7 The Puzzle of Freedom
Structure and Agency in International Adjudication

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Introduction

For decades, critical scholars have debated the contours of agency and structure – or 'freedom and constraint'[1] – in the legal activities of international organisations.[2] According to some, the inherent indeterminacy and open-endedness of legal processes enable – indeed require – institutional actors to exercise political discretion in (re)definition of norms without reifying 'the ideas and attitudes that make the established order seem natural [and] necessary'.[3] Others, by contrast, highlight the structural 'limits and pressures, tendencies and orientations'[4] that shape normative possibilities, 'promote the expression of certain types of interests', and 'suppress that of others'.[5] Arguably, these are

[1] D. Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518.

[2] As used throughout the chapter, the word 'legal' is to be understood broadly and not limited to the formal sources of international law. Indeed, much of the output of international institutions takes the form not of general and binding rules but of 'soft law' instruments (resolutions, guidelines, recommendations, etc.) and *ad hoc* decisions (judgments, arbitral awards, etc.). That output has 'legal' force insofar as it shapes the conduct and stabilises the behavioural expectations of international actors. For discussion of this deformalised notion of legality, see e.g. J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011), 38–82.

[3] R. M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2nd edn., Verso, 2004), xx. See also e.g. D. W. Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' (2007) 31 *New York University Review of Law and Social Change* 641.

[4] S. Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1, 10.

[5] B. de Sousa Santos, 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279, 297. See also e.g. G. Teubner and A. Fischer-Lescano, 'Cannibalizing Epistemes:

two sides of the same coin, and an emphasis on either position reflects the sensibilities and preoccupations of the observer.

In this chapter, I apply the agency/structure dichotomy to a specific subset of organisations, namely international courts and tribunals. Unlike other entities, judicial bodies do not possess the power of legal initiative: they are not supposed to create law from scratch, but to interpret and apply pre-existing rules to solve concrete cases. However, much like other institutions, courts and tribunals develop recursive – and often 'unwritten'[6] – practices, postures, and modes of world sensemaking that shape the meaning and evolution of international norms, with systemic effects that extend well beyond the parties to individual cases.

Indeed, the rise in prominence of international adjudicative mechanisms, like the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the dispute settlement system of the World Trade Organisation (WTO), and investor-state arbitration (ISDS), has been the object of intense scrutiny by international lawyers, political scientists, and sociologists alike. Countless studies have appeared that seek to identify patterns and strategies in the jurisprudence of the various tribunals and reconstruct the ever-elusive *intention du juge*.[7] While those studies helpfully shed light on the external forces affecting the decision horizon of international adjudicators, they also tend to overplay systemic constraints and institutional biases.

Against this backdrop, it bears asking: what guides international courts in reaching their decisions? What structural limitations do they encounter? And what agency and discretion do judicial actors enjoy in the process? My main argument is that the legal production of the international judiciary reflects *the internal socio-professional dynamics of the community of professionals that run the machinery in its routine operations*. The ways those professionals interact, cooperate, and clash on a daily basis have a crucial impact on judicial outcomes – more

Will Modern Law Protect Traditional Cultural Expressions?', in C. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Edward Elgar, 2008) 17, 20.

[6] M. McDougal, H. Lasswell, and M. Reisman, 'The World Constitutive Process of Authoritative Decision' (1967) 19 *Journal of Legal Education* 253, 260.

[7] See E. Jouannet, 'La Motivation ou le Mystère de la Boîte Noire', in H. Ruiz Fabri and J.-M. Sorel (eds.), *La Motivation des Décisions des Juridictions Internationales* (Pedone, 2008) 251, 271.

so than the substantive norms that courts are called upon to interpret and apply; and more so than the external political pressures to which they are subject. To illustrate this point, I unravel some of the everyday practices that occur inside international judicial institutions. My analysis reveals that those practices are at once *structured* – i.e. subject to social constraints and pressures – and *contingent* – i.e. open to change, contestation, and restructuring.

My argument proceeds as follows. In the section 'Determinism, Determinism Everywhere', I problematise the notion of institutional bias that has been expounded by several authors, and call for an anti-formalist and anti-determinist account of international judicial processes. In the section 'Sources of Constraint', I discuss the ways in which the inner circle of adjudication experts delimits and constrains the decision horizon of international courts. In the section 'Spaces of Freedom', I identify some residual spaces of freedom and discretion in the construction of international judicial 'truths'.

Determinism, Determinism Everywhere

In 1989, Martti Koskenniemi shook our disciplinary conscience by revealing the indeterminacy of the international legal argument. Because the body of international law doctrines can accommodate contrary outcomes and courses of action, expert argument enables 'the taking of any conceivable position in regard to a dispute',[8] thereby delegating the solution to 'an ultimately arbitrary choice'.[9] Some twenty years later, the same author offered a strikingly different account: 'in practice nothing is ever that random. Competent lawyers know that the world of legal practice is quite predictable.'[10]

This is intriguing. What has transpired in the meantime that has shifted the focus from indeterminacy to predictability? For Koskenniemi, the game-changer is 'the emergence and operation of *structural bias*'; more precisely, 'the creation of special regimes of knowledge and expertise' like human rights law, environmental law,

[8] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument – Reissue with New Epilogue* (Cambridge University Press, 2005), 565.
[9] Ibid., 67.
[10] M. Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20 *European Journal of International Law* 7, 9.

trade law, investment law, and security law.[11] The consolidation of 'institutional projects [that] cater for special audiences with special interests and special ethos' has made it possible to predetermine the outcomes produced in the international world.[12]

This change of view neatly captures the existing narratives of international adjudication. Thanks to years of critical inquiry, we now know that international courts are more than 'apersonal'[13] bodies ascertaining the preordained meaning of rules and mechanistically applying it to facts.[14] We no longer expect the judicial interpreter to proceed in a scientific fashion, plodding through Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), to 'deduce the meaning exactly of what has been consented to' and reach neutral and unassailable conclusions.[15] Our contemporary imagination is finally emancipated from the deterministic shackles of traditional legal formalism.

Yet, the notion of institutional bias, in its various permutations, still holds sway. To its proponents, judicial outcomes are determined by the sectoral mandate of each court, the backgrounds and entrenched ideologies of its adjudicators, and their quest for legitimacy in the eyes of political constituencies.[16] These 'external constraints'[17] reinforce

[11] Ibid., 9 (original emphasis). [12] Ibid., 9.

[13] G. Messenger, 'The Practice of Litigation at the ICJ: The Role of Counsel in the Development of International Law', in M. Hirsch and A. Lang (eds.), *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018) 208, 210.

[14] J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice, O. Elias, and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17, 23. See also I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011), 35; I. Venzke, 'The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 99, 99–100.

[15] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008), 286.

[16] See e.g. J. L. Gibson and G. A. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) 39 *American Journal of Political Science* 459; K. J. Alter, L. R. Helfer, and M. R. Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 *Law and Contemporary Problems* 1; N. Grossman et al., 'Legitimacy and International Courts: A Framework', in N. Grossman et al., *The Legitimacy of International Courts* (Cambridge University Press, 2018), 1.

[17] S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press, 2015), 87.

'institutionally ingrained problem definitions and strategies for solution',[18] thus framing the categories and vocabularies through which legal issues are addressed. Institutional bias is often depicted as irresistible. A human rights court will be 'programmed'[19] to prioritise fundamental freedoms over state interests; a WTO panel will invariably privilege trade liberalisation over, say, environmental protection; an international criminal tribunal will always be inclined to pierce through sovereign immunity and combat the culture of impunity; and so on.

Taken to an extreme, institutional bias is as deterministic as traditional formalism. Both tend to explain the decisions of international judges by reference to some *other* reality, invisible to their eyes, that guides their every action. For traditionalists, that reality is the law itself: a concrete entity with its own inherent logic and rationality, somehow independent of the human agents who routinely create, interpret, apply, resist, and are bound by it.[20] For institutional bias theorists, it is the context of 'deeper, impersonal forces' that exert their pressure and inexorably nudge courts in a set direction.[21] In either case, the *people* actually involved in the process possess little agency, squeezed as they are between the Scylla of legal determinacy and the Charybdis of ideological partiality.

This sombre picture leaves many questions unanswered. How, for one, do 'particular normative biases and preferences come to be embedded within an international regime at a particular point in its historical trajectory'?[22] And how, for another, can individuals exercise responsible freedom in the definition and evolution of judicial outcomes? In the pages that follow, I seek to provide tentative answers to these questions and offer an anti-formalist *yet* anti-determinist account of international adjudication.

[18] Teubner and Fischer-Lescano, 'Cannibalizing Epistemes', 20.

[19] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682 (13 April 2006), para. 488.

[20] For a critique of this view, see e.g. P. Schlag, *The Enchantment of Reason* (Duke University Press, 1998), 100–104.

[21] D. W. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 *Sidney Law Review* 1, 4.

[22] A. Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition', in M. A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 113.

To do so, I deconstruct the notion of international courts as cohesive and monolithic entities and shed light on their micro-level practices. Seen from this angle, the ethos and the preoccupations of each court are not carved in stone, but are shaped by the evolving socio-professional dynamics of the club of legal experts that contribute to its routine functioning. This club, which I call the *international judicial community*,[23] comprises all the professionals that gravitate in the immediate proximity of a given judicial institution. International judges are just the tip of the iceberg. Other less visible players include the professional litigators (state agents, government lawyers, private counsel, NGOs, etc.) representing the parties in court; the legal bureaucracies (registries, secretariats, clerks, etc.) assisting the bench with the preparation, deliberation, and drafting of judgments; the specialised scholars developing the unified grammar and conceptual categories of each judicial field; and the like.

The relationships, interactions, and worldviews of the international judicial community are *both* constrained by existing social arrangements *and* open to renegotiation, contingency, and agency. As such, they are both the vehicle of reproduction of legal outcomes and the source from which legal changes originate. On the one hand, intersubjective socialisation and patterned repetition allow for shared assumptions and expectations to crystallise, thus ensuring predictability in adjudication. On the other hand, the endless struggles among community members, which in turn reflect their power relations and relative capital, enable the contestation of pre-established patterns, the opening of paths to resistance, and the creation of avenues for the gradual evolution of legal systems.

To fully understand these dynamics, we must stop treating international courts as 'reified collectives forming separate and self-standing units of analysis'.[24] Instead, we must open the 'black box' of judicial institutions[25] and engage in a micro-analysis of their inner workings.

[23] See T. Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (Cambridge University Press, 2022).

[24] A. Vauchez, 'Communities of International Litigators', in C. P. R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 655, 655–656.

[25] J. L. Dunoff and M. A. Pollack, 'International Judicial Practices: Opening the Black Box of International Courts' (2018) 40 *Michigan Journal of International Law* 47.

This can be done through a variety of methods, including field sociology, practice theory, and ethnographic participant-observation. In the next sections, I sketch a tentative framework for this analysis and link it to the overarching theme of structure vs. agency. I begin by identifying the socio-professional sources of constraint in the production of judicial outcomes, after which I turn to the interstitial spaces of freedom where judicial actors can steer the course of proceedings in new and unexpected directions.

Sources of Constraint

If, as Koskenniemi posits, international norms are inherently indeterminate, then what limits the discretion of international courts in the definition of legal outcomes? Can adjudicators really take any conceivable position regarding a dispute? Of course not. The scope of what is 'legitimately assertable' in judicial discourse is subject to powerful constraints, stemming from the collective expectations and dispositions of the international judicial community.[26]

The community plays this constraining role in an active and a passive way. Throughout the adjudicative process, it pushes and forces adjudicators by expressing views as to how certain issues should be addressed, how certain legal terms should be read, and what bodies of rules should be considered to solve the case at hand. Once the judgment is rendered, it carefully tests its analytical rigour, ascribes (in)competence based on background knowledge, and acts as the ultimate arbiter of professional recognition. In short, the community constitutes the immediate audience of international courts. Adjudicators are keenly aware of these internal pressures, and their decisions often 'speak' more directly to the legal professionals gravitating around them than to broader political constituencies.[27]

The dispositions of the international judicial community are often un-reflexive, deeply entrenched, and stubbornly resistant to change, and hence the impression that institutional bias is inescapable. Yet, as I will argue in the section 'Spaces of Freedom', the socially constructed

[26] S. Kripke, *Wittgenstein on Rules and Private Language* (Blackwell, 1982), 78.
[27] See T. Soave, 'Who Controls WTO Dispute Settlement? Socio-professional Practices and the Crisis of the Appellate Body' (2020) 29 *Italian Yearbook of International Law* 13, 18–19.

nature of that bias means that it can be contested and overcome under certain conditions. For now, let me discuss how the community secures and maintains its grip on the routine activities of international courts and fosters the crystallisation of their ingrained preferences. In a nutshell, the pathways of control relate to: (a) the institutional design of each court; (b) the social structures governing the relationships among community experts; and (c) the patterned practices and competent performances that those experts carry out on a routine basis.

Institutional Design

To begin with, the community plays a pervasive, if often unacknowledged, role in shaping the institutional architecture of judicial mechanisms, with obvious repercussions on the manner in which cases are prepared, filed, pleaded, and deliberated. Courts endowed with compulsory jurisdiction, like the ECtHR or WTO panels, may interpret and discharge their mandate differently from those that require the consent of the responding party, such as the ICJ.[28] Likewise, the relevant rules of procedure, the applicable standard of review, the remedies available, and the delimitation of the body of rules falling within a court's purview bear on the conduct of proceedings. Less noticeably, but equally importantly, the internal organisation of a court's bureaucracy informs the interplay and the division of labour between adjudicators and their legal advisors, giving rise to a variety of power dynamics.[29]

Traditional functionalist narratives tend to treat these design features as an external given, dictated by the preferences of constituent states and immutable in time. After all, it is government delegates who, through protracted negotiations, define the core structure and characteristics of each court, debate its competence and powers, and eventually ratify its constituent treaty. Later, they periodically negotiate the

[28] See e.g. L. Gross, 'Compulsory Jurisdiction under the Optional Clause: History and Practice', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (Transnational, 1987) 19.

[29] See e.g. D. Caron, 'Towards a Political Theory of International Courts and Tribunals' (2007) 24 *Berkeley Journal of International Law* 401; T. Soave, 'The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?', in F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press, 2019) 323.

appointment of judges and, if needed, set the agenda for institutional reform. These forms of engagement ensure the continued goodwill of political stakeholders towards international courts[30] and make them the ultimate arbiters of the system's legitimacy.[31]

However, these narratives obscure the crucial contribution of professional litigators to the establishment and reform of international courts. Those litigators are not mere 'operators' of judicial systems, but rather 'entrepreneurs' who co-decide the shape those systems should take in the first place.[32] If many states have embraced international adjudication as a mode of governance, it is partly because of their exposure to a transnational network of experts, who forged alliances with government departments, academic circles, and civil society organisations to promote their views and foster their agendas.[33] Lawyers 'created' their clients as much as clients 'created' their lawyers.[34]

Take ISDS, for instance. There, in the 1980s and 1990s, a handful of pioneering practitioners developed the very legal doctrines that would later be used to consolidate the system and turn it into a core component of international economic law.[35] Or think of international criminal justice, where NGOs and advocacy groups played a key role in the negotiation of the Rome Statute.[36] More recent

[30] See e.g., A.-M. Slaughter and L. R. Helfer, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899, 946–949.

[31] See T. Soave, 'WTO Dispute Settlement', 16–17.

[32] Y. Dezalay and M. R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 *Annual Review of Law and Social Science* 433, 444.

[33] See notably Y. Dezalay and B.G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

[34] M. Shapiro, 'Judicialization of Politics in the United States' (1994) 15 *International Political Science Review* 101, 109. See also Vauchez, 'International Litigators', 657.

[35] A good case in point is Jan Paulsson's elaboration of the doctrine of 'arbitration without privity'. J. Paulsson, 'Arbitration without Privity' (1995) 10 *ICSID Review – Foreign Investment Law Journal* 232. For discussion, see e.g. S. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 *European Journal of International Law* 875, 876.

[36] See e.g. Z. Pearson, 'Non-governmental Organisations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 *Cornell International Law Journal* 243.

history is equally rich in examples. The Multi-Party Interim Appeal Arbitration Arrangement, adopted by several WTO members to compensate for the demise of the Appellate Body, was politically promoted by the EU delegation, but technically developed by a trade law firm based in Geneva.[37] Similarly, the ongoing UNCITRAL talks on ISDS reform see the participation of some élite arbitration practitioners and scholars, who infiltrated state delegations and secured a seat at the negotiating table.[38]

As these examples show, the international judicial community has constrained the institutional design of international courts since their very inception, thus leaving its initial imprint on the kind of judicial discourse those courts will later develop.

Social Closure

Past the moment of genesis, the community's control of judicial processes gets even tighter by virtue of its social closure. Community members form a close-knit network of habitués who walk the corridors of courts regularly, maintain first-name personal contacts, and cultivate friendly professional relationships.[39] Ostensibly, they occupy distinct and well-defined positions. However, the boundaries are blurrier than they first appear. Throughout their careers, legal professionals swap roles frequently, sometimes donning multiple hats at once. Prominent professors may take a break from their faculty chairs to serve on an international court;[40] arbitrators in an ISDS case may appear as counsel in another; registry or secretariat lawyers may later be recruited

[37] See Soave, 'WTO Dispute Settlement', 30.
[38] See Soave, *Everyday Makers*, chapter 2.
[39] See J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191, 195; K. Hopewell, 'Multilateral Trade Governance as Social Field: Global Civil Society and the WTO', (2015) 22 *Review of International Political Economy* 1128, 1142–1143.
[40] Some 40 per cent of the judges sitting on permanent international courts 'have significant academic credentials' (D. Terris, C. P. R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007), 20) and about one third of investment arbitrators are former or current scholars (J. A. Fontoura Costa, 'Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields', (2011) 1 *Oñati Socio-Legal Series* 1, 17).

by government departments or private law firms;[41] and so forth. All combinations are possible.[42] These revolving doors among the bench, the bureaucracy, the bar, and the academe help strengthen existing bonds and forge new ties.

The closure of the network consolidates trust among its participants and perpetuates its insulation from external interference.[43] Court proceedings gradually come to be characterised by an increasing sense of 'clubbiness' and familiarity. The same handful of counsel appear at most hearings alongside their clients. Their intimate knowledge of the intricacies of international adjudication grants them a competitive edge over new entrants in the litigation market. Meanwhile, registry and secretariat bureaucrats incessantly work behind the scenes to streamline adjudicative practices, ensure consistency in jurisprudence, and serve as the institutional memory of the court. Finally, scholarly production in the field is densely populated by authors who have direct or indirect stakes in the system.[44] Being an 'insider' in the game means being familiar with its rules, adopting strategies that resonate with other players, and ultimately shaping judicial outcomes to an extent that is usually precluded to 'outsiders'.

At the same time, social closure reinforces the epistemic bias of community participants,[45] each of whom becomes 'a fully instrumentalised cog in the respective machine'.[46] Over time, the circle of professionals orbiting around each court develops a set of assumptions as to which legal sources, categories, and modes of reasoning are 'in line with [its] philosophy' and which others should be 'kept largely at bay'.[47]

[41] For instance, it is customary for firms specialising in international trade to hire former WTO secretariat officials, panellists, and even, on occasion, Appellate Body members. See Soave, 'WTO Dispute Settlement', 24.

[42] See J. d'Aspremont et al., 'Introduction', in J. d'Aspremont et al. (eds.), *International Law as a Profession* (Cambridge University Press, 2017) 1, 8; Vauchez, 'International Litigators', 661.

[43] See R. S. Burt, *Brokerage and Closure: An Introduction to Social Capital* (Oxford University Press, 2005), 93–97.

[44] See e.g. S. Schill, 'W(h)ither Fragmentation', 894; H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165, 171.

[45] Burt, *Brokerage and Closure*, 168.

[46] M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 26.

[47] M. Waibel, 'Interpretive Communities in International Law', in A. Bianchi, D. Peat, and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015) 147, 163.

This, as Koskenniemi had foreseen, results in a turf war among different sub-fields of expertise, such as trade, human rights, investment, or environmental law, each striving to preserve its internal rationality from 'disturbing outside perspectives'.[48] Any attempt to export expertise, practices, and worldviews from one sub-field to another is considered a trespass that might shake the 'context-preserving routine'.[49]

Competent Practices

Besides structuring community relationships, this degree of social cohesiveness gives rise to the most powerful source of constraint in judicial activity: recursive practices. Emmanuel Adler and Vincent Pouliot have famously defined 'practices' as 'competent performances'.[50] More precisely, practices 'are socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world'.[51] This definition captures the characteristics of the myriad activities the community carries out on an everyday basis, and which have a pervasive impact on the outcomes of disputes.

First, practices are 'patterned', meaning that they exhibit 'certain regularities over time and space' and 'reproduce similar behaviors with regular meanings'.[52] Although every dispute is unique in content, the internal steps that mark its unfolding are standardised. Every case begins with the parties' submission of written memorials, often followed by rejoinders and counter-rejoinders. These filings are then processed by the court bureaucrats who circulate internal memoranda to summarise their analyses and help the adjudicators prepare for the next steps. After the written phase, most courts hold hearings. After that, the adjudicators convene for deliberations and cast their decisions on the issues at stake. Based on the adjudicators' instructions, the final judgment is drafted, reviewed, approved, and circulated. Recursiveness extends to the actors involved in the process who, as

[48] I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012), 157.
[49] Unger, *False Necessity*, 32.
[50] E. Adler and V. Pouliot, 'International Practices', (2011) 3 *International Theory* 1, 4.
[51] Ibid. [52] Ibid., 6.

discussed, tend to know each other well, communicate regularly, and entertain long-term professional relationships. Hence, judicial practices occur within a 'highly organised context'.[53]

Second, practices can be performed more or less 'competently' depending on the shared 'background knowledge' of the actors carrying them out.[54] This means that the hallmarks of (in)competence in judicial processes are socially attributed by the community based on collectively held standards. Through education, training, and work experience, community members are initiated to the way things are done[55] – the doctrines, argumentative techniques, ethos, aesthetics, and mythologies of their peers and superiors[56] – and reproduce them through communication and transmission of knowledge. These channels of socialisation contribute to perpetuation of the structures that 'condense and are confirmed as a result of the system's own operations.[57] At the same time, being socialised in the game *enables* each player to make arguments and take positions that will be accepted as 'true' or 'valid' by other players.[58]

Background knowledge informs every aspect of the judicial process, including – and perhaps especially – the interpretation of norms. The consensus of the community determines, at any given moment, whether the reading of a given norm is (un)acceptable, whether an interpretive posture is (un)viable, whether a legal argument is (un) persuasive, and ultimately whether a judicial decision is (in)correct.[59] An interpretation that meets them will be recognised as legitimate and

[53] Dunoff and Pollack, 'International Judicial Practices', 62.
[54] Adler and Pouliot, 'International Practices', 6–7 (emphasis omitted).
[55] J. Gross Stein, 'Background Knowledge in the Foreground: Conversations about Competent Practice in "Sacred Space"', in E. Adler and V. Pouliot (eds.), *International Practices* (Cambridge University Press, 2011) 87, 89.
[56] See e.g. D. W. Kennedy 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9; P. Schlag, 'The Aesthetics of American Law' (2002) 115 *Harvard Law Review* 1047.
[57] N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419, 1424.
[58] See e.g. S. B. Ortner, *Anthropology and Social Theory: Culture, Power and the Acting Subject* (Duke University Press, 2006), 3; Dunoff and Pollack, 'International Judicial Practices', 54.
[59] See e.g. A. Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning', in P. Bekker, R. Dolzer, and M. Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010) 34, 39–40.

authoritative, and might be tolerated even if it slightly departs from established canon. Conversely, an interpretation that radically breaks from accepted standards is likely to fail to 'find acceptance' by the community[60] and be dismissed as anomalous or aberrant.

This, no more and no less, is what we mean by *precedent* in international law – a system without formal *stare decisis*. The authority of an interpretation stems solely from its consistent use. Judicial decisions have no other force than their patterned reproduction. Yet, no serious practitioner would dare to ignore those decisions altogether: the community backs their fragile existence and consolidates them into *jurisprudence*.

Spaces of Freedom

As argued in the previous section, the international judicial community constrains the discretion of courts in many ways, including by participating in their institutional design, perpetuating their operational closure, and developing patterned practices and shared standards of legal argument. Yet, these constraints do not make judicial outcomes automatic or entirely predictable. After all, stability is only 'an illusion created by the recursive nature of practice', whereas change 'is the ordinary condition of social life'.[61] Indeed, amid the tight socio-professional structures of the community, there remain interstitial spaces for agency, responsibility, and freedom. It is there that new paradigms emerge – and legal evolution becomes possible.

In this section, I provide an initial mapping of these spaces of freedom and suggest ways to preserve them from the deterministic tendencies of the international judicial system. In particular, I focus on the possibilities offered by: (a) the creative interpretation of norms; (b) the competition among members of the international judicial community; and (c) the many contingent and accidental occurrences that punctuate proceedings. The term 'freedom', of course, should be handled with care: international adjudication being a collective endeavour, no single individual is, alone, in full control of the process. If any freedom is possible, it can only emerge from the interactions of multiple actors over time.

[60] Venzke, *Interpretation*, 5.
[61] Adler and Pouliot, 'International Practices', 18.

Creative Interpretation

First, the indeterminacy of international norms enables judicial actors to promote and defend interpretations of those norms that resonate with their ethical commitments or policy preferences. Faced with competing and equally viable rationalisations of legal constructs, courts must take sides. No pseudo-scientific exercise, no rigorous application of the VCLT rules of interpretation can relieve them from the inevitable duty of making choices. Hesitation, rather than certainty, is the essence of adjudication.[62] Why else would we speak of judicial *decisions*?

The moment of doubt is gleefully celebrated by the defenders of 'false necessity' as a tenet of moral psychology. David Kennedy, for instance, describes the exposure to the irreducible pluralism of possible solutions as a moment of supreme 'professional freedom', where we are 'open to persuasion', and we 'have lost control', precisely 'because *we do not know* what the law determines'.[63] Doubt provides us with an opportunity to unlearn our 'methodological predilections', transcend the 'widely shared commitments' of our profession, and bravely leap forward into the unknown.[64] Similarly, Duncan Kennedy imagines a left-leaning judge wishing to express their '"political" objection' and promote their vision of justice against a line of adverse precedent.[65]

To engage in judicial creativity is akin to Lévi-Strauss' *bricolage*. Unlike the 'engineer', who first comes up with an overarching plan and then selects the tools required to carry it through, the '*bricoleur*' is ready to use 'whatever is at hand' to get the job done.[66] A certain precedent bothers you – then paraphrase and dilute it. You struggle with the legal status of a rule – then simply 'take note' of that rule and move on. The parties' logical constructs give you a headache – no problem, just shift the emphasis from abstract reasoning to the factual context. Rigid textualism, open-ended reasoning, reliance on general principles, matter-of-factual analysis – anything goes, provided it sustains the flow of your narrative.

[62] See B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Polity Press, 2010), 91.
[63] Kennedy, 'Many Legal Orders', 644 (original emphasis). [64] Ibid., 645.
[65] Kennedy, 'Freedom and Constraint', 519–520.
[66] C. Lévi-Strauss, *The Savage Mind* (Weidenfeld and Nicolson, 1966), 16–17.

The problem with imbuing the law with your commitments is that, first, you need to know *what* your commitments are – at least in relation to the specifics of the case at hand. Duncan Kennedy's idealised judge is conveniently equipped with a coherent set of beliefs that guide their strategy and positioning throughout the case.[67] Whether *real-world* judicial professionals share such a deep understanding of means, ends, and consequences is open to debate. Focused as it is on technical mastery, international legal practice leaves relatively little time to consider the 'vivid odds and ends'[68] of distributive trade-offs. The 'ideals' moving the community can be as vague as the protection of human rights, generic support for economic development, or a 'broad renunciation of power politics, militarism, and the aspiration to empire'.[69] Not exactly the ideal ground for principled decision-making.

Despite these limitations, self-reflexivity and overt policy reasoning can play an important role here. Instead of dissimulating their choices behind the veneer of legal objectivity and technical jargon,[70] judicial actors should openly disclose the discretional and value-laden nature of their conclusions. This would enable the audience to grasp the real *intention du juge* and contest it in legal and political terms in subsequent cases.

Socio-professional Struggle

But freedom is not only a matter of individual agency. The very social structure of the international judicial community presents 'clusters and holes'[71] that open up avenues for dissent and renegotiation. In fact, despite its social cohesiveness, the community is neither homogenous nor internally peaceful. Instead, borrowing from Pierre Bourdieu, it is

[67] That judge has – no less! – a 'general preference for transforming the current modes of American economic life in a direction of greater worker self-activity, worker control and management of enterprise, in a decentralized setting that blurs between "owner" and "worker", and "public" and "private" enterprise'. Kennedy 'Freedom and Constraint', 520.

[68] T. Eagleton, *The English Novel* (Blackwell, 2005), 311.

[69] Kennedy, 'Many Legal Orders', 645.

[70] For an indictment of this tendency, see e.g. G. Shaffer and D. Pabian, 'Case Note: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R' (2015) 109 *American Journal of International Law* 154.

[71] Burt, *Brokerage and Closure*, 222.

'the site of a competition for monopoly of the right to determine the law', within which 'there occurs a confrontation among actors possessing a technical competence which is inevitably social' and which 'consists essentially in the socially recognised capacity to interpret a corpus of texts'.[72]

Disagreement and conflict pervade every corner of international courts from hearing rooms to backroom corridors. Case after case, community members strive against one another to assert their authority and impose their visions of the law as dominant – agents and counsel through their submissions, court bureaucrats through their memoranda, scholars through their articles, and adjudicators through their decisions.

Every step of the process sees the deployment of schemes, postures, and strategies that, depending on the circumstances, may be 'risky or cautious, subversive or conservative'.[73] Incumbents have a natural tendency to perpetuate their dominance. Challengers must come up with other plans, ranging from opportunistic deference to overt defiance, to get the upper hand. At every turn, old alliances break down and new ones emerge, in a continuous process of assertion, contestation, and restructuring.

It follows that the boundaries, priorities, and preoccupations of the community are 'never inherently fixed or stable', but are 'constantly being renegotiated' among its members.[74] The expert vocabularies in use in international courts are 'sites of controversy and compromise where prevailing "mainstreams" constantly clash against minority challengers'.[75] Each agent modifies the form taken by arguments and the salience of texts, and traces 'a set of divergent paths, mobilising clans who confront each other with facts, precedents, understandings, opportunities or public morality, all of which are used to stoke the fire of the debate'.[76]

Over time, these tensions open the door to new legal approaches, new interpretive postures, new ways of doing things. Innovations are

[72] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805, 817 (emphasis omitted).
[73] P. Bourdieu and L. Vacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992), 98.
[74] Adler and Pouliot, 'International Practices', 18.
[75] Koskenniemi, *From Apology to Utopia*, 12.
[76] Latour, *Making of Law*, 192.

seldom presented as radical, lest they be dismissed out of hand. They will usually creep in through the backdoor – discussed as a side point during a meeting, inserted in the paragraph of a party submission, etc. The most successful then slowly grow in the system – first as obscure footnotes buried in a judgment, then as *obiter dicta* in the main text, and finally as the new standard against which the community measures the persuasiveness of legal reasoning.

Ultimately, change occurs when the dominant assumptions embedded in a judicial regime are successfully challenged and replaced by new assumptions, as a result of the piecemeal evolution of the power relationships among competing actors. Whenever this happens, 'it is never because pure law has triumphed, but because of the internal properties of these relations of force or these conflicts between heterogeneous multiplicities'.[77]

Contingency

Finally, one should not underestimate the role that contingency and accident play in the unfolding of proceedings. While formalist accounts typically depict the judicial process as an orderly endeavour guided by an overarching rationality, things are often much, much messier. The construction of judicial 'truths' is akin to a meandering, uncertain, painstaking knitting process throughout which community actors 'grapple with a file';[78] assemble, disassemble, and reassemble claims and arguments; single out the salient facts among the plethora of evidence on record; assert, resist, and test their interpretive choices and moral instincts; until, eventually, the patchwork takes the form of a coherent whole.[79]

Along this 'developing drama',[80] countless 'amanuenses'[81] work tirelessly to reduce the amorphous factual context that gave rise to a dispute into a binary legal equation – the only form in which the case can be adjudicated. Along the way, the folders of relevant materials become thinner and thinner. The most salient information is gradually selected while the rest falls into the background. Eventually,

[77] Ibid. [78] Ibid.
[79] See C. Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1727, 1734–1736.
[80] Ibid., 1734. [81] Latour, *Making of Law*, 77.

a judgment will emerge which obscures all intricacies, inconsistencies, and hesitations that marked every phase of the process.

This process of 'denial', 'abstraction', and 'essentialisation'[82] entails a mutual adaptiveness of positions, an incessant construction and deconstruction of discursive possibilities, and an iterative quest for meaning and persuasion. At every turn, 'a whole series of tensions, vectors, currents, pressures [are] slightly rearranged'.[83] Submission after submission, pleading after pleading, question after question, certain subjects gain or lose traction; lawyers and adjudicators acquire or forgo authority; stumble momentarily; overcome roadblocks; glide over new terrains; affirm or disavow precedents; and revise interpretations.

No litigator, not even the most prescient, can confidently forecast the exact trajectory of a case. Arguments that seemed dispositive at the early stages of the dispute may be progressively sidelined, whereas seemingly mundane elements may rise in prominence and eventually become the cornerstone of the final ruling.

These contingencies can be exploited to introduce novel approaches and unorthodox views into the gears of the judicial machinery. They go on to show that nothing is as predetermined and predictable as the proponents of institutional bias would have us believe. The challenge is to identify those critical junctures, those loopholes in the socio-professional fabric of the international judicial community, and harness their tremendous creative potential.[84] After all, as a poet once put it, it is through the cracks that the light gets in.[85]

Conclusion: Structured Contingency?

In this chapter, I have started to unravel the relationship between agency and structure in the legal production of international judicial institutions. Seen from a distance, international courts appear as

[82] P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening: A Report on the State of the Art' (2009) 97 *Georgetown Law Journal* 803, 816.
[83] Latour, *Making of Law*, 141.
[84] See e.g. I. Venzke and K. J. Heller (eds.), *Contingency in International Law: On the Possibility of Different Legal Histories* (Oxford University Press, 2021).
[85] Leonard Cohen, 'Anthem'.

subservient entities, pulled apart by the competing forces of metaphysical law and unscrupulous politics. At closer examination, however, they reveal themselves as a site of socio-professional struggles, competing positions, and clashing worldviews. These micro-level relationships and practices are the source of both systemic constraint and responsible freedom in the definition of international legal outcomes.

Therefore, I would conclude that international adjudication takes place in conditions of *structured contingency*.[86] 'Contingency', because the path that leads to the formation of an international judgment is not predetermined, but susceptible to contestation and unforeseen twists. Every step of the process contemplates purposeful choices and value-judgements on the part of the actors involved. Each actor has countless opportunities to voice their opinion, assert and resist claims, and consciously exercise their discrete portion of agency to steer the course of proceedings. 'Structured', because while existing arrangements can be changed, 'change unfolds within a context that includes systematic constraints and pressures'.[87] Departing too abruptly from the tacit rules of the game would lead to professional reprimand, public derision, or outright expulsion from the game. Perhaps, then, the puzzle of freedom can be solved by paraphrasing Karl Marx: international courts 'make their own history, but they do not make it just as they please in circumstances they choose for themselves; rather they make it in present circumstances, given and inherited'.[88]

[86] See Soave, *Everyday Makers*. [87] Marks, 'False Contingency', 2.
[88] K. Marx, 'The Eighteenth Brumaire of Louis Bonaparte', in T. Carver (ed.), *Marx: Later Political Writings* (Cambridge University Press, 1996) 31, 32.