


ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

# The social field of international adjudication: Structures and practices of a conflictive professional universe

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## Abstract

The modern professional world of international adjudication bears little trace of the ‘invisible college’ theorized by Oscar Schachter 50 years ago. Instead, it has become a social field marked by a fierce competition among actors possessing unequal skills and influence. Moving from these premises, this article unravels the socio-professional dynamics of the community of legal experts – judges, arbitrators, government agents, private counsel, court bureaucrats, specialized academics, etc. – dealing with the judicial settlement of international disputes on a daily basis. On the one hand, the community has developed a specific set of social structures, practices, and dispositions that distinguish it from the rest of the international legal profession and insulate its activities from outside interference. On the other, it is the site of an endless struggle among its participants, who deploy various forms of capital to consolidate their positions relative to one another. Having outlined the twofold structure of the community – externally autonomous and internally conflictive – the article reflects on how co-operation and competition affect the everyday unfolding of international judicial proceedings and the production of legal outcomes at the international level.

**Keywords:** international courts; legal profession; practice theory; sociology of law; structure and agency

## 1. Introduction

‘International law is a group of *people* pursuing projects in a common professional language.’<sup>1</sup> With these simple words, David Kennedy invited an analytical turn away from the traditional objects of international law – rules, procedures, institutions – and towards the actors who make up the international legal profession. Of course, Professor Kennedy is not alone. In recent decades, numerous scholars have built on similar ideas to map social structures and interactions and connect them to the production of legal outcomes in the international world.<sup>2</sup> Thanks to their work,

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<sup>1</sup>D. W. Kennedy, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’, (2006–2007) 31 *New York University Review of Law and Social Change* 641, at 650 (original emphasis).

<sup>2</sup>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; M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, (2007) 70 *Modern Law Review* 1; H. G. Cohen, ‘Finding International Law, Part II: Our Fragmenting Legal Community’, (2012) 44 *New York University Journal of International Law and Politics* 1049; M. Waibel, ‘Interpretive Communities in International Law’, in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation*

we have come to appreciate the expansion, diversification, and autonomization of the discipline over the years.<sup>3</sup> We have grown more aware of the ethos, idiosyncrasies, sensibilities, vernaculars, and modes of sense-making of international lawyers. And we have begun to trace how legal expertise ‘flows through the capillaries’ of international life.<sup>4</sup>

Yet, our mental maps remain incomplete and obscure as much as they reveal. Many studies of the international legal profession tend to lump it together as an ‘immense’<sup>5</sup> class of actors who, despite their different roles and affiliations, ultimately share the same ‘methods, style, and aesthetics’,<sup>6</sup> fulfil a ‘similar function’, and work together towards the emergence of ‘common fundamental values’ at the global level.<sup>7</sup> The image of an ‘invisible college’, co-operating across borders and serving as the ‘*conscience juridique*’ of humankind,<sup>8</sup> still holds sway in the discipline and forms part of its modern mythologies. These narratives are not epistemically neutral. Any attempt at ‘representing’ and ‘imagining’ international law as a profession inevitably ends up ‘distorting’ it.<sup>9</sup> For one thing, the various social *segments* that comprise the profession are seldom considered on their own merits and in light of their specific structures and practices. For another, the emphasis on the co-operation of international lawyers obfuscates the *struggles* and the confrontations that agitate the profession and shape its inner workings.

In this article, I begin to sketch an alternative map of the professional universe of international lawyers – one that brings its conflictive social dimensions into sharper relief. To do so, I focus on one particular segment of that universe, which I call the *international judicial community*. This, in a nutshell, is the exclusive club of legal experts – judges, arbitrators, government agents, private counsel, court bureaucrats, specialized academics, etc. – who deal with the judicial settlement of international disputes and run international courts and tribunals in their routine operations. The club has seen a rise in prominence since the 1990s, and can be credited for the circa 40,000 rulings issued by international judicial institutions to date.<sup>10</sup>

In the pages that follow, I unravel the socio-professional dynamics of the international judicial community and reflect on how they affect the everyday unfolding of adjudication. My analysis borrows from field sociology, epitomized by the writings of Pierre Bourdieu,<sup>11</sup> and from more recent developments in international practice theory, including the contributions of Emanuel Adler and Vincent Pouliot.<sup>12</sup> As I explain in Section 2, these works offer an analytical toolbox that helps shed light on the sites of struggle within the community, the positions of its participants, their relations vis-à-vis other social fields, and the linkages between social interaction and the production of legal outcomes.

On the one hand, as I discuss in Section 3, the international judicial community has gradually developed a distinctive set of structures, practices, and dispositions that differentiate it from the rest of the international legal world. Its members are uniquely placed to influence judicial activity,

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in *International Law* (2015), 147; J. d’Aspremont et al. (eds.), *International Law as a Profession* (2017); A. Roberts, *Is International Law International?* (2017); D. W. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2018); L. Leão Soares Pereira and N. Ridi, ‘Mapping the “Invisible College of International Lawyers” Through Obituaries’, (2021) 34 *LJIL* 67.

<sup>3</sup>See generally J. d’Aspremont, ‘The Professionalisation of International Law’, in d’Aspremont et al., *ibid.*, at 19.

<sup>4</sup>D. W. Kennedy, ‘The Mystery of Global Governance’, (2008) 34 *Ohio Northern University Law Review* 827, at 851.

<sup>5</sup>d’Aspremont et al., ‘Introduction’, in d’Aspremont et al., *supra* note 2, at 2.

<sup>6</sup>J. d’Aspremont, ‘The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished’, in Bianchi, Peat and Windsor, *supra* note 2, at 119. See also, e.g., J. Brunnée and S. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2013).

<sup>7</sup>A. M. Slaughter, ‘A Global Community of Courts’, (2003) 44 *Harvard International Law Journal* 191, at 192, 217.

<sup>8</sup>O. Schachter, ‘The Invisible College of International Lawyers’, (1977) 72 *Northwestern University Law Review* 217, at 224.

<sup>9</sup>B. De Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’, (1987) 14 *Journal of Law and Society* 279, at 297.

<sup>10</sup>See K. J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014), at 4.

<sup>11</sup>See, e.g., P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, (1987) 38 *Hastings Law Journal* 805.

<sup>12</sup>See, e.g., E. Adler and V. Pouliot, ‘International Practices’, (2011) 3 *International Theory* 1.

and zealously protect their position from outside interference. Indeed, much of the output of international courts and tribunals can be explained by the internal properties of this ‘increasingly autonomous space’<sup>13</sup> which is ‘relatively independent of external determinations and pressures’.<sup>14</sup>

On the other hand, as I argue in Section 4, the community is the site of a ruthless contest among its participants. Adjudicators, bureaucrats, counsel, and academics all deploy various forms of capital to promote their visions of the law while, at the same time, striving to assert their dominance relative to one another. Competition does not occur solely within, but also across international courts, leading to the emergence of sub-communities that defend their provinces from unwarranted trespasses.

In turn, the two-fold structure of the community – externally cohesive and internally conflictive – constitutes the ground for both the ‘continuities’ and the ‘construction of new practices’ leading to the formation of international judgments.<sup>15</sup> The collective expectations and the patterned repetition that emerge from the distribution of capital across the community ensure consistency in the interpretation norms, thus making international jurisprudence consistent and predictable. At the same time, the endless confrontations among community members open the door to the contestation, renegotiation, and restructuring of established patterns, thus creating avenues for the gradual evolution of legal systems. Hence, as I conclude in Section 5, the intersection between the social structures of the community and its everyday judicial practices is a key driver of both stability *and* change in international law.

By their nature, the dynamics I seek to describe here cannot be addressed by simply looking at the official papers (judgments, memorials, etc.), but require a deeper dive into empirically grounded socio-legal research. The information collected for this article comes from three main sets of sources, to which I refer whenever relevant to the analysis.

First, being myself a member of the international judicial community, I had the opportunity to conduct six years of ethnographic fieldwork at a multilateral judicial institution, namely the Appellate Body of the World Trade Organization (WTO). There, I familiarized myself with the myriad activities that punctuate the preparation, filing, litigation, deliberation, and resolution of international cases. This extensive participant-observation enabled me to discern the structures, logics, and presuppositions of the sub-community of WTO judicial professionals and understand how their internal interactions are socially and culturally organized.

Second, as part of a larger research project,<sup>16</sup> I interviewed four lawyers affiliated with the registry of the International Court of Justice (ICJ);<sup>17</sup> three employed at the registry of the European Court of Human Rights (ECtHR); two serving at the secretariat of the Inter-American Court of Human Rights (IACtHR); three assisting investment arbitrators as tribunal secretaries; and five acting as counsel in state-to-state and investor-state dispute settlement (ISDS) proceedings. These interviews allowed me to compare the inner workings of the WTO with those of other international courts and tribunals, and revealed striking commonalities in terms of patterns of practice, perceptions of competence, and standards of legal argument.

Third, I rely on the accounts of sitting and retired judges,<sup>18</sup> litigators,<sup>19</sup> and court officials,<sup>20</sup> who frequently disclose details about their day-to-day business through public speeches and on

<sup>13</sup>M. R. Madsen, ‘Reflexive Sociology of International Law: Pierre Bourdieu and the Globalization of Law’, in M. Hirsch and A. Lang (eds.), *Research Handbook on the Sociology of International Law* (2018), 189, at 191.

<sup>14</sup>See Bourdieu, *supra* note, at 816.

<sup>15</sup>See Madsen, *supra* note 13, at 193.

<sup>16</sup>See T. Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (2022).

<sup>17</sup>These include so-called ‘clerks’ assigned to individual judges.

<sup>18</sup>See, e.g., the interviews contained in 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* (2007), at 39–48 (Navi Pillay), 92–101 (Thomas Buergenthal), 131–46 (Georges Abi-Saab), 180–90 (Cecilia Medina Quiroga), and 212–20 (John Hedigan).

<sup>19</sup>See, e.g., A. Pellet, ‘The Role of the International Lawyer in International Litigation’, in C. Wickremasinghe (ed.), *The International Lawyer as a Practitioner* (2000), 147.

<sup>20</sup>See, e.g., H. Thirlway, ‘The Drafting of ICJ Decisions: Some Personal Recollections and Observations’, (2006) 5 *Chinese Journal of International Law* 15.

the pages of law reviews. Because of their selective and often self-congratulatory character, those accounts must be read ‘against the grain’<sup>21</sup> and triangulated with other data. Yet, they can offer precious insights into the authors’ self-perceptions as agents in society and the tacit rules of their game. Indeed, a good portion of this article is based on publicly available sources.

Admittedly, the material I gathered through ethnographic fieldwork, interviews, and desk research falls short of conclusive evidence – especially as far as quantitative empirics are concerned. More work will be needed to map the ‘gigantic maze of practices and arrangements’ that make up the international judicial field.<sup>22</sup> Likewise, I am aware that other authors have applied Bourdieusian concepts to international courts and tribunals.<sup>23</sup> While masterful, their studies tend to focus narrowly on specific institutions, without placing their findings under a wider and cross-institutional framework. My own analysis, by contrast, opts for an intermediate ‘level of abstraction’,<sup>24</sup> at once more specific than the whole international legal profession and more general than single organizations considered in isolation.

## 2. From college to field: International adjudication as a site of struggle

Much has changed since Oscar Schachter coined the famous metaphor of an ‘invisible college of international lawyers’. As originally formulated in the 1970s, the notion referred to an élite of academics hailing from the most prestigious law schools of Europe and the Americas, as well as a handful of statesmen who maintained ‘contact with the scholarly side of the profession’.<sup>25</sup> According to Schachter, the college was devoted to the ‘common intellectual enterprise’ of promoting international law as a unified discipline across state borders.<sup>26</sup> Its members often pursued both national and international careers, thus valorizing their knowledge ‘in more places’ and deploying ‘double (or even triple) strategies’ from their multiple social positions.<sup>27</sup>

Some 50 years later, this idyllic image is thoroughly outdated. The college, if it ever existed, has given way to a full-blown profession that attracts ever-growing numbers of individuals and institutions. International regulation has exploded in scope and reach. What once was ‘a thin net of rules’ has evolved into a multi-layered set of norms covering most aspects of political, economic, and social life. Today, we find international ‘law and regulation and rule at every turn’.<sup>28</sup> The thickening of the system’s ‘normative density’ has resulted in a proportional increase in the ‘institutional density necessary to sustain the norms’.<sup>29</sup> International organizations have proliferated; state governments have established departments tasked with handling international legal affairs; and a wide array of new actors – politicians, civil servants, military commanders, multinational

<sup>21</sup>The expression is borrowed from T. Eagleton, *Against the Grain: Essays 1975–1985* (1986).

<sup>22</sup>T. Schatzki, ‘Keeping Track of Large Phenomena’, (2016) 104 *Geographische Zeitschrift* 4, at 6.

<sup>23</sup>See, e.g., Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996); H. Schepel and R. Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’, (1997) 3 *European Law Journal* 165; M. R. Madsen, ‘From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics’, (2007) 32 *Law and Social Inquiry* 137; J. Meierhenrich, ‘The Practice of International Law: A Theoretical Analysis’, (2013) 76 *Law and Contemporary Problems* 1; S. Puig, ‘Social Capital in the Arbitration Market’, (2014) 25 *EJIL* 387; M. J. Christensen, ‘The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations’, (2015) 63 *Current Sociology* 825.

<sup>24</sup>J. Dunoff and M. A. Pollack, ‘International Judicial Practices: Opening the Black Box of International Courts’, (2018) 40 *Michigan Journal of International Law* 47, at 60.

<sup>25</sup>See Schachter, *supra* note 8, at 217.

<sup>26</sup>*Ibid.*

<sup>27</sup>See Madsen, *supra* note 13, at 197.

<sup>28</sup>See Kennedy, *supra* note 4, at 848.

<sup>29</sup>G. Abi-Saab, *Cours Général de Droit International Public* (1987), Vol. 207, at 93.

corporations, advocacy networks, and journalists – have become conversant in the vernacular of the discipline.<sup>30</sup>

The broadening of the profession has coincided with its diversification and specialization. Unlike the members of the invisible college, who were raised in domestic legal traditions and turned to the field of international law late in their careers,<sup>31</sup> modern-day professionals are often ‘purebred’ international lawyers who acquire their ‘credentials’ and earnings mainly through activities in a cosmopolitan, delocalized socio-professional space.<sup>32</sup> Over time, their palimpsest of expert knowledges has grown more structured, technical, and differentiated, on par with that of domestic law specialists. Hence, if yesteryear’s international law was ‘a tradition and a political project’,<sup>33</sup> today’s international law is also a business and a set of career paths.

But while international legal actors are now aplenty, only a few are involved in the *judicial* settlement of international disputes. In fact, adjudication traditionally accounted for a minuscule portion of international legal practice. For the best part of the twentieth century, the Permanent Court of International Justice and its successor, the ICJ, remained the only state-to-state courts, each issuing no more than a couple of decisions per year. The professionals orbiting around those institutions were few and far between. To this day, ‘only a tiny percentage’ of international disputes end up before a judge. The vast majority ‘are still resolved the old-fashioned way: through diplomacy behind closed doors if we are lucky, through more confrontational and even violent forms when we are not’.<sup>34</sup>

Yet, the proliferation of international courts and tribunals in the aftermath of the Cold War did cause a gradual shift in focus across the discipline. That was the moment when international law entered its ‘post-ontological era’,<sup>35</sup> that is when its existence, effectiveness, and ‘lawness’ ceased to be questioned. At last, the system had teeth. Finally, international lawyers could focus on ‘real law’, real cases, and real judges.<sup>36</sup> The ‘new terrain’<sup>37</sup> of international adjudication saw the multiplication of treatises systematizing the case law of the various courts, evaluating the quality and rigour of their reasoning, and dissecting a variety of jurisdictional and procedural matters.<sup>38</sup> Judicial interpretation suddenly became the obsession of the discipline, playing out as ‘the functional equivalent of truth’ in international legal discourse.<sup>39</sup>

Amid these developments, a group of international lawyers sought to differentiate themselves from their peers and specialize in the various aspects of international litigation. Relying on international law as background knowledge, they mastered the procedures of the different courts and tribunals and honed their skills in the art of judicial persuasion. Contrary to a purely functionalist view, these experts were not passive ‘operators’ of the emergent system, but active ‘entrepreneurs’<sup>40</sup> who reached out to public officials and private entities that may be interested in resorting to adjudication or arbitration to settle their differences. If many sovereign states have gradually overcome their traditional reluctance towards international courts, it is not only because of their

<sup>30</sup>See, e.g., A. Bianchi, ‘The International Legal Regulation of the Use of Force’, (2009) 22 *LJIL* 651, at 653–4; A. Bianchi, ‘The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle’, in Bianchi, Peat and Windsor, *supra* note 2, at 40.

<sup>31</sup>See d’Aspremont, *supra* note 3, at 22. See also S. Neff, *Justice among Nations: A History of International Law* (2014), at 303–4.

<sup>32</sup>T. Schultz and R. Kovacs, ‘The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth’, (2012) 28 *Arbitration International* 161, at 162. See also Dezalay and Garth, *supra* note 23, at 24; d’Aspremont, *supra* note 3, at 20–3.

<sup>33</sup>Koskenniemi, *supra* note 2, at 1.

<sup>34</sup>J. E. Alvarez, ‘The New Dispute Settlers: (Half) Truths and Consequences’, (2003) 38 *Texas International Law Journal* 405, at 411.

<sup>35</sup>T. M. Franck, *Fairness in International Law and Institutions* (1995), 6. See also d’Aspremont, *supra* note 3, at 23.

<sup>36</sup>See Alvarez, *supra* note 34, at 406.

<sup>37</sup>See Alter, *supra* note 10.

<sup>38</sup>See Dunoff and Pollack, *supra* note 24, at 48.

<sup>39</sup>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* (2010), 17, at 18.

<sup>40</sup>See Madsen, *supra* note 13, at 199.

purported commitment to the rule of law,<sup>41</sup> but *also* because of their increased exposure to an increasingly global legal service market.<sup>42</sup> Lawyers ‘created’ clients as often as clients ‘created’ lawyers.<sup>43</sup>

Since its debut, this *international judicial community* has risen to prominence and prestige within the profession. Fifty years ago, if you had asked a young international lawyer about their ambitions, they would probably have pointed to the United Nations Office of Legal Affairs or the International Law Commission; today, they are as likely to indicate the ICJ, the ECtHR, or the WTO dispute settlement system as ideal duty stations.<sup>44</sup> Back then, private practitioners would lament a lack of business opportunities in international dispute settlement; today, they can comfortably list the many law firms that have set up dedicated offices in the strategic hubs of the system.<sup>45</sup> Universities would treat international judicial practice and procedure as an appendix to their curricula; today, they offer a wealth of specialized courses on the topic. Researchers would typically write about substantive rules and principles of international law, often acknowledging their aspirational character; today, they turn their attention to ‘what courts have actually decided’.<sup>46</sup>

As a result, nowadays many commentators place adjudication ‘at the centre of the world of the professional international lawyer’<sup>47</sup> and, by extension, consider the international judicial community as the innermost circle of that world – that which inhabits the immediate vicinity of the centre.<sup>48</sup> Whether real or imagined, the perceived ‘centrality’ of courts and tribunals has made them the object of keen academic scrutiny, sometimes bordering on the obsessive.<sup>49</sup>

Indeed, in recent years, numerous authors have deployed various socio-legal concepts to delineate the community and understand the features that unite its participants. For instance, some resort to the notion of ‘epistemic community’, first described by Peter Haas as ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain’.<sup>50</sup> These studies focus, *inter alia*, on how the collective values, worldviews, and argumentative techniques of the community contribute to international judicial discourse.<sup>51</sup> Others borrow from Stanley Fish’s work on ‘interpretive

<sup>41</sup>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: Legal Issues* (2001), 251, at 255.

<sup>42</sup>Think, for instance, of ISDS: there, in the 1980s and 1990s, a handful of pioneering practitioner-academics developed the very legal doctrines that, a decade later, would be used to consolidate the system and make it thrive. See, e.g., S. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, (2011) 22 *EJIL* 875, at 876. Another example is the ICC, where NGOs and legal advocacy groups played a key role in the negotiation of the Rome Statute. See, e.g., Z. Pearson, ‘Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’, (2006) 39 *Cornell International Law Journal* 243.

<sup>43</sup>M. Shapiro, ‘Judicialization of Politics in the United States’, (1994) 15 *International Political Science Review* 101, at 109.

<sup>44</sup>Participant-observation of the WTO secretariat; interviews with former ICJ and ECtHR registry lawyers (The Hague, October 2017).

<sup>45</sup>Interviews with two counsels specializing in ISDS and WTO litigation, respectively (Geneva, March 2015).

<sup>46</sup>J. Frank, *Law and the Modern Mind* (1949), 46.

<sup>47</sup>I. Brownlie, ‘The Calling of the International Lawyer: Sir Humphrey Waldock and His Work’, (1983) 54 *British Yearbook of International Law* 7, at 68. See also A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, (2004) 25 *Michigan Journal of International Law* 999, at 1014 (noting that international courts and tribunals are located at ‘the very center of global law’).

<sup>48</sup>See, e.g., T. Soave, ‘Who Controls WTO Dispute Settlement? Socio-Professional Practices and the Crisis of the Appellate Body’, (2019) 29 *Italian Yearbook of International Law* 13.

<sup>49</sup>See, e.g., Bianchi, *supra* note 30, at 40–2; F. Zarbiyev, ‘On the Judge Centredness of the International Legal Self’, (2021) 32 *EJIL* 1139.

<sup>50</sup>P. M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, (1992) 46 *International Organization* 1, at 3. See also, e.g., M. Noortmann, ‘The International Law Association and Non-State Actors: Professional Network, Public Interest Group or Epistemic Community?’, in J. d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011), 233.

<sup>51</sup>See, e.g., N. Klein, ‘Who Litigates and Why’, in C. P. R. Romano, K. J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), 569, at 574–5; J. d’Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (2015); A. Bianchi, ‘Epistemic Communities in International Arbitration’, in

communities<sup>52</sup> to explore the communicative interactions underlying the interpretation of international rules.<sup>53</sup> Moving from the premise that the meaning of words resides in their use in language,<sup>54</sup> these works show that the persuasiveness of legal interpretation does not stem from the inherent properties of the text to be interpreted, but from the categories of understanding, the ways of organizing experience, and the stipulations of (ir)relevance shared by the community tasked with interpreting that text.<sup>55</sup> Thus conceived, interpretation becomes ‘an act of authority dependent on its ability to induce acceptance by way of argument or persuasion’.<sup>56</sup>

For all its lucidity and insight, this literature leaves several questions unaddressed. The emphasis on the ‘normative and principled beliefs’ and the ‘common policy enterprise’<sup>57</sup> pursued by the community tends to overlay the degree of its cohesiveness and make its participants ‘seem more similar to each other than they really are’.<sup>58</sup> Moreover, the socially constructed nature of interpretive and argumentative postures is often analysed in isolation from the individual *agents* who adopt those postures, their competing positions within the community, the structures in which they operate, and the conflicts that pit them against one another. In other words, the ideational features of the community are frequently divorced from the ‘differences and contradictions’<sup>59</sup> that characterize its ‘social and material activity’.<sup>60</sup>

In the remainder of this article, I seek to fill these gaps by reappraising the international judicial community as a space of socio-professional struggle and reflecting on how its conflictive dynamics affect the practices of international courts and tribunals.

Rather than a cohesive entity, I view the community as a *juridical field*, famously defined by Bourdieu as ‘the site of a competition for monopoly of the right to determine the law’.<sup>61</sup> That competition occurs ‘among actors possessing a technical competence which is inevitably social’, and which consists in the ‘socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world’.<sup>62</sup> Simply put, to apply a Bourdieusian lens to the community is to explore the material and symbolic conditions under which its members strive to ‘advance their interests’ both within their social field and in relation to other, competing fields.<sup>63</sup>

A brief overview of the core concepts of field theory can help elucidate the task. First, the object of the contest among community members – the ‘economy’ of the juridical field<sup>64</sup> – is to appropriate the *symbolic power* necessary to impose one’s conception of the law as the dominant paradigm across the community. Symbolic power, in Bourdieu’s words, is the power to transform the

T. Schultz and F. Ortino (eds.), *The Oxford Handbook of International Arbitration* (2020), 569; F. Cardenas and J. d’Aspremont, ‘Epistemic Communities in International Adjudication’, *Max Planck Encyclopedia of International Procedural Law*, available at [opil.ouplaw.com/view/10.1093/law-mpeipro/e2425.013.2425/law-mpeipro-e2425](http://opil.ouplaw.com/view/10.1093/law-mpeipro/e2425.013.2425/law-mpeipro-e2425).

<sup>52</sup>S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (1980), at 338–55.

<sup>53</sup>See, e.g., I. Johnstone, ‘Treaty Interpretation: The Authority of Interpretive Communities’, (1991) 12 *Michigan Journal of International Law* 371; 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* (2010), 34; see Klabbers, *supra* note 39; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012); d’Aspremont, *supra* note 6; Waibel, *supra* note 2.

<sup>54</sup>L. Wittgenstein, *Philosophical Investigations* (1958), para. 43.

<sup>55</sup>S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989), at 141.

<sup>56</sup>See d’Aspremont, *supra* note 6, at 114.

<sup>57</sup>See Haas, *supra* note 50, at 3. See also, e.g., A. Wendt, *Social Theory of International Politics* (1999), 215–20.

<sup>58</sup>A. Kazun, ‘Juridical Field or Legal Profession? Comparison of Bourdieusian Theory and Theory of Professionalism for Studies of Legal Community’, (2016) 15 *Comparative Sociology* 572, at 580. See also d’Aspremont, *supra* note 3, at 28.

<sup>59</sup>P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (1992), at 243.

<sup>60</sup>D. Nicolini, *Practice Theory, Work And Organization: An Introduction* (2012), 5.

<sup>61</sup>See Bourdieu, *supra* note 11, at 817.

<sup>62</sup>*Ibid.* (emphasis omitted).

<sup>63</sup>G. Messenger, ‘The Practice of Litigation at the ICJ: The Role of Counsel in the Development of International Law’, in Hirsch and Lang, *supra* note 13, at 212.

<sup>64</sup>See Madsen, *supra* note 13, at 196.

world ‘by transforming the words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions’.<sup>65</sup> The views that emerge victorious from this symbolic struggle gain the force of ‘universality and neutrality’,<sup>66</sup> thereby creating ‘not only the field’s logic and taken for granted limits (*doxa*) but also its consecration mechanisms’.<sup>67</sup> In other words, once established, the prevailing paradigm obscures ‘the various battles and processes’ that led to its emergence and naturalizes the social dominance of those who espouse it.<sup>68</sup>

Second, the actors taking part in the contest possess, accumulate, and deploy various ‘species of power’, or ‘*capital*’,<sup>69</sup> which can be converted into one another under certain conditions<sup>70</sup> and whose relative value is varies across time and fields. Economic capital, for instance, refers to the set of material assets that are ‘immediately and directly convertible into money and may be institutionalized in the form of property rights’.<sup>71</sup> Cultural capital designates the ‘instruments for the appropriation of symbolic wealth socially designated as worthy of being sought and possessed’.<sup>72</sup> It can be ‘institutionalized in the form of educational qualifications’,<sup>73</sup> but also projected informally through perceptions of competence, knowledge, taste, manners, and the like. Finally, social capital is ‘the aggregate of the actual or potential resources’ linked to ‘institutionalised relationships of mutual acquaintance and recognition’.<sup>74</sup> This, essentially, is the kind of capital that derives from recognition within a group and possession of the credentials that allow participation in its activities.

The amount and composition of each actor’s capital determines her ‘relative force in the game’ and ‘the moves she makes’.<sup>75</sup> It follows that the field can be understood as ‘a network, or a configuration, of objective relations between *positions*’.<sup>76</sup> Those positions can never be reduced to technical arguments or abstract opinions. Instead, they are objectively and historically defined, in their existence and in the determinations they impose upon the agents, by their ‘present and potential situation’ in the ‘structure of the distribution of . . . capital’, whose possession ‘commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.)’.<sup>77</sup>

Crucially, these notions enable an analysis of the international judicial community both in its *external* relations with competing social fields and in the *internal* structures that govern the interactions among its members.

*Externally*, fields are not ‘contained or closed entities’ with fixed boundaries, but rather ‘spaces of practices that remain in competition with other fields’.<sup>78</sup> Indeed, the membrane that separates the outside and the inside of the community is rather porous. Many of its participants cross it back and forth during the course of their careers, and maintain some ‘interrelationship with social

<sup>65</sup>See Bourdieu, *supra* note 11, at 839.

<sup>66</sup>See Madsen, *supra* note 13, at 190.

<sup>67</sup>*Ibid.*, at 196.

<sup>68</sup>*Ibid.*, at 197.

<sup>69</sup>See Bourdieu and Wacquant, *supra* note 59, at 97 (emphasis added).

<sup>70</sup>See A. Rasulov, ‘The Discipline as a Field of Struggle: The Politics and the Economy of Knowledge Production in International Law’, in A. Bianchi and M. Hirsch (eds.), *International Law’s Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (2021), 180, at 193–5.

<sup>71</sup>P. Bourdieu, ‘The Forms of Capital’, in J. G. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education* (1986), 241, at 242.

<sup>72</sup>P. Bourdieu, ‘Cultural Reproduction and Social Reproduction’, in J. Karabel and A. H. Halsey (eds.), *Power and Ideology in Education* (1977), 487, at 488.

<sup>73</sup>See Bourdieu, *supra* note 71, at 242.

<sup>74</sup>*Ibid.*, at 248.

<sup>75</sup>See Bourdieu and Wacquant, *supra* note 59, at 98 (emphasis omitted). See also Bianchi, *supra* note 30, at 49.

<sup>76</sup>See Bourdieu and Wacquant, *ibid.*, at 97 (emphasis added).

<sup>77</sup>*Ibid.*

<sup>78</sup>See Madsen, *supra* note 13, at 192.



forces other than those immediately at stake only in the microcosm of law'.<sup>79</sup> At the same time, the community is grounded on 'a logic and a necessity that are specific and irreducible to those that regulate other fields'.<sup>80</sup> Its members share a 'collective interest' in policing the borders of the community against external interference and 'in publicly presenting a more fixed and coherent profession of law'<sup>81</sup> than that which emerges from their inner confrontations.

*Internally*, the struggles of the community are simultaneously geared towards the perpetuation of existing arrangements and towards 'questioning and redefining social hierarchies and power'.<sup>82</sup> On the one hand, socialization and repeated interaction generate a system of 'durable, transposable dispositions', called '*habitus*',<sup>83</sup> which is internalized by each agent in the field and guides their behaviour both consciously and unconsciously. *Habitus* produces recursive practices, rituals, and representations which are 'always tending to reproduce the objective structures of which they are the product'.<sup>84</sup> On the other hand, the ever-shifting distribution of capital that results from the competition among community members means that its *habitus* and social structures remain open to contestation, renegotiation, and restructuring.

The interplay between stability and change in community dynamics has a profound impact on the routine *practices* of international adjudication. The notion of practice has itself become the object of a renewed scholarly interest. In recent years, several theorists have developed on Bourdieu's works to appraise social practices as 'an actual, contingent, evolving and productive set of activities'.<sup>85</sup> Those activities are informed by 'symbolic structures of knowledge' that 'enable and constrain the agents to interpret the world according to certain forms, and to behave in corresponding ways'.<sup>86</sup> In turn, the structures are not dictated only by official discourse or peremptory commands, but rather encompass 'the explicit and the tacit'; 'what is said and what is left unsaid'; 'what is represented and what is assumed'; the 'language, tools, documents ... regulations, and contracts' that instantiate the shared dispositions of a social group.<sup>87</sup>

Applying these insights to the domain of international governance, Emanuel Adler and Vincent Pouliot have defined international practices as 'competent performances'.<sup>88</sup> 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'.<sup>89</sup> The definition has known some success in international legal scholarship,<sup>90</sup> including in the works of authors seeking to understand the operations of international courts and tribunals.<sup>91</sup> These studies interrogate the ways in which practices

<sup>79</sup>*Ibid.*, at 191.

<sup>80</sup>See Bourdieu and Wacquant, *supra* note 59, at 98 (emphasis omitted).

<sup>81</sup>See Madsen, *supra* note 13, at 191.

<sup>82</sup>*Ibid.*, at 198.

<sup>83</sup>P. Bourdieu, *Outline of a Theory of Practice* (translated by R. Nice, 1977), at 72 (emphasis omitted).

<sup>84</sup>*Ibid.* (emphasis omitted).

<sup>85</sup>N. M. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen, 'Introduction', in N. M. Rajkovic, T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Power of Legality: Practices of International Law and Their Politics* (2016), 1, at 12.

<sup>86</sup>A. Reckwitz, 'Toward a Theory of Social Practices: A Development in Culturalist Theorizing', (2002) 5 *European Journal of Social Theory* 243, at 245–6.

<sup>87</sup>É. Wenger, *Communities of Practice: Learning, Meaning and Identity* (1998), at 47.

<sup>88</sup>See Adler and Pouliot, *supra* note 12, at 4.

<sup>89</sup>*Ibid.*

<sup>90</sup>See, e.g., Brunnée and Toope, *supra* note 6; T. Aalberts and I. Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice', in d'Aspremont et al., *supra* note 2, 287.

<sup>91</sup>See Dunoff and Pollack, *supra* note 24; N. Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts', (2020) 12 *International Theory* 33.

‘connect structure to agency and back’, as well as ‘the dynamic material and ideational processes that enable structures to be stable or to evolve, and agents to reproduce or transform structures’.<sup>92</sup>

Taken together, field theory and practice theory form the analytical framework that guides my exploration of the socio-professional dynamics of the international judicial community. In the sections that follow, I apply this framework to map the myriad instances of co-operation and competition among community members in their day-to-day business. The analysis proceeds in three movements. I begin by delineating the external boundaries of the community and identifying the exclusionary mechanisms that enable it to sustain its structural distinction and relative autonomy from the rest of the international legal world. Next, I turn to the internal conflicts that roil the community and examine how its members strive to maximize their capital and consolidate their positions relative to one another. Having shown that the community is simultaneously ‘a relatively autonomous structure and an unsettled *mélange* of different outlooks and ideas’,<sup>93</sup> I conclude by discussing the impact of its everyday practices on the conduct of judicial proceedings and the production of legal outcomes.

### 3. Policing the borders: Co-operation, autonomization, and operational closure

The first challenge that arises in attempting to describe the international judicial community is to draw its boundaries. Who are its members? And what differentiates them from the broader professional universe of international lawyers? Answering these questions is no easy task, because social fields come ‘in various shapes and sizes’, can be ‘tightly organized’ or ‘diffuse’,<sup>94</sup> and often intersect with other fields. Moreover, my own descriptive perspective is, by all purposes, a *chosen* perspective that represents, and thus inevitably modifies, the object of my inquiry.<sup>95</sup> To write about the community is, partly, to constitute it.

That being said, I believe that what sets the community apart from the rest of the international legal profession is the degree of *proximity* to the routine functioning of international courts and tribunals – which, as I will explain, roughly corresponds to the degree of *influence* on judicial outcomes. This distinction, however blurry, helps separate an ‘outer’ and an ‘inner’ circle of international adjudication professionals.

In the former camp, we find the wide variety of actors having direct or indirect stakes in international adjudication. 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 or renewal of judges and set the agenda for institutional reform. Meanwhile, national politicians praise or blame judicial decisions to advance domestic or foreign 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 trade or investment plans; journalists cover the most significant rulings and disseminate them to the general public; etc. These forms of engagement ensure the continued goodwill of external stakeholders towards international adjudication<sup>96</sup> and make them the ultimate arbiters of the system.

In practice, however, these 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

<sup>92</sup>E. Adler and V. Pouliot, ‘International Practices: Introduction and Framework’, in E. Adler and V. Pouliot (eds.), *International Practices* (2011), 3, at 4–5.

<sup>93</sup>See Madsen, *supra* note 13, at 197.

<sup>94</sup>See Cohen, *supra* note 2, at 1066.

<sup>95</sup>See Bourdieu, *supra* note 83, at 2.

<sup>96</sup>See, e.g., L. Helfer and A.-M. Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, (2005) 93 *California Law Review* 899, at 946–9.

judgments. What happens *in between* is usually of little concern to them: after all, the rules that govern international proceedings aim to shield the content of decisions from overt political interference. If anything, external stakeholders serve as the *mediate* audience of international adjudicators: a looming presence that observes the unfolding of dispute settlement from a certain distance and intervenes only when the circumstances so require.<sup>97</sup>

In the inner circle, by contrast, we find the actors who operate within and in the immediate surroundings of international courts and tribunals. These legal professionals are in charge of running the judicial machinery in its routine operations, and their recursive practices shape and inform every stage of the proceedings. Obviously, international judges and arbitrators fit the bill: they are the most recognizable actors in the community, officially vested with the symbolic power to interpret and apply the relevant norms to the cases at hand. Other repeat players include state agents, who head the delegations appearing before the court, and the 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, each court or tribunal provides its adjudicators with a set of legal bureaucrats – called clerks, registry or secretariat officials, or arbitral secretaries depending on the institution concerned – who assist in the preparation, deliberation, and drafting of judgments. Likewise, outside of courts, specialized scholars appraise and systematize judicial decisions, identify patterns and inconsistencies in case law, and suggest solutions going forward.

Ostensibly, these various actors occupy distinct positions. However, 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.<sup>98</sup> Prominent academics may take a break from their faculty chairs to serve on an international court;<sup>99</sup> arbitrators in an ISDS case may appear as counsel in another;<sup>100</sup> the legal officers working for a registry or secretariat may later be recruited by government departments or private law firms;<sup>101</sup> universities routinely organize conferences bringing together practitioners and academics; 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.<sup>102</sup> Indeed, while external stakeholders are diffuse and scattered across the globe, the international judicial community is a tight network of *habitués* who walk the corridors of international courts on a regular basis, hold first-name personal contacts, and boast friendly professional relationships.<sup>103</sup>

Overall, community members are driven by different interests from external stakeholders. The latter play the game of adjudication in pursuit of goals *other* than the game itself – be they a country's

<sup>97</sup>See Soave, *supra* note 48, at 17.

<sup>98</sup>Participant-observation of the WTO secretariat. See also A. Vauchez, 'Communities of International Litigators', in Romano, Alter and Shany, *supra* note 51, at 661; see d'Aspremont et al., *supra* note 5, at 8; 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* (2019), 323, at 343.

<sup>99</sup>According to some data, about 40% of the judges sitting on permanent international courts 'have significant academic credentials' (see Terris, Romano and Swigart, *supra* note 18, at 20) and 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, at 17). Recently, the President of the ICJ has taken steps to reduce so-called 'moonlighting', i.e., the practice of ICJ Judges serving as arbitrators in their spare time. See, e.g., C. Musto, 'New Restrictions on Arbitral Appointments for Sitting ICJ Judges', *EJIL Talk!*, 5 November 2018, available at [www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/](http://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/).

<sup>100</sup>Interviews with two ISDS tribunal assistants (Geneva, May 2015 and Turin, May 2016).

<sup>101</sup>For instance, it is customary for trade law firms to hire former WTO secretariat officials, panellists, and even, on occasion, Appellate Body members. See Soave, *supra* note 48, at 24.

<sup>102</sup>Participant-observation of the WTO secretariat; interviews with an IACtHR registry lawyer (via Skype, April 2015) and a counsel specializing in ECtHR litigation (via Skype, June 2015).

<sup>103</sup>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, at 195; K. Hopewell, 'Multilateral Trade Governance as Social Field: Global Civil Society and the WTO', (2015) 22 *Review of International Political Economy* 1128, at 1142–3.

perceived national interest, a multinational company's trade or investment opportunities, an individual's fundamental freedoms, etc. The former, conversely, derive their capital from *the very functioning* of the adjudicative mechanism.<sup>104</sup> 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.<sup>105</sup> It follows that community members share a self-interest in defending international judicial institutions as such, extending the reach and pervasiveness of their powers, and constantly reasserting their 'courtiness'.<sup>106</sup>

As its influence grew, the international judicial community sought to erect barriers to insulate its inner social workings from external competition and secure its control over the everyday functioning of international courts and tribunals. Nowadays, the 'modes of education and reproduction, paths to access, and definitions of competences'<sup>107</sup> of the community are increasingly regimented and serve as powerful mechanisms of social exclusion. Indeed, in their routine unfolding, judicial proceedings take place 'at a considerable remove' from political and diplomatic institutions<sup>108</sup> and are characterized by an increasing sense of clubbiness and familiarity among participants.<sup>109</sup>

For instance, almost every international court or tribunal is surrounded by a specialized bar of counsel, whose members master the particular subject matter and the judicial style of the institution at hand.<sup>110</sup> These bars are not formally recognized institutions, as there exist no official qualifications or requirements for someone to represent a party before an international judicial body.<sup>111</sup> Instead, access to the bar is conditioned on reputation, recursive legal practice, strenuous training, and often the mentorship of an incumbent member.<sup>112</sup> Accordingly, capital in international litigation is concentrated in the hands of surprisingly small clusters of individuals. In jurisdictions like the ICJ or the WTO, it is common for the same handful of counsel to appear at most hearings alongside their clients.<sup>113</sup> Their knowledge of the intricacies of international adjudication grants them a competitive edge over new entrants in the market,<sup>114</sup> while their repeated participation in the proceedings makes them familiar and reliable faces in the courtroom.<sup>115</sup> Litigation before other international courts, like the ECtHR, has not yet reached comparable levels of concentration. There too, however, the social proximity between the court and the bar has grown tighter in recent years, with former judges and registry officials joining Strasbourg-based NGOs and law firms.<sup>116</sup>

<sup>104</sup>See Soave, *supra* note 48, at 18.

<sup>105</sup>Interviews with an ECtHR registry lawyer (Geneva, February 2015), an ICJ registry lawyer (Paris, April 2016), and a counsel specializing in WTO litigation (Geneva, September 2016).

<sup>106</sup>M. M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (2002), at 175.

<sup>107</sup>See Madsen, *supra* note 13, at 196.

<sup>108</sup>R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', (2016) 27 *EJIL* 9, at 25.

<sup>109</sup>Participant-observation of WTO dispute settlement proceedings; interview with an IACtHR registry lawyer (via Skype, April 2015).

<sup>110</sup>See Vauchez, *supra* note 98, at 656–7.

<sup>111</sup>See, e.g., M. Kazazi, 'Commentary on the Hague Principles of Ethical Standards for Counsel Appearing Before International Courts and Tribunals', (2011) 10 *The Law and Practice of International Courts and Tribunals* 17, at 18; J. Crawford, 'The International Law Bar: Essence Before Existence?', in d'Aspremont et al., *supra* note 2, at 338.

<sup>112</sup>Interview with a counsel appearing in multiple ICJ proceedings (The Hague, October 2014).

<sup>113</sup>Participant-observation of WTO dispute settlement hearings. See also Pellet, *supra* note 19; K. T. Gaubatz and M. MacArthur, 'How International Is "International" Law?', (2001) 22 *Michigan Journal of International Law* 239; S. P. Kumar and C. Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012', (2014) 25 *EJIL* 893, at 902; Soave, *supra* note 48, at 22–5.

<sup>114</sup>See M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law and Society Review* 95, at 98.

<sup>115</sup>Participant-observation of WTO dispute settlement hearings; interview with a counsel appearing in multiple ICJ proceedings (The Hague, October 2014). See also K. Highet, 'A Personal Memoir of Eduardo Jiménez de Aréchaga', (1994) 88 *Proceedings of the American Society of International Law* 577, at 579.

<sup>116</sup>Interview with a counsel specializing in ECtHR litigation (via Skype, June 2015). See also K. Dzehtsiarou and D. K. Coffey, 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights', (2014) 37 *Hastings International and Comparative Law Review* 271, at 314. Moreover, the ECtHR the Court is sometimes called upon to decide on state-sponsored individual applications, i.e., cases in which the applicant's attorney fees are covered by their home state. For instance, Cyprus had high stakes in the outcomes of the *Loizidou v. Turkey* case, which might explain why a claimant of modest economic

Likewise, the invisible army of clerks, assistants, and registry and secretariat lawyers works staunchly and discreetly to nudge the decisions of adjudicators, streamline and standardize their practices, and ensure consistency in jurisprudence.<sup>117</sup> Unlike judges, these actors are fully-fledged bureaucrats whose recruitment through public competitions is not subject to political oversight. Their long-tenure contracts, often outlasting the terms of service of adjudicators, makes them the institutional memory of international courts and tribunals.<sup>118</sup> The ‘critically important’<sup>119</sup> contribution of judicial bureaucrats to the preparation, deliberation, and drafting of judgments is widely known across the inner circle of professional litigators, but is zealously kept secret to outsiders.<sup>120</sup> The few commentators attempting to shed light on the topic<sup>121</sup> are often met with scorn and accusations of unprofessionalism.<sup>122</sup> This double standard, defined by some as ‘hypocritical’,<sup>123</sup> testifies to the community’s desire to remain the only ones in the know, the sole initiates to the arcane mysteries of international adjudication.

Finally, scholarly production in the field is densely populated by ‘practitioner-academics’ who have direct stakes in the system and ‘stand[] to profit from its widespread acceptance’.<sup>124</sup> For instance, much of the writing on investment arbitration is done by authors who themselves ‘are involved’ in it as either adjudicators or counsel.<sup>125</sup> 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’.<sup>126</sup> One might expect similar findings to apply, say, to human rights<sup>127</sup> and trade law<sup>128</sup> scholarship as well. This familiarity between the bench and the academe creates a favourable intellectual environment for the flourishing of international adjudication, but also poses an ‘obstacle for independent and clear positioning’.<sup>129</sup>

Generally speaking, being an insider in the game means being acquainted with its rules, adopting strategies that resonate with other players, and ultimately shaping legal outcomes to an extent that is usually precluded to outsiders. Being ‘well-known to the Judges’ and understanding by

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means could afford Ian Brownlie as counsel. See *Loizidou v. Turkey*, Merits, Judgment of 18 December 1996, No. 15318/89, ECHR-1998, para. 5; *Loizidou v. Turkey (Article 50)*, Judgment of 28 July 1998, No. 15318/89, ECHR-1998, para. 8. Similarly, Azerbaijan might have had a sufficient interest in the *Chiragov and others v. Armenia* dispute to hire Malcolm N. Shaw as its third-party litigator. See *Chiragov and others v. Armenia*, Judgment of 16 June 2015, No. 13216/05, ECHR-2015, para. 10.

<sup>117</sup>See generally S. Cartier and C. Hoss, ‘The Role of Registries and Legal Secretariats in International Judicial Institutions’, in Romano, Alter and Shany, *supra* note 51, at 712.

<sup>118</sup>*Ibid.*, at 722; see Soave, *supra* note 16, at 113–16.

<sup>119</sup>D. Caron, ‘Towards a Political Theory of International Courts and Tribunals’, (2007) 24 *Berkeley Journal of International Law* 401, at 416.

<sup>120</sup>Participant-observation of the WTO secretariat. For discussion, see Soave, *supra* note 98.

<sup>121</sup>See, e.g., Thirlway, *supra* note 20; K. Pelc, ‘Sausage-Making at the WTO’, in M. Elsig, R. Polanco and P. van den Bossche (eds.), *International Economic Dispute Settlement: Demise or Transformation?* (2021), 47; J. Pauwelyn and K. Pelc, ‘Who Guards the “Guardians of the System”? The Role of the Secretariat in WTO Dispute Settlement’, (2022) 116 *AJIL* 534.

<sup>122</sup>Participant-observation of the WTO secretariat. See also Soave, *supra* note 98, at 332–3.

<sup>123</sup>C. Partasides, ‘Secretaries to Arbitral Tribunals’, in B. Hanotiau and A. Mourre (eds.), *Players’ Interaction in International Arbitration* (2012), 84.

<sup>124</sup>W. L. Kidane, *The Culture of International Arbitration* (2017), at 64–5.

<sup>125</sup>See Schill, *supra* note 42, at 894.

<sup>126</sup>See Schepel and Wesseling, *supra* note 23, at 171.

<sup>127</sup>A good case in point is the ECtHR’s adoption of the pilot judgment procedure (PJP), a procedural device that enables the joint examination of large numbers of cases arising from the same underlying problems. The introduction of the PJP was advocated in a series of strategically timed scholarly articles written by the incumbents in the European human rights regime. See, e.g., L. Wildhaber, ‘Pilot Judgments in Cases of Structural or Systemic Problems on the National Level’, in U. Deutsch and R. Wolfrum (eds.), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (2009), 69. This point emerged during an interview with a former ECtHR registry lawyer (The Hague, October 2017).

<sup>128</sup>For instance, a market-leading textbook on WTO law is co-authored by a former Appellate Body member and the former director of the Appellate Body Secretariat (ABS). See P. van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (2022).

<sup>129</sup>See Schill, *supra* note 42, at 894. See also J. Dunoff, ‘International Legal Scholarship at the Millennium’, (2000) 1 *Chicago Journal of International Law* 85, at 89.

experience ‘the difficulties, pitfalls and tricks of the trade’<sup>130</sup> enables community members to discern which claims are more likely to stick and concentrate their resources on ‘rule-changes that are likely to make a tangible difference’.<sup>131</sup> With a little stretch of the imagination, one could say that the community has replaced external stakeholders as the *immediate* audience of international adjudication. When a court or tribunal issues a decision, it is often ‘speaking’ more directly to the legal professionals gravitating around it than to its broader political constituency or the general public.<sup>132</sup>

Such a degree of socio-professional closure contributes to the independence and impartiality of international courts and ensures that extraneous factors and preoccupations are kept at bay. Yet, it can also give rise to frictions between the inner circle of community members and the outer circle of political stakeholders, especially when the latter feel unfairly marginalized in the day-to-day operations of judicial institutions. When this happens, one can witness a temporary re-entry of external forces into the community’s dynamics.

Two recent examples can help illustrate these tensions. The first is the downfall of the WTO Appellate Body. Once considered one of the most powerful international courts, since 2017 the Appellate Body has been facing the United States’ veto on the appointment of new adjudicators, eventually leading to a complete paralysis of its proceedings in December 2019.<sup>133</sup> Officially, the United States justified its blockade by accusing the Appellate Body of overstepping its judicial mandate in a number of ways.<sup>134</sup> However, it soon became clear that there was more at stake than a simple normative disagreement or a raw assertion of diplomatic might: rather, the attack on the Appellate Body was also a radical attempt by US political stakeholders to regain control of a process that they believed was slipping out of their hands.<sup>135</sup>

In pursuit of this goal, the US delegation tried to persuade the WTO Director-General to sack the director of the ABS,<sup>136</sup> the legal bureaucracy that provides support to appellate adjudicators. It also threatened to freeze the WTO’s annual budget for 2020 unless other states agreed to draconian cuts to the Appellate Body’s funding.<sup>137</sup> Ultimately, nobody was fired, but ABS staff were reallocated to other WTO divisions. The offensive on the Appellate Body was *also* an offensive on the inner circle of professional WTO litigators, aimed at disrupting their quasi-monopoly over the conduct of appellate proceedings.

This backlash poses a formidable threat to the club of trade practitioners, which has been in turmoil since the beginning of the crisis. Professional feuds both inside and outside the WTO are reshuffling alliances and reconfiguring the community, whose participants are mobilizing to mitigate the impact on their career prospects.<sup>138</sup> For instance, in 2020, a number of WTO member states (excluding, of course, the United States) agreed to the Multi-Party Interim Appeal

<sup>130</sup>See Hight, *supra* note 115, at 579.

<sup>131</sup>See Galanter, *supra* note 114, at 100.

<sup>132</sup>Participant-observation of WTO dispute settlement proceedings. See also Soave, *supra* note 48, at 18–19.

<sup>133</sup>See Soave, *supra* note 48, at 14–15.

<sup>134</sup>See, e.g., Office of the US Trade Representative, *Report on the Appellate Body of the World Trade Organization* (2020), available at [www.ustr.gov/sites/default/files/Report\\_on\\_the\\_Appellate\\_Body\\_of\\_the\\_World\\_Trade\\_Organization.pdf](http://www.ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf).

<sup>135</sup>See Soave, *supra* note 48, at 30–1.

<sup>136</sup>See S. Charnovitz, ‘The Attack on the Appellate Body: Events of 5 December 2019’, *International Economic Law and Policy Blog*, 5 December 2019, available at [ielp.worldtradelaw.net/2019/12/the-attack-on-the-appellate-body-events-of-5-december-2019.html](http://ielp.worldtradelaw.net/2019/12/the-attack-on-the-appellate-body-events-of-5-december-2019.html).

<sup>137</sup>See B. Baschuk, ‘A US Offer to Keep the WTO Alive Comes With Painful Conditions’, *Bloomberg News*, 26 November 2019, available at [www.bloomberg.com/news/articles/2019-11-26/a-u-s-offer-to-keep-the-wto-alive-comes-with-painful-conditions](http://www.bloomberg.com/news/articles/2019-11-26/a-u-s-offer-to-keep-the-wto-alive-comes-with-painful-conditions).

<sup>138</sup>Participation-observation of the WTO secretariat; interview with a counsel specializing in WTO litigation (Geneva, August 2019). See also B. Baschuk ‘WTO Faces Cliff-Edge Crisis Next Week as Mediator Eyes Departure’, *Bloomberg News*, 2 December 2019, available at [www.bloomberg.com/news/articles/2019-12-02/wto-faces-cliff-edge-crisis-next-week-as-mediator-eyes-departure](http://www.bloomberg.com/news/articles/2019-12-02/wto-faces-cliff-edge-crisis-next-week-as-mediator-eyes-departure).

Arbitration Arrangement (MPIA), designed to temporarily replace ordinary appellate proceedings. While the new mechanism is still in its infancy, it bears highlighting that the core MPIA proposal was developed jointly by a state delegation *and* a trade law firm based in Geneva.<sup>139</sup>

The second example is offered by the ongoing discussions of the institutional reform of ISDS.<sup>140</sup> Since its inception, this area of international law has been dominated by a select élite of practitioners enjoying a wide reputation and possessing highly concentrated professional capital. When, in 2017, the United Nations Commission on International Trade Law (UNCITRAL) was tasked with working on ISDS reform, it became apparent that the negotiating states would not let the arbitration ‘mafia’<sup>141</sup> infiltrate the debate and perpetuate their dominance.

Faced with this hostility from outside political stakeholders, the inner circle of arbitration practitioners had mixed reactions. Some strove to keep control over the system, warning that the UNCITRAL project would ‘bring termites into [the] wooden house of investor state dispute resolution’.<sup>142</sup> Others showed a greater ability to adapt to the new environment and to secure a seat at the negotiating table. For instance, two papers co-authored by a leading arbitrator and one of her closest collaborators<sup>143</sup> offered the technical basis for the UNCITRAL discussions and are largely credited for catalyzing the reform process.<sup>144</sup> Thanks to their efforts, the two authors were included in Switzerland’s delegation and are now key actors in the debate.

To sum up, the international judicial community maintains unstable and unsettled boundaries vis-à-vis both international politics and the rest of the international legal profession. Through networked interaction, tight social relationships, and various forms of professional co-operation, community members carefully police and refurbish those boundaries to perpetuate the internal logics of their field and its continued autonomy from competing social fields. Such *esprit de corps* may suggest that the community is internally homogenous, heterarchical, and peaceful. But, as I discuss in the next section, nothing would be farther from the truth.

#### 4. Bubbling beneath the surface: Competition, assertion, and contestation

Having outlined the external relations of the international judicial community, it is now time to untangle the conflictive interactions that occur *inside* the field. As discussed,<sup>145</sup> the community can be understood in Bourdieusian terms as the site of an endless confrontation among its participants, who amass and deploy various types of capital to consolidate their relative positions and secure the symbolic power to impose their particular visions as dominant and universal. Given that Bourdieu originally formulated his theory in relation to a localized and highly structured

<sup>139</sup>S. Andersen et al., ‘Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals’, CTEI Working Paper 2017-17 (2017), available at [repository.graduateinstitute.ch/record/295745?ln=en](https://repository.graduateinstitute.ch/record/295745?ln=en).

<sup>140</sup>See generally A. Roberts, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’, (2018) 112 AJIL 410; A. Roberts and T. St John, ‘The Originality of Outsiders: Innovation in the Investment Treaty System’, (2023) 33 EJIL 1153.

<sup>141</sup>See Dezalay and Garth, *supra* note 23, at 10; C. A. Rogers, ‘The Vocation of the International Arbitrator’, (2005) 20 *American University International Law Review* 957, at 967; Puig, *supra* note 23, at 423.

<sup>142</sup>L. Pelucacci, ‘Hon. Charles N. Brower Delivers Keynote Address at International Arbitration Conference’, *Fordham Law News*, 27 November 2017, available at [news.law.fordham.edu/blog/2017/11/27/hon-charles-n-brower-delivers-keynote-address-international-arbitration-conference/](https://news.law.fordham.edu/blog/2017/11/27/hon-charles-n-brower-delivers-keynote-address-international-arbitration-conference/). See also C. N. Brower and J. Ahmad, ‘Why the “Demolition Derby” That Seeks to Destroy Investor-State Arbitration?’, (2022) 91 *Southern California Law Review* 1139.

<sup>143</sup>G. Kauffman-Kohler and M. Potestà, ‘Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?’, CIDS Working Paper (2016); G. Kauffman-Kohler and M. Potestà, ‘The Composition of a Multilateral Investment Court and an Appeal Mechanism for Investment Awards’, CIDS Supplemental Report (2017).

<sup>144</sup>Interviews with two ISDS tribunal assistants (Turin, May 2016 and The Hague, October 2017).

<sup>145</sup>See Section 2, *supra*.

context – French society – his teachings should be handled with care when applied to international legal fields, where agents are ‘somehow more schizophrenic’ than at the domestic level.<sup>146</sup> Yet, even when employed in an ‘indicative and flexible fashion’,<sup>147</sup> field theory offers several valuable lessons about the specific inner dynamics of the community.

The first lesson is that capital is *unevenly distributed* across the community. Not all positions carry the same weight and not all voices are equally listened to.<sup>148</sup> Powerful social hierarchies, both formal and informal, shape the social relationships among community members,<sup>149</sup> with a handful of professionals sitting at the top of the pyramid and the majority slowly crawling up from the bottom. The most eminent actors in the field 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 relegated to the underbelly of the judicial machinery.

These hierarchies exist, first, *within* each cluster of community actors.

Inside a court, judges enjoy an exalted position compared to their supporting legal staff.<sup>150</sup> Yet, not all judges are created equal. Most courts and tribunals attach formal significance to the role of their presidents or chairpersons, who often exercise greater powers and bear additional responsibilities than the rest of the bench. Some institutions, like the ECtHR and the WTO, contemplate two levels of jurisdiction, therefore placing first-instance adjudicators in a subordinate position vis-à-vis their appellate counterparts. Official prerogatives aside, certain judges possess informal qualities – experience, fame, fluency in the court’s working languages – that makes them perceived as more authoritative, more capable, or more reliable than others, thus becoming the object of admiration – or envy – by their colleagues.<sup>151</sup>

The supporting legal bureaucracy, too, can be formally organized in tiers of seniority (as with the ABS) or be more horizontal (as with ICJ clerks or arbitral secretaries). Administrative personnel, translators, interpreters, and other non-lawyers usually come last in the court’s ranks. At the informal level, bureaucrats with a long-standing record of service are more knowledgeable about a court’s practice and jurisprudence than their more junior colleagues,<sup>152</sup> thereby wielding greater power in the conduct of proceedings and the definition of legal outcomes.<sup>153</sup>

Meanwhile, law firms specializing in international litigation tend to mirror the structure and division of labour typical of the Anglo-Saxon market, from which they often originate. New recruits work for several years as salaried associates ‘for their employers’ clients as well as for their own’.<sup>154</sup> During that probation period, they are expected to meet stringent benchmarks and procure new business opportunities to move up the firms’ ranks. Indeed, advancement to partnership is by no means guaranteed, such that junior lawyers ‘are in constant battle with each other for resources and remuneration’.<sup>155</sup> Partners, whose earnings are calculated on the basis of equity, carefully manage the workforce and entertain good relationships with current and prospective clients. In the courtroom, they are usually in charge of delivering the main pleadings – thereby fostering their visibility among attendees – while associates tend to take the backseat, provide

<sup>146</sup>See Madsen, *supra* note 13, at 197.

<sup>147</sup>*Ibid.*

<sup>148</sup>See Bianchi, *supra* note 30, at 40–2.

<sup>149</sup>See d’Aspremont, *supra* note 3, at 35.

<sup>150</sup>Participant-observation of the WTO secretariat.

<sup>151</sup>Participant-observation of WTO dispute settlement proceedings; interviews with an ICJ registry official (Paris, April 2016) and an IACtHR secretariat official (via Skype, April 2015). See also Terris, Romano and Swigart, *supra* note 18, at 66–7.

<sup>152</sup>See, e.g., C. A. Rogers, ‘Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn’, (2016) 109 *AJIL Unbound* 294, at 297.

<sup>153</sup>Participant-observation of WTO dispute settlement proceedings; interview with an ECtHR registry official (Geneva, February 2015).

<sup>154</sup>J. Flood, ‘Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions’, (2007) 14 *Indiana Journal of Global Legal Studies* 35, at 42.

<sup>155</sup>*Ibid.*, at 50.



support, and pass notes – thus going almost unnoticed.<sup>156</sup> Regardless of their rank, private attorneys are but one part of the teams representing the parties in litigation. Frequently, they must contend with other actors – state agents, domestic industry representatives, external experts, etc. – who may hold different views and sensibilities, thereby creating potential frictions and competition within the teams themselves.<sup>157</sup>

Second, informal hierarchies exist *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. Given the symbolic power accorded to judicial interpretation, being appointed to an international court is widely regarded as the acme of one's trajectory in the field. The total number of available positions on permanent courts is estimated at around 300<sup>158</sup> – a small figure compared to the overall size of the community. 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, holding personal and professional contacts, and more generally being at the right place at the right time.<sup>159</sup> Under these conditions, it would be difficult for 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. Capital in the ISDS arena is notoriously concentrated, with 20–30 arbitrators securing most appointments to tribunals and leaving the rest of their peers fighting for the scraps. The status acquired by the arbitration elite is the object of intense scholarly analysis.<sup>160</sup> As evidence of that status, the United States bestows the title of 'Honorable' on its nationals sitting on the US-Iran States Claims Tribunal, thereby equating them to federal judges. While most US members of the Tribunal do not make much of this title, some proudly sport it on their professional webpages.<sup>161</sup>

University professors and prominent litigators vie for the second position in the hierarchy. Both clusters of actors enjoy widespread recognition within the field, and both offer a steady pool of candidates for international courts and tribunals. However, the types of capital that scholars and counsel deploy are quite different. The former advance their position by disseminating their opinions across the community. Academics stand in a 'co-constitutive'<sup>162</sup> 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.<sup>163</sup> Ideas legitimate judicial power, and judicial power enforces ideas.

Counsel, for their part, mobilize economic capital and channel clients into the dispute settlement process, thereby acting as 'brokers' that connect the demands of the parties with the legal supply of the courts.<sup>164</sup> Indeed, it is largely thanks to their entrepreneurship that international adjudication has expanded from a fragile political project to a robust node of global governance.

<sup>156</sup>Participant-observation of WTO dispute settlement hearings; interview with a counsel appearing in multiple ICJ proceedings (The Hague, October 2014).

<sup>157</sup>See, e.g., Pellet, *supra* note 19, at 157–60; M. N. Shaw, 'The International Court of Justice: A Practical Perspective', (1997) 46 *International and Comparative Law Quarterly* 831; see Soave, *supra* note 16, at 59–60.

<sup>158</sup>See L. Swigart and D. Terris, 'Who are International Judges?', in Romano, Alter and Shany, *supra* note 51, at 621. See also Terris, Romano and Swigart, *supra* note 18, at 17.

<sup>159</sup>See Swigart and Terris, *ibid.*, at 633.

<sup>160</sup>See, e.g., Dezalay and Garth, *supra* note 23; see Puig, *supra* note 23; J. Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus', (2015) 109 *AJIL* 761.

<sup>161</sup>See, e.g., Twenty Essex website, 'The Honorable Charles N. Brower', available at [www.twentyessex.com/people/charles-brower/](http://www.twentyessex.com/people/charles-brower/).

<sup>162</sup>G. I. Hernández, 'The Responsibility of the International Legal Academic: Situating the Grammarian Within the "Invisible College"', in d'Aspremont et al., *supra* note 2, 160.

<sup>163</sup>See *ibid.*, at 160–1.

<sup>164</sup>See Vauchez, *supra* note 98, at 657.

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 bolster their standing among their peers, develop a cordial relationship with the bench, and secure future hiring opportunities.<sup>165</sup> Hence, counsel's prime source of capital 'is the recognition of judges, not clients (who are merely proximate sources of capital)'.<sup>166</sup>

At the bottom of the hierarchy we find the legion of clerks, secretariat and registry staff, and arbitral secretaries assisting the adjudicators. While, as mentioned, this cluster of actors constitutes the backbone of international courts and tribunals, its manifold activities take place mostly off the radar, concealed behind the closed doors of judicial institutions and largely neglected by external commentators.<sup>167</sup> Faceless by definition, judicial bureaucrats seldom enjoy the visibility necessary to rise to fame. Some of them relish this *invisibility*, and take great pleasure in the influence they wield behind the scenes.<sup>168</sup> Their vocation, as well as the source of their capital, resides in what Max Weber described as 'technical superiority[,] [p]recision, speed, unambiguity, knowledge of the files, continuity, [and] discretion'.<sup>169</sup> For others, employment with the bureaucracy is a mere entry point into the community and, hopefully, a springboard towards more visible positions.<sup>170</sup>

Interestingly, the 'conversion rate'<sup>171</sup> between social and economic capital is not 1:1. In fact, if we were to rank community members based on their income, the hierarchy would look a bit different. At the top, we would find big law firm partners and elite arbitrators. The former can charge in excess of USD 1,000 per hour, especially when working on large trade or investment cases.<sup>172</sup> The latter's fees are capped at US\$3,000 per day when the arbitration takes place under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), and can rise up to US\$6,000 per day if the arbitration is governed by the rules of the London Court of International Arbitration.<sup>173</sup> Next we would find permanent judges, whose remuneration, while varying across courts, can exceed US\$200,000 per annum.<sup>174</sup> Judicial bureaucrats would come a distant third. Their net annual salaries differ widely depending on institutional affiliation and level of seniority, and indicatively range from US\$60,000 (for newcomers) to US\$150,000 (for top officials).<sup>175</sup> Finally, academic remuneration is highly dependent on the salary structure of each university, but would normally land in the lower regions of the chart. Of course, the fact that community participants may don multiple hats at once enables them to combine different sources of income.

Third, competition occurs not only within the same judicial institution, but also *among* different courts and tribunals.

<sup>165</sup>Participant-observation of WTO dispute settlement proceedings; interviews with two counsel specializing in WTO and ISDS litigation, respectively (Geneva, March 2015).

<sup>166</sup>See Messenger, *supra* note 63, at 211 (emphasis added).

<sup>167</sup>See Soave, *supra* note 98.

<sup>168</sup>Interviews with two ICJ registry lawyers (via Skype, March 2015 and Paris, April 2016), an ECtHR registry lawyer (Geneva, February 2015), and an ISDS tribunal assistant (Geneva, May 2015).

<sup>169</sup>M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (G. Roth and C. Wittich eds. 1978), at 973.

<sup>170</sup>Interviews with a former ICJ registry lawyer (The Hague, October 2017), an ECtHR registry lawyer (Geneva, March 2015), an IACtHR secretariat lawyer (via Skype, April 2015), and an ISDS tribunal assistant (Turin, May 2016).

<sup>171</sup>See Bourdieu, *supra* note 71, at 248.

<sup>172</sup>See, e.g., Aceris Lawwebsite, 'The Costs of Arbitration', available at [www.acerislaw.com/the-costs-of-arbitration/](http://www.acerislaw.com/the-costs-of-arbitration/).

<sup>173</sup>See, e.g., D. Rosert, *The Stakes Are High: A Review of the Financial Costs of Investment Treaty Arbitration* (2014), at 10–11.

<sup>174</sup>See, e.g., M. Simons, 'In The Hague's Lofty Judicial Halls, Judges Wrangle over Pay', *New York Times*, 20 January 2019, available at [www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html](http://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html) (reporting that ICJ Judges are paid US \$230,000/annum as of 2019); O. Bowcott, 'UK Nominees for Judge at European Court of Human Rights Revealed', *Guardian*, 28 April 2016, available at [www.theguardian.com/law/2016/apr/28/uk-nominees-for-judge-at-european-court-of-human-rights-revealed](http://www.theguardian.com/law/2016/apr/28/uk-nominees-for-judge-at-european-court-of-human-rights-revealed) (estimating the net annual salary of ECtHR Judges at €200,000).

<sup>175</sup>See, e.g., ICJ website, *Vacancy announcement* (accessed 29 August 2020) (fixing the indicative minimum net annual remuneration for ICJ clerks at US\$63,806); WTO Committee on Budget, Finance and Administration, 2019 WTO Salary Survey, WT/BFA/W/471 (7 March 2019) (indicating that gross annual salaries range from CHF90,881 for G7 officers to CHF216,168 for G11 directors).

The exponential growth of the profession at the turn of the century was accompanied by its progressive specialization into sectoral areas of expertise such as human rights, trade, investment, territorial delimitation, and international criminal law. The international judicial community is no stranger to this trend, and has been ‘fragmenting’<sup>176</sup> into several sub-communities that operate largely independently of one another. Echoing a well-known metaphor,<sup>177</sup> one could say that the international judicial community resembles a constellation. Each court or tribunal is a star exerting its gravitational pull on the various planets – government departments, law firms, academic centres, 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.<sup>178</sup> For instance, ICJ experts often cross into ISDS territory by appearing as arbitrators or counsel;<sup>179</sup> European Union law specialists have progressively come to infiltrate the WTO arena, with repercussions on the ethos, style, and tone of trade adjudicators;<sup>180</sup> regional human rights courts maintain tight relationships among their judges and legal bureaucracies, and carefully read each other’s judgments;<sup>181</sup> and so on.

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 truly neutral and universal outlook on the international legal world, which has become too vast, too pluralistic, and too complex for any one individual or group to master it all.<sup>182</sup> Instead, the various sub-communities ‘are necessarily partial and selective’.<sup>183</sup> The position that each occupies in the constellation shapes its social dynamics, its epistemic categories, 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.

Seen from this angle, the emergence of ‘self-contained regimes’<sup>184</sup> in international law acquires a new meaning. Over time, the sub-community gravitating around each international court develops a set of dispositions as to what legal sources are trustworthy and what others are not, based on its specialized expertise. The operational closure of each sub-network fosters trust among its participants<sup>185</sup> and, at the same time, reinforces its epistemic bias.<sup>186</sup> Hence, the members of a sub-community do not only seek autonomy from the broader international legal profession – they also

<sup>176</sup>See Cohen, *supra* note 2. See also, e.g., A. Bianchi, ‘Looking Ahead: International Law’s Main Challenges’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), 392, at 404; Waibel, *supra* note 2.

<sup>177</sup>See B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’, (2006) 17 *EJIL* 483.

<sup>178</sup>See Cohen, *supra* note 2, at 1068.

<sup>179</sup>But see note 99, *supra*.

<sup>180</sup>See generally T. Soave, ‘European Culture and WTO Dispute Settlement: Thirty Years of Socio-Legal Transplants from Brussels to Geneva’, (2020) 19 *The Law and Practice of International Courts and Tribunals* 107.

<sup>181</sup>Interviews with an IACtHR secretariat lawyer (Geneva, June 2015) and a former ECtHR registry lawyer (The Hague, October 2017). See also, e.g., Terris, Romano and Swigart, *supra* note 18, at 120.

<sup>182</sup>See J. Crawford, *Chance, Order, Change: The Course of International Law* (2014), 153.

<sup>183</sup>*Ibid.*, at 153.

<sup>184</sup>See Simma and Pulkowski, *supra* note 177.

<sup>185</sup>See R. S. Burt, *Brokerage and Closure: An Introduction to Social Capital* (2005), 93–7.

<sup>186</sup>*Ibid.*, at 168.

guard their turf from *other* sub-communities, which may constitute a source of ‘disturbing outside perspectives’.<sup>187</sup> Any attempt to transfer expertise, practices, or modes of thinking from one sub-community to another is considered a trespass that might shake the ‘context-preserving routine’.<sup>188</sup>

Consider, for instance, the two ICSID arbitral awards rendered against Argentina in the *CMS* and *Continental* cases. In both disputes, Argentina sought to justify its measures based on the state of necessity under customary international law and specific treaty provisions.<sup>189</sup> The *CMS* tribunal, for the most part, addressed Argentina’s defence through the ‘traditional’ prism of the customary rules of state responsibility.<sup>190</sup> By contrast, the *Continental* tribunal observed that similarities existed between the defence raised by Argentina and the general exceptions enshrined in Article XX of the GATT. It therefore found it ‘more appropriate to refer to the GATT and WTO case law . . . rather than to refer to the requirement of necessity under customary international law.’<sup>191</sup>

The different approaches adopted by the two tribunals could be due to many factors, including the ways in which the parties presented their arguments. However, a plausible explanation is that the president of the *CMS* tribunal was a practitioner with extensive experience in general international law,<sup>192</sup> whereas the president of the *Continental* tribunal was a sitting member of the WTO Appellate Body.<sup>193</sup> The former was an insider to the ISDS field; the latter came from another sub-community carrying a baggage of ‘foreign’ expertise. Unsurprisingly, the ‘unorthodox’ approach of the *Continental* tribunal was harshly criticized by the incumbents in the ISDS regime, who found the tribunal’s reasoning ‘inadequate and flawed’, making ‘unsupported leaps to trade or other international law’, and threatening to ‘undermine the legitimacy of investor-State arbitration’.<sup>194</sup>

This example nicely illustrates the second lesson we can learn from Bourdieu – specifically, from his observation that ‘technical competence . . . is inevitably social’.<sup>195</sup> The distribution of capital within the community is *inseparable from the substance* of legal activity. Ostensibly, the ‘ultimate object’ of the game of international adjudication is to persuade one’s audience that their legal opinion or solution to a given problem is ‘correct’. The ‘winner’, in principle, is he or she who succeeds in securing adherence to his or her own views.<sup>196</sup> However, ‘victory’ is not only a source of personal gratification – it is *also* a means to bolster one’s capital in the field. Thus, the interpretive and technical arguments put forward by community members can never be reduced to the expression of abstract and dispassionate beliefs, but always reflect the specific positions, the agendas, and the sheer ‘careerism’<sup>197</sup> of the actors involved.

For instance, when a counsel pursues a sophisticated line of argument in court, they do merely wish to advance their client’s interests; they also seek to impress the judges with their *interprétation savante* and, possibly, secure a precedent they can exploit in future cases with *other*

<sup>187</sup>See Venzke, *supra* note 53, at 157.

<sup>188</sup>R. M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (2001), 32.

<sup>189</sup>*CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 309; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 160.

<sup>190</sup>See *CMS v. Argentina*, *supra* note 189, para. 315.

<sup>191</sup>See *Continental v. Argentina*, *supra* note 189, para. 192.

<sup>192</sup>See A. Ross, ‘Francisco Orrego Vicuña 1942–2018’, *Global Arbitration Review*, 3 October 2018, available at [www.globalarbitrationreview.com/gallery/francisco-orrego-vicuena-1942-2018](http://www.globalarbitrationreview.com/gallery/francisco-orrego-vicuena-1942-2018).

<sup>193</sup>See WTO website, *Giorgio Sacerdoti*, available at [www.wto.org/english/tratop\\_e/dispu\\_e/popup\\_giorgio\\_sacerdoti\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/popup_giorgio_sacerdoti_e.htm).

<sup>194</sup>J. E. Alvarez and T. Brink, ‘Revisiting the Necessity Defense: *Continental Casualty v. Argentina*’, in K. P. Sauvant (ed.), *Yearbook of International Investment Law and Policy 2010–2011* (2012), 315, at 358.

<sup>195</sup>See Bourdieu, *supra* note 11, at 817.

<sup>196</sup>See Bianchi, *supra* note 30, at 36.

<sup>197</sup>P. Schlag, ‘US CLS’, (1999) 10 *Law and Critique* 199, at 210. See also P. Schlag, ‘Normativity and the Politics of Form’, (1991) 139 *University of Pennsylvania Law Review* 801, note 125.

clients.<sup>198</sup> Likewise, when a scholar develops a new legal theory or taxonomy, they often undertake a ‘marketing campaign’ to disseminate it across courts and tribunals in the hope that practitioners will adopt it as their own, or even that adjudicators will cite it in their rulings.<sup>199</sup> Each actor’s endowment of capital determines, at any given moment, the persuasiveness and the deference accorded to their views. A reputable judge will think twice before following the advice of a new recruit to the supporting bureaucracy;<sup>200</sup> a first-year associate will have to work extra hard to include a certain argument in a submission against the will of a seasoned partner;<sup>201</sup> and so on.

The inextricable link between legal argument and social positioning brings us to the third and final lesson. Because the distribution of capital across the field can change over time, the social configurations of the international judicial community are not carved in stone, but ‘historically contingent’.<sup>202</sup> The competition among judges, bureaucrats, agents, counsel, and scholars does not serve only to entrench the logics of the community, but also to create spaces of contestation of power and hierarchies. Case after case, those actors adopt schemes, postures, and strategies that may be ‘risky or cautious, subversive or conservative’<sup>203</sup> depending on the circumstances. The incumbents in the game have a natural tendency to perpetuate their position. Challengers have to come up with other plans, ranging from opportunistic deference to overt defiance, to get the upper hand.<sup>204</sup> At every turn, old alliances may break down and new ones emerge, redistributing capital in a continuous ‘context-transforming struggle’.<sup>205</sup>

An example of these reshufflings is offered, once again, by the recent transformations of WTO adjudication following the demise of the Appellate Body.<sup>206</sup> While several commentators speak to an impending ‘dejudicialization’ of trade dispute settlement driven by member state interests,<sup>207</sup> what is *also* happening is an internal renegotiation of capital among trade adjudicators and the secretariat – or, to put it differently, between political appointees and technocratic experts. Both sides are working behind the scenes to assert their dominance in the conduct of proceedings and contain each other’s influence on the production of legal outcomes in the trade arena.<sup>208</sup> The terms of the renegotiation are historically determined. In the WTO’s early days, it was suggested that every adjudicator have a personal clerk, with whom they would have a one-to-one working relationship.<sup>209</sup> The proposal was ultimately scrapped in favour of secretariat divisions responding collectively to the whole bench. This seemingly innocuous organizational choice has, in fact, pro-

<sup>198</sup>Participant-observation of WTO dispute settlement proceedings.

<sup>199</sup>Interviews with former ICJ and ECtHR registry lawyers, both active in academic life (The Hague, October 2017). This, incidentally, opens the door to a plethora of legal-technical scholarship eager to ‘imitate judicial discourse’. 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, at 819.

<sup>200</sup>Participant-observation of the WTO secretariat; interviews with an ICJ registry lawyer (The Hague, February 2015) and an ECtHR registry lawyer (Geneva, February 2015).

<sup>201</sup>Interviews with two counsel specializing in WTO and ISDS litigation, respectively (Geneva, March 2015).

<sup>202</sup>See Madsen, *supra* note 13, at 198 (emphasis added).

<sup>203</sup>See Bourdieu and Vacquant, *supra* note 59, at 98.

<sup>204</sup>Participant-observation of the WTO secretariat; interviews with an ECtHR registry lawyer (Geneva, February 2015), an ISDS tribunal assistant (Geneva, May 2015), and an IAcHR secretariat lawyer (via Skype, April 2015).

<sup>205</sup>See Unger, *supra* note 188, at 32.

<sup>206</sup>See Section 3, *supra*.

<sup>207</sup>See, e.g., R. H. Steinberg, ‘The Impending Dejudicialization of the WTO Dispute Settlement System?’, (2018) 112 *Proceedings of the ASIL Annual Meeting* 316; J. R. Basedow, ‘Why De-Judicialize? Explaining State Preferences on Judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement Reforms’, (2022) 16 *Regulation and Governance* 1362.

<sup>208</sup>Participant-observation of WTO dispute settlement proceedings; interview with a counsel specializing in WTO litigation (Geneva, September 2016). For discussion see Pauwelyn and Pelc, *supra* note 121.

<sup>209</sup>See D. P. Steger, ‘The Founding of the Appellate Body’, in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in Multilateral Trading System* (2015), 447, at 452.

foundly affected the structures, practices, and allegiances of the WTO judiciary, and has now turned into a bone of contention.<sup>210</sup> Every battle, however mundane, brings with it a host of ‘discarded possibles’, and every ‘reconstruction of genesis’ reminds us of the ‘possibility that things could have been (and still could be) otherwise’.<sup>211</sup>

### 5. A community in action: From structures to practices

In the two previous sections, I sought to outline the social features of the international judicial community. Partly inspired by Bourdieu’s teachings, I listed its main participants, discussed how they relate to one another, described their co-operative quest for autonomy from competing social fields, and shed light on their hierarchies and competitive interactions. By now, it should be clear that the community is at once externally cohesive and internally conflictive. To conclude the discussion, it now bears reflecting on how this twofold structure affects the way community members go about their everyday business, contribute to the unfolding of judicial proceedings, and shape the piecemeal construction of legal outcomes at the international level. In other words, it is time to connect the field’s structures to its *practices*.

This is where the core tenets of practice theory find their way into the analysis. As mentioned, many contemporary scholars seek to move beyond the ‘rationalist’ and ‘norm-based’ accounts of adjudication that have dominated international legal thinking for much of the twentieth century.<sup>212</sup> In particular, practice theorists explore the structures of power and knowledge that enable and constrain agents’ perceptions and behaviour in their social space<sup>213</sup> and shape their engagement in a contingent and evolving set of activities.<sup>214</sup> Particularly relevant, for present purposes, is Adler and Pouliot’s definition of practices: to recall, 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’.<sup>215</sup>

This definition spells out four main attributes that distinguish practices from – and make them more than – simple action. Let us see how each of these attributes plays out in the specific context of the international judicial community, and how it intersects with Bourdieu’s insights on the sociology of the juridical field.

*First*, practices are ‘performances’. At its simplest, this means that international adjudication entails ‘a process of doing’ that has ‘no existence other than in [its] unfolding’.<sup>216</sup> Thus understood, this attribute is self-evident. The various members of the community engage in a variety of activities throughout the adjudicative process. Chief among these is the interpretation of the international rules applicable to the case at hand. According to many, this is *the* activity that defines the very essence of adjudication. Indeed, all community members take part, in one way or another, in the ‘symbolic struggle’ for appropriation of the meaning of legal texts:<sup>217</sup> agents and counsel through their briefs and oral arguments, judicial bureaucrats through their advice and internal memoranda, scholars through their articles, and adjudicators through their decisions.

However, legal interpretation does not exhaust the scope of international judicial practices. In fact, a large swathe of life at the court is taken up by tasks that are not of ‘interpretive’ in nature. For instance, state agents routinely co-ordinate with their political masters to define the goals and modes of recourse to international courts. Counsel spend time and energy reaching out to clients,

<sup>210</sup>See Soave, *supra* note 16, at 110.

<sup>211</sup>P. Bourdieu, L. Wacquant and S. Farage, ‘Rethinking the State: Genesis and Structure of the Bureaucratic Field’, (1994) 12 *Sociological Theory* 1, at 4.

<sup>212</sup>See Dunoff and Pollack, *supra* note 24, at 52.

<sup>213</sup>See Reckwitz, *supra* note 86, at 245–6.

<sup>214</sup>See Rajkovic, Aalberts and Gammeltoft-Hansen, *supra* note 85, at 12.

<sup>215</sup>See Adler and Pouliot, *supra* note 12, at 4.

<sup>216</sup>*Ibid.*, at 6.

<sup>217</sup>See Bourdieu, *supra* note 11, at 827.

devising business and litigation strategies, and cultivating amicable relationships with the bench.<sup>218</sup> Court bureaucrats digest vast amounts of information, summarize the litigants' legal and factual submissions, and provide logistical support throughout proceedings.<sup>219</sup> Academics seek to secure chairs, funding, and visibility within their respective universities. Adjudicators often engage in extra-judicial activities such as lecturing, publishing, and outreach. And so on.<sup>220</sup>

Whether interpretive or not, each act of 'doing' leaves a trace on the routine realities of litigation. Some traces are tangible: a counsel's written submission, a bureaucrat's memo, a folder of documentary evidence and, of course, the court's final judgment are all embodied in the physical medium of printed paper. The corporeal properties of the object are not a mere wrap for content: in many instances, they take on a significance of their own. For instance, a *thick* dossier, one that contains lengthy party memorials and voluminous amounts of evidence, will typically make for a 'big case' requiring the allocation of additional time and staff resources to be processed; the *length* of a decision will be read as a proxy for the complexity of the issues addressed, the degree of harmony or discord among the judges, etc.<sup>221</sup> Other traces are physically intangible, but no less material: oral pleadings, deliberations, and conference presentations all generate a web of meaning that carries a certain *weight*, informs the behaviour of both speakers and listeners, and imparts direction to future activities.

But there is more to the word 'performances' than first meets the eye. One cannot think about that word without thinking about theatre.<sup>222</sup> From artists to semioticians, from literary critics to philosophers, many see everyday life as rife with instances of theatrical performance.<sup>223</sup> As Umberto Eco once noted, '[i]t is not theatre that is able to imitate life; it is social life that is designed as a continuous performance and, because of this, there is a link between theatre and life'.<sup>224</sup> Or, as musician David Byrne puts it, 'there [are] lots of unacknowledged theater forms going on all around' that 'have been so woven into our daily routine that the artificial . . . aspect has slipped into invisibility'.<sup>225</sup>

International judicial practices are no exception. The adjudicative process is a succession of carefully *staged* acts carried out by certain *actors*, directed at a certain *audience*, and following a *script*. Some steps of the process are more explicitly 'performative' than others. The delivery of an ICJ judgment, held in the solemn atmosphere of the Great Hall of Justice, is a largely ceremonial act symbolizing the triumph of justice over the cynicism of inter-state politics.<sup>226</sup> Similarly, court hearings are often tightly choreographed events<sup>227</sup> that publicly display the 'theatricalization – in the sense of magical evocation, sorcery – of the united group consenting to the discourse that unites it'.<sup>228</sup> Yet, theatrics and rituals permeate many other corners of life at the court.

*Second*, practices are 'patterned', meaning that they tend to exhibit 'certain regularities over time and space'.<sup>229</sup> Their repetition 'reproduce[s] similar behaviors with regular meanings',

<sup>218</sup>Interviews with counsels specializing in ICJ, WTO, and ISDS litigation (The Hague, October 2014 and Geneva, March 2015).

<sup>219</sup>Participant-observation of the WTO secretariat; interviews with two ICJ registry lawyers (via Skype, March 2015 and Paris, April 2016), an IACTHR secretariat lawyer (via Skype, April 2015), and an ISDS tribunal assistant (Geneva, May 2015).

<sup>220</sup>For a more comprehensive typology of international judicial practices see, e.g., Dunoff and Pollack, *supra* note 24, at 65–85.

<sup>221</sup>Participant-observation of WTO dispute settlement proceedings.

<sup>222</sup>See P. Auslander, *From Acting to Performance: Essays in Modernism and Postmodernism* (1997), at 4.

<sup>223</sup>See, e.g., U. Eco, 'Semiotics of Theatrical Performance', (1977) 21 *The Drama Review* 107, at 113; D. Byrne, *How Music Works* (2012), at 64.

<sup>224</sup>See Eco, *ibid.*, at 113.

<sup>225</sup>See Byrne, *supra* note 224, at 64.

<sup>226</sup>See Soave, *supra* note 16, at 1–4.

<sup>227</sup>See *ibid.*, at 256–74.

<sup>228</sup>P. Bourdieu, *On the State: Lectures at the College de France, 1989-1992* (translated by D. Fernbach, 2014), at 63.

<sup>229</sup>See Adler and Pouliot, *supra* note 12, at 6.

and ‘structures interaction’ within a socially organized context.<sup>230</sup> This attribute comports well with the iterative nature of international judicial proceedings. Although every dispute is unique in the legal issues it raises, the procedural steps that mark its unfolding are standardized. Every case invariably begins with the submission of written memorials by the complainant and the respondent, often followed by rejoinders and counter-rejoinders. These written filings are then processed by the bureaucrats assisting the court, who circulate internal memoranda to summarize their analyses and help adjudicators prepare for the next steps. After the written phase, most courts and tribunals hold hearings, where the merits of the case are discussed orally. After the hearings, the adjudicators convene for deliberations and cast their decisions about the issues at stake. Based on the adjudicators’ instructions, the final judgment is drafted – typically by the bureaucracy – and then reviewed, approved, and issued to the parties and the public.<sup>231</sup>

Iteration is not limited to the procedural steps of litigation but, importantly, is entrenched in the social structure of the international judicial community. As discussed at length,<sup>232</sup> the community is a close-knit network whose participants know each other well, communicate regularly, entertain long-term professional relationships, and defend their club from external competition. In the game of adjudication, repeat players are the norm and one-shotters are the exception, and the social capital of each player stems in part from their experience and recurring participation in proceedings. It follows that international judicial practices occur within a ‘highly organized context’ and presents a strong measure of repetition.<sup>233</sup>

The density and tightness of the community is deeply intertwined with the *third* attribute of international judicial practices, namely their being ‘performed more or less competently’ depending on the ‘background knowledge’ of the actors carrying them out.<sup>234</sup> The Bourdieusian notion of *habitus*, i.e., ‘the internalized schemes’ and the ‘practical sense of reality’ guiding agents’ behaviour,<sup>235</sup> proves particularly relevant here. The hallmarks of (in)competence in the community and the social recognition of its members do not reside in the abstract quality of the work performed. Instead, they are socially attributed by the community itself based on collectively held standards which, in turn, invariably reflect the dominant vision and the attendant distribution of capital at any given moment. *Habitus* tends to reproduce the very structures of which it is itself the product.<sup>236</sup> Through education, training, and work experience, new entrants in the community are initiated to the way things are done.<sup>237</sup> Over time, they master the doctrines, the argumentative techniques, the vernacular, the ethos, the aesthetics, and the mythologies of their peers and superiors,<sup>238</sup> and tend to reproduce them through communication and transmission of knowledge. Hence, *habitus* is not only a source of constraint for those who play the game of adjudication; it also *enables* them to make statements and take positions that will be accepted as ‘true’ or ‘valid’ by other players.<sup>239</sup>

<sup>230</sup>*Ibid.*

<sup>231</sup>Participant-observation of WTO dispute settlement proceedings. See also, e.g., ICJ, ‘Resolution Concerning the Internal Judicial Practice of the Court’ adopted pursuant to Article 19 of the Rules of Court, 12 April 1976.

<sup>232</sup>See Section 2, *supra*.

<sup>233</sup>See Dunoff and Pollack, *supra* note 24, at 62.

<sup>234</sup>See Adler and Pouliot, *supra* note 12, at 6–7 (emphasis omitted).

<sup>235</sup>See Madsen, *supra* note 13, at 197.

<sup>236</sup>See Bourdieu, *supra* note 83, at 72 (emphasis omitted).

<sup>237</sup>Participant-observation of the WTO secretariat. See also J. Gross Stein, ‘Background Knowledge in the Foreground: Conversations about Competent Practice in “Sacred Space”’, in Adler and Pouliot, *supra* note 92, at 89.

<sup>238</sup>See, e.g., d’Aspremont, *supra* note 3, at 33–4; D. W. Kennedy, ‘The Disciplines of International Law and Policy’, (1999) 12 *IJIL* 9; P. Schlag, ‘The Aesthetics of American Law’, (2002) 115 *Harvard Law Review* 1047.

<sup>239</sup>See, e.g., S. B. Ortner, *Anthropology and Social Theory: Culture, Power and the Acting Subject* (2006), at 3; see Dunoff and Pollack, *supra* note 24, at 54.



The outer limits of the game, beyond which no respectable player can venture, are dictated by *doxa* – to recall,<sup>240</sup> the set of unquestioned truths that define the universe of possible practices and discourses in the field.<sup>241</sup> International adjudication has no short supply of doxic beliefs: that law is better than politics; that politics is better than war; that judicialization fosters the predictability of behaviour on the world stage; and the like.<sup>242</sup> Incidentally, those beliefs aggrandize the self-perception of the community as indispensable to international affairs. Many of its members have become blind to the irreducible pluralism of global society. From their vantage point, it is easy to forget that there are more things in heaven and earth than are dreamt of in their philosophy.<sup>243</sup>

The *habitus* of the community, which reifies the structural power relations among its members, informs every aspect of life at the court, including practices that have little to do with legal argument. It is so, for instance, that a counsel may calibrate their argument so as to avoid potential conflicts with prospective clients;<sup>244</sup> that a newly appointed judge may accede to the views of a senior colleague out of deference;<sup>245</sup> and that a scholar's theory may acquire visibility and semantic authority thanks to their astute positioning on the academic market.<sup>246</sup> This is due to the *fourth* and final attribute of international judicial practices: their ability to weave together the 'discursive' and the 'material world'.<sup>247</sup> As mentioned,<sup>248</sup> the community knows no sharp distinction between technical argument and social positioning. Its legal debates cannot be abstracted from the objective conditions of competition among its participants. Thus, while the communications that punctuate judicial proceedings may be disguised as 'legal discourse', they always bear 'material consequences for the litigants'.<sup>249</sup>

The intersection between the social structures and the everyday practices of the community leads to one last question: namely, the interplay of freedom and constraint in the judicial interpretation of international law. What guides international courts and tribunals in deciding cases the way they do? What limitations and pressures do they encounter? And what agency and discretion do individual actors enjoy in the process?

As the preceding analysis suggests, the answer lies in the inner workings of the community itself, which can be described by the shorthand of *structured contingency*. 'Contingency', because the path that leads to the formation of an international judgment is not predetermined, but open-ended. Every step of the process contemplates moments of choice and purposeful action on the part of the professionals involved. Each actor has countless opportunities to voice their opinion, assert and resist claims, and exercise a 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'.<sup>250</sup> Departing too abruptly from the rules of the game can lead to professional reprimand, derision, or outright expulsion from the game itself.

Seen through the lens of structured contingency, the practices of the international judicial community are both the vehicle of reproduction that ensures predictability in international legal outcomes and the source from which legal change originates.<sup>251</sup>

<sup>240</sup>See Section 2, *supra*.

<sup>241</sup>See, e.g., P. Bourdieu, 'Structures, Habitus, Power: Basis for a Theory of Symbolic Power', in N. B. Dirks, G. Eley and S. B. Ortner (eds.), *Culture/Power/History: A Reader in Contemporary Social Theory* (1994), 164.

<sup>242</sup>Participant-observation of the WTO secretariat; interviews with an IACtHR registry lawyer (via Skype, April 2015) and an ISDS tribunal assistant (Turin, May 2016).

<sup>243</sup>Forgive me, Shakespeare. W. Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (ca. 1600), 1.5.187–188.

<sup>244</sup>Interviews with two counsel specializing in WTO and ISDS litigation, respectively (Geneva, March 2015).

<sup>245</sup>Participant-observation of WTO dispute settlement proceedings.

<sup>246</sup>Interviews with former ICJ and ECtHR registry lawyers, both active in academic life (The Hague, October 2017).

<sup>247</sup>See Adler and Pouliot, *supra* note 12, at 4.

<sup>248</sup>See Section 4, *supra*.

<sup>249</sup>See Dunoff and Pollack, *supra* note 24, at 62.

<sup>250</sup>S. Marks, 'False Contingency', (2009) 62 *Current Legal Problems* 1, at 2.

<sup>251</sup>See Adler and Pouliot, *supra* note 12, at 18.

The community plays its stabilizing role in both 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. Once the judgment is rendered, it carefully tests its persuasiveness, ascribes (in)competence, and acts as the ultimate arbiter of professional recognition. At each step, community expectations determine the continued validity of legal standards and ensure jurisprudential continuity in a system without formal *stare decisis*. While a decision that slightly departs from canon will normally be tolerated, an abrupt change of direction will encounter resistance and be attacked as an anomaly, a deviation, or – heaven forbid! – an ‘irrational’ decision.<sup>252</sup> Hence, the community serves as the anchor that prevents adjudicators from sailing adrift, adopting ‘extreme’ decisions, and ripping the underlying social fabric apart.

But the community is not only a source of stability. Its practices also help explain how legal outcomes *evolve* over time.<sup>253</sup> After all, stability is only ‘an illusion created by the recursive nature of practice’, whereas change ‘is the ordinary condition of social life’.<sup>254</sup> Given the forms of competition that agitate the community,<sup>255</sup> the boundaries, priorities, and preoccupations of judicial regimes are ‘never inherently fixed or stable’, but are ‘constantly being renegotiated’.<sup>256</sup> The expert vocabularies in use in international courts are ‘sites of controversy and compromise where prevailing “mainstreams” constantly clash against minority challengers’.<sup>257</sup> Each agent modifies the form taken by arguments and the salience of texts, and traces ‘a set of divergent paths, mobilizing 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.’<sup>258</sup>

These tensions create paths of resistance 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.<sup>259</sup> 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 a judicial regime are successfully challenged and replaced by new assumptions, as a result of the piecemeal evolution of the power relationships and the relative distribution of capital among the actors involved. 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’.<sup>260</sup>

## 6. Conclusion

In this article, I sought to map the socio-professional dynamics of one particular segment of the international legal profession: namely, the community of legal experts dealing with the judicial settlement of international disputes on a daily basis. Using the analytical tools of field sociology

<sup>252</sup>For example, Harm Schepel and Rein Wesseling forcefully described how a decision of the European Court of Justice that deviated from well-established case law was harshly criticized in specialized law reviews as being “inexplicable and contradictory”, without “convincing or sufficient motivation”, leaving ... a “worrisome jurisprudential void”. See Schepel and Wesseling, *supra* note 23, at 185–6.

<sup>253</sup>See generally Stappert, *supra* note 91.

<sup>254</sup>See Adler and Pouliot, *supra* note 12, at 18.

<sup>255</sup>See Section 3, *supra*.

<sup>256</sup>See Adler and Pouliot, *supra* note 12, at 18.

<sup>257</sup>M. Koskeniemi, ‘The Politics of International Law: 20 Years Later’, (2009) 20 EJIL 7, at 12.

<sup>258</sup>B. Latour, *The Making of Law: An Ethnography of the Conseil d’État* (2010), at 192.

<sup>259</sup>Participant-observation of WTO dispute settlement proceedings.

<sup>260</sup>*Ibid.*

and practice theory, I conceptualized the community as the site of a confrontation among agents endowed with different amounts and types of capital, and shed light on the many forms of co-operation and competition that occur among them. First, I argued, the social structures of the community have facilitated its autonomization from the rest of the profession while, at the same time, providing the ground for a fierce contest for authority and recognition among its participants. Second, I connected those social structures to the everyday practices of the community, showing that the intersection between the two is a powerful driver of continuity and change in the interpretation and application of international law.

The picture that emerges from this account brings to the fore aspects of international adjudication that would otherwise go epistemically ‘unmarked’<sup>261</sup> – all while letting other aspects slip into the background. Indeed, staring at the picture requires certain adjustments to the angle of vision that may prove unfamiliar to the more traditional international lawyers. The first adjustment relates to the identity of the protagonists of international judicial processes. Rather than treating the formal ‘subjects’<sup>262</sup> of international law as ‘reified’ and ‘self-standing’ units of analysis,<sup>263</sup> I suggest focusing on the *individual and social actors* through which those ‘subjects’ think, speak, act, and live. The second adjustment concerns the relationships and interactions among those actors. To the image of a harmonious and cosmopolitan ‘college’, I oppose the image of a *conflictive universe* marked by social and epistemic violence. The third adjustment is about the nature of legal processes and the operations that define them. Formal rules, principles and procedures are almost absent from the picture, replaced by competing *practices, strategies, and positions*. The international judgment, the magical artefact that unites the discipline, is not portrayed as a conclusive and coherent text, but as ‘the product of a symbolic struggle between professionals possessing unequal technical skills and social influence’.<sup>264</sup>

To be sure, the picture remains blurry on the edges. By design, my cross-institutional inquiry cannot do full justice to the specificities of the various international judicial regimes and the socio-professional sub-communities that orbit around them. The social structures, the fault lines of struggle, and the relative value of different types of capital do vary between the ICJ and the ECtHR, the WTO and investment tribunals, etc. Moreover, the empirical link between the production of international judgments and the underlying socio-professional confrontations is notoriously difficult to establish given the confidentiality of proceedings. For lack of better alternatives, researchers are often forced to ‘reverse-engineer’ those confrontations from the little discrepancies, the slight *non sequiturs*, and the imperceptible logical leaps that are found in the texts of judgments themselves.<sup>265</sup>

Yet, I see promise in continuing to explore the ‘micro-level detail’<sup>266</sup> by the international judicial community structures, perpetuates, and contests its endogenous dynamics. Those dynamics are not a simple corollary to the international legal process. They *are* the process. The relationships that tie together the community and pitch its participants against one another are, ultimately, what *makes* international law every day. Besides, is it even ‘always an advantage to replace an indistinct picture by a sharp one? Isn’t the indistinct one often exactly what we need?’<sup>267</sup>

<sup>261</sup>See W. Brekhus, ‘A Sociology of the Unmarked: Redirecting Our Focus’, (1998) 16 *Sociological Theory* 34.

<sup>262</sup>See Bianchi, *supra* note 30, at 39.

<sup>263</sup>See Vauchez, *supra* note 98, at 655–6.

<sup>264</sup>See Bourdieu, *supra* note 11, at 827.

<sup>265</sup>See E. Jouanet, ‘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* (2008), 251.

<sup>266</sup>G. A. Sarfaty, ‘Corporate Actors as Translators in Transnational Lawmaking’, (2021) 115 *AJIL Unbound* 278.

<sup>267</sup>See Wittgenstein, *supra* note 54, para. 71.