University of Miami International and Comparative Law Review

Volume 20
Issue 1 *Volume 20 Issue 1 (Fall 2012)*

Article 5

10-1-2012

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JUDICIAL CREATIVITY AND CONSTRAINT OF LEGAL RULES: DUELING CANNONS OF INTERNATIONAL LAW

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ABSTRACT

According to the traditional theory of judicial decision-making, legal rules constrain judicial creativity because they entail an objectively correct legal answer. Therefore, even if judges want to engage in judicial legislation they are nonetheless constrained by legal rules. This article argues that this understanding is flawed. First, the selection effect ensures that most cases that reach international courts revolve around uncertain legal rules. Second, various cannons of construction will usually allow judges to ascertain several equally plausible legal rules; judges are likely to select those rules which favor their preferred outcome of the case; and their preferred outcome will be largely based on non-legalistic grounds, such as fairness or specific policy preferences. None of this means that legal rules are worthless. It does mean, however, that the traditional theory of judicial decision-making overrates the importance of legal rules as a possible check on judicial creativity.

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I. INTRODUCTION

A. *Judicial Creativity and Constraint of Legal Rules*

In recent decades international law has expanded noticeably in scope and international courts have dramatically expanded in number.[2] Naturally, judicial accountability has become a subject of debate. The prevailing view suggests that legal rules constrain judicial creativity. Thus, the traditional theory of judicial decision-making "entails the beliefs that law is 'rules'; that these rules are 'neutral'; that the judiciary is 'objective'; and that its prime task is to 'apply' rather than to 'make' the rules."[3] An interrelated view is that legal rules normally have a single and clear meaning. Therefore, it is only natural to expect that there is an objectively correct legal answer to any legal issue presented in a case. Some international tribunals have gone even further by asserting that judicial decision-making is no different from mathematical sciences.[4]

This article argues that such views are misguided and legal rules in public international law, because of their ambiguity, will rarely constrain international courts. Most of the ambiguity is due to the rules for figuring out rules, such as canons of treaty interpretation or methods and techniques for ascertaining customary rules. Karl

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[2] Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999) ("When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post–Cold War age.").

[3] *See* Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L& COMP. L.Q. 58, 58 (1968).

[4] *Eastern Extension, Australasia and China Telegraph Company, Ltd. v. U.S.*, 6 RIAA 112, 114–115 (9 November 1923) ("International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to *find - exactly as in the mathematical sciences - the solution of the problem.* This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals." (emphasis added)).

Llewellyn used the fencing metaphor – "thrust" and "parry" of dueling cannons – to illustrate the ambiguity of legal rules in the American law. According to Llewellyn, for every canon of interpretation that said one thing, there was a "dueling" canon that said just the opposite.[5] For example, one canon of interpretation may provide that later statutes supersede the earlier ones; yet, it might be canceled out by another canon of interpretation like the canon of *in pari materia*-statutes dealing with the same subject should be interpreted so as to be consistent with each other. Accordingly, legal rules and principles are "in the habit of hunting in pairs."[6] Such dueling cannons will usually allow judges to justify almost any position they adopt.[7] This article likewise argues that various cannons of international law are inherently ambiguous and legal rules in public international law will seldom lead to an objectively correct legal answer. Thus, the idea that legal rules constrain the judicial creativity of international courts is based on a misconception.

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[5] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960).

[6] Walter Wheeler Cook, *Book Review*, 38 YALE L.J. 405, 406 (1929).

[7] Llewellyn's assault on the idea that legal rules can act as a constraint was part of a larger legal realist movement that arose in 1920s and 1930s as a reaction to legal formalism. For legal formalists, judging is a rule-bound activity and there is an objectively correct legal answer; some formalists consider legal rules to be the beginning and the ending - Alpha and Omega - of judicial decision-making. In contrast, legal realists espoused a two-pronged thesis. First, legal rules are not the only things that determine actual judicial decisions. Judges usually make up their mind even before they turn to legal rules; the preferred outcome is usually based on some non-legalistic grounds – conceptions of justice, attributes of litigating parties (government, poor plaintiff, racial group, etc), ideology, public policy preferences, and the like. Some realists like Jerome Frank went even further and asserted that a judge's personality plays much more important role than legal rules. Second, judges usually will find justification in legal rules for their preferred outcome. This is possible because the legal system is complex and often contradictory. Occasionally a judge will come across a preferred outcome that just "won't write", but these are rare. *See generally* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138 (1999); FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 138 (2009); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); JEROME FRANK, LAW AND THE MODERN MIND 101 (1930).

B. The Selection Effect

The selection effect, one of the concepts developed in economic analysis of law, suggests that judicial disputes, and especially disputes settled in higher courts, are not typical disputes.[8] Most disputes will be settled even before any lawsuit is filed. In domestic and international litigation, there are many incentives to settle a dispute before it reaches a court. For example, an individual or a State would be foolish to litigate a dispute where the odds are clearly stacked against it.

Accordingly, whenever a case reaches a court, it is likely that both parties feel that legal rules provide at least some chance of success. Thus, cases that reach courts are seldom those where the law is clearly in favor of one side. In a sense, parties pre-select those disputes that revolve around ambiguous rules or ambiguous facts. Therefore, easy cases — i.e., those that revolve around straightforward legal rules — are settled out of court and courts are more likely to deal with hard cases. The selection effect opens up more the higher one goes. Most straightforward cases are seldom appealed precisely because the case probably revolves around clear statutory language or strong precedent. Thus, the higher the level, "the weaker the tug of legalism."[9]

The selection effect is likely to operate more powerfully in international courts because States usually have stronger incentives to settle out of court. First, inter-State litigation is very expensive. Costs of litigation in virtually all international tribunals are prohibitively high for developing countries.[10] Second, reputational

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[8] *See generally* George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990).

[9] RICHARD A. POSNER, HOW JUDGES THINK, 45 (2008).

[10] AMRITA NARLIKAR, THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION 96 (2005) (A relatively insignificant case in the World Trade Organization would require at least $500,000 to cover legal representation costs; costs in high profile cases are well over $10 million.); *see also* Luis Ignacio Sánchez Rodríguez and Ana Gemma López Martín, THE TRAVAILS OF POOR COUNTRIES IN GAINING ACCESS TO THE INTERNATIONAL COURT OF JUSTICE 81–102 (Carlos Jiménez Piernas ed., 2007).

costs for States in international affairs usually count more heavily than for individuals or corporations in domestic litigation. Third, States usually conduct extensive diplomatic negotiations before a case reaches an international court. Thus, both parties must think that there is a reasonable chance of success for both of them.

Of course, none of this means that international courts never deal with easy cases or cases that revolve around clear-cut legal rules. It does mean, however, that international courts are at higher risk of chronically facing hard cases—cases where several legal answers become equally plausible and thus enable more judicial creativity.

C. Types of Legal Rules in Public International Law

Although this might be a contentious issue in the higher realm of legal theory, but overall most commentators agree that that there are four types of legal rules in public international law: (1) treaties, (2) customary law, (3) general principles of law, and (4) precedents. These are stipulated in the Article 38 of the Statute of the International Court of Justice (hereinafter "ICJ"),[11] and it is widely acknowledged that this article reflects legal rules of general international law and not just those that the ICJ applies.[12]

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[11] 1945 I.C.J. Acts & Docs 38(1),T.S. No. 993, 3 Bevans 1179.

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id.* [hereinafter ICJ Article 38].

[12] JAMES L. BRIERLY, THE LAW OF NATIONS56 (Humphrey Waldock ed., 6th ed. 1963) (This is the "text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law."). Schwarzenberger went even further by asserting that "the near-universality" of Article 38 transformed it into "a certainty – of the exclusive character of three law-creating processes in international law." GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 5 (1965).

II. PRECEDENT

A. The Notion and the Influence of the Precedent

Judging from the statutes of international courts, precedent seems relatively unimportant. Yet, such an inference is wrong because precedent's binding force reveals little about its actual influence.[13] Lord McNair observed some time ago that expanding jurisprudence of the ICJ "completely transformed the international *corpus juris* from a system that rested very largely upon textbooks and diplomatic dispatches into a body of hard law, resembling the common law."[14]

Yet, while it is true that precedent has taken over judicial opinions, the question remains whether it acts as a real constraint on judicial creativity or is used only as a justification for decisions made on other grounds. For one, the notions of precedent and judicial constraint sit uneasy together: the first precedent must be based on something else than a precedent, and that something else is usually a good dose of judicial law-making. But even if we assume that the first precedent was based on faithful interpretation of a treaty or geometrically precise ascertainment of customary law, the view that precedent can constrain would be still troublesome.

In general, the underlying idea behind precedent is that the court should make the same decision as it had made in the previous case. This is recognized as a fundamental principle in almost all legal traditions. However, this seemingly simple idea gives birth to plenty

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[13] Barcelona Traction, Light and Power Co. (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (separate opinion of Jessup, J.).

[14] ARNOLD DUNCAN MCNAIR, THE DEVELOPMENT OF INTERNATIONAL JUSTICE 16 (1954), *quoted in* MOHAMMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 15 (1996). John Jackson, the leading legal scholar of the WTO, similarly noticed the prevalence of the precedent in the WTO: "Now, in the WTO, we see precedent being used, no matter how you call it." John H. Jackson, *Comment, Process and Procedure in WTO Dispute Settlement*, 42 CORNELL INT'L. L. J. 233, 239 (2009). *See also* David Palmeter and Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998); Raj Bhala, *Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2000–2001); Adrian Chua, *The Precedential Effect of WTO Panel and Appellate Body Reports*, 11 LEIDEN J. INT'L L. 45 (1998).

of complications. First, it is unclear whether international courts are legally obliged to follow their previous decisions. Second, it is unclear how one should determine whether the current case is the same or similar to the previous one. Finally, courts can openly depart from their previous decisions under certain exceptions, and this is true even in jurisdictions where the courts are legally obliged to follow their previous decisions.

B. Precedential Systems

In general, there are two principal systems of precedent.[15] First, a system may allow judges to consider their previous decisions but without legal obligation to do so. Second, a legal system may oblige judges to decide the case in the same way as the previous case. Some systems of the latter force judges to decide the same way, even if there are good reasons to do otherwise; most systems, however, usually permit some departure from the previous case if there is a good reason doing so.

1. Legal Obligation to Follow

In general, legally binding precedent is distinguished from persuasive precedent: legally binding precedent requires that courts follow the precedent even if they are not persuaded by its rationale. The notion of legally binding precedent is sometimes referred to as the "content independent authority" – the precedent is followed because of its authority or status, not because of its persuasive content.[16] Persuasive precedent, as the name implies, operates by offering cogent reasons for the later judges who might want to follow it. Some legal systems have historically imposed a legal obligation to follow previous decision.[17] The idea is expressed in the concept of

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[15] *See generally* RUPERT CROSS and J. W. HARRIS, PRECEDENT IN THE ENGLISH LAW 4 (4th ed., 1991).

[16] *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989).

[17] In domestic legal systems, there are two aspects of legally binding precedent: vertical and horizontal. Vertical aspect requires lower courts to follow the decisions of the higher courts. The vertical precedent is irrelevant to most inter-state tribunals,

stare decisis: *stare decisis et non quieta movere*—"to stand by decisions and not disturb the undisturbed." The underlying reasons for this legal doctrine are stability and predictability. The doctrine of *stare decisis* apparently became firmly established only in the beginning of the nineteenth century.[18]

It would be difficult to sustain the view that statutes of international courts embody *stare decisis* doctrine. For example, the ICJ seems to rule out any possibility of precedent, not to mention *stare decisis*. Article 59, one of the most reviled articles in the whole Statute, states that, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[19]

On the other hand one could argue that Article 59 applies to the *dispositif* of a judgment and has nothing to do with the *stare decisis*. But overall, whatever merits of such proposition, one could hardly find a single authority claiming that the doctrine of *stare decisis* applies to international courts. As one commentator noted, the doctrine of legally binding precedent simply "was not part of the thinking on which the Court was constructed."[20] However, just because the Statute does not embody the doctrine of *binding* precedent, it does not automatically mean that it discards any idea of precedent.

2. Permission to Follow

If the Statute of the ICJ (not necessarily Article 59) rules out *stare decisis*, does this mean that other models of precedent are also excluded? Arguing this position would be as radical as arguing that the Statute supports *stare decisis*. First, Article 59 was probably inserted out of abundant caution.[21] Second, refuting the literal interpretation of Article 59 is possible by arguing *ad absurdum:* Article

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with a limited exception of the WTO. Horizontal aspect requires the court to follow its own previous decisions or decisions of the court on a similar rank.

[18] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

[19] ICJ Article 38, *supra* note 11.

[20] MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 105 (Cambridge Ed., 1996).

[21] Hersch Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31, 58 (1931).

38 (1) d states that the Court can apply all judicial decisions " as subsidiary means for the determination of rules of law," but Article 59 states only that the "decision of the Court has no binding force" – so the Court could not follow its own decisions but could follow those of other courts. This is an obviously absurd proposition.[22] Third, as the Permanent Court of the International Justice (PCIJ) noted in *Certain German Interests in Polish Upper Silesia*, "[t]he object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes".[23] Again, Article 59 applies only to *dispositif.*

So what models of precedent are left to international courts? In the absence of the doctrine of legally binding precedent, the courts could follow the European consistent jurisprudence model ("*jurisprudence constante*"). According to this model, the courts are not bound by their first case; instead, they can wait until a consistent pattern emerges from many cases and such an approach is essentially a process of trial and error.[24] However, it seems that this is not the precedential model that international courts embrace: the ICJ and other courts rarely wait until the practice accumulates and consistent patterns emerge; usually they refer to a previous decision even if it is the only one.[25]

Arguably, the precedential model that the ICJ and other courts follow is simply that of persuasive precedent. Persuasive precedent refers to any previous case, even not necessarily by the same court, which is not binding in the present case but guides judges in the present case. For example, in the *Cameroon v. Nigeria* case, the ICJ stated that "[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusion of earlier

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[22] SHAHABUDDEEN, *supra* note 20, at 100–101.

[23] German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7 (May 25). *See also* SHAHABUDDEEN, *supra* note 20, at 63 ("Article 59 is concerned to ensure that a decision, qua decision, binds only the parties to the particular case; but this does not prevent the decision from being treated in a later case as 'a statement of what the Court regarded as the correct legal position.").

[24] A. L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q.R. 40, 42 (1934).

[25] SHAHABUDDEEN, *supra* note 20, at 11.

cases."[26] Essentially, the ICJ says that if it can be swayed by better reasons, it will follow better reasons and not the precedent.

C. *Why International Courts Follow Precedents*

If international courts do not have to follow their previous decisions, why might they still want to justify their decisions with precedential reasoning? As Justice Louis Brandeis once observed, precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[27] Sir Hersch Lauterpacht likewise noted that certainty and stability ensure the sound administration of justice.[28] So legal systems place a high premium on legal certainty, and the role of the precedent is to ensure that certainty, or at least provide its illusion.

However, this does not explain why it is in the interest of courts to ensure that certainty, or at least its illusion, even when the legal system does not require them to follow the precedents. The agency model can explain this conundrum. According to this model, developed in economic analysis of law, a principal hires an agent to do a job that the principal does not want to do, cannot do, or the

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[26] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 275, 292 (11 June 1998).

[27] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

[28] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 14 (London, 1958):

> The Court follows its own decisions for the same reasons for which all courts - whether bound by the doctrine of precedent or not - do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.

Id.

agent can do better and cheaper.[29] Judicial agency is one example of agency relationship: a government establishes its domestic courts or sovereign States establish international courts to apply legal rules and solve legal disputes. Yet, the agent might stray from the principal's directions, for example, by basing judicial decisions not on legal rules but on personal preferences or idiosyncratic policy principles.[30] The problem of judicial agency becomes more pronounced the less control the principal has over the agent.

Both the principal and the agent are interested in minimizing the costs of the agency relationship. "Following" precedent is an extra cost for courts and could constrain their natural inclination for judicial creativity. Thus, strict conformity to precedent can be considered an unnecessary cost. So we should expect that courts would expend resources on precedential conformity only if there would be strong incentives. However, in the agency model, it is not only in the interest of the principal to measure the performance of the agent, but also in the interest of the agent to assure the principal that the standards are obeyed. Accordingly, conforming to precedent is the necessary agency cost that courts pay. On the surface at least, if international courts are strictly relying on their previous cases, it must mean that they are following the mandate – only applying legal rules and not working at judicial legislation.

D. The Selection Effect and Reasoning from Analogy

Most legal scholars rarely distinguish between precedential and analogical reasoning. The difference, although subtle, is important.[31] Precedential reasoning deals with the court's obligation to reach the same result in resolving the same issue. Precedent leaves no choice. In analogical reasoning, the issue is similar but not the same. Therefore, precedent constrains, analogy persuades. The difference between precedential and analogical reasoning can be shown schematically:

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[29] *See generally* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); WARD FARNSWORTH, THE LEGAL ANALYST 87–99 (2007).
[30] Posner, *supra* note 9, at 126.
[31] *See generally* Frederick Schauer, *Precedent, in* ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW (Andrei Marmor ed., 2012).

Reasoning from precedent:

Case I (precedent) has properties	**a, b, c, d, e**	> the Court made decision **X**
Case II (new case) has properties	**a, b, e, m, s**	> the Court should decide **X**

Reasoning from analogy:

Case I (previous case – the source of analogy) has properties	**a, b, c, d, e**	> the Court made decision **X**
Case II (new case – the target of analogy) has properties	**a, b, e, m, s**	> the Court should decide **X**

Reasoning from analogy obviously calls for a great deal of judicial discretion—it is the judge who decides whether the similarity between the source of analogy and the target is sufficient to extend the holding of the original case to the new situation. Understandably, not all legal systems have been fond of reasoning from analogy. In Roman law for example, Justinian's *Codex* prohibited reasoning from analogy: *non exemplis sed legibus iudicandum est.*[32] However, at least in the common law tradition, reasoning from analogy is the basic pattern of legal reasoning.[33]

Moreover, most cases that reach international courts seldom require precedential reasoning proper; more likely, they call for reasoning from analogy. This is again due to the selection effect: States are seldom willing to litigate a case where the clear precedent exists. Naturally, analogical reasoning dominates international courts. On the other hand, precedential reasoning may serve perhaps equally important function (if not more important) by clearing up most disputes before they become judicial disputes.

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[32] *See* Gerald J. Postema, *A Similibus ad Similia: Analogical Thinking in Law, in* COMMON LAW THEORY 102–133 (Douglas E. Edlin ed., 2007).

[33] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (rev. ed., 1962).

E. Ratio Decidendi: Determining the Similarity of the Previous Case & Distinguishing It

There is the persistent question of how exactly the judge should determine the similarity to the previous case. Traditionally, the answer has been that the *ratio decidendi* of the previous case determines similarity. How can the judge determine the *ratio decidendi* – the rationale of the previous case?

Not all legal reasoning in the previous case is *ratio decidendi*; reasoning that was not necessary to reach the decision is *obiter dictum* and courts are free to disregard *dicta*. There is some question about whether the distinction between *ratio decidendi* and *obiter dictum* applies to international courts because there is no doctrine of *stare decisis*.[34] However, at least in the case of other tribunals, the ICJ apparently acknowledges the concept of *obiter dictum*.[35]

There are several schools of thought on how the judges should determine *ratio decidendi*.[36] One way is to connect the facts with the outcome; a slight variation of this approach emphasizes connecting only material facts with the outcome and necessary reasoning.

The rule model of *ratio decidendi* looks at the actual words used in the previous decision to explain and justify its holding. In essence, the words that the Court used in the previous case serve like the written text of the statute. Those who are concerned with dangers of judicial creativity favor this approach. One version of this

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[34] Judge Anzilotti, for one, argued that distinction between *ratio decidendi* and *obiter dicta* is unnecessary in international law: "The grounds of a judgment are simply logical arguments, the aim of which is to lead up to the formulation of what the law is in the case in question. And for this purpose there is no need to distinguish between essential and non-essential grounds, a more or less arbitrary distinction which rests on no solid basis and which can only be regarded as an inaccurate way of expressing the different degree of importance which the various grounds of a judgment may possess for the interpretation of its operative part." Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No 13, at 24 (Interpretation, Dec. 16) (dissenting opinion by Judge Anzilotti).

[35] SHAHABUDDEEN, *supra* note 20, at 152.

[36] *See generally* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); James Louis Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587 (1957); A. W. B. Simpson, *The Ratio Decidendi of a Case*, 21 MOD. L. REV. 155 (1958).

approach was applied in English law, but was eventually abandoned in the second part of the twentieth century.[37] It required that courts adhere to precedents rigidly by *literally* following the holding of the previous case (i.e., they could not paraphrase previous case or loosen up its language). That way, courts showed that they were not creating new law but merely following established precedents.

Not only was it difficult to determine the similarity between the present and previous case, but it is also relatively difficult to distinguish the two. These are two sides of the same coin. Courts can usually distinguish a new case even if the *ratio decidendi* of the old case fits the rule model. One method international courts employ is to claim that the present case on its face should follow the precedent, but the principle of the previous case has been "qualified by later legal developments."[38] Likewise, international courts may state that the principle does not apply because the circumstances of the new case are significantly different.[39]

F. Departing

Even when international courts come across cases that they cannot distinguish from the precedent, they are often able to depart from it openly. This is especially pronounced in some regional courts, where they can depart from a previous decision even without giving any reasons for doing so.[40] Most international courts, however, feel compelled to provide some reason for departure. Thus, the Permanent Court of International Justice stated early on "the Court has in practice been careful not to reverse precedents established by itself in previous judgments and opinions, and to explain apparent departures from such precedents."[41]

Even common law courts of the highest rank feel free to depart from precedent whenever they find good reason.[42] Likewise,

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[37] *See* Posner, *supra* note 9, at 154–155.
[38] SHAHABUDDEEN, *supra* note 20, at 115.
[39] *Id.*
[40] *Id.* at 131.
[41] *Id.* at 129.
[42] For example, the United States Supreme Court observed "when convinced of former error, this Court has never felt constrained to follow precedent. In

the quasi-official theory of international courts admits that the courts will depart from their previous cases when the original decision was wrong in the first place or that it no longer corresponds to the requirements of the international community.[43]

Understandably, instances of open departure are rare. This is because when such a need arises in an individual case, the courts are usually able to distinguish the case without discarding the precedent. When the courts do depart, it is mostly because they want to establish the legal certainty of the new legal rules.

G. Summary: Precedent as Constraint

So what is the constraining potential of precedent? As this section has shown, it is apparent that precedent's constraining power is more illusory than real.

First, international judges may openly state that they do not care about the precedent because there is no statutory obligation to follow previous cases. But that would be a very poor strategy, because the judicial agency model predicts that the courts themselves will want to create an impression of legal certainty. This is a necessary agency cost for international courts, and the doctrine of legal precedent serves this function very well.

Second, although judges want to reinforce the impression of legal certainty, they do not want to be constrained by it. Rigid conformity to precedent would conflict with the need to adapt the law to new cases and circumstances. To paraphrase Jeremy Bentham, rigid adherence to precedent means acting without reason, to the

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constitutional questions, where correction depends upon amendment, and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Lauterpacht, however, noted that in some domestic jurisdictions the courts would reverse precedents "only if satisfied by the twin tests of clear error and public mischief. ... legal position as laid down by the challenged precedent decisively outweighs the injustice that may be created by disturbing settled expectations based on an assumption of continuance of that position." LAUTERPACHT, *supra* note 28, at 19–20.

[43] *See* SHAHABUDDEEN, *supra* note 20, at 134.

declared exclusion of reason, and thereby in declared opposition to reason.[44]

Third, the courts need a way out of this conundrum—to create the impression of legal certainty yet also be free from precedential constraints. As Roscoe Pound put it, these are "the conflicting demands of the need of stability and the need of change."[45]

One way out of this conundrum is through various juristic techniques for distinguishing previous cases. Courts thus create the impression that new cases are perfectly consistent with previous ones. This is not difficult to achieve due to the selection effect, which makes sure that most cases that reach international courts require analogical reasoning as opposed to precedential reasoning. Additionally, international courts may point out that the proposition asserted in the previous case is not *ratio decidendi.* Finally, the courts can always openly depart from prior case law when distinguishing a case proves unfeasible.

So in the end, what is the role of precedent? As this section has shown, the power of precedent is its persuasiveness, much like other legal rules. That is usually what lawyers mean when they say that arguments based on precedent are merely forms of persuasion.[46] Arguably, the Permanent Court meant something similar when it said that the Court would not depart from "the previous judgments the reasoning of which it still regards as sound."[47]

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[44] 9 THE WORKS OF JEREMY BENTHAM 323 (John Bowring ed., 1843).

[45] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (Harold Dexter Hazeltine ed., 1923) ("Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change.").

[46] JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 240–241 (Richard W. Nice ed., 1964).

[47] Readaptation of Mavrommatis Jerusalem Concessions (Greece v. Gr. Brit), 1927 P.C.I.J. (ser. A) No. 11, at 43 (Oct. 10). As Oppenheim's International Law puts it, "the authority and *persuasive power* of judicial decisions may sometimes give them greater significance than they enjoy formally." HERSCH LAUTHERPACT, OPPENHEIM'S INTERNATIONAL LAW 41 (Robert Jennings and Arthur Watts eds., 9th ed., 1992) (emphasis added).

III. TREATIES

A. Univocalists vs. Skeptics

There are two basic views on the nature of treaties and the function of rules of treaty interpretation: univocalist and skeptic. These two schools are but a specific reflection of legal formalism (positivism) and realism in treaty interpretation. In large part, these divergent views are also due to different understandings of the nature of the treaty.

1. Univocalists

Univocalist philosophy of treaty interpretation draws heavily on general positivist hermeneutics. There are several conspicuous elements of this positivist hermeneutics, including the beliefs that law has a single and clear meaning; that the creation of law is the legislative monopoly and written law is the real law; that judges must look for the legislative intent; and that law is a complete system and thus allows any interpretative method to be formalized by the syllogism.[48]

Accordingly, univocalists argue that rules of interpretation permit only one correct answer. Thus, according to some theorists, the purpose of interpretation is to "deduce the meaning exactly of what has been consented to and agreed."[49] For univocalists, rules of treaty interpretation will lead to the "correct" result, and even a "single autonomous interpretation."[50] As some scholars have pointed out, this view imagines that an interpreter can arrive at a determinate result "in a completely value-free way."[51]

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[48] ROBERT KOLB, INTERPRÉTATION ET CRÉATION DU DROIT INTERNATIONAL: ESQUISSE D'UNE HERMÉNEUTIQUE JURIDIQUE MODERNE POUR LE DROIT INTERNATIONAL PUBLIC 74–80 (2006).

[49] ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 286 (2008).

[50] *See generally* RICHARD GARDINER, TREATY INTERPRETATION 6, 30 (2008). Gardiner, however, points out that rules of interpretation "are not simple precepts that can be applied to produce a scientifically verifiable result." *Id.* at 9.

[51] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW

2. Theoretical Skeptics

Interpretation skeptics, on the other hand, argue that rules of treaty interpretation do not lead to one correct answer. Theoretical skeptics base their position on some general systemic inadequacies of international law. Leo Gross's theory of autointerpretation is perhaps the best-known theoretical skepticism. Back in 1962, Gross observed that:[52]

> It is generally recognized that the root of unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what appropriate sanction may be. In the absence of such an authority, and failing agreement between the states at variance on these points, each state has a right to interpret the law, the right of auto-interpretation, as it might be called. (...) This is, for better or worse, the situation resulting from the organizational insufficiency of international law.

One might argue that international courts precisely fill the gap in that organizational insufficiency. In this context, it is interesting to note that Gross made his point as a critique of Kelsen's international legal theory, but even Kelsen himself, the greatest European positivist of the twentieth century, did not argue that there is one correct answer. On the contrary, he noted that from a logical point of view, many meanings are equally possible; instead, his main thrust was directed at the authoritative interpretation: "[T]he function of authentic interpretation is not to determine the true

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OF TREATIES 4 (2007) ("In the view of the one-right-answer thesis . . . [one] can interpret a treaty by applying a number of legal rules and be perfectly certain of always arriving at a determinate result in a completely value-free way. There is no room for political judgment.").

[52] LEO GROSS, *States as Organs of International Law and the Problem of Autointerpretation, in* ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 367, 386 (1984).

meaning of the legal norm thus interpreted, but to render binding one of several meanings of a legal norm, all equally possible from a logical point of view."[53] Therefore, international courts do make one of the possible meanings binding, but it does not mean this is the only possible correct answer.

3. Practical Skeptics

Like theoretical skeptics, practical skeptics doubt that a treaty provision can have only one correct meaning. However, their skepticism is based less on some overarching theory and more on brass tracks of treaty making. Practical skeptics realize that treaties do not always embody shared intentions of the parties. On the contrary, as Philip Allott famously observed, "a treaty is a disagreement reduced to writing" and it "is not the end of a process, but the beginning of another process."[54]

For a univocalist, treaties are written declarations of intentions, they have a defined object, or at least their text has some meaning, even if not natural. Yet, this assumption ignores actual practice. Treaties do not always contain an agreement. They do not always have a shared intention. Sometimes the provision of the treaty has no meaning at all— it is a mere drafting error.

First, parties do not always agree on the meaning. Sometimes they deliberately put a vague provision and expect that subsequent practice will give some meaning to it. For a theorist, this sounds impossible because it is "definitionally impossible for the parties to have agreed on rendering the treaty not fully effective."[55] But for a practitioner, compromise can be more important than clarity; parties may be unable to agree on their shared intentions, and so they deliberately include some vague provisions.[56] Ambiguity is the basic

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[53] HANS KELSEN, LAW OF THE UNITED NATIONS, at xv (1950).

[54] Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31, 43 (1999). *See also* PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 305 (2002).

[55] ORAKHELASHVILI, *supra* note 49, at 397.

[56] Eileen Denza, *Compromise and Clarity in International Drafting*, *in* DRAFTING LEGISLATION: A MODERN APPROACH 232 (Constantine A. Stefanou, and Helen Xanthaki eds., 2008) ("If negotiation of a multilateral instrument had to await a decision by all delegations that the wording was from their own individual

"damage limitation" strategy of multilateral negotiation, and in its basic form, it is simply achieved by making a text deliberately ambiguous so that "different parties can read it differently."[57]

Second, a provision may have no meaning at all. It may be a plain drafting error. One could expect some drafting errors in minor treaties, but not meaningless provisions in major multilateral treaties. Yet, one can find such example even in the ICJ Statute, which is an integral part of the UN Charter; and the United Nations Charter, according to many theorists, comes closest to the constitution of the international community. Article 36(1) of the ICJ Statute illustrates this point.[58] The article provides that the "jurisdiction of the Court comprises ... all matters specially provided for in the Charter of the United Nations." The main problem with this provision is that the Charter does not provide any matters which fall within compulsory jurisdiction of the Court.[59] During the drafting phase, the negotiators considered including several issues within the compulsory jurisdiction; eventually, they could not agree, but they forgot to delete the text. It only shows that drafting errors are ubiquitous not only in domestic legislation,[60] but in international treaties as well.

Third, in the drafting process of international agreements, lawyers and other technical drafters are not prominent players. Most agreements are negotiated by diplomats and other non-lawyers, who could care less about rules of treaty interpretation or other formal points. Thus, one observer pointed out that it is illusory to expect that legalistic concerns figure prominently in negotiations:

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perspective clear and unambiguous, the number of Treaties and other legally binding international instruments adopted would be very small indeed.").

[57] *See, e.g.*, RONALD A. WALKER, MULTILATERAL CONFERENCES: PURPOSEFUL INTERNATIONAL NEGOTIATION 190 (2004) ("[A]t times, you may find yourself losing, and the emerging text not in accordance with your objectives. In those circumstances ... to accommodate conflicting viewpoints, make the text somewhat ambiguous, so that different parties can read it differently. From the point of view of the defending party, this means that their position is not entirely overwhelmed.").

[58] ICJ Article 38, *supra* note 11.

[59] *See generally* Christian Tomuschat, Article 36, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 589–687 (Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams, and Tobias Thienel eds., 2006).

[60] *See, e.g.*, Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 310 (2001).

> Lawyers—if present at all during high-level diplomatic negotiations—are usually treated as subordinate to ministers and diplomats and not invited or encouraged to raise 'legalistic' doubts as to the meaning or acceptability of a compromise brokered by politicians.[61]

Accordingly, for practical skeptics it makes little sense to interpret treaties according to rules of interpretation when international legislators themselves pay no heed to them.

B. Schools of Treaty Interpretation

There have been three major schools of treaty interpretation. Not all of them are mutually exclusive, but each of those emphasizes one element over the over.

Teleological school, also known as "aims and objects", says that the object of the treaty should be the guiding element. Accordingly, intention of the parties and the wording of the treaty do not matter as much as the ultimate aims that the treaty is supposed to achieve. Before the adoption of Vienna Convention, this view had been advocated most heavily by the so-called New Haven School.[62] This approach perhaps has had as many critics as supporters.[63] One reason why it has been so controversial is that it is impossible to implement it without a good dose of judicial activism.

Intentions school, also known as the founding fathers school, emphasizes intention, or at least the presumed intentions of the parties. The role of the judge is to discover these and give them their effect. The problem of course is in discovery of these intentions.

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[61] Denza, supra *note* 56, at 232–233 ("The role and function of the draftsman is generally more restricted in international conferences and councils than his role in the preparation of national legislation.").

[62] MYRES SMITH MCDOUGAL, HAROLD DWIGHT LASSWELL AND JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1967).

[63] *See, e.g.*, Sir Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiator! Your Treaty or Our "Interpretation" of It*, 65 AM. J. INT'L L. 358 (1971).

Traditionally, one way was to look at the *travaux prépatoire.* Yet, in the twentieth century, international negotiations became more multifaceted, more protracted, and treaties went from bilateral or plurilateral to multilateral. Because of these changes, *travaux* became misleading and incomplete.

The textualists argue that the text of the treaty—usually ordinary meaning of its terms—reveal best the meaning of the treaty. According to this school, intentions may be relevant, but the best indication of intentions is the final text of the treaty. This school has also been the most popular among those who are concerned with finding ways to limit judicial creativity. No doubt, it would be much easier to ensure that courts only apply law, and not develop it, if the courts had to apply treaties literally.

But strict textualism would also lead to absurd results, if applied without common sense. As Judge Learned Hand remarked, "there is no surer way to misread any document than to read it literally."[64] The famous "Bologna law" example illustrates the possible absurdity of this approach: according to the law of Bologna, "whoever drew blood in the streets should be punished with the utmost severity"; if it would be interpreted textually, one would have to punish a surgeon "who opened the vein of a person that fell down in the street in a fit."[65] Moreover, as Judge Spender pointed out in the *Certain Expenses* case, common sense is rather personal: "[w]hat makes sense to one may not make sense to another. Ambiguity may be hidden in the plainest and most simple of words even in their natural and ordinary meaning."[66] However, if judges incorporate some common sense, then strict textual interpretation is impossible and judicial creativity inevitable.

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[64] Guiseppi v. Walling, 144 F.2d. 608, 624 (1944) (Hand, J., concurring), *quoted in* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 274 (2007).

[65] Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U.L. REV. 127, 127 (1994).

[66] Certain Expenses of the United Nations, 1962 I.C.J. 151, 184 (July 20) (separate opinion of Spender, J.).

C. *Rules of Treaty Interpretation and the Vienna Convention*

All schools of treaty interpretation have something to offer and all have major drawbacks. Naturally, before the Vienna Convention on the Law of Treaties was adopted in 1969, and even after its adoption, international lawyers questioned whether there was a need for rules of treaty interpretation. One view, rooted in the theory of legal realism, was that multiple rules of treaty interpretation would contradict and cancel each other out, making it preferable to have a few basic principles of treaty interpretation rather than a false sense of certainty created by specific rules of interpretation.[67] Sir Gerald Fitzmaurice, who would later also serve as a Special Rapporteur to the International Law Commission on the Draft Vienna Convention, summarized the debate twenty years before the adoption of the Vienna Convention:

> [According to one view, it] would be better therefore to rely on two or three basic general principles, and accept the fact that in the last resort all interpretation must consist in the exercise of common sense by the judge, applied in good faith and with intelligence. . . . The opponents of this view consider that it leaves too much to the discretion of the judge, and point to the existence of rules of interpretation in most systems of law, as being necessary to ensure that decisions are given on reasoned grounds of principle, and not arbitrarily. The practical difficulties which may arise in the application of the rules are, according to their view, due not to multiplicity or contradictoriness, but to the absence of any definite system establishing the order in which the rules should be applied, and the relative weight to be given to each.[68]

Eventually, the Vienna Convention seemed to have favored the second approach. As the International Law Commission noted in its

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[67] *See* G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 2–3 (1951).
[68] *Id.*

commentary to the draft Vienna Convention, the Convention (Article 31) provided a single and general rule of treaty interpretation that essentially combined the three schools of treaty interpretation.[69] Articles 31 and 32 of the Vienna Convention embodied the core rules of treaty interpretation.[70]

For a realist-minded judge, the best thing about Article 31 is that it is only a guideline. As Sir Gerald Fitzmaurice noted in the above quoted passage, the proponents of specific rules want to solve the problem of judicial discretion with rules that provide "the order in which the rules should be applied, and the relative weight to be

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[69] *Report of the International Law Commission to the General Assembly*, (1966) Y.B. INT'L L. COMM'N 169, 217-225, U.N. Doc. A/CN.4/SER.A/1966/Add 1 [hereinafter General Assembly Report].

[70] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

"Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result, which is manifestly absurd or unreasonable."

Id.

given to each."[71] While some scholars do think that the rules of the Vienna Convention are fixed,[72] this view contradicts both the practice of international tribunals and the view of the International Law Commission itself.[73]

Based on this, only theoretical extremists would argue that two judges, even extremely like-minded judges, would arrive at the same conclusions because of the treaty interpretation rules. However, two judges, both using Article 31, can easily arrive at different conclusions because one of them will give more weight to the text of the treaty and the other will rely more on the object and purpose or something else.

D. Beyond Vienna Convention

Even if the Vienna Convention rules of interpretation would be constraining, which they are not, they still would not limit judicial creativity. Many international and regional courts have shown a willingness to openly depart from the Vienna Convention, or at least renovate some of its elements.

For example, the International Court of Justice went beyond the Vienna Convention (which was not in force at the time) with its evolutionary interpretation: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."[74] The Appellate Body of the WTO developed the principle of harmonious interpretation in

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[71] Fitzmaurice, *supra* note 67, at 3.

[72] ORAKHELASHVILI, *supra* note 49, at 309 (the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods).

[73] *See* General Assembly Report, *supra* note 69 ("[T]he Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties . . . . It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article.").

[74] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

which it kept in mind the aggregate results of interpretation and considered its implications for the future of the treaty regime.[75] The European Court of Human Rights has discarded the ordinary meaning interpretation in favor of the concept of autonomous interpretation.[76]

Various uncodified rules and canons of interpretation are certainly not more constraining. For almost every uncodified canon of interpretation one can easily find a dueling canon. Take, for example, the famous principle of effectiveness—*ut res magis valeat quam pereat*. According to this principle, when two possible interpretations of a treaty exist, the court should prefer the one that will make the treaty more effective.[77] But then there is a "dueling" canon — the principle of restrictive interpretation: "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted."[78] With some ingenuity, one could find a dueling canon for every interpretative canon out there.

E. Summary: Rules of Treaty Interpretation as Constraint

This section has shown that, for the most part, rules of treaty interpretation are elastic. Even if one could codify a general rule which would provide "the order in which the rules should be applied, and the relative weight to be given to each"—in essence an algorithm for interpretation-creating a workable rule is still next to impossible. Part of this idealistic quest to have mathematically precise rules is due to misunderstanding of the nature of treaty making. Many treaties do not have a legislative intent or a

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[75] *See* ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 275–305 (2009).

[76] JOHN G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 71 (1993); George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 523–527 (2010).

[77] Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 67–82 (1949).

[78] Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq), 1925P.C.I.J. (ser. B) No. 12, at 25 (Nov. 21). *See also* Lauterpacht, *supra* note 77, at 61–67.

meaningful text. Mechanical application of precise interpretation rules, even if there were such a thing, would often cause as much damage as it is intended to avoid.

A more realistic view of treaty interpretation is that judicial creativity is inevitable and constraint is unrealistic. Indeed, interpretation and development of international law operate as a "joint venture."[79] Sir Hersch Lauterpacht deftly pointed out that rules of treaty interpretation usually serve only as a cloak for a decision made on other grounds:

> In a sense the controversy as to the justification of rules of interpretation partakes of some degree of artificiality inasmuch as it tends to exaggerate their importance. *For as a rule they are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means.* It is elegant—and it inspires confidence—to give the garb of an established rule of interpretation to a conclusion reached as to the meaning of a statute, of a contract, or of a treaty. But it is *a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or partiality.* [80]

IV. CUSTOMARY INTERNATIONAL LAW

A. The Notion of Customary International Law

Legal rules derived from unwritten law—customary international law—do not easily reveal themselves; instead, judges must rely on ancillary rules for ascertaining customary international law. But even the notion of customary international law is itself evasive. In general, for customary law to be established, there must be a general practice, which is widespread, consistent, etc. This practice must be considered obligatory, meaning there must be some sort of conviction that this practice is followed because it is obligatory. The ICJ has on several occasions upheld the requirement

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[79] KOLB, *supra* note 48, at 931.

[80] Lauterpacht, *supra* note 77, at 53 (emphasis added).

for both elements: objective (practice) and subjective (*opinio juris*). Thus, in the *Continental Shelf* case between Libya and Malta, the Court stated that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States..."[81]

These "simple" requirements in turn raise a number of other issues. What is the density required for practice—how widespread, how consistent, for how long, etc? What counts as practice—only physical acts or also verbal acts, such as voting in international conferences? What weight should be accorded to verbal acts if they are recognized as the form of states practice? Practice of which State organs counts—only organs responsible for foreign relations or all State organs? Does practice of non-state actors count? What is the nature of legal conviction or *opinio juris?*

This is not a very promising introduction for legal rules that should act as a constraint on judicial creativity of international courts. As this section shows, rules derived from customary law can provide a safe haven for all sorts of judicial innovation.

B. Objective Element: What Counts as Evidence of Practice?

First of all, a judge looking for a justification in customary international law can choose which evidence to count as state practice.[82] It is widely accepted that state practice takes many forms.[83]

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[81] Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29 (June 3).

[82] *See* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 3 (1974–75).

[83] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporter's note 2 (1987). International Law Commission in its report to the UN General Assembly on "Ways and Means for Making the Evidence of Customary International Law More Readily Available" indicated the following non-exhaustive list of evidence of customary law: texts of international instruments, decisions of international courts, decisions of national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations. *Report of the International Law Commission to the General Assembly*, Ways and Means for Making the Evidence of Customary International Law More Readily Available, [1950] 2 Y.B. INT'L L. COMM'N 367, U.N. Doc. A/1316. (1950). Similarly, Brownlie indicates that the following are included among the possible evidence of state practice: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on

For one, there is some disagreement between authorities over whether state practice includes verbal acts. On the one side, we find authorities that assert that only physical acts count as state practice.[84] Thus, in his separate opinion in *Fisheries Case*, Judge Read asserted that "[c]ustomary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims . . . The only convincing evidence of State practice is to be found in seizures, where the coastal States asserts its sovereignty over the waters in question by arresting a foreign ship . . . "[85]

One the other side, we find authorities that argue that verbal acts do count as the evidence of practice.[86] Others yet take a middle position and suggest including verbal acts, but also ascertaining customary rules primarily "on real and concrete practice."[87] In its final report, the International Law Association's Committee on Formation of Customary International Law also seemed to support the middle position by emphasizing that one should take into account the distinction between what conduct counts as State practice and the weight to be given to it.

Of course, counting verbal acts as state practice opens the door for using a great variety of materials, many of which will be contradictory. The only "remedy" to this inconsistency is judicial discretion. With so many sources of state practice to choose from, every judge will be able to find something to his liking.

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legal questions, e.g. manuals on military law, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recital in treaties and other international instruments, etc. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (6th ed. 2003).

[84] ANTHONY A. D'AMATO, THE CONCEPT OF SPECIAL CUSTOM IN INTERNATIONAL LAW 47–98 (1971).

[85] Anglo-Norwegian Fisheries, U.K. v. Norway, Order, 1951 I.C.J. 117, 191 (Jan. 18) (separate opinion of Read, J.).

[86] *See, e.g.*, MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 20 (2nd ed., 1997).

[87] G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 91 (1993).

C. *Objective Element: Density*

Another issue that helps judges ascertain favorable customary rules is the required density of practice. In the international community, consisting of roughly 200 States, it is often difficult to establish a consistent practice. Wolfgang Friedmann voiced his concern some 50 years ago when he noted that "custom is too clumsy and slow" to accommodate the international community, which went "from a small club of Western Powers to 120 or more 'sovereign' states."[88] Normally, "[g]eneral customary international law is created by State practice which is *uniform, extensive, and representative in character.*"[89] However nice and laconic the formulation of this rule, even radical formalists would admit that in practice it is often unclear when the required density is reached.[90]

Moreover, there is no requirement of ideal consistency. The ICJ clearly stated this point in the *Nicaragua v. United States:* "[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."[91] Thus, some general consistency of state practice will be enough for judges to "determine "the existence of a customary rule.

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[88] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 122 (1964).

[89] INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW – STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 20 (London Conference, 2000) (emphasis added) [hereinafter ILA Final Report on Customary Law].

[90] Mendelson's amusing example illustrates the difficulty: "It makes no more sense to ask a member of a customary law society 'Exactly how many of you have to participate in such-and-such a practice for it to become law' than it would to approach a group of skinheads in the centre of The Hague and ask them, 'How many of you had to start wearing a particular type of trousers for it to become the fashion – and, indeed, *de rigeur* – for members of your group?'" MAURICE H. MENDELSON, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW, 272 RECUEIL DES COURS 155, 174 (1998).

[91] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

D. *Objective Element: Class of Subjects Who Form Customary Rules*

Another problem is that it is unclear whose practice is relevant to the formation of customary law: is it limited only to States, to States and international organizations, or to all subjects of international law? This issue splits hairs of customary rule determination even further. First, conservatives argue that only *State* practice is relevant to the formation of the customary international law. The Third Restatement states that "[c]ustomary international law results from a general and consistent *practice of states* followed by them from a sense of legal obligation."[92] Other commentators expressly stress the point that practice has to be attributable to States and thus "the practice of international organizations or individuals is excluded."[93]

Second, there are those who maintain that States do not have an exclusive competence in the formation of customary international law, but the formation of customary international law should be limited to States and international organizations.[94] This is becoming the new conventional view.[95]

Finally, there are progressives—those who accord competence to form customary law to all participants in the international community. Some suggest the inclusion of NGOs together with international (intergovernmental) organizations.[96] Others suggest

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[92] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102.2 (1987) (emphasis added).

[93] VILLIGER, *supra* note 86, at 17.

[94] *See, e.g.*, Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

[95] Mendelson, *supra* note 90, at 188. Mendelson defines a rule of customary international law as "one which emerges from, and is sustained by, the constant and uniform practice of States and *other subjects of international law*, in their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future." He further asserts the right of international organizations in their own name to contribute to formation of customary law. Mendelson further acknowledges that indirectly (but only indirectly, and not in their own name) other entities–like NGOs or multinational corporations–may contribute to formation of customary law. *Id.* at 201–03.

[96] *See* Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211 (1991).

that this competence should be recognized in individuals, particularly in the field of human rights.[97] Once these views become the official theory of customary international law any judge should be able to easily synthesize dozens of different customary rules on the same legal issue.

E. Subjective Element

Then there is the delicate issue of ascertaining the subjective element, or *opinio juris.* Not every international usage or habit is customary law; only a usage felt to be obligatory can be considered customary law. Thus, *opinio juris* requires that there be "present a feeling that, if the usage is departed from, some form of sanction will . . . fall on the transgressor."[98] The subjective element, as the ICJ stressed in the *North Sea Continental Shelf* case, is crucial because it helps to distinguish customary legal rules from mere usages.[99] In inter-State relations, there are plenty of international acts that "are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[100] For example, States habitually use red carpets when greeting high-ranking foreign officials, but this habit is not part of the customary law because States perform such acts without conviction that they are legally obliged to do so. Thus, *opinio juris* indicates the conviction of States that certain acts are performed because they are obligatory or right.[101]

Of course, the tricky part is determining this conviction or feeling that the usage is obligatory. Few judges, if any, are renowned for their mind reading abilities, and reading the minds of abstract entities such as States seems to be equally challenging. One way to deduce *opinio juris*, as the ICJ indicated in *Nicaragua* case, "with all

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[97] Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 127 (1937).

[98] BRIERLY, *supra* note 12, at 59.

[99] North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

[100] *Id.*

[101] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 47, at 27.

due caution ...inter alia, [is from] the attitude of the Parties and the attitude of States towards certain General Assembly resolutions..."[102] But this is in fact only one possible source of *opinio juris* and not the method for deducing it. So in the end, each judge will decide for herself or himself if state practice (in an international community consisting of two hundred States), which is uniform, extensive, and representative, deserves to be considered customary law because the States showed "conviction" or "feeling" that this practice is obligatory or right.

F. Summary: Customary Rules as Constraint

In the search for the justification of the preferred outcome, only an unimaginative judge would be disappointed with customary international law. Customary international law might have been easy to ascertain when the international community was a small club of a dozen States (primarily a family of Western nations), but as the number of States multiplied, it has become next to impossible to detect a perfectly consistent practice. Of course, there might be exceptions, such as the prohibition of genocide or apartheid, where few States if any will openly support such practices; yet even these kinds of prohibitions may be occasionally honored more in their breach than in their compliance.

Accordingly, one will rarely detect consistent practice, much less consistent practice coupled with clear indications that it is considered obligatory or right. Ultimately, which customary rules are chosen for justification may depend entirely upon judicial discretion. Therefore, the ascertainment of customary law often provides a guise for judicial legislation.[103] One could only add that customary international law is arguably the best guise of all for judicial creativity.[104]

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[102] *See* Military and Paramilitary Activities in and Against Nicaragua, *supra* note 91, at 98–100.

[103] LAUTERPACHT, *supra* note 28, at 368.

[104] In quantitative empirical studies of judicial decision-making, some scholars use reliance on customary law as straightforward evidence of expansive interpretation of international law. Sébastien Jodoin, *Understanding the Behaviour of International*

V. GENERAL PRINCIPLES OF LAW

This category of rules has the least potential to constrain international courts, and perhaps there is not a single scholar who would contest that. It suffers from similar haziness and perplexity as customary international law does, only much more so. Suffice it to mention that general principles of law were never intended to serve as any sort of constraint, in a way that other rules might serve. Its purpose was to fill the gaps in the international legal system left by treaties and customary rules. Already in the drafting process of the PCIJ Statute, some drafters opposed the inclusion of general principles or equity into the Statute. It was not a representative of the continental tradition but Lord Phillimore—a common law lawyer who was much more accustomed to judicial law-making than his continental counterparts. In his view, unless the English technical meaning of equity was adopted, the inclusion of equity as a general source of law would give the judge too much liberty.[105]

Less than a decade after the adoption of the Statute, Dionisio Anzilotti, one of the leading international lawyers of his generation, noted the very limited application of general principles of law. According to Anzilotti, an international judge may derive a legal rule from national legal systems, but that legal rule could be used only to solve that particular case.[106] Thus, Anzilotti did not believe that legal rules derived from general principles of law could have a constraining effect on future cases. Other scholars have likewise observed that hunches, and nothing else, make judges choose which general principles of law to use.[107]

Courts: An Examination of Decision-Making at the ad hoc *International Criminal Tribunals*, 6 J. INT'L L. & INT'L RELATIONS 1, 20 (2010).

[105] PERMANENT COURT OF INTERNATIONAL JUSTICE ADVISORY COMMITTEE OF JURISTS, PROCÉS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE 333 (1920).

[106] DIONISIO ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 107 (3a ed., 1928), *quoted in* FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 37 (2008).

[107] Rudoff B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 734 (1957) ("But if we read the opinions, we look in vain for an answer to the question: How did the Court know that the particular rule or principle it relied on was in fact a general principle of law recognized by civilized nations? In case after case, the judge writing the opinion

Overall, whatever the potential of general principles of law,[108] constraint of international courts is not one of them.

VI. BEYOND LEGAL RULES

A. Inherent Ambiguity of Language

Early legal realists scoffed at the idea that judicial decision-making is merely a rule-based activity. Rather, they argued that multiplicity of legal rules and dueling cannons usually cancel each other out and thus cannot constrain courts. Later, scholars in other disciplines demonstrated the inherent ambiguity in language and the impossibility of objectively correct answers—including objectively correct legal answers. In the second half of the twentieth century, many post-modernist philosophers and philosophers of law, most notably deconstructualists such as Jacques Derrida, asserted that language is inherently undecidable.[109]Accordingly, for Derrida and other deconstructualists, there are no rules at all. This was perhaps one of the most radical schools of thought in legal philosophy.

But even before deconstructualists and other post-modernists gained prominence, argumentation scholars showed that arguments of formal logic are impossible with natural language.[110] Chaim Pereleman, a noted Belgian rhetorician, demonstrated this idea when he aimed to ressurect the classical Aristotelian notion of argumentation which is opposed to Cartesian ideals of formal logic.[111]According to Perelman, only formal systems, which are complete and have no internal contradictions, allow formal logical

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simply expressed a hunch, a hunch probably based upon the legal system or systems with which he happened to be familiar.").

[108] *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50–55 (1991); Elihu Lauterpacht, *Equity, Evasion, Equivocation and Evolution,* Proc, 1978–79 PROC. AM. BRANCH INT'L LAW ASS'N 33.

[109] SURI RATNAPALA, JURISPRUDENCE 231 (2009).

[110] *See, e.g.*, CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson and Purcell Weaver transl., 1969); STEPHEN TOULMIN, THE USES OF ARGUMENT 188–200 (1958); *see also* Alain Lempereur, *Logic or Rhetoric in Law?*, 5 ARGUMENTATION 283 (1991); Lyndel Prott, *Argumentation in International Law*, 5 ARGUMENTATION 299 (1991).

[111] PERELMAN & OLBRECHTS-TYTECA, *supra* note 110.

arguments.[112] Mathematics is an example of such a system. An important feature of formal systems is the principle of identity—one proposition or symbol must refer to only one meaning. Language is clearly not a formal system because it violates the principle of identity—words do not stand for only one meaning, but rather have multiple meanings. According to Perelman, in a formal system, the following statement would make no sense: "A penny is a penny" or "When I see everything I see, I think what I think."[113] These statements do, however, make sense because words are capable of having more than one meaning. In the classical Aristotelian tradition of argumentation, arguments do not exist in nothingness, their acceptance depends on the particular audience. Thus, one audience might reject the argument because it does not accept its premise, while another audience may accept it without any reservations.[114]

In this sense, decisions of international courts are rarely more objectively correct than their possible alternatives and it is therefore impossible to "objectively" evaluate whether international courts are performing well. Whether a judicial decision will be regarded as a good one depends on a multitude of subjective factors. Hence, judicial decisions are not objectively correct from the outset, but instead become correct because a particular judicial audience accepts them as such.

If a judicial decision seems "objectively correct" and predictable, it is mainly due to the hindsight bias: looking back at judicial decisions, legal scholars are ready to detect a coherent development and predictable (but only in hindsight) outcomes. Yet, if one looks at various opinions before the adoption of a particular decision, the "objectively correct outcome" is much more difficult to predict.

An example of this is *South West Africa* decision. There, the ICJ refused to entertain a claim against South Africa for its apartheid practices in South West Africa (Namibia).[115] Subsequently, most countries saw the Court as the pro-Western Court protecting apartheid policies of South Africa. This decision caused a near

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[112] *Id.* at 1–47.
[113] *Id.* at 217.
[114] *Id.* at 26–45.
[115] South West Africa (Eth. v. S.Afr.; Liber. v. S.Afr.), 1966 I.C.J. 6 (Jul. 18).

universal boycott of the Court; and in hindsight, it is the best example of an utterly senseless decision. Yet, at the time of the decision, eminent lawyers considered it to be a perfectly correct decision. Sir Francis Vallat stated that "in five or six years time it will be realized that this Case was a great turning point because it (i.e. the Court) did not give way to political pressure . . . [The Court] is not to be brown beaten by political consideration."[116] For every decision that history eventually favored, one can find ample criticism at the time of its adoption, and for every witless decision, one can find plenty of praises before the tide of criticism turned the other way. It just serves to show that the "objectively correct answer" is usually a product of hindsight, not logical reasoning or an "objectively verifiable" method.

B. External and Internal Constraints

As the previous sections have shown, legal rules cannot constrain judicial creativity, but that does not automatically mean that there are no constraints at all. The full treatment of this topic is outside the scope of this article, but it is worthwhile to note the main points here.

Historically, straightforward external constraints rarely worked. For example, the English used several techniques to minimize judicial latitude.[117] First, the doctrine of *stare decisis* required that courts rigidly adhere to precedents — by *literally* following the holding of the previous case so that they could not paraphrase it or loosen up its language. Second, the principle of orality required judges to do everything in public. They had no written pleadings to read, no staff, no secret deliberations - everything had to be done in public. And because the public could observe everything the judges were doing, they were unlikely to legislate off the top of their head. Not surprisingly, the English eventually abandoned both constraints.[118]

Likewise, in today's international courts, external constraints are weak. For example, one empirical study of international judges,

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[116] *See* Higgins, *supra* note 3, at 67.
[117] *See* POSNER, *supra* note 9, at 154–55.
[118] *Id.*

based on interviews with judges of most international courts, revealed that judges themselves believe that institutional or external constraints either do not exist or are rather weak. As one judge observed, "[a]ccountable to God, is an old-fashioned way of putting it."[119] According to another judge, "[t]here is no check from the outside; it's only from the inside."[120] Thus, it seems that collegiality and deliberation might be overrated as the constraint.[121] There is also some empirical evidence from quantitative studies that external interests influence judicial decisions of international courts only when they are in line with the internal attitudes of the judges themselves.[122]

Arguably, the most important constraints are internal, not institutional or external. One internal constraint is the internalization of the norms and usages of the judicial "game".[123] This internalization depends on many factors, with the professional background of judges being one of the most important. For example, former academics tend to be more activist as international judges, while former diplomats tend to be more restrained and are more responsive to national interests.[124] Other possible constraints, which may not be purely internal, include concerns for reputation[125] and reactivity (a tendency to change behavior in reaction to evaluation or observation by third parties).[126] In this context, there is some merit to the views of international courts as social systems, where the socialization of

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[119] DANIEL TERRIS, CESARE P.R. ROMANO, AND LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 205 (2007).

[120] *Id.*

[121] This is not limited to international courts and probably is even more pronounced in the American courts. *See* Patricia M. Wald, *Some Real-Life Observations about Judging*, 26 IND. L. REV. 173 (1992) (observing that a judge usually states her bottom line and sometimes a brief explanation; seldom judges change their minds in the process of deliberations).

[122] Jodoin, *supra* note 104, at 33.

[123] POSNER, *supra* note 9, at 125.

[124] TERRIS ET AL, *supra* note 119, at 64; Jodoin, *supra* note 104, at 30.

[125] POSNER, *supra* note 9, at 125.

[126] POSNER, *supra* note 9, at 149.

international judges and legal staff influences judicial decision-making.[127]

VII. CONCLUSIONS

International law is better qualified than common law systems to be called inherently ambiguous. For one, international law has no legislature, which is a prerequisite for all common law systems. Also, there are little or no checks and balances on international courts; even those that do exist are incomparable to the checks and balances found in legal systems such as the United States.

As this article has shown, there is inherent ambiguity in international legal rules. Furthermore, natural language generally does not qualify as a formal logical system. Accordingly, such rules are unlikely to constrain international judges who want to pursue judicial law-making or make decisions on other grounds than legal rules. Thus, an objectively correct legal result is a myth and "the search for 'objective determination' is a chimera."[128]

Moreover, this article has discussed only what can be described as "legal rules realism," or the juggling of legal rules and cannons of interpretation in order to justify a decision that was made on other grounds. However, "fact-finding realism" can also serve as a safe haven for judicial creativity, allowing a judge to accept only that evidence which will support the preferred outcome.[129] Fact-finding in international courts is much more fluid than in the majority of domestic courts. Consequently, fact-finding realism would be effective whenever judicial creativity confronts exceptionally clear-cut legal rules.

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[127] Jodoin, *supra* note 104, at 31; *see also* Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING : NEW INSTITUTIONALIST APPROACHES 32 (Cornell W. Clayton and Howard Gillman eds., 1999).

[128] Higgins, *supra* note 3, at 71.

[129] JEROME FRANK, LAW AND THE MODERN MIND 135 (1930) ("A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the 'facts' reported by him, combined with those traditional rules, will justify the result which he announces.").

Does this then mean that legal rules are worthless and there are no constraints on international courts? No. Only radical post-modernist philosophers would argue so. Legal rules matter, a great deal so in some cases, but they are only one factor out of many. Pekelis probably expressed it best when he said that "concrete cases cannot be decided by general propositions—nor without them."[130] More importantly however, legal rules can operate as constraints through internalization, and internal constraints can be more potent than any institutional or external constraints, if those matter at all.

Of course, it would be wrong to think in binary terms about the constraints of legal rules, i.e. that legal rules either constrain totally or do not constrain at all. Instead, the question is one of scope - how much they contrain. Even in public international law, where ambiguity is the trademark of the legal system, international courts will seldom make outlandish decisions. But as this article has shown, international courts can easily find several equally plausible legal rules applicable to a case. Which legal rule will carry the day will likely depend on the preferred outcome, and the preferred outcome will likely depend on policy preferences and other non-legalistic grounds.[131]

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[130] ALEXANDER H. PEKELIS, LAW AND SOCIAL ACTION: SELECTED ESSAYS 20 (1950) (*quoted in* Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MNTN. L. REV. 123, 131 (1961)).

[131] *See generally* Higgins, *supra* note 3 (Policy reasoning in international law is less welcomed than it is in the U.S. or a few other common law jurisdictions; that is why international courts usually have to juggle legal rules to justify decisions that are actually based on policy preferences).