, on [that of] the International Court of Justice."¹⁸⁹ In particular, the provision for judicial dissent was drawn verbatim from the ICJ Statute and provides that "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."¹⁹⁰ Judging from the *travaux* of the Convention, it appears that this provision was not controversial, and it has remained essentially unchanged over the years.

As is often the case, however, the text of court statutes and procedural law cannot alone explain judicial practices. The ECHR *authorizes* judges to issue separate opinions, but does not *require* them to do so or indicate how, or how frequently, they will do so. The statutes of many other courts feature similar language, yet judges of many of those courts have adopted the practice of offering separate opinions only rarely. Constitutional court judges in most European states, for example, are statutorily authorized to issue dissents, yet many of these courts operate under informal norms that reserve dissent only to cases of profound disagreement with the majority, and in practice, these judges issue separate opinions in fewer than 10 percent of all judgments.¹⁹¹ At the international level, the WTO's DSU explicitly authorizes AB members to dissent anonymously from majority decisions, yet the first AB members adopted rules of procedure explicitly discouraging public dissent, and dissents are quite rare.¹⁹²

186. See, e.g., BATES, *supra* note 180, at 56–58.

187. TRAVAUX, *supra* note 183, at 242–44.

188. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. In time, the various member states of the Council gradually accepted both compulsory jurisdiction and the right of individual petition, which were made mandatory in Protocol 11, which entered into force in 1998; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, arts. 32, 34, May 11, 1994, E.T.S. 155.

189. TRAVAUX, *supra* note 183, at 121 (quoting Sir David Maxwell-Fyfe).

190. ECHR, *supra* note 188, art. 51, ¶ 2.

191. ROSA RAFFAELLI, DIRECTORATE-GEN. FOR INTERNAL POLICIES, PE 462.470, DISSENTING OPINIONS IN THE SUPREME COURTS OF THE MEMBER STATES (2012); Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345 (2013).

192. Alberto Alvarez-Jimenez, *The WTO Appellate Body's Decision-Making Process: A Perfect Model for International Adjudication?*, 12 J. INT'L ECON. L. 289 (2009).

Despite these possibilities, the first ECtHR judges did not opt for such an approach, but instead adopted Rules of Court that hewed closely to the text of the Convention and to the practice of the ICJ, providing in Rule 50(2) that “[a]ny judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring or dissenting with that judgment, or a bare statement of dissent.”¹⁹³ Here again, the Rules are permissive, allowing but not requiring separate opinions. Hence, to understand dissent practices at the ECtHR, we need to look beyond the Convention and Rules of Court to the informal “second-order” norms that govern the Court’s operations, as well as the considerations that prompt “first-order” decisions of judges to issue separate opinions in any given case.¹⁹⁴

2. Norms of Dissent

In terms of second-order norms, all of the judges we interviewed indicated that there does not exist at the Court a strong norm against dissent, as at the German Constitutional Court and the WTO’s AB. To the contrary, the most commonly expressed view is that judges who vote against the majority should explain publicly the reasons for their votes, and also that judges who disagree with the reasoning in a majority opinion should feel free to issue a concurring opinion.¹⁹⁵ As one judge recounted:

I was told when I arrived here that I’m obliged at least to have a short declaration that I did not vote with the majority, so that for the outside world it is clear that if it is 6 to 1, who is the one. So you are under an obligation to declare that, and you are under a moral obligation to give reasons in the dissent.¹⁹⁶

Other judges interpreted the norm more liberally, suggesting that judges were entitled, but not legally or morally obliged, to issue a separate opinion where they disagreed with the majority.¹⁹⁷ In any event, all of the judges we interviewed indicated that they issued separate opinions whenever they disagreed with the majority, that there is no stigma attached to issuing separate

193. Council of Europe, Rules of Court of the European Court of Human Rights (1959).

194. In adopting this terminology, we follow Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

195. Interviews with Judges S1, S2, S3, S4, and S5. Our findings thus agree with those of Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 39 (“Although the ability to annex a separate opinion is expressed in the Convention as permissive, the tradition of the Strasbourg Court is very much that those dissenting will file an opinion setting out the reasons for their dissent. Equally, many judges clearly take the view that differences in reasoning which lead to the same conclusion as that of the Court in its judgment should also be articulated.”).

196. Interview with Judge S2.

197. Interview with Judge S3.

opinions, and that judges feel free to write separately on large or small matters of law or fact.¹⁹⁸

Supplementing this highly permissive norm about writing separately were secondary norms that separate opinions should be brief and should be respectful of both the Court and the majority.¹⁹⁹ We were also told that judges who engage in particularly frequent and lengthy separate opinions are likely to come in for opprobrium from their fellow judges.²⁰⁰

3. Deciding to Dissent

Previous studies identify several, mostly weak, patterns in ECtHR judges' dissent practices.²⁰¹ First, despite the expectation that common law judges would dissent more readily than their civil law brethren, existing studies provide no evidence for such an effect.²⁰² Second, there seems to be some influence of prior career trajectory, with judges from academic backgrounds being more inclined to issue separate dissenting or concurring opinions than judges from practitioner backgrounds.²⁰³ Third, national judges are more likely, and ad hoc judges dramatically more likely, than other judges to dissent against a majority decision that finds a violation in their member state of origin.²⁰⁴ Fourth, separate opinions are considerably more common in Grand Chamber judgments than in regular chamber judgments, which could be a function of either the larger number of judges (17 judges in Grand

198. "I'm not afraid of writing a short separate opinion saying that the majority opinion is not according to the law the way I see it. The issue doesn't necessarily have to be of big importance. Such short opinions are usually of the concurring type." Interview with Judge S1.

199. "Now the idea is that the separate opinions should have a reasonable length – whatever this means, that's up to the judge. It should be written in a respectful tone to the majority." Interview with Judge S2.

200. Interviews with Judges S2, S3 and S4.

201. Previous studies of separate opinions at the ECtHR include: Fred J. Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, 2008 ANCIILLA IURIS 32 [hereinafter Bruinsma, *Room at the Top*]; Fred J. Bruinsma & Matthijs de Blois, *Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights*, 15 NETH. Q. HUM. RIGHTS 175 (1997); FLORENCE RIVIÈRE, *LES OPINIONS SÉPARÉES DES JUGES À LA COUR EUROPÉENNE DES DROITS DE L'HOMME* (2004); MARTENS *DISSENTING: THE SEPARATE OPINIONS OF A EUROPEAN HUMAN RIGHTS JUDGE* (W.E. Haak et al. eds., 2000); White & Boussiakou, *supra* note 195; and Voeten, *Impartiality*, *supra* note 79.

202. Voeten, *Impartiality*, *supra* note 79, at 426–29 (finding no difference between civil and common law judges in their tendency to dissent in favor of defendant states). Bruinsma, however, finds that, in a sample of Grand Chamber cases from 1998 to 2006, judges from the former Soviet-bloc states of central and eastern Europe dissent less frequently than judges appointed in respect of the "old" member states. Bruinsma, *Room at the Top*, *supra* note 201, at 32.

203. White & Boussiakou, *supra* note 195, at 46.

204. Voeten, *Impartiality*, *supra* note 79, at 425; Bruinsma, *Room at the Top*, *supra* note 201, at 35–36.

Chambers versus seven in chambers), the inherently greater controversy associated with cases that go to Grand Chamber, or both.²⁰⁵

Our interviews with present and former judges provide an important supplement to this scholarship, reinforcing the literature's findings in some areas and adding fundamentally new insights in others. Among our interviewees, we find a remarkably consistent and vivid sense of the considerations that judges take into account when deciding whether to write separately, including the role of legal tradition, the impact of workload, and the intended audiences for such decisions.

Legal Tradition. One common supposition is that judges from common law backgrounds would dissent much more readily and frequently than judges from civil law backgrounds.²⁰⁶ The judges we interviewed, however, were skeptical that legal tradition significantly shaped the dissent practices of ECtHR judges. One judge observed that some of the great dissenters in the Court's history came from civil law traditions and noted that many civil law judges, presented with the possibility to dissent, took to the practice "like ducks to water."²⁰⁷ Another judge explained the apparently weak influence of national legal traditions by pointing out that individuals who join the Court are typically experts in European human rights law, familiar with the Court's jurisprudence, and hence intimately acquainted with the Court's long tradition of frequent separate opinions. Given this background, even judges whose previous experience did not include writing separately tend to come to the Court acquainted with its practices and ready to participate in them.²⁰⁸

Workload and Time Pressure. The empirical literature on dissent in U.S. federal courts finds an inverse correlation between judges' workload and the production of separate opinions: *ceteris paribus*, judges with heavier caseloads face greater costs in producing separate opinions and, therefore, produce fewer of them.²⁰⁹ The Strasbourg judges likewise expressed the view that high caseloads, intense time pressures, and lack of staff support all dramatically increase the costs of writing separate opinions. The ECtHR has a famously high caseload, including over 63,000 applications considered in

205. Bruinsma, *Room at the Top*, *supra* note 201, at 33 (finding that 1969 to 1997, 78% of all Grand Chamber judgments have separate opinions, compared to 42% of Chamber judgments); *see also* White & Boussiakou, *supra* note 195, at 50–51 (finding that 72% of all Grand Chamber cases between 1999 and 2007 were accompanied by at least one separate opinion).

206. *See, e.g.*, Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990).

207. "It's true, a lot of them had no tradition of dissent in their own judicial system, but some of them took to it like ducks to water when they got here. Look at the French judges . . . endless separate opinions, long, wordy. . . . They came from systems where there weren't such separate opinions, but once here, they embraced the opportunity." Interview with Judge S4.

208. Interview with Judge S3.

209. Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011).

2017. While the vast majority of such petitions are deemed inadmissible, the Court delivered a total of 1,068 judgments during the year, including 526 by chambers, 523 by committees of three judges, and 19 judgments by the Grand Chamber.²¹⁰ Compared to

other international courts, therefore, Strasbourg judges have an extraordinarily high workload, and the writing of individual separate opinions in such a large number of cases competes with the judges' other responsibilities.

Furthermore, time limits for the writing of separate opinions are short and strictly enforced: judges have only 14 days to prepare separate opinions from chamber judgments, and three weeks for Grand Chamber judgments. Unlike CJEU judges, Strasbourg judges do not employ their own clerks or *référéndaires*, meaning that judges typically draft their own dissents, with minimal support from the Registry. By all accounts, therefore, writing separate opinions is a high-cost activity for the judges, often undertaken during weekends and evenings.²¹¹

Yet, despite the disincentives imposed by high caseloads and tight deadlines, separate opinions are common at the ECtHR. As noted above, notwithstanding time and resource constraints, the Strasbourg judges have internalized a norm that motivates them to explain their reasoning when they disagree with the majority. These judges have developed strategies for addressing workload and time pressures, such as frequent co-authoring of separate opinions, as well as the issuance of relatively brief and pointed opinions, often only a few pages long, by contrast with the more elaborate separate opinions of ICJ judges.

Audiences. Strasbourg judges are very aware of the multiple audiences for separate opinions, which vary systematically depending on the judicial formation—namely, a seven-judge chamber versus the larger 17-judge Grand Chamber. Several judges noted that the primary audiences for a dissent from a Chamber judgment include the litigants and the panel of ECtHR judges who will later decide whether to accept an appeal from the Chamber judgment. More specifically, a dissenting judge may wish to signal to the losing party that an alternative outcome is possible and that they should appeal to the Grand Chamber. A carefully argued dissent, these judges continued, also serves as a signal to the panel of judges that decide whether to accept appeals against chamber judgments. These judges suggested that, just as the U.S. Supreme Court is more likely to accept certiorari petitions on issues that divide the Courts of Appeals,²¹² so too the panel of Strasbourg

210. Council of Europe, Annual Report 2017 of the European Court of Human Rights, at 155, 163, <https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c> (last visited Nov. 28, 2018).

211. Interviews with Judges S1, S2, and S3.

212. See, e.g., VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT 76–77 (2006).

judges is more likely to accept appeals where the minority demonstrates that a serious division exists on an important point of law.²¹³

By contrast, several judges pointed out, the intended audience is likely to be different in Grand Chamber cases, from which there is no opportunity for appeal. In these cases, judges in the minority are likely to write for different audiences, including future generations of judges, the broader legal community, and, at times, the general public.²¹⁴ The judges also made a clear distinction between the intended audiences for dissenting and concurring opinions: while dissents are likely to draw attention, encourage appeals, and spark public debate, concurrences typically represent more nuanced differences over legal reasoning and are therefore more likely to be addressed to members of the attentive legal community (i.e., the relevant community of practice).²¹⁵

4. The Implications of ECtHR Dissent Practices

The practice of judicial dissent is highly controversial. Many argue that dissenting opinions have several negative impacts, including on judicial legitimacy (undermined by open divisions among the judges), collegiality (weakened by the failure to reason together and by open public disagreements), and independence (by allowing governments to identify the positions of individual judges and potentially retaliate against them).²¹⁶ Other scholars and judges argue, in contrast, that separate opinions improve the quality of jurisprudence by bringing otherwise hidden arguments into the open and forcing the majority to address explicitly the concerns and arguments of the minority.²¹⁷ Our aim is not to adjudicate these competing claims, but rather to discover how judges understand the relationship between their practice of dissent and these other values. Our research reveals

213. Interviews with Judges S1, S2 and S3. Judge S1: "Of course, the traditional benefit is that the separate opinion might be the start of a development in the other direction. And that is definitely true in the case of chamber judgments that might still end up in the Grand Chamber. That is a very useful purpose of a separate opinion: you try to show to the losing party that there is still a chance to win. It is very common that the losing party relies on the separate opinion to ask for a rehearing before the Grand Chamber. The filtering panel of the Grand Chamber may then look at the separate opinion and find it interesting to have a confrontation of the two opinions before the Grand Chamber."

214. Interviews with Judges S2, S3 and S7. Judge S2: "Now the situation is completely different in the Grand Chamber. There the game is over. And there you write to the party that will lose the case, but also to the outside world. And ultimately to this Court, but a future generation of judges. So the strategy is a little bit different if you're writing in a Chamber judgment or in the Grand Chamber."

215. Interview with Judge S3.

216. For a discussion of arguments against dissent offered in the U.S. context, see M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283.

217. Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 39–42 (1994); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

that the Strasbourg judges generally believe that the heightened transparency of a court with open dissent increases the Court's legitimacy, collegiality, and the quality of its jurisprudence without posing a serious threat to judicial independence.²¹⁸

Legitimacy. Many prominent judges and scholars argue that a unified court, ruling *per curiam* without dissenting votes or voices, serves to increase judicial legitimacy.²¹⁹ Given their long history of open and frequent dissent, Strasbourg judges not surprisingly tend to disagree. Several judges we interviewed argued that separate concurring or even dissenting opinions can *increase* the Court's legitimacy, for example by making clear to losing litigants that their concerns were fully considered.²²⁰ Others noted that the practice of publishing votes and offering separate opinions increases the transparency of the Court, arguably an important component of legitimacy.²²¹ Separate opinions also allow judges to detail the *reasons* for their vote, thus preemptively addressing potential accusations of politicized or biased voting.²²²

Whether frequent dissents impact the ECtHR's legitimacy among various audiences is an empirical question well beyond this paper's scope. For now, we note that CJEU judges tend to disagree with their Strasbourg counterparts and argue that public shows of unity increase the Court's public legitimacy.²²³ We also observe that the relatively high degrees of public acceptance and support enjoyed by both the CJEU and the ECtHR suggest that there may be multiple roads to legitimacy, at least as far as the question of dissent is concerned.²²⁴

Collegiality and Consensus. Writings on judicial dissent often claim that frequent dissents can undermine judicial collegiality, understood both in terms of the collegiality of collective deliberation and opinion-writing and in the more colloquial sense of interpersonal rapport.²²⁵ The Strasbourg judges we interviewed drew a sharp distinction between the collegiality of

218. Cf. White & Boussiakou, *supra* note 195, at 57 (finding overwhelming support for separate opinions in interviews with ECtHR judges).

219. This view is often associated with Chief Justice John Marshall, who suppressed dissent in U.S. Supreme Court opinions to enhance the new Court's legitimacy. See David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 91 (Cornell W. Clayton & Howard Gillman eds., 1999).

220. Interviews with Judges S1 and S3.

221. Interview with Judge S2.

222. Interviews with Judges S1 and S3.

223. Several judges issued caveats to this general claim, noting that dissenting opinions should remain respectful toward the Court, and that closely divided judgments of, say, 9 to 8 or 10 to 7 (in the Grand Chamber) could potentially damage the legitimacy of the majority judgment. Interview with Judge S3.

224. We explore this issue in more detail in Dunoff & Pollack, *supra* note 12.

225. For a discussion, see Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003).

deliberation and opinion-writing on the one hand, and collegiality of personal relations on the other. Several judges conceded that the option to write separately reduces the incentive for judges to seek consensus in any given case. ECtHR chambers, according to these judges, attempt to reach consensus in their initial deliberations, but if it becomes clear that a consensus is not possible, then the majority at some point will retire to deliberate and draft a judgment, while the dissenters will begin to draft their own opinion or opinions.²²⁶ Nevertheless, the judges noted, whereas such an outcome might be considered a failure in courts with a strong consensus norm, it is considered a normal part of the system in Strasbourg and does not necessarily entail any loss of collegiality in interpersonal relations among the judges, provided that the resulting dissents are moderate in tone and respectful of the majority and of the Court as an institution.²²⁷

Legal Reasoning and Style of Judgments. It is a truism in the literature on U.S. federal courts that the possibility and practice of dissent results in a richer jurisprudence and more carefully reasoned judgments, insofar as multiple positions are aired and the majority is forced to respond to the minority's arguments.²²⁸ The Strasbourg judges we interviewed agreed that the possibility and practice of writing separately produces decisions that are more sharply and decisively reasoned, insofar as the differences among judges are exposed and argued in both the Court's decision and the separate opinion, rather than "papered over" in a single, consensus decision.²²⁹

Judicial Independence. Perhaps the most challenging question for judges is whether and how decisions to write separately might influence each judge's independence vis-à-vis home states. Unlike U.S. Supreme Court Justices, who enjoy life tenure, the vast majority of international court judges serve for renewable terms of between four and nine years.²³⁰ As we shall see, CJEU judges believe that their six-year renewable terms render them potentially susceptible to political pressure from their home governments, which could potentially punish them for unwelcome decisions by failing to re-nominate them for additional terms of office. It is largely for this reason, according to many Luxembourg judges, that the CJEU releases neither voting records nor separate opinions. For most of its history, judges of the Court of Human Rights also served for limited, renewable terms, initially set at nine years in the 1950 ECHR and then shortened to six years by Protocol 11 in 1998. In this context, the decision by Strasbourg judges to dissent openly left them open to retaliation from member governments,

226. Interview with Judge S1.

227. Interviews with Judges S1 and S2.

228. *E.g.*, Brennan, *supra* note 217.

229. Interviews with Judges S3 and S4; *see also* RIVIÈRE, *supra* note 201.

230. For example, WTO AB members serve for four-year terms, and may be reappointed once, while CJEU judges serve six-year terms, and are eligible for reappointment. ICJ and ITLOS judges serve for nine-year terms, and may be reappointed, while ECtHR and ICC judges also serve for nine-year terms but are not eligible for reappointment.

which could refuse to re-nominate judges in retaliation for unwelcome votes or opinions.²³¹

Unlike their Luxembourg counterparts, the Strasbourg judges opted to publish open and sometimes vociferous separate opinions from the beginning, seemingly unconcerned with the potential reactions of states when it was time to renew their terms. By the late 1990s, however, states began to retaliate by not re-nominating judges who had delivered adverse judgments or separate opinions.²³² In response to concerns that this behavior threatened judicial independence, the member states agreed in Protocol 14 to the ECHR to extend the judges' terms of office from six to nine years and to make these terms non-renewable.²³³ This reform, which was adopted explicitly to protect judicial independence,²³⁴ represents the only instance of which we are aware of states making a deliberate transition from renewable to non-renewable terms for international judges.²³⁵ It also means that Strasbourg judges no longer face the prospect of reappointment when carrying out their day-to-day practices of judicial decision-making, unlike their Luxembourg counterparts.

The current and former ECtHR judges we interviewed agreed that pre-Protocol 14 judges were potentially subject to pressures from their home states,²³⁶ and several expressed satisfaction that they would not face a campaign for reappointment at the end of their terms.²³⁷ On the other hand, however, four of the eight judges we interviewed noted that the elimination of renewable terms did not completely eliminate extralegal pressures on judg-

231. Recall that national judges, or ad hoc judges, serve on the chambers deciding each and every case filed against a given member state, requiring national judges to take a public, individual position on the complaint against their home state.

232. Voeten, *Impartiality*, *supra* note 79, at 421.

233. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention art. 2, May 13, 2004, C.E.T.S. No. 194. Article 2 of the Protocol amends Article 23 ECHR, paragraph 1 of which now reads, "The judges shall be elected for a period of nine years. They may not be reelected."

234. Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718, 729 (2006).

235. The most comparable case of which we are aware is the decision of the drafters of the Rome Statute of the International Criminal Court to adopt nine-year, non-renewable terms, breaking with the precedent of the International Criminal Tribunals for Yugoslavia and Rwanda, whose judges had enjoyed only four-year renewable terms.

236. Interviews with Judges S2 and S5. In the words of Judge S2, "the pressure on the judges was tremendous. And there were incidents where judges were not put up for reelection on the candidates of three by the government, and that's the reason why the system has changed."

237. See, e.g., the comments of Judge S3: "I think the reform was good. I would not like to have the six-year renewable term, because then you get it back to party politics. You have the right and the left wing, and if you talk about surrogate motherhood or homosexual couples, these are issues where you have different positions in party politics, so that might be used in the context of party politics for reappointment. And I'm happy to stay out of that."

es. Many judges, they observed, are sufficiently young that they face the prospect of lengthy careers—whether in the judiciary, in government, in academia or elsewhere—after the end of their nine-year terms.²³⁸ The Protocol 14 reforms, in this sense, did not entirely eliminate concerns about external pressures, since judges might still be concerned about the reception of their decisions and opinions “back home”²³⁹ and the implications for their future careers. Overall, then, judges indicated that the switch to non-renewable terms indeed made it easier to vote and dissent (or join the majority) openly, although they were candid that judicial independence remains challenging for any international judge without the benefit of a lifetime appointment.

5. Conclusions on the ECtHR

The practice of judicial dissent—or, more broadly, of adopting separate concurring and dissenting opinions alongside the judgments of the Court—is manifest in the material, measurable outputs of the ECtHR, where we can measure the frequency and character of separate decisions, and also in the ideational, intersubjectively shared, and remarkably stable norms that both facilitate and set boundaries for the practice. By contrast with many other domestic and international courts, the norm of dissent at the ECtHR is highly permissive, with no stigma attached to the practice and indeed with a widespread (though not universal) view that judges have a moral obligation to state their reasons publicly where they disagree with a majority’s reasoning or outcome. Internal norms, or background knowledge, set the boundaries for acceptable behavior in separate opinions, which should be of reasonable length and respectable tone. Finally, Strasbourg judges broadly agree that their dissent practices benefitted the Court, strengthening its transparency, legitimacy, and legal reasoning while not threatening the judges’ precious and admittedly fragile independence. Both the material and ideational aspects of this judicial practice are far different at the CJEU, to which we now turn.

B. The European Court of Justice

By contrast with the ECtHR, where separate opinions are common, the CJEU presents a case of the dog that did not bark, insofar as the Luxembourg judges display a unified face to the world and suppressed any sign of internal dissent for more than six decades.²⁴⁰ From a purely behavioral perspective, the ongoing decision by CJEU judges to eschew dissent appears as

238. Interviews with Judges S1, S2, S3, and S7.

239. Interviews with Judges S2 and S3.

240. The Court of Justice of the European Union (formerly called the European Court of Justice (“ECJ”)) is the judicial organ of the European Union. As a formal matter, the CJEU is the judicial institution of the EU and the European Atomic Energy Community and is made up of two courts: the Court of Justice and the General Court (formerly the Court of First Instance). For current purposes, our focus is on the Court of Justice.

a negative finding—a series of zeroes in a spreadsheet of unwritten separate opinions. Taking a practice-based approach to the Court, however, encourages us to explore the ideational as well as the material side of what we might more positively describe, not as the absence of dissent, but as the *practice* of consensus judicial decision-making. Before proceeding to describe and analyze this practice, however, we briefly consider the conventional wisdom on this point, which is that the lack of dissent is compelled by language in the Court’s Statute.

1. Statute, Procedural Law, and Practice

Our analysis of CJEU dissent practices starts with the 1951 European Coal and Steel Community (“ECSC”) Treaty,²⁴¹ which created the original European Court of Justice, and with its first Statute, which set out basic procedural rules which continue substantially unchanged to this day. The original CJEU was designed by the then-six member states primarily as an administrative court to consider challenges to the ECSC’s High Authority and, as such, was modeled in large part after French administrative courts such as the *Conseil d’État*.²⁴² Article 29 of the ECSC Court’s statute provides that the deliberations of the Court shall be and remain secret, and Article 2 of the statute includes the secrecy of deliberations as part of the oath of office to be sworn by all judges. The Statute was silent on the possibility of issuing separate opinions²⁴³ and remains so today.²⁴⁴

Many scholars and CJEU judges argue that the obligation to maintain the secrecy of deliberations precludes any possibility of dissent. This view is summarized by Josef Azizi, a former judge of the General Court, who writes that “the full secrecy of deliberations also excludes to reveal the mere number of judges who have adhered to the final judgment and to specify the reasons why they partly or entirely disagree with that judgment.”²⁴⁵ Several of the judges we interviewed expressed similar views.²⁴⁶

We find this reasoning to be less than fully persuasive. The statutes of many courts require that deliberations be secret, including many which practice both public voting and issue separate opinions. The ICJ Statute, for

241. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

242. See e.g., Anne Boerger-de Smedt, *La Cour de Justice dans les Négociations du traité de Paris Instituant la CECA*, 18 J. EUR. INTEGRATION HIST. 7 (2008); Anne Boerger-de Smedt *Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome*, 21 CONTEMP. EUR. HIST. 339 (2012).

243. Treaty Establishing the European Coal and Steel Community, *supra* note 241, Protocol on the Code of the Court of Justice, 261 U.N.T.S. at 239.

244. Protocol (No 3) on the Statute of the Court of Justice of the European Union art. 35, 2010 O.J. 210, 218 (C 83).

245. Josef Azizi, *Unveiling the EU Courts’ Internal Decision-Making Process: A Case for Dissenting Opinions?*, 12 ERA FORUM (SUPPLEMENT 1) 49, 52 (2011).

246. Interview with Judge L1.

example, provides in Article 54(3) that “[t]he deliberations of the Court shall take place in private and remain secret,”²⁴⁷ and the ECtHR Rules of Court similarly provide that “[t]he Court shall deliberate in private. Its deliberations shall be and shall remain secret.”²⁴⁸ Judges at both courts find this language to be consistent with publication of separate opinions.

For these reasons, the CJEU Statute’s provisions on secret deliberation and its silence on the question of dissent cannot be taken to be determinative of the Court’s practices or of the tenacity with which the judges persist in those practices in a changing world. Once again, both statute and procedural law underdetermine judicial practice. Questioned on this point, several judges acknowledged that interpreting the treaty to rule out the public release of either voting results or separate opinions reflects a particular reading of the treaty, informed by the French tradition and by civil law practices at the founding of the communities, when none of the original six member states allowed or practiced dissent within their domestic courts. To be sure, one judge argued, the vast majority of EU member states have since allowed separate opinions within their respective constitutional courts, “but our practice predates that evolution.”²⁴⁹ Another judge agreed, suggesting that the interpretation of the secrecy of deliberations to preclude dissent was “close to self-evident” in the Europe of the 1950s and that this interpretation persisted for more than six decades, even as a large majority of EU member states altered their own domestic practices.²⁵⁰ “The question,” this judge asked, “is why haven’t we changed it?”²⁵¹ Before turning to the judges’ stated rationale for retaining the practice of non-dissent, let us pause briefly to consider its positive counterpart, the Court’s consistent practice of consensus.

2. The Practice of Consensus

Our approach to the CJEU began with an effort to understand how and why CJEU judges decided not to issue dissents and how that decision was continually reproduced over six decades, even as a growing number of both European constitutional courts and international courts moved to embrace the practice of writing separately. We were seeking, in short, to understand

247. ICJ Statute, *supra* note 74, art. 54, ¶ 3.

248. Rules of Court of the European Court of Human Rights, *supra* note 193, r. 19. This formulation remains virtually unchanged in Rule 22 of the 2018 Rules of Court, which stipulate that, “The Court shall deliberate in private. Its deliberations shall remain secret.” Council of Europe, Rules of Court (Aug. 1, 2018).

249. Interview with Judge L2. On the introduction and spread of dissent within the civil law systems of continental Europe, see, e.g., RAFFAELLI, *supra* note 191, at 20–29; Kelemen, *supra* note 191, at 1347–51.

250. By 2012, only seven EU members (France, Belgium, Luxembourg, the Netherlands, Italy, Austria, and Malta) continued to suppress separate opinions in all of their domestic courts. RAFFAELLI, *supra* note 191, at 30.

251. Interview with Judge L3.

why the dog had not barked in Luxembourg. To do so, however, we first needed to understand the affirmative practice of not barking—or, to put it more precisely, the material and ideational practice of consensus decision-making in CJEU deliberations and opinion-writing.

As a material practice, the CJEU judges issue judgments that speak with one magisterial voice, providing no hint of arguments or divisions among its judges. Given the diversity of its judges, who hail from 28 different member states and from diverse professional backgrounds, this apparent unanimity is highly unlikely to have emerged spontaneously. Instead, it reflects a deliberate, decades-long practice of consensus decision-making among the judges. A thorough discussion of the judges' deliberative and opinion-writing practices is beyond the scope of this paper.²⁵² Rather, our focus is on the intersubjective understandings that led judges to both strive for internal consensus—albeit not always successfully—and to speak with one voice in their judgments.

Again, we start with the Court's material practices. As at the Strasbourg court, most cases before the CJEU are adjudicated primarily before chambers (in Luxembourg, of five judges), with Grand Chamber hearings reserved for the most important cases. Judges in these chambers generally deliberate on the basis of a draft judgment prepared by the Judge Rapporteur, in some cases informed also by an Opinion from one of the Court's Advocates General (about whom more below). These deliberations, and the subsequent efforts by the Judge Rapporteur to prepare judgments reflecting the collective deliberations of the chamber, are again secret. Nonetheless, in off-the-bench writings and interviews, CJEU judges provide a window into the motivations behind and broad characterizations of the consensus style of deliberations that ultimately produce a single *per curiam* decision of the Court.

Judge Azizi offers a particularly vivid picture of the culture of consensus in the CJEU and in its first-instance counterpart, the General Court:

EU courts' chambers act by majority decisions. Even where more than superficial divergences have emerged, a judge who would not have succeeded in convincing the majority of the chamber would not retire from the deliberations like in a snail shell, but would continue to take part actively in the on-going discussion on the basis of the premise of a majority opinion he or she did not agree with ("stante concluso"), and contribute, with his or her best efforts, to render the final judgment's argumentation as consistent and convincing as possible. This exercise may be particularly difficult for a reporting judge who, although adhering to an adverse minority opinion, is expected to serve, with full loyalty, the majority opinion

252. See generally David Edward, *How the Court of Justice Works*, 20 EUR. L. REV. 539 (1995) (describing these practices).

and not, like a pouting child, to throw away his or her duty to prepare (elaborate) a finalised judgment.²⁵³

In this context, Azizi argues, the introduction of separate opinions would substantially undermine the deliberative processes that have long defined the CJEU:

[It] is more than evident that, as soon as the publication of dissenting opinions were admitted, the dissenting judge . . . would leave the internal deliberation process and concentrate solely on the elaboration of a formal dissenting opinion. Likewise, on their side, the other members of the chamber would continue their internal deliberations, leaving deliberately the dissenter outside, since he or she would, anyhow, be free to present his or her own dissenting opinion. Consequently, the publication of dissenting opinions would dramatically impair the unique and unparalleled form of cooperation and cohesion which privileges and characterises the EU courts in comparison with many other international courts.²⁵⁴

The CJEU judges we interviewed expressed remarkably similar views (minus the references to pouting children). One judge, for example, commented that, “not having dissenting opinions has . . . certain merits because we are forced to look for consensus.”²⁵⁵ Another noted that the president of any given chamber “is always trying to unify the colleagues, so that each can recognize themselves in the judgment,” reflecting the Court’s strong culture of consensus.²⁵⁶ A third judge similarly argued that the absence of dissent strongly encouraged judges to “look for intermediate solutions” and to “integrate legal arguments from either side” in the final decision. The result, this judge conceded, could occasionally dilute the quality of legal reasoning (see below), but, he argued, there is real value in forging a consensus among judges representing diverse legal cultures. By contrast, he suggested, judges in a system with dissent might abandon the search for consensus more readily, knowing that the minority could express their views in a dissent. The result of such a system, he said, was that, “You have the purest legal reasoning on either side, and you get the winner by counting heads.” But, he concluded, “[t]his is not Europe.”²⁵⁷

Other CJEU judges, however, insisted that the extent of consensus among the judges should not be exaggerated. One judge, for example, suggested that, “it is quite frequent that some judges or a judge sitting in a case disagrees with at least some of the findings[.] . . . There may not be a formal vote but the discussion will often show, for instance in a chamber of five,

253. Azizi, *supra* note 245, at 66.

254. *Id.*

255. Interview with Judge L2.

256. Interview with Judge L5.

257. Interview with Judge L2.

that one or two judges disagree on some point or entirely.”²⁵⁸ A former judge agreed, noting that, early in his tenure at the Court, he disagreed strongly with one particular ruling to the point where he briefly considered resigning from the Court rather than put his name on the majority decision.²⁵⁹ The point of the Court’s culture of consensus, therefore, is not that a consensus is always reached, but that the judges strive for as much consensus as they can muster, and subsequently speak with a single voice to the public despite their private reservations on any given point.

3. The Implications of CJEU Consensus Practices

While CJEU judges take pride in the collegial norms that guide decision-making and opinion-writing at the Court, many of them concede a potential negative consequence, which is the tendency of the Court’s consensus style to produce relatively short, thinly reasoned opinions. As Mitchel Lasser has famously noted, “ECJ decisions are rather short, terse, and magisterial decisions that offer condensed factual descriptions, impersonally clipped and collegial legal reasoning, and ritualized stylistic forms.”²⁶⁰ Some critics of the Court have gone farther, criticizing Court decisions for their terse, poor, or even cryptic legal reasoning.²⁶¹ Former CJEU Judge David Edward famously commented that “a disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels.”²⁶²

The Court’s stylistic tendencies—which constitute a set of practices of their own—date from the Court’s earliest days and remain largely unchanged, notwithstanding the addition of new member states with very different (e.g., common law) legal traditions. Lasser attributes this literary style in part to the influence of the French legal

tradition at the founding of the Court.²⁶³ But he and others also claim that the Court’s literary style results in large part from the practice of issuing *per curiam* decisions and suppressing public dissent.²⁶⁴

In sharp contrast to the near unanimity we encountered among judges and scholars with respect to many other issues, the judges we interviewed

258. Interview with Judge L3.

259. Interview with Judge L8.

260. MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 104 (2004).

261. See, e.g., J.H.H. Weiler, *The Judicial Après Nice*, in THE EUROPEAN COURT OF JUSTICE 215, 225 (Gráinne de Búrca & J.H.H. Weiler eds., 2001).

262. Edward, *supra* note 252, at 556–57.

263. LASSER, *supra* note 260, at 103.

264. *Id.* at 105.

were divided on their assessment of both the Court's literary style and the role of consensus practices in producing it. A number of judges conceded that the Court's decisions could be phrased more clearly and sharply and observed that the judges' practice of consensus decision-making tends to produce "lowest common denominator" reasoning.²⁶⁵ Notably, however, several judges defended the Court's consensus approach as appropriate for a multinational court and suggested that its largely French-inspired drafting traditions might continue even if the judges were to move toward a practice of issuing separate opinions.²⁶⁶ Still others argued that the Court already moved away from the extremely terse style of its early decisions, even while retaining its consensus style and implicit ban on dissent.²⁶⁷ Regardless of their differences on this issue, Luxembourg judges nearly unanimously claim that the norm of consensus, and the *de facto* ban on dissent, also entails strongly positive consequences for the legitimacy of the Court, the unity of EU law, and the independence of the judiciary.

Legitimacy. As noted earlier, there is an ongoing debate about the impact of unity versus dissent on the legitimacy of domestic and international courts. While some argue that judges enjoy the greatest public legitimacy when they speak with a single voice, others, including Strasbourg judges, argue that open dissent can enhance a court's legitimacy by revealing the reasoning of all the judges and persuading losing parties that their arguments were taken seriously.

The Luxembourg judges, as well as the vast majority of CJEU scholarship, claim that their practice of speaking with a single, authoritative voice has increased the Court's legitimacy. Indeed, most judges we interviewed felt that the CJEU's legitimacy was secure among national court judges, na-

265. Interview with Judges L1, L3 and L4. In the words of Judge L1: "For the rest it's really talking and trying to find reasoning to a judgment that everybody can live with. And that of course can have influence on the final outcome, things can be a bit blurred, at least that's what people say from both sides, it's not clear enough, and it's a sort of consensual language which could have been put sharper, so you don't do it because you try to get everybody on board. But it's not a bad thing to talk so long that you really feel that everybody can agree with the result." Judge L4 was more blunt: "[T]he fact that there's no separate opinion means that there is a real effort made to get a text that will attract as many votes as possible. So you really do water down the text. It's really the lowest common denominator, very often. You cut out paragraphs that one doesn't want or the other one doesn't want. And so you may have begun with a text where there was a sort of step-by-step reasoning, and what you end up with is a text where you jump a couple of steps, just to please the other judges. . . . So there is collegiality in this sense. But the consequences for the quality of the text, and the clarity of the text, and the coherence, or the transparency, really, it's much more difficult for the reader to understand, why was this decision arrived at in this case, and what is its relationship to slightly different cases in the past."

266. Interview with Judge L1; see also Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 366 (2009) ("It seems possible that, even if separate opinions were allowed, judges would not avail themselves of these new opportunities.").

267. Interview with Judge L2 ("We do better now, without dissent.").

tional governments and the broader European public.²⁶⁸ Moreover, nearly all of the Luxembourg judges we interviewed expressed concerns that dissents could diminish the Court's legitimacy, which in turn could reduce compliance with CJEU decisions and diminish acceptance of CJEU decisions in national courts and public opinion. One CJEU judge pointed out that, as a "federal court *en devenir*,"²⁶⁹ the Court was open to question in ways that domestic courts are not, such that a controversial judgment could raise questions not only about the wisdom of the particular decision, but about the Court as a whole.²⁷⁰ Similarly, a move to open dissent might, for example, reveal that a controversial decision was narrowly decided by a split vote,²⁷¹ which might in turn call the legitimacy of the decision or the court into question.

Several CJEU judges emphasized relations with national judiciaries. EU law, according to one judge, is directly effective in national legal orders, but it "percolates," or filters down, into those orders primarily through national courts, which therefore require clear and unambiguous signals from Luxembourg.²⁷² Furthermore, according to one participant with experience in both European legal orders, since the CJEU is responsible for interpreting and applying detailed economic regulations throughout the Union, it needs to be far more concerned about the unity of EU law than the ECtHR, which interprets a smaller number of values-based human rights rules and explicitly allows member states a "margin of appreciation" for their application in national legal orders. Taken together, several judges argued, these considerations increased the importance of sending a single, unified message to national judges. Split decisions and minority opinions could send national judges mixed signals and undermine the uniform interpretation of EU law in member states.²⁷³

Independence. Many scholars argue that Luxembourg judges adopted the practice of consensus decisions primarily to compensate for their short, six-year, renewable terms and specifically to prevent their home governments from identifying and punishing (by failing to reappoint) the judges

268. See, e.g., JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE (Maurice Adams et al. eds., 2013).

269. Interview with Judge L4.

270. Interview with Judge L2.

271. The concern is not merely hypothetical. See, e.g., Morten Rasmussen, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, 12 INT'L J. CONST. L. 136, 154 (2014) (revealing that iconic case was decided by a 4-3 vote).

272. Interview with Judge L4.

273. "The national courts are asking us questions about interpretation. I mean, already now there are quite some difficulties for us to explain to the national judges how EU law should be interpreted. . . . And then of course you could wonder what messages are you sending out if you said, okay, this is how the majority sees it but there are four other judges who have other views. I think then the national court will be completely lost." Interview with Judge L1.

for individual positions on sensitive issues.²⁷⁴ Former judges have also commented, in some cases very candidly, about the fragility of judicial independence, the dangers of short, renewable terms, and the practice of issuing *per curiam* rulings as a potential defense against external pressures on the Luxembourg judges. The most extensive discussion comes from Judge Azizi, who suggests that “the very fact that judges may be reappointed could be seen as putting at risk their independence.”²⁷⁵ He continues:

Seen from this angle, the obligation to keep the secrecy of deliberations is simply an appropriate means to guarantee judicial independence. . . . In all these types of proceedings, the possibility of making known the position of a judge . . . could put him or her under pressure to change his or her attitude in order to be in line with his or her Member State or with the public opinion prevailing in his or her Member State. In this respect, the relevant question is not so much as to whether or not a judge would be strong enough to resist such potential pressures[.] . . . [What is] relevant is only that the mere taint of the external appearance or even likelihood to meet such expectations could not be ruled out[.]²⁷⁶

Nearly all the judges we interviewed expressed similar sentiments. One judge raised the issue particularly pointedly: “If you are nominated for six years and you are just at the end of your term and you want to be reappointed and you are dependent on your government—eh?”²⁷⁷ Other judges noted that, if dissents were allowed, judges might feel pressure to dissent on cases of importance to their home states. Avoiding these potential conflicts of interest was accordingly a major, although not the only, reason cited by the judges for avoiding public dissent.

Interestingly, several judges indicated that they and their fellow judges discussed ways in which their mandates could be made compatible with issuing separate opinions. Several judges mentioned the strategy—pursued at

274. See, e.g., DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: CASES AND MATERIALS 145 (2d ed. 2010) (“Fears have been expressed that the ability to renew the term of office might compromise the independence of the judges. . . . In practice, this has not posed a problem, because the Court works under the principle of collegiality, in which a single judgment is given.”); Weiler, *supra* note 261, at 225–26 (arguing for the introduction of dissenting opinions in the Court, but noting that a “precondition” to any such reform would be for the member states to renewable judicial terms, “a continuous affront to the integrity of the European legal system”); J.H.H. Weiler, *Epilogue: Judging the Judges: Apology and Critique to JUDGING EUROPE’S JUDGES*, *supra* note 268, at 252 (calling for the introduction of dissenting opinions, but noting that, “[s]o long . . . as the judges may be reappointed the possibility of dissenting opinions would be inimical.”).

275. Azizi, *supra* note 245, at 55.

276. *Id.* at 55–56; see also G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 MOD. L. REV. 175, 176 (1994) (“[I]n few countries is the judiciary so bereft of formal guarantees of its independence.”).

277. Interviews with Judges L1, L2 and L3.

the German Constitutional Court and at the ECtHR—of shifting from relatively short, renewable terms to longer, non-renewable terms.²⁷⁸ In their report to the 1996 Intergovernmental Conference that culminated in the Treaty of Amsterdam, the Court expressed an interest in moving toward longer, non-renewable judicial terms of office, a reform that it justified explicitly in terms of judicial independence.²⁷⁹ The European Parliament, the Spanish government, and a number of non-state actors advanced similar proposals,²⁸⁰ but the Conference made no changes in this regard. Hence, CJEU judges face an unchanged, six-year renewable mandate, and with it a strong incentive to avoid public dissent in the interests of preserving independence.

The Role of the Advocate General. Finally, one should not leave the question of judicial dissent at the CJEU without mentioning the office and the contribution of the Advocate General (“AG”), who, in most cases, prepares a detailed preliminary opinion for the chamber, which is free to follow or to depart from the AG’s decision.²⁸¹ The judges we interviewed, as well as Judge Azizi in his off-the-bench writing, suggest that the AG opinion can function as a substitute—albeit an imperfect one—for separate concurring or dissenting opinions.

On the one hand, several judges noted that the AG Opinion often provides richer and more detailed arguments than the Court’s typically shorter and more terse decisions. Furthermore, in those cases in which the Court departs in whole or in part from the AG’s views, that difference provides a sense of the other jurisprudential roads the Court might have taken.²⁸² These are, indeed, some of the functions of separate concurring or dissenting opinions. Nevertheless, several of the judges we interviewed pointed to the limits of the AG Opinion as a substitute for dissent. Unlike dissenting or concurring opinions in judicial rulings, the AG Opinion is formulated prior to judicial deliberation, meaning that it informs, but is not informed by, that deliberation.²⁸³ Furthermore, the value of the AG Opinion in clarifying the alternative paths the court might have taken is limited to the minority of cases in which the Court breaks with the AG’s Opinion. In the large majority of cases where the Court agrees with the AG Opinion, the public sees no hint of possible alternatives.²⁸⁴

278. Interviews with Judges L2, L3 and L5.

279. European Court of Justice, *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, at 6–7 (May 14, 1995).

280. See European Parliament, *Intergovernmental Conference Briefing No. 1: The Court of Justice*, §§ 3–6 (1997), http://www.europarl.europa.eu/igc1996/fiches/fiche1_en.htm.

281. For more on this office, see generally NOREEN BURROWS & ROSA GREAVES, *THE ADVOCATE GENERAL AND EC LAW* (2007).

282. Interview with Judge L2; see also Azizi, *supra* note 245, at 63.

283. Interview with Judge L2.

284. Interview with Judge L3.

4. Conclusions on the CJEU

The practice of non-dissent—or, more positively, the practice of consensus-based deliberation and decision-making—is well established at the CJEU, externally reflected in the Court’s magisterial unity toward the outside world and internally reproduced by judicial practices of collective deliberation and compromise. These practices, moreover, appear to be embraced and defended by judges from both civil and common law backgrounds. Our expectation upon undertaking this research was that civil law judges would be more comfortable with the CJEU’s consensus culture, while common law judges might chafe at being unable to express their individual views publicly.²⁸⁵ Our hypothesis was initially supported, as we found that judges with a civil law background tended to indicate that the norms in Luxembourg felt natural,²⁸⁶ while those from common law backgrounds²⁸⁷ and from post-socialist judiciaries in central and eastern Europe²⁸⁸ found the lack of opportunity to express their individual opinions jarring at first. Without exception, however, the judges we interviewed indicated that they—like the judges at the ECtHR—rapidly acclimated to the norms of the Court and came to support them with time.

C. Comparing Practices in Strasbourg and Luxembourg

Our discussion of dissent practices at the European courts has been necessarily abbreviated, focusing only on several core questions and leaving out related practices.²⁸⁹ Nevertheless, it is possible to highlight a few salient points.

First, and significantly, a practice-oriented approach to opinion-writing practices at both courts reveals that the obvious differences between the two courts are not simply behavioral—namely, that the Strasbourg judges issue public, separate opinions, and the Luxembourg judges do not—but also normative and ideational. Judges at both courts have carefully considered the impact of their dissent practices on important values, such as judicial legitimacy and judicial independence, and have crafted their practices accordingly. These different practices are also reproduced over time through a combination of formal rules and informal norms into which new judges are socialized.

285. See, e.g., JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 122 (3d ed. 2007).

286. Interview with Judge L1.

287. Interview with Judge L6.

288. Interview with Judge L5.

289. To take just one example, judges at both courts volunteered details about their relations with and dependence on the courts’ registries and clerks (*référéndaires*), with Strasbourg judges enjoying both less support and less control over the choice of their clerks than their Luxembourg counterparts.

Second, we found that both the material and ideational practices of dissent were highly stable over time. Drawing on writings detailing shifts in dissent practices at the U.S. Supreme Court over time, we formulated what one might call a “life cycle” hypothesis. Namely, we theorized that the imperative of judicial unity—and its purported legitimacy benefits vis-à-vis the political branches and general public—are greatest early in the life of any court as the new institution struggles to establish its place and legitimacy in the constitutional order. By contrast, a more mature court that has established its place and legitimacy might be more able to afford public displays of disunity through dissents. Hence, we hypothesized that judges might move toward greater acceptance of dissents over a given court’s life cycle. However, we found few if any signs of a life cycle at either of the European courts, but rather a remarkable stability of both material behaviors and intersubjectively shared norms at each court over time. It is as if, as one participant with experience at both courts suggested, the two courts entered separate tunnels six decades ago and remain in those tunnels today.²⁹⁰

Third and finally, practices of dissent and non-dissent are intertwined with other practices at the two courts, including practices of judicial appointment as well as deliberation and opinion-writing. Thus, while we have bracketed a particular set of practices for the purposes of this study, the practice of dissent does not stand alone, but rather takes its place in the constellation of practices that characterize any given court.

CONCLUSION

To date, both legal and political science scholars have largely treated international courts as the unit of analysis. In this paper, we argue for a methodological and epistemological shift in research on international courts and for the importance of opening up the black box of the courts to study what judges do and how they do it. Practice theory provides a useful conceptual framework for engaging in this activity. Applying one strand of practice theory, we identified and created a typology of a wide variety of international judicial practices; analyzed the striking variation among practices at different international courts; and began a comparative exploration of a single practice—international judicial dissent—across a handful of courts.

Our work here, however, is only a first effort at exploring the large universe of international judicial practices, and we therefore conclude simply by highlighting future research opportunities along three dimensions. First, there is much work to be done in *expanding the scope* of inquiry beyond that found in this paper. One way to do so is by examining courts beyond the illustrative handful analyzed in this paper, especially less-studied courts such as regional courts outside of Europe and hybrid tribunals, as well as court-like bodies such as the various UN human rights bodies and arbitral

290. Interview with participant.

tribunals. Another way is to expand the number and type of judicial practices under scrutiny, since we are well aware that our list of practices is illustrative rather than complete.

Second, the presentation of international judicial practices in this paper—perhaps reflecting a strong tendency in the literature on practices—emphasizes continuity and stability of international judicial practices. In Part IV, for example, we noted the remarkable persistence of practices of dissent at the two European courts, and many other practices are similarly reproduced over years and decades, passed from one generation of judges to the next with little or no significant change. Other strands of the practice literature, however, problematize questions of continuity and change, noting that what we sometimes consider to be stable structures can fall into desuetude if not reproduced in practice and finding the possibility of change immanent in the interplay of practitioners exercising their agency within, and upon, existing practices. This approach begs the question of how, and why, practices change over time. Thus, a second frontier of research would explore issues of *continuity and change over time*—of inheritance and adaptation, or habit and innovation—in international judicial practices.

Third and finally, future scholars would do well to devote particular attention to the *consequences of judicial practices*. By way of example, this paper outlined several consequences of different opinion-writing practices for judicial independence, legitimacy, collegiality, and the quality of the law, although we caution that these findings are tentative. We believe, with the majority of practice theorists, that everyday practices, including those of international judges, are both understudied and worth studying in their own right. At the end of the day, however, drawing connections between specific practices and outcomes may produce the most important payoff for scholars seeking to understand the role of courts and judges in the international legal order.