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**The two faces of the invisible college:
cooperation and competition in the
international judicial community**

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Abstract

Over the last 50 years, the invisible college theorized by Oscar Schachter has burgeoned into a full-blown profession attracting ever-growing numbers of individuals and institutions. Today, its centre is occupied by a tight and cohesive club of legal experts specialized in international litigation. This club, which I call the international judicial community, is characterized by socio-professional interactions that are at once cooperative and competitive. On the one hand, its members have gradually developed a distinctive set of structures and dispositions that differentiate it and make it autonomous from the rest of the international legal profession. On the other hand, the community is the site of a ruthless contest among its participants, who strive to assert their dominance and to consolidate their position relative to one another. This paper explores these two 'faces' of the international judicial community and tentatively connects its internal dynamics to the production of legal outcomes in the international world.

Keywords

Invisible college of international lawyers; International courts and tribunals; Social field; Legal profession; Reflexivity

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Introduction

If you are reading this paper, chances are that you identify with the ‘invisible college of international lawyers’.¹ The phrase, famously coined by Oscar Schachter in the 1970s, has known a resounding success across our discipline and constitutes part of its modern mythologies. According to Schachter, the members of the college devoted their time and energy to the ‘common intellectual enterprise’² of advocating, negotiating, applying, or studying international norms. Despite their different national and cultural backgrounds, they engaged in a ‘continuous process of communication and collaboration’, championed the promotion of a unified specialty able to transcend state borders,³ and strove to serve as the ‘*conscience juridique*’⁴ of the world. Today, the college has burgeoned into a profession attracting ever-growing numbers of practitioners, civil servants, scholars, businesspeople, and activists. Yes –that probably includes you.

The ‘discovery’ of the invisible college was more than an act of (congratulatory) self-recognition. Indeed, it offered a first, tentative basis for the study of international law as ‘a group of *people* pursuing projects in a common professional language’.⁵ In recent decades, numerous authors have built on that idea to map the social structures and interactions of our field and connect them to the production of legal outcomes in the international world.⁶ Yet, the ‘level of abstraction’⁷ of this emergent scholarship remains somewhat ambiguous. Some studies broadly conceive of the international legal profession as an ‘immense’⁸ social group sharing a common set of ‘methods, style, and aesthetics’⁹ – without, however, delving into the different roles, affiliations, and areas of specialization of its actors. Other studies, by contrast, narrowly focus on the dynamics of individual institutions like the World Trade Organization (WTO),¹⁰ the Court of Justice of the European Union (CJEU),¹¹ or arbitral tribunals¹² – without, however, placing their findings into a wider theoretical framework.

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¹ O. Schachter, ‘The Invisible College of International Lawyers’, 72 *Northwestern University Law Review* 217 (1977), at 217.

² O. Schachter, *supra* note 1, at 217.

³ O. Schachter, *supra* note 1, at 217.

⁴ O. Schachter, *supra* note 1, at 224.

⁵ D.W. Kennedy, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’, 31 *New York University Review of Law and Social Change* 641 (2006-2007), at 650 (original emphasis).

⁶ See, among many, D.W. Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’, 2001 *European Human Rights Law Review* 463 (2001); M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ 70 *Modern Law Review* 1 (2007); H.G. Cohen, ‘Finding International Law, Part II: Our Fragmenting Legal Community’, 44 *New York University Journal of International Law and Politics* 1049 (2012); M. Waibel, ‘Interpretive Communities in International Law’, in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (Oxford University Press, 2015); J. d’Aspremont et al. (eds.), *International Law as a Profession* (Cambridge University Press, 2017); A. Roberts, *Is International Law International?* (Oxford University Press, 2017); L. Leão Soares Pereira and N. Ridi, ‘Mapping the ‘Invisible College of International Lawyers’ Through Obituaries’, *Leiden Journal of International Law* (2020).

⁷ J. Dunoff and M. A. Pollack, ‘International Judicial Practices: Opening the Black Box of International Courts’, 40 *Michigan Journal of International Law* 47 (2018), at 60.

⁸ J. d’Aspremont et al., ‘Introduction’, in J. d’Aspremont et al. (eds.), *International Law as a Profession* 1 (Cambridge University Press, 2017), at 2.

⁹ J. d’Aspremont, ‘The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished’, in A. Bianchi, D. Peat, and M. Windsor (eds.), *Interpretation in International Law* 111 (Oxford University Press, 2015), at 119.

¹⁰ See e.g. J.H.H. Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, 35 *Journal of World Trade* 191 (2001).

¹¹ See e.g. H. Schepel and R. Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, 3 *European Law Journal* 165 (1997).

¹² See e.g. Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996); C.A. Rogers, ‘The Vocation of the International Arbitrator’, 20 *American*

This paper chooses, so to speak, an intermediate level of abstraction. In the pages that follow, I explore the social features of a particular segment of the international legal profession, which I call the *international judicial community*. That, in a nutshell, is the exclusive club of legal experts – judges, arbitrators, government agents, private counsel, court bureaucrats, and specialized academics – who deal with the judicial settlement of international disputes and run international courts and tribunals in their routine operations. Since the early 1990s, this segment has risen in prominence among the vast group of international lawyers,¹³ sometimes to the point of being equated to the group writ large. If adjudication ‘stands at the centre of the world of the professional international lawyer’,¹⁴ then the international judicial community constitutes the innermost circle of that world, that which inhabits the immediate vicinity of the centre.

The community, I will argue, has two ‘faces’, in the sense that the interactions among its participants are at once *cooperative* and *competitive*. On the one hand, the inner circle of international litigators has gradually developed a distinctive set of structures and dispositions that differentiate it and make it autonomous from the rest of the international legal profession. Its participants are uniquely positioned to shape judicial outcomes, and zealously defend this prerogative from outside interference. Thanks to its cohesiveness and *esprit de corps*, the community has established itself as the immediate audience of international courts and tribunals and as the gatekeeper of their jurisprudence. On the other hand, the community is neither homogenous nor peaceful. In fact, it is the site of a ruthless contest among its participants, who strive to assert their dominance and to consolidate their position relative to one another. Judges, legal bureaucrats, counsel, and academics all deploy various forms of professional capital to promote their visions of the law while, at the same time, maximizing their prestige and recognition.

In turn, the twofold nature of the community – externally cohesive and internally conflictive – has a profound impact on the definition of international legal outcomes. The collective assumptions and expectations emerging from socialization and patterned repetition ensure consistency in the interpretation of norms, thus making international jurisprudence more certain and predictable. At the same time, the endless socio-professional struggles that agitate the community open the door to the contestation and renegotiation of established patterns, thus creating avenues for the gradual evolution of judicial systems. Hence, community practices are key drivers of continuity and change – or structure and contingency – in international law.

Moving from these premises, the two main sections of this paper are each devoted to one ‘face’ of the international judicial community. Section 2 discusses the forms of cooperation by which its members have progressively secured control over courts and tribunals and achieved autonomy from the rest of the international legal profession. Section 3 turns to the instances of competition that take place within the community and sheds light on the conflictive nature of its internal relationships. In both sections, I will try to link social structures and interactions to the modes of production of legal outcomes. Having done so, Section 4 concludes with a couple of open-ended thoughts.

University International Law Review (2005); S. Puig, ‘Social Capital in the Arbitration Market’, 25 *European Journal of International Law* 387 (2014); S. Dezalay with Y. Dezalay, ‘Professional of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration’, in J. d’Aspremont et al. (eds.), *International Law as a Profession* 311 (Cambridge University Press, 2017); M. Langford, D. Behn, and R.H. Lie, ‘The Revolving Door in International Investment Arbitration’, 20 *Journal of International Economic Law* 301 (2017).

¹³ See A. Bianchi, ‘The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle’, in A. Bianchi, D. Peat, and M. Windsor (eds.), *Interpretation in International Law* 34 (Oxford University Press, 2015), at 40-42.

¹⁴ I. Brownlie, ‘The Calling of the International Lawyer: Sir Humphrey Waldock and His Work’, 54 *British Yearbook of International Law* 7 (1983), at 68.

One caveat before proceeding: my analysis here is not meant to offer an exhaustive sociological study of international adjudication, nor to prove a point through conclusive quantitative data. The ‘gigantic maze of practices and arrangements’¹⁵ that enliven international courts is too intricate to unravel in a few pages. A more comprehensive analysis will require a lot more research into field sociology and practice theory, which will hopefully illuminate the connections between socio-professional dynamics and the output of international judicial institutions. The picture inevitably remains blurry on the edges. But then, ‘[i]s it even always an advantage to replace an indistinct picture by a sharp one? Isn’t the indistinct one often exactly what we need?’¹⁶

Cooperation, autonomy, and patterned practices: The international judicial community as a stabilizer of legal outcomes

When attempting to describe a social group, the observer is inevitably confronted with the challenge of drawing its boundaries and distinguishing it from other sectors of society. Groups come ‘in various shapes and sizes’, can be ‘tightly organized’ or ‘diffuse’,¹⁷ and often intersect with other groups. My object of inquiry, the international judicial community, is no exception. The membrane that separates its ‘inside’ from its ‘outside’ is rather porous, and many of its participants cross it back and forth during their careers. How, then, to define the community? And what differentiates it from the broader professional universe of international lawyers? Tentatively, I would say that the distinguishing criterion is the degree of *proximity* to the routine functioning of international courts and tribunals – which roughly corresponds to the degree of *influence* on judicial outcomes.

Let me explain.

Over the last half century, Schachter’s invisible college has given way to a full-blown profession that attracts ever-growing numbers of individuals and institutions. The object of international regulation has exploded in both scope and reach. The thickening of the system’s ‘normative density’ has resulted in a proportional increase in the ‘institutional density necessary to sustain the norms’.¹⁸ A variety of new actors – politicians, civil servants, military commanders, business conglomerates, advocacy networks, journalists, and opinion-makers – have become conversant in the vernacular of the discipline.¹⁹ If yesteryear’s international law was ‘a tradition and a political project’,²⁰ today’s international law is also a *business*.

Yet, while international lawyers are now aplenty, only a few of them are involved in the *judicial* settlement of international disputes. In fact, adjudication traditionally accounted for a minuscule portion of international legal practice. For most of the 20th century, the only state-to-state jurisdictions – the Permanent Court of International Justice (PCIJ) and later the International Court of Justice (ICJ) – issued no more than a couple of decisions per year, and the professionals gravitating around them were few and far between. Arguably, even to this day, ‘only a tiny percentage’ of international controversies end up before a judge.²¹

Things started to change in the aftermath of the Cold War, when international judicial mechanisms exploded in number and reach. Within the span of a decade, dozens of new

¹⁵ T. Schatzki, ‘Keeping Track of Large Phenomena’, 104 *Geographische Zeitschrift* 4 (2016), at 6.

¹⁶ L. Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe transl., Basil Blackwell, 1958), para. 71.

¹⁷ H.G. Cohen, *supra* note 6, at 1066.

¹⁸ G. Abi-Saab, *Cours Général de Droit International Public* (1987), Vol. 207, at 93.

¹⁹ See e.g. A. Bianchi, ‘The International Legal Regulation of the Use of Force’, 22 *Leiden Journal of International Law* 651 (2009), at 653-4; A. Bianchi, *supra* note 13, at 40.

²⁰ M. Koskeniemi, *supra* note 6, at 1.

²¹ J.E. Alvarez, ‘The New Dispute Settlers: (Half) Truths and Consequences’, 38 *Texas International Law Journal* 405 (2003), at 411.

institutions were established, including the WTO dispute settlement system, the International Tribunal on the Law of the Sea, the International Criminal Tribunals for Former Yugoslavia and Rwanda, and the International Criminal Court. Investor-state arbitration (ISDS), which had remained dormant through the 1980s, suddenly rose to prominence as a central dispute settlement node. Pre-existing mechanisms, such as the European Court of Human Rights, were overhauled in ways that facilitated the filing of complaints and broadened the pool of potential applicants. And so forth. The current landscape sees the simultaneous operation of circa 30 standing courts and hundreds of *ad hoc* tribunals,²² which have collectively issued over 40,000 rulings on a wide array of issues.²³

Amid these developments, a subset of international lawyers sought to differentiate themselves from the rest of the invisible college and specialize in the various aspects of litigation. Relying on international law as background knowledge, they mastered the procedures of the different courts and tribunals, honed their skills in the art of judicial persuasion, and reached out to public officials and private entities that may be interested in resorting to adjudication or arbitration to settle their differences. If, nowadays, many sovereign states have overcome their traditional reluctance towards international courts, it is not only because of their purported commitment to the rule of law,²⁴ but *also* because of their increased exposure to a network of proactive legal entrepreneurs. Lawyers 'created' their clients as often as clients 'created' the lawyers.²⁵ Thanks to its initiative, the international judicial community progressively secured a central position within our discipline – to the point of becoming a synecdoche for the discipline as a whole.

As a result, the 'new terrain'²⁶ of international adjudication is characterized by an increasingly sharp divide between its *outer* and *inner* circles. In the former camp, we find the wide variety of actors having direct or indirect stakes in judicial activity. Government representatives spend years defining the institutional design of each new court, debating its powers and jurisdiction, and eventually ratifying its founding treaty. Later, they periodically negotiate the appointment of judges and set the agenda for institutional reform. Meanwhile, national politicians invoke judicial decisions to advance policy agendas; non-governmental organizations submit *amici curiae* or sponsor complaints in pursuit of advocacy strategies; multinational corporations take jurisprudence into account when setting out their plans; journalists cover major rulings and disseminate them to the general public; and the like. These forms of engagement ensure the continued goodwill of political stakeholders towards international adjudication²⁷ and make them the ultimate arbiters of the system's legitimacy.

However, those stakeholders have a relatively limited say on the day-to-day unfolding of the international judicial process. The pressure they exert on courts and tribunals occurs either *before* the start of proceedings – through institutional design and the appointment of judges – or *after* their completion – through the appraisal and the (non-)implementation of judgments. What happens *in between* is usually none of their concern: after all, the procedural rules that govern the proceedings aim to shield the content of decisions from overt political interference.

²² For a more comprehensive account, see C.P.R. Romano, K.J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), annexed taxonomic timeline.

²³ See K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014), at 4.

²⁴ See e.g. H. Thirlway, 'The Proliferation of International Judicial Organs: Institutional and Substantive Questions', in N. Blokker and H. Schermers (eds.), *Proliferation of International Organizations* 251 (Kluwer Law International, 2001), at 255.

²⁵ M. Shapiro, 'Judicialization of Politics in the United States', 15 *International Political Science Review* 101 (1994), at 109. See also A. Vauchez, 'Communities of International Litigators', in C.P.R. Romano, K.J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* 655 (Oxford University Press, 2014), at 657.

²⁶ K. J. Alter, *supra* note 23.

²⁷ See e.g. A.-M. Slaughter and L.R. Helfer, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *California Law Review* 899 (2005), at 946-949.

If anything, official stakeholders serve as the *mediate* or *external* audience of international courts: a looming presence that observes the unfolding of adjudication from a certain distance and intervenes only when the circumstances so require.²⁸

By contrast, the international judicial community operates within and in the immediate surroundings of courts and tribunals. This inner circle of legal professionals is in charge of running the judicial machinery in its everyday operations, and its recursive practices shape and inform every stage of the proceedings. The backgrounds and expertise of community members differ significantly from the 'old guard' of the invisible college. The latter were typically academics hailing from prestigious European and American law schools, who had been raised in domestic legal traditions and came to international law late in their careers.²⁹ The new generation, by contrast, consists largely of 'purebred' international lawyers, who bear no particular allegiance to any domestic legal system and move in a cosmopolitan, delocalized socio-professional space.

Telling exactly *who* is part of the international judicial community can be daunting. Tentatively, I would say that the community includes whomever possesses sufficient expertise, social capital, and interest in the matter at issue to repeatedly participate in the adjudicative process.³⁰ Obviously, international judges and arbitrators fit that definition: these are the most recognizable actors in the community, vested with the official authority to resolve cases. Other repeat players include state agents, who head the delegations appearing before the court, and counsel who represent the parties and submit arguments on their behalf. In addition, the community includes a panoply of actors whose roles are less apparent. For instance, the legal bureaucrats working for the court (called clerks, registry or secretariat officials, or arbitral secretaries depending on the institution concerned) assist the adjudicators in the preparation, deliberation, and drafting of judgments. Likewise, outside of courts, specialized academics critically appraise judicial outcomes, identify patterns and inconsistencies in jurisprudence, and suggest solutions going forward.

Ostensibly, these various actors occupy distinct positions. Yet, the boundaries between their roles are blurrier than they first appear. Throughout their careers, community members swap roles frequently – and sometimes even don multiple hats at once.³¹ Prominent scholars may take a break from their chairs to serve on an international court;³² arbitrators in an ISDS case may appear as counsel in another; the legal officers working for a registry or secretariat may later be recruited by government departments or specialized law firms; and so forth. All combinations are possible. This 'revolving door' among the bench, the bureaucracy, the bar, and the academe helps strengthen bonds and forge ties. Indeed, while political stakeholders are diffuse and scattered across the world, the community is a close-knit club of *habitués* who

²⁸ See T. Soave, 'Who Controls WTO Dispute Settlement? Socio-Professional Practices and the Crisis of the Appellate Body', 29 *Italian Yearbook of International Law* 13 (2020), at 17.

²⁹ See e.g. O. Schachter, *supra* note 1, at 218-219; S. Neff, *Justice among Nations: A History of International Law* (2014), at 303-304; J. d'Aspremont, 'The Professionalisation of International Law', in J. d'Aspremont *et al.* (eds.), *International Law as a Profession* 19 (2017), at 21.

³⁰ See e.g. E. Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge, 2005), at 24 (describing communities as being 'determined by people's knowledge and identity and the discourse associated with a specific practice').

³¹ See J. d'Aspremont *et al.*, *supra* note 8, at 8; A. Vauchez, *supra* note 25, at 661; 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* 323 (Cambridge University Press, 2019), at 343.

³² According to recent data, some 40 percent 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), at 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', 1 *Oñati Socio-Legal Series* 1 (2011), at 17).

maintain a dense network of first-name personal contacts and cultivate friendly professional relationships.³³

Overall, the participants in the community are driven by different interests from political stakeholders. The latter play the adjudication game in pursuit of goals other than the game itself – a country's perceived national interest, a multinational company's trade or investment opportunities, an individual's fundamental freedoms, etc. The former, conversely, derive their standing, prestige, and income from the very functioning of the adjudicative mechanism.³⁴ For them, the complexities of dispute settlement are not the means to an ulterior result – but an end in itself, and the specific focus of their expertise. It follows that community members all share an enormous self-interest in defending international judicial institutions as such, extending the reach and pervasiveness of their powers, and constantly reasserting their 'courtiness'.³⁵

Thanks to its cohesiveness, the international judicial community has gradually secured its control on the everyday functioning of international courts and tribunals, while managing to insulate its internal operations from outside interference. In its routine unfolding, international adjudication takes place 'at a considerable remove from ... political and diplomatic institutions'.³⁶ Nowadays, the same handful of counsel appear at most hearings alongside their clients. Their inside-out knowledge of the intricacies of international adjudication grants them a competitive advantage over new entrants in the litigation market. In the same vein, the invisible army³⁷ of registry and secretariat bureaucrats works under the radar to streamline adjudicative processes, ensure consistency in jurisprudence, and serve as the institutional memory of courts and tribunals. Finally, scholarly production in the field is densely populated by authors who have direct or indirect stakes in the system.³⁸

Being an 'insider' in the game means being familiar with its rules, adopting strategies that resonate with other players, and ultimately shaping the outcomes of the adjudicative process to an extent that is usually precluded to 'outsiders'. With a little stretch of the imagination, one could say that the community has replaced external stakeholders as the *immediate* or *internal* audience of international courts and tribunals. When adjudicators issue a decision, they are often 'speaking' more directly to the legal professionals gravitating around them than to their broader political constituency or the general public.³⁹

Crucially, the cooperative practices developed by the community have a profound impact on judicial activity and the determination of legal outcomes. Their *patterned* and *competent* nature enables the reproduction of 'similar behaviors with regular meanings' and the stabilization of expectations within a socially organized context.⁴⁰

Let us take a closer look.

³³ See J.H.H. Weiler, *supra* note 10, at 195; K. Hopewell, 'Multilateral Trade Governance as Social Field: Global Civil Society and the WTO', 22 *Review of International Political Economy* 1128 (2015), at 1142-1143.

³⁴ See T. Soave, *supra* note 28, at 18.

³⁵ M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002), at 175.

³⁶ R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', 27 *European Journal of International Law* 9 (2016), at 25.

³⁷ For discussion, see T. Soave, *supra* note 31.

³⁸ For instance, much of the writing on investment treaty arbitration 'is done by authors who themselves are involved in [it]' as either adjudicators or counsel. S. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law', 22 *European Journal of International Law* (2011), at 894. Similarly, European Union law scholarship is dominated by 'authors working for institutions structurally geared towards the expansion and consolidation of a genuine European legal order'. H. Schepel and R. Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe', 3 *European Law Journal* 165 (1997), at 171. Even without robust empirical data, one might expect similar findings to apply to human rights and trade law scholarship as well.

³⁹ See T. Soave, *supra* note 28, at 18-19.

⁴⁰ E. Adler and V. Pouliot, 'International Practices', 3 *International Theory* 1 (2011), at 6.

First, community practices are *patterned* in that they exhibit 'regularities over time and space'.⁴¹ Indeed, while every international dispute is unique in the legal issues it raises, the steps that mark its unfolding are standardized. Every case begins with the submission of written memorials by the parties, often followed by rejoinders and counter-rejoinders. These written filings are then processed by the bureaucrats assisting the court or tribunal, who circulate internal memoranda to summarize their analyses and prepare the adjudicators for the next steps. After the written phase, most courts and tribunals hold one or more hearings where the case is discussed orally. After the hearing(s), the adjudicators convene for deliberations, often aided by their legal assistants, and cast their decisions about the issues at stake. Based on the adjudicators' instructions, the final judgment is drafted by the court's bureaucracy, reviewed, approved, translated, and issued to the parties and the public.

Recursivity is not limited to procedure, but extends to the social interactions among the actors involved. As discussed, the community is a tight network whose participants know each other well, communicate regularly, and entertain long-term professional relationships. In the game of adjudication, repeat players are the norm and one-shotters are the exception. The prestige of dispute settlement experts stems largely from their experience and recurring participation in judicial proceedings. Hence, international judicial practices occur within a 'highly organized context'⁴² and present a strong measure of systematic repetition.

Second, community practices are *competent* in that they rest on the shared 'background knowledge' of the actors carrying them out.⁴³ The hallmarks of (in)competence within the community are not inherent in the abstract quality of the work performed, but are socially attributed by the community itself based on collectively held standards of legal argument. Through education, training, and work experience, newcomers are initiated to the way things are done.⁴⁴ They master the doctrines, the techniques, the ethos, the aesthetics, and the mythologies of their peers and superiors,⁴⁵ and tend to reproduce them through communication and transmission of knowledge. The assumptions and dispositions of the community are not only a source of *constraint* for the players in the game of adjudication; they also *enable* them to take positions that will be accepted as 'true' or 'valid' by other players.⁴⁶ Hence, cooperation and socialization within the community contribute to the perpetuation of the structures of the system, which 'condense and are confirmed as a result of the system's own operations'.⁴⁷

Construed as patterned and competent performances, community practices inform every aspect of the judicial process, including – and perhaps especially – the interpretation of international legal norms. This idea was first explored by Stanley Fish in his seminal work on interpretive communities⁴⁸ and is now increasingly popular among international legal scholars.⁴⁹ Moving from the premise that the meaning of words resides in their use in

⁴¹ E. Adler and V. Pouliot, *supra* note 40, at 6.

⁴² J.L. Dunoff and M.A. Pollack, *supra* note 7, at 62.

⁴³ E. Adler and V. Pouliot, *supra* note 40, at 6-7 (emphasis omitted).

⁴⁴ J. Gross Stein, 'Background Knowledge in the Foreground: Conversations about Competent Practice in 'Sacred Space'', in E. Adler and V. Pouliot (eds.), *International Practices* 87 (Cambridge University Press, 2011), at 89.

⁴⁵ See e.g. J. d'Aspremont, *supra* note 29, at 33-34; D.W. Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* 9 (1999); P. Schlag, 'The Aesthetics of American Law', 115 *Harvard Law Review* 1047 (2002).

⁴⁶ See e.g. S.B. Ortner, *Anthropology and Social Theory: Culture, Power and the Acting Subject* (Duke University Press, 2006), at 3; J.L. Dunoff and M.A. Pollack, *supra* note 7, at 54.

⁴⁷ N. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System', 13 *Cardozo Law Review* 1419 (1991-1992), at 1424.

⁴⁸ See S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1980).

⁴⁹ See e.g. I. Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', 12 *Melbourne Journal of International Law* 371 (1990-1991); 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* 17 (2010),

language⁵⁰, these authors have highlighted that the meaning of a legal text is not inherent in the text itself, but rather reflects the categories of understanding, the ways of organizing experience, and the stipulations of relevance and irrelevance shared by the community tasked with interpreting that text.⁵¹ The consensus of the international judicial community determines, at any given moment, whether the reading of a given norm is or is not acceptable, whether a specific interpretative posture is or is not viable, and whether a particular legal argument is or is not persuasive.⁵²

Over time, these cooperative structures and patterned practices stabilize judicial outcomes in both an active and a passive way. Throughout the adjudicative process, the community pushes and forces adjudicators by expressing views as to how certain issues should be addressed, how certain legal terms should be interpreted, and what bodies of rules should be considered to solve a given dispute. Once the judgment is rendered, it carefully tests its persuasiveness, ascribes competence and incompetence based on its collective knowledge, and acts as the ultimate arbiter of professional recognition. Community expectations determine the continued validity of legal standards and jurisprudential continuity in a system without formal *stare decisis*. While a decision that slightly departs from established practice will normally be tolerated, an abrupt change of direction will encounter the resistance of the community and be attacked as an anomaly, a deviation, or – Heaven forbid! – an ‘irrational’ decision. Hence, the international judicial community serves as the anchor that prevents adjudicators from sailing adrift, adopting ‘extreme’ decisions, and ripping the underlying social fabric apart.

Competition, contestation, and struggle: The international judicial community as a driver of legal change

So far, I have focused on the *esprit de corps* of the international judicial community and its progressive autonomization from the rest of the international legal profession. These tight external boundaries may suggest that the community is internally homogenous, heterarchical, and peaceful.

But nothing would be farther from the truth. In fact, the community is endlessly agitated by a fierce contest among its members, who strive to assert their dominance and to consolidate their position relative to one another. Paraphrasing Bourdieu, one could describe the community as a *field*, i.e. ‘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 recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world’.⁵³

Stated simply, influence and prestige⁵⁴ are unevenly distributed across the community. Not all views carry the same weight and not all voices are equally listened to.⁵⁵ Powerful hierarchies,

at 18; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012); A. Bianchi, *supra* note 13; M. Waibel, *supra* note 6.

⁵⁰ L. Wittgenstein, *supra* note 16, para. 43.

⁵¹ S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1990), at 141.

⁵² See e.g. A. Bianchi, *supra* note 13, at 39-40; J. d’Aspremont, *supra* note 9, at 114.

⁵³ P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, 38 *Hastings Law Journal* 805 (1987), at 817 (emphasis omitted).

⁵⁴ Again, echoing Bourdieu, one might be tempted to speak of social capital, defined as ‘the aggregate of the actual or potential resources’ linked to ‘institutionalised relationships of mutual acquaintance and recognition’. P. Bourdieu, ‘The Forms of Capital’, in G. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (1986), 241 at 248.

⁵⁵ See A. Bianchi, *supra* note 13, at 40-2.

both formal and informal, shape the social relationships among community members,⁵⁶ with a handful of professionals sitting at the top of the pyramid and the majority slowly crawling up from the bottom. The most eminent players in the game are widely recognizable throughout the international legal world, and some of them even break through with the general public. The rest of the lot is virtually unknown, relegated to the underbelly of the judicial machinery.

These formal and informal hierarchies occur, first, *within* each cluster of community actors. Inside a court, for instance, judges enjoy an exalted position compared to their supporting legal staff. Yet, not all judges are created equal. Some of them are perceived as more authoritative, more capable, or more reliable than others, thus becoming the object of admiration – or envy – by their colleagues.⁵⁷ The supporting legal staff, too, can be organized in descending tiers of seniority (as is the case with the WTO Secretariat) or be more horizontal (as with ICJ clerks or arbitral secretaries). Likewise, at law firms, the earnings of partners (usually calculated on the basis of equity) are several times higher than those of associate attorneys (usually taking the form of salaries). Moreover, partners are in charge of pleading in the courtroom (thereby making themselves known to the bench), while associates tend to take the backseat, provide support, and pass notes (thus going mostly unnoticed).

But hierarchies exist also *across* clusters, i.e. community-wide, with certain professional profiles garnering more recognition than others.

Predictably, judges tend again to occupy the most prestigious spot. Being appointed to an international court is widely regarded as the acme of one's career in the field. Actually, it would perhaps be improper to speak of a full-fledged career. When states nominate their candidates to the bench, they seldom do so based on standardized selection procedures. Often, a successful candidate owes the privilege to an inscrutable set of factors such as possessing the right nationality, cultivating personal and professional relationships, and more generally being at the right place at the right time.⁵⁸ Under these conditions, it would be difficult for anyone, even the most accomplished lawyer, to deliberately *plan* to become an international judge. Similar reverence is paid to top-tier investment arbitrators, who constitute an even smaller group. As mentioned, social capital in the ISDS arena is particularly concentrated, with 20-30 arbitrators securing most appointments to tribunals and leaving the rest of their peers fighting for the scraps.⁵⁹

University professors and top-tier counsel compete for the second position in the hierarchy. Both clusters of actors are highly visible within the field and, both produce a steady pool of candidates for international courts and tribunals. The former derive their reputation from the dissemination of their opinions across the community. Academics are in a 'co-constitutive'⁶⁰ relationship with judicial practice: on the one hand, it is that practice that creates the object of their studies; on the other, it is their theories, commentaries, and systematizations that generate the background knowledge necessary to structure the epistemic categories and the expert vernacular of practitioners.⁶¹

Counsel, for their part, mobilize economic resources and channel clients into the dispute settlement process, thereby acting as 'brokers' that connect the demands of the parties with

⁵⁶ J. d'Aspremont, *supra* note 29, at 35.

⁵⁷ See D. Terris, C.P.R. Romano, and L. Swigart, *supra* note 32, at 66-67.

⁵⁸ See D. Terris, C.P.R. Romano, and L. Swigart, *supra* note 32, at 17.

⁵⁹ See e.g. Y. Dezalay and B.G. Garth, *supra* note 12; S. Puig, *supra* note 6; J. Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus', 109 *American Journal of International Law* 761 (2015).

⁶⁰ G.I. Hernández, 'The Responsibility of the International Legal Academic: Situating the Grammarian Within the 'Invisible College'', in J. d'Aspremont et al. (eds.), *International Law as a Profession* 160 (Cambridge University Press, 2017), at 160.

⁶¹ See D.W. Kennedy, *supra* note 6; G.I. Hernández, *supra* note 60, at 160-161.

the supply of the courts.⁶² It is largely thanks to their initiative and entrepreneurship that international adjudication has expanded from a fragile political project to a robust node of global governance. Counsel's allegiance to the litigants they represent is somewhat ambiguous: when they participate in proceedings, they do not only seek to win the case, but *also* to consolidate their standing among their peers, develop a cordial relationship with the bench, and secure future hiring opportunities. Hence, counsel's principal source of social capital 'is the recognition of judges, not clients (who are merely *proximate* sources of capital)'.⁶³

At the bottom of the hierarchy we find the legion of clerks, secretariat and registry staff, and arbitral secretaries assisting the adjudicators. This cluster of actors constitutes the backbone of international courts and tribunals and plays a fundamental role in the definition of judicial outcomes. Yet, its manifold activities take place mostly off the radar, concealed behind the closed doors of judicial institutions and largely neglected by external commentators. Faceless by definition, judicial bureaucrats simply do not enjoy the visibility necessary to rise to fame within the community. Some of them relish their *invisibility*, and take great pleasure in the influence they wield behind the scenes. For others, employment with the bureaucracy is a mere entry point into the community and, hopefully, a springboard towards more visible positions.

Finally, competition for the top spots in the hierarchy occurs not only *within* the same judicial institution, but also *among* different courts and tribunals.

The progressive specialization of the international legal profession into sectoral areas of expertise such as human rights, trade, investment, territorial delimitation, international criminal law, etc. has led to its fragmentation into several 'sub-communities'⁶⁴ that operate largely independently of one another. Adjudication is no exception to this trend. The international judicial community, one may argue, resembles a constellation.⁶⁵ Each court or tribunal is a star exerting its gravitational pull on the various planets – government departments, law firms, academic institutions, and so on – that orbit around it in concentric circles, from centre to periphery. Some gravitational fields may be stronger than others. Specialized knowledge may be more concentrated in certain sub-communities (e.g. the WTO, characterized by a highly sectarian expertise) than in others (e.g. the ICJ, which takes great pride in its 'generalist' outlook). Moreover, the trajectories of some planets may be attracted to the gravitational fields of more than one star, therefore creating overlaps between different sub-communities.⁶⁶

Yet, none of the stars – not even the ICJ – can be deemed to sit at the centre of the constellation. No sub-community can lay claim to a fully neutral and universal outlook on the international legal world. Instead, the position that each sub-community occupies in the constellation shapes its epistemic categories, its social dynamics, and its operational boundaries. This polycentricity entails entry barriers and conversion costs for professionals wishing to transition from one sub-community to another. A senior lawyer trained in the practice of the WTO may struggle to land an equally senior position at a firm specializing in ISDS. A preeminent scholar in the field of European human rights law may not enjoy the same reputation in ICJ circles. And so on. Hence, one could say, the members of a sub-community do not only seek autonomy from the broader international legal profession – they also guard their turf from *other* sub-communities, which may constitute a source of 'disturbing outside

⁶² A. Vauchez, *supra* note 25, at 657.

⁶³ 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* 208 (2018), at 220 (emphasis added).

⁶⁴ J. d'Aspremont, *supra* note 29.

⁶⁵ See B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *European Journal of International Law* 483 (2006).

⁶⁶ See H.G. Cohen, *supra* note 6, at 1068.

perspectives'.⁶⁷ Any attempt to transfer legal categories, judicial practices, or modes of thinking from one sub-community to another is considered a trespass that might shake the 'context-preserving routine'.⁶⁸

Importantly, the object of these forms of competition is not limited to the substance of legal argument. Instead, it is intertwined with the social position occupied by each community participant. Persuading others of the validity of one's legal opinion is not merely a source of personal gratification – it is *also* a means to strengthen one's reputation and bolster one's position in the field. Each communication may take 'the form of legal discourse', but inevitably bears 'material consequences'.⁶⁹ Thus, the normative stances taken by community members can never be reduced to pure technical arguments. Rather they always combine dispassionate beliefs with the interests and the agendas of the actors involved, who use their technical expertise to consolidate their standing. Each actor's prestige and recognition dictate, at any given moment, the degree of their persuasiveness and the deference accorded to their views. Thus, a reputable judge will think twice before following the advice of a new recruit to the supporting bureaucracy; a junior associate will have to work extra hard to include a certain argument in a submission against the will of a seasoned partner; and so on.

This inextricable link between legal argument and social positioning reveals a final and crucial feature of the international judicial community: namely, that its social structures are not static, but rather *evolve over time* as a result of the endless struggle among its participants. Disagreement and conflict pervade literally every corner of international courts and tribunals, from hearing rooms to backroom corridors, from deliberation tables to cafeterias. Day after day, case after case, community members strive against one another to assert their authority and impose their competing visions of the law as the dominant paradigm – agents and counsel through their submissions, judicial advisors through their memoranda, scholars through their articles, and adjudicators through their decisions. Every step of the process sees a confrontation for the appropriation of the 'the symbolic power'⁷⁰ contained in the relevant legal texts, as well as the deployment of schemes, postures, and strategies that, depending on the circumstances, may be 'risky or cautious, subversive or conservative'.⁷¹ Incumbents will have a natural tendency to perpetuate their dominance. Challengers will have to come up with other plans, ranging from opportunistic deference to overt defiance, to get the upper hand. At every turn, old alliances may break down and new ones may emerge, in a continuous process of assertion, contestation, and restructuring.

Ultimately, these socio-professional struggles lie at the core of legal change and the piecemeal evolution of judicial outcomes. After all, stability is only 'an illusion created by the recursive nature of practice', whereas change 'is the ordinary condition of social life'.⁷² The boundaries, priorities, and preoccupations of a court or tribunal are 'never inherently fixed or stable', but are 'constantly being renegotiated' among community members.⁷³ The expert vocabularies in use in judicial institutions are 'sites of controversy and compromise where prevailing "mainstreams" constantly clash against minority challengers'.⁷⁴ Each agent 'modifies the form taken by arguments [and] the salience of texts', and traces 'a set of divergent paths, mobilizing

⁶⁷ I. Venzke, *supra* note 49, at 157.

⁶⁸ R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2nd edn., Verso, 2001), at 32.

⁶⁹ J.L. Dunoff and M.A. Pollack, *supra* note 7, at 62.

⁷⁰ P. Bourdieu, *supra* note 53, at 818.

⁷¹ P. Bourdieu and L. Vacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992), at 98.

⁷² E. Adler and V. Pouliot, *supra* note 40, at 18.

⁷³ E. Adler and V. Pouliot, *supra* note 40, at 18.

⁷⁴ M. Koskeniemi, 'The Politics of International Law: 20 Years Later', *20 European Journal of International Law* 7 (2009), at 12.

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'.⁷⁵

These tensions create paths of contestation and open the door to new legal approaches, new interpretive postures, new ways of doing things. Innovations are 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 or internal memo, etc. The most successful will 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 an adjudicatory regime are successfully challenged and replaced by new assumptions, as a result of the evolution of the power relationships between the competing actors over time. Whenever the judicial process culminates in a final decision, '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'.⁷⁶

Conclusion

In this paper, I have sought to explore the two 'faces' of the international judicial community, i.e. the forms of cooperation and competition occurring among the legal professionals who run international courts and tribunals in their routine operations. The participants in the community are located at the centre of the invisible college of international lawyers, and their socio-professional interactions are key to understanding the evolution of legal outcomes in the international world. Admittedly, the sketch remains somewhat incomplete. The outline is in place, but it is still lacking in colour. Further research will be needed to complete the picture – to map the concrete ways in which the community operates, to describe what its members do every day, and to assess how these doings shape decisions.

Yet, I believe, there is great promise in reappraising international adjudication as a nexus of socio-professional practices. For one thing, this reappraisal could reveal a wealth of 'otherwise hidden activities that illuminate international tribunals' inner workings'.⁷⁷ While some of those activities have been sparsely discussed in legal scholarship, no comprehensive work exists which critically systematizes them and reveals their full extent. This silence, which may be due to lack of access to information, is nonetheless quite striking. The myriad ways in which legal professionals interact on a daily basis are not a corollary to the judicial process – they *are* the process. Indeed, much of the output of international courts can be explained by the internal properties of this 'social universe' which is 'relatively independent of external determinations and pressures'.⁷⁸

Perhaps more important, however, is the question of freedom. If legal outcomes depend on professional practices, and if those practices depend in turn on social structures, what room is left for personal agency? How can individuals leave their mark on the judicial process? Again, an answer to these questions may be found in the dynamics of the community. As I tried to suggest, international adjudication takes place in conditions of *structured contingency*. 'Contingency', because the path that leads to the formation of a judgment is not predetermined, but open-ended. Every step of the process contemplates choices, value-judgments, and purposeful actions on the part of the professionals involved. And 'structured', because while

⁷⁵ B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Polity Press, 2010), at 192.

⁷⁶ B. Latour, *supra* note 75, at 192.

⁷⁷ J.L. Dunoff and M.A. Pollack, *supra* note 7, at 49.

⁷⁸ P. Bourdieu, *supra* note 53, at 816.

existing arrangements can be changed, 'change unfolds within a context that includes systematic constraints and pressures'.⁷⁹

Continuing down this line of inquiry, as I intend to do in the future, will require a careful examination of the interplay between legal structures, institutional ideologies, personal politics, unreflexive doings, and – why not – random thought processes in the everyday construction of international law. Who knows, perhaps in the end it will all boil down to Marx: 'Men 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'.⁸⁰

⁷⁹ S. Marks, 'False Contingency', 62 *Current Legal Problems* 1 (2009), at 2.

⁸⁰ K. Marx, 'The Eighteenth Brumaire of Louis Bonaparte' in T. Carver (ed.), *Marx: Later Political Writings* (Cambridge University Press, 1996), at 32.

