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CHANGING THE RULES OF THE (INTERNATIONAL) GAME: HOW INTERNATIONAL LAW IS TURNING NATIONAL COURTS INTO INTERNATIONAL POLITICAL ACTORS

Osnat Grady Schwartz [†]

Abstract: Courts are known to be political actors. National courts play the political game in the national domain. International courts play it in the international sphere. This article studies the transformation of national courts into international political actors (IPAs), and the part international law plays in so making them. The article identifies, categorizes, and demonstrates the influence of national courts and judges on international relations (IR), separating the influence into two main categories: direct and indirect. Direct influence, is the effect of a national court taking a position on international issues in concrete situations with immediate IR implications. Indirect influence is the effect of a national court supporting trends that transform international politics (specifically legalization and judicialization of IR) through national courts and judges' contribution to the empowerment of international law. This process progresses as national courts increase their engagement with international law, making national courts stronger and more significant actors in international politics.

I. INTRODUCTION

In the past two decades it became generally accepted that courts are political actors. National courts play the political game in their national domain,¹ international courts play it in the international sphere.² However,

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¹ See THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate & Torbjorn Vallinder eds., 1995); Ran Hirschl, *The New Constitution and the Judicialization of Politics Worldwide*, 75 *FORDHAM L. REV.* 721, 723-724 (2006); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 129-37 (2000); Itzhak Galnoor, *The Judicialization of the Public Sphere in Israel*, 37 *ISR. L. REV.* 500 (2003-2004); Russell A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, 61 *WASH. & LEE L. REV.* 587 (2004); Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 28 (2005).

² See generally KAREN ALTER, *THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS* (2010) [hereinafter ALTER, *THE EUROPEAN COURT*]; KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014) [hereinafter ALTER, *THE NEW TERRAIN*]; *The International Rule of*

the idea of *national* courts and judges being *international* political actors (“IPAs”), and the part played by international law (“IL”) in making them so, is still under-developed. This article contributes to this notion by analyzing the ways in which national courts and judges act as IPAs, and how their engagement with international law supports this development.

Recalling some foundational concepts in international relations (“IR”), an international actor is “an individual, group, state, or organization that plays a major role in world politics.”³ International actors shape and influence “the trends that are transforming world politics” and “take position on international issues.”⁴ This definition applies to national courts and judges, and reflects their increasing international political power, i.e., their increasing ability to influence international relations and the behavior of foreign states. The international influence of national courts and judges is both direct and indirect. It is direct when national courts and judges adopt positions on international issues in concrete situations with immediate IR implications, normally through engagement with rules and institutions of international law. It is indirect when decisions of courts affect trends that transform international politics (specifically, the legalization and judicialization of IR) through mutually-empowering engagements with international law in all cases that favorably apply it.

Two cross-border trends have enabled the transformation of national courts and judges into IPAs. The first is the legalization of international relations, generally meaning the subordination of increasing numbers of subjects (issues and persons alike) to legal rules and standards embodied in international customs, conventions, norms, and “soft law.”⁵ Today, rules of international law govern almost every aspect of state behavior: states are generally expected to abide by the (international) “rule of law,” and they share “Legalish” as a common language for international relations. The second “enabling” trend is the judicialization of national politics, also known

Law: *Coordination and Collaboration in Global Justice*, BRANDEIS INST. FOR INT’L JUDGES (2012), <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2012.pdf>.

³ CHARLES W. KEGLEY & SHANNON L. BLANTON, *WORLD POLITICS: TREND AND TRANSFORMATION* 11 (Wadsworth 12th ed., 2009).

⁴ *Id.* at 11, 13.

⁵ This definition of legalization is different to the one offered by several scholars, who include in this term an institutional aspect as well. *Cf.* Kenneth W. Abbott et al., *The Concept of Legalization*, 54(3) INT’L ORG. 401-403 (2000).

as the “expansion of judicial power.”⁶ This trend is mostly found in Western democracies, and is often treated as “judicial activism.”⁷

The legalization of international relations is a precondition for transforming national courts into IPAs in two ways. First, as an axiom, legal professionals can act in a given arena only if applicable legal rules governs that arena. In this respect, legalization of the international sphere transforms what used to be a strictly political arena into fertile soil for legal and judicial involvement. Second, legalization of the international sphere, a *normative* process, is not backed with sufficient *institutional* guarantees of state compliance.⁸ Therefore, it creates an opportunity for national judicial involvement in fulfilling legal rules created by states.⁹

The judicialization of national politics is the second requirement for national courts and judges to act as IPAs. Since compliance with international law often entails sovereignty and flexibility costs,¹⁰ courts can only exploit the empowering impact of international law in practice if they are strong enough to confront their governments, using external legitimization and support from international sources. The judicialization of national politics fulfills this precondition. It reflects the strengthening of national courts vis-à-vis the political branches of their own national realms, which increases the number of political issues that end up in court.

Several scholars have discussed the ideal roles and actual functions of national courts and judges in the international sphere. To date, they presented three main models. The first is Scelle’s model of *dédoublement fonctionnel* (role splitting), where national courts should perform a similar role in the international sphere to international court tribunals,¹¹ basically ascribing to them a *legal* role and input. The second is Whytock’s model of national courts as “global governors,” which also concentrates on the courts’

⁶ See generally THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 1.

⁷ See *id.*

⁸ On domestic courts “filling the missing link,” see ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 6 (2010). See also Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 925 (1999) (Abi-Saab’s rule of legal physics requires a balance between normative and institutional density. The current gap between the two levels motivates, or at least allows, domestic courts and judges to enter the international scene and eventually function as IPAs.).

⁹ See NOLLKAEMPER, *supra* note 8.

¹⁰ See Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54(3) INT’L ORG. 661, 662-65 (2000).

¹¹ See LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 378, § 1 (1984); Antonio Cassese, *Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law*, 1 EUR. J. INT’L L. 210, 218-19, 229 (1990).

legal functions (most of which involve employing private international law), rather than their political participation.¹² The third model is Slaughter's construction of national courts and judges as autonomous political actors, who act beyond the "unitary state" and become members of "cross-border networks" with their counterparts around the world.¹³

Slaughter's model examines the political input of national courts.¹⁴ However, she primarily examines national courts' horizontal and vertical interactions with fellow courts and judges (national and international).¹⁵ Conversely, the IPAs model advanced in this article concentrates on the diagonal dimension of national courts' influence on the behavior of foreign governments, and on foreign governments' relations with the judges' own state. This diagonal dimension is therefore at the heart of this article.

The diagonal dimension of national courts' influence on IR manifests in the two ways mentioned previously: a direct influence and an indirect influence on foreign governments' behavior and their relations with the judges' states. With regard to the first kind of influence, national judges confront their governments and foreign governments involved in the proceedings in cases of extradition, immunities of states and officials, consular notification, and universal jurisdiction.¹⁶ For example, judges who initiated universal jurisdiction proceedings against foreign officials have more than once created a diplomatic crisis between their states and the nation states of the accused.¹⁷ As a result, foreign governments acted both internationally and domestically, canceling existing proceedings and using legal and political actions to prevent new ones. An indirect influence on foreign and judges' own governments occurs when national courts contribute to trends that dictate state behavior in the international sphere: legalization and judicialization of international politics.¹⁸

¹² See Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009).

¹³ See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37 (Thomas M. Franck & Gregory H. Fox eds., 1996); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 12-15 (2004).

¹⁴ See SLAUGHTER, *supra* note 13, at 12-15; Slaughter, *supra* note 13, at 62.

¹⁵ See SLAUGHTER, *supra* note 13, at 12-15; Slaughter, *supra* note 13, at 62; Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49(1) INT'L ORG. 183, 184 (1995) (focusing on the European experience, in which judges talk "above and below" the governments).

¹⁶ See *infra* Part IV.A.

¹⁷ See *infra* Part IV.A.

¹⁸ See *infra* Part V.B.

Both trends have been transforming the rules of the international game from mostly political and diplomatic ones to more legally structured and subject to judicial scrutiny. They obligate states to adopt the legal discourse and calculate their moves in the shadow of national and international judicial intervention.¹⁹ National courts contribute to these trends through positive engagement with IL that empowers the latter (and themselves) to make IL more relevant and consequential to governments' formal and informal decisions.

This article continues as follows: Part II is an introductory chapter that delineates the scope and context of discussion. It offers a methodological typology of categories of cases, judicial motivations, and consequential influences on IR. These factors help to contextualize the analysis offered of IPAs practices. Part III distinguishes in further detail between the IPAs model on one hand, and Scelle's, Whytock's, and Slaughter's models on the other hand, in order to highlight this article's contribution to existing IL-IR scholarship. Part IV and Part V explain and demonstrate the ways in which national courts and judges perform as IPAs through engaging with international law. Part IV demonstrates national courts' and judges' direct influence on IR in specific contexts and situations that intrinsically involve aspects of IR. Part V contemplates their indirect influence on IR through applying international law in a variety of cases, especially ones that are essentially domestic.

II. DEFINING THE SCOPE AND CONTEXT OF DISCUSSION

In order to define the scope and context of the discussion surrounding the role of national courts as IPAs, it is important to identify the nature of their influence on international relations, explore types of cases, understand their causes and motivations, and note the difference between "strong" and "weak" IPAs.

A. *Identifying the Nature of Influence on International Relations*

The organizing idea behind categorizing national courts and judges as IPAs is the nature of their influence on international relations. National courts' influence on IR can be direct or indirect. It can also be focalized or

¹⁹ See Yuval Shany, *Negotiating in the Shadow of the Judicial Process: Domestic and International Perspectives*, 1 NEKUDAT MIFGASH 46 (2003) (Isr.).

spread, general or particular. Various combinations of the following attributes are possible:

1. *Direct* influence on international relations causes specific incidents with immediate foreign affairs implications between states. *Indirect* influence affects states' behavior through a mediating factor—international law—that sets the “rules of the game” of the continuously-legalizing IR.

2. *Focalized* influence affects specific states, i.e., states that are involved in a concrete dispute or have a particular interest in one. *Spread* influence affects (at least potentially) all states or large groups of states.

3. *General* influence affects basic norms of international conduct (e.g., developing core norms and standards of human rights law). *Particular* influence relates to an individual state's obligations that do not constitute common rules of international law.

Some cases exhibit all types of influences—direct and indirect, focalized and spread, and general and specific IR implications. The nature of influence does not necessarily determine its strength; direct influence on international relations may be mild and short-term, while the indirect influence of various judicial decisions may be stronger and longer-lasting because they have a cumulative impact. More often than not, only hindsight, if anything, can identify and estimate the impact of each and every judicial decision, isolated from other significant decisions or influencing factors. The typology offered here, however, is intended to draw attention to the various ways and directions in which national courts and judges can potentially influence IR.

B. *Types of Cases*

National courts' decisions may affect states' international relations regardless of the application of international law. To delimit the scope of discussion, we should distinguish between two types of cases:

1. “*Pure*” *IR-related cases*: Cases that intrinsically involve IR considerations but do not include references to international law (e.g., rejecting or granting a petition to allow a demonstration in front of a foreign embassy in consideration of diplomatic relations with that foreign state).²⁰

²⁰ See, e.g., HCJ 496/85 *Servetman v. the Police Chief of Tel-Aviv District* 40(4) PD 550 [1986] (Isr.) (giving primacy to the international relations with Egypt over the freedom of public demonstration, especially as grave security concerns were also present). See also HCJ 953/89 *Meir Indor v. Teddi Kollek, Mayor of Jerusalem City* 45(4) PD 683 [1991] (Isr.) (declaring that only when there is a high probability of grave risk to the state's international relations, administrative acts may infringe upon human rights; in this

There is no evidence of an increase in such cases, and, in any event, their number and impact seem too small to transform national courts into IPAs. Therefore, they do not concern the subject of this Article.

2. “Mixed” IR-IL cases: Cases in which IR implications are tied to judicial engagement with IL. This category includes two sub-categories: (a) cases that are essentially domestic and (b) cases that are intrinsically international. An example of the first sub-category is judicial review of the constitutionality of a national law, in which the court refers to IL norms through doctrines of consistent interpretation and comparative law.²¹ The IR impact of such cases may be incidental and unintended, though by no means unimportant. An example of the second sub-category is the application of universal jurisdiction to try foreign officials for crimes under international law.²² Such cases have clear and immediate IR implications for the prosecuting state and the defendants’ nation-state.

C. Causes and Motivations

To a large extent, the transformation of national courts into IPAs is driven by exogenous changes—the growing density of international law,²³ its increasing relevance to inward-looking domestic affairs,²⁴ and the

case, the relations with the U.S. versus the freedom of speech of an Israeli citizen who desecrated the U.S. flag). It should not be surprising, that these cases are brought by Dotan as examples of judicial activism in Israel. See Yoav Dotan, *Judicial Activism in the HCJ*, in JUDICIAL ACTIVISM: FOR AND AGAINST—THE PLACE OF THE HCJ IN ISRAELI SOCIETY 5, 48-49 (Ruth Gavison, Mordechai Kremnitzer, & Yoav Dotan eds., 2000). For general scholarship on the issue, see THOMAS M. FRANCK, POLITICAL QUESTIONS/ JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

²¹ See Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31(2) BROOK J. INT’L L. 341 (2006); Roy Bijon, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 99 U. TORONTO FAC. L. REV. 99 (2004); Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 MONASH U. L. REV. 85 (2002); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: the Dangers of Domestic Judicial Invocation of Foreign and International Law*, 29 FORDHAM INT’L L. J. 507 (2006); Michael Kirby, *The Growing Rapprochement between International Law and National Law*, in THE GROWING RAPPROCHEMENT BETWEEN INTERNATIONAL LAW AND NATIONAL LAW (Antony Anghie & Garry Sturgess eds., 1998); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Human Rights*, 20(4) OXFORD J. LEGAL STUD. 499 (2000).

²² See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105(1) AM. J. INT. L. 1, 41 (2011).

²³ See William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 967 (2004).

²⁴ See Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT’L & COMP. L. REV. 133, 138-142 (2011).

expansion of globalization.²⁵ All of these changes bring more transnational activity to national courts.²⁶ On the other hand, national courts can also choose to perform as IPAs even when not pushed into this position by the circumstances of specific cases. Theoretically, we can distinguish between three types of judicial “motivations” to engage with international law, reflecting the spectrum of “internationalist inclination” judges may possess. The first “motivation” is essentially “passive” in that it is a result of exogenous constraints, and not of independent choice. The second motivation is “active” because it favorably responds to the parties’ invitation to apply international law, which expresses judicial discretion and a choice to engage with international law when possible, but not unavoidable. The third motivation is “proactive” in that it takes the initiative to employ international law and invoke it to advance the court’s or judge’s agenda.

Motivations are hard to track, and their study can lead to wild interpretations if not conducted in a systematic method. Inferring them from the language of judicial decisions may be tricky because judges can disguise motivations in a sophisticated way when necessary to protect their decision’s legitimacy. In a different paper, this author suggested a methodology to empirically measure judges’ internationalist inclinations by examining the status that they gave to international law in cases where it was applied (from primary normative guidelines for the decision to the canon of interpretation from national law to comparative law).²⁷ This, however, is not the focus of the current discussion, as this section does not attempt to answer how we can identify judicial motivations, but rather attempts to describe what motivations may exist. The following typology should therefore be understood as an analytical exercise for studying the what, not the how.

1. *Passive/involuntary* (i.e., *externally-driven*) *motivation—acting as an IPA without independent personal motivation*: Judges may act as IPAs due to reasons and circumstances beyond their control, such as changes in the adjudication setting (e.g., globalization with its increasing transnational litigation), and the types of cases presented before them. In such cases, the fact that judges act as IPAs is an unavoidable consequence of the

²⁵ See Whytock, *supra* note 12, at 74.

²⁶ *Id.*

²⁷ See generally Osnat Grady Schwartz, *International Law in Domestic Judges’ Decisions: The Relationship Between Broad Role-Perception and a Strong Internationalist Inclination*, 34 T.A. U. L. REV. 475 (2011).

circumstances, and occurs regardless of their personal tendencies and inclinations.

2. *Active-responsive motivation*: Judges act as IPAs in a discretionary way by demonstrating their willingness to engage with international law when they *can* but are not obligated to do so. In some cases, such practice is a positive response to the parties' reference to international law. Where the court can reject or ignore such a reference, or dismiss the case altogether—and especially when the court has a history of doing so (e.g., in the context of national security and occupation)²⁸—the court's willingness to apply international law expresses an active choice. A strong example of willingness is judicial cooperation with private initiatives to open investigations or issue arrest warrants against foreign officials for alleged universal crimes (as a number of UK judges did).²⁹

3. *Proactive-initiative motivation*: Judges can become IPAs proactively, by independently *initiating* the application of international law when such an application is either evitable or evolves from parties' submissions. The most extreme case is when national judges open criminal procedures against foreign officials of their own accord (in states granting judges such authority, e.g., Spain and Germany).³⁰ A less extreme case is when judges voluntarily invoke international law to substantiate their decisions, which are not necessarily tied to international law. Choice can take the shape of interpretive presumption (e.g., a presumption of consistency of national law with international law, or an IL-based presumption of administrative integrity of acts aimed at complying with international obligations) and comparative law.³¹ Such engagement with international law is *self-motivated*, and is a proactive step to becoming an IPA.

D. A Comment on “Strong” and “Weak” IPAs

To summarize, national courts' influence on IR can be direct or indirect, focalized or spread, and general or particular. This influence can

²⁸ See, e.g., HCJ 2164/09 Yesh Din-Volunteers Organization for Human Rights v. IDF Commander in the West Bank Tak-El 2011(4) 4101 [2011] (Isr.) (President Beinisch establishing that the case could be dismissed based on barrier doctrines, but nevertheless thinking it right to examine the case merits in light of art. 55 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 187 CTS 227 (1907)).

²⁹ See *infra* Part IV.D.

³⁰ See *infra* Part IV.D.

³¹ See *infra* Part V.A.

materialize through domestic cases and intrinsically IR-related cases. The influence can be self-motivated by judges or circumstantially imposed on them. Different cases can present different combinations of these features. For instance, consider the following different options: First, a random distribution of cases (where courts do not sit *en banc*) may bring more IR-related cases to “passive” judges who—regardless of their will or intentions—may have a more direct and concrete impact on their state’s international relations than their “active” or even “proactive” colleagues. Second, intrinsically IR-related cases brought before “active” judges who make internationally-minded decisions aimed to directly influence state behavior on concrete matters. Third, domestic cases handled by “passive” judges, who opt to disregard international law, and write their decisions only in terms of their domestic law, even when their domestic law expresses or incorporates international law norms (e.g., decisions regarding “consubstantial norms”).³² Such a situation *deprives* international law of opportunities to develop and *prevents* additional judicial influence on international relations.

National courts and judges perform as IPAs with varying levels of vigor, on a scale from “weak” to “strong.” Theoretically, “passively motivated” judges can have a stronger IR impact than their “actively/proactively motivated” counterparts, if only because of the nature of the cases brought before them. However, “actively” and “proactively” motivated judges are more likely to be “stronger” IPAs, since their IR impact is less dependent on exogenous constraints and chance, and more on their own initiative. The stronger the judge’s “internationalist inclination,” the more likely she is to engage with international law voluntarily, thereby increasing her influence on the international scene, and becoming a “strong” IPA.

III. EXISTING MODELS: SCELLE, WHYTOCK, AND SLAUGHTER

A. *Scelle’s Model*

IPAs differ substantially from international *legal* actors—a function that Scelle’s theory of *dédoublement fonctionnel* (role splitting) expects

³² Consubstantial norms are lengthily discussed by Antonios Tzanakopoulos who generally explains them as “domestic rules that are *in substance* reflective of an existing international rule.” See Tzanakopoulos, *supra* note 24, at 143.

national courts to fulfill.³³ Scelle writes from a clear internationalist perspective, and is mainly concerned with what national courts can do for international law (i.e., not how they can utilize it for their purposes).³⁴ According to Scelle's theory, national authorities bear double responsibility—national and international.³⁵ This is true of all branches of government, including the judiciary that, when implementing international law, steps into the shoes of the weak or sometimes even absent international courts.³⁶ According to Shany, there are an increasing number of instances in which national courts serve as international actors, performing a role akin to what international courts perform.³⁷

Article 17 of the International Criminal Court (“ICC”) Statute,³⁸ which embodies the complementarity principle, provides a good example of functional equivalence between national and international courts, and is compatible with Scelle's model. This principle acknowledges the primary role of national judicial systems in assuring accountability for war crimes, crimes against humanity, and genocide. It does so by stipulating that when a state has conducted a genuine investigation or prosecution of these crimes, the case should be determined inadmissible to the ICC.³⁹ Therefore, when trying the individuals accused of such international crimes, national courts function, to some extent, as international judiciaries that should be replaced by the ICC only if they are unwilling or unable to perform this duty.

Scelle's approach envisions courts in their traditional sense—i.e., institutions whose role is confined to the realm of law (in this case, international law). It does not consider their judicial decisions to be political acts, as it does not consider the acts of international courts to be political per

³³ See GROSS, *supra* note 11; Cassese, *supra* note 11.

³⁴ See generally GROSS, *supra* note 11; Cassese, *supra* note 11.

³⁵ See GROSS, *supra* note 11.

³⁶ See Cassese, *supra* note 11, at 213. This theory has been questioned by some scholars. For a summary of the primary objections, see Yuval Shany, *National Courts as International Actors: Jurisdictional Implications*, in FEDERALISM 1, 2 nn.51-59 (2009).

³⁷ See Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31(2) BROOK. J. INT'L L. 341 (2006); see also Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004); Burke-White, *supra* note 23; Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy and the Evolution of National Law*, 20(1) EUR. J. INT'L L. 59 (2009).

³⁸ Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

³⁹ *Id.* at art. 17(1)(a)-(b).

se (or consider international law to have strong political elements).⁴⁰ Hence, Scelle's theory can substantiate an argument about the legal-professional status and performance of national courts in the international realm, but not about their political influence. This is one aspect in which our theories differ. Another is that Scelle's theory is mostly prescriptive, while the theory advanced in this article is generally descriptive-evaluative—whereas Scelle wishes to draw a desired model, this article theorizes and models observations on an existing reality.

B. *Whytock's Model*

According to Whytock, increased transnational activity has created a need for global governance, and national courts fulfill some functions within this governance system.⁴¹ He adopts Keohane's definition of "governance" as "the processes and institutions, both formal and informal, that guide and restrain . . . collective activit[y]."⁴² Global governance is the process of guiding and restraining transnational activity.⁴³

To Whytock, national courts take part in global governance by performing two governance functions: jurisdictional and substantive.⁴⁴ On the jurisdictional level, national courts determine "who governs" when more than one state potentially has the authority to govern the transnational activity. National courts generally do so by applying the rules and doctrines of private international law and choice of law.⁴⁵ On the substantive level, they answer "who gets what?" by determining the rights and duties of transnational actors based on domestic, foreign, and international law.⁴⁶

Whytock's analysis resembles that of Scelle's in many respects. In fact, on several points, Scelle's prescriptive approach seems to have

⁴⁰ For an opposite analysis of international courts as political entities, see ALTER, *THE EUROPEAN COURT*, *supra* note 2; ALTER, *THE NEW TERRAIN*, *supra* note 2.

⁴¹ See Whytock, *supra* note 12, at 74.

⁴² *Id.* at 71 n.11 (quoting ROBERT O. KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 202, 245-46 (2002)).

⁴³ See Whytock, *supra* note 12, at 71 n.11.

⁴⁴ See *id.* at 75.

⁴⁵ See *id.* at 75-83. Whytock's example of the use of "act of state" doctrine to allocate adjudicative authority acknowledges the place of public international law in the jurisdictional function of domestic courts as global governors. But even here, Whytock clarifies that this doctrine has also been characterized as a separation of powers doctrine and a choice of law doctrine. See *id.* at 79 n.40 (referring to GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 751-55 (4th ed. 2007)).

⁴⁶ See Whytock, *supra* note 12, at 71-72, 92-94.

materialized in Whytock's descriptive-evaluative picture of today's globalized world. Scelle's idealized "suprastate"⁴⁷ shares many characteristics with Whytock's descriptions of transnational activity where private actors are becoming more prominent.⁴⁸ Both writers ascribe national and international/supranational roles to national courts.⁴⁹ Both writers also view public international law and private international law as interwoven legal branches.⁵⁰ Nonetheless, while Scelle (like this author) focuses more on public international law,⁵¹ Whytock adopts a more comprehensive concept of "transnational law,"⁵² in which public international law is just one of many interlinked legal regimes that govern transnational activity (including various fields of national private law, such as torts, contracts, and property), and are managed via the rules of private international law.⁵³ Clearly, in Whytock's model, public international law is not central to the function of national courts as global governors.⁵⁴

⁴⁷ As distinct from "interstate." See Cassese, *supra* note 11, at 213-14, 225, 231.

⁴⁸ As opposed to a scene solely dominated by sovereign nations. See, e.g., Whytock, *supra* note 12, at 92, 94-95. It is true that Scelle's desired "ecumenical community"—a society of peoples and individuals—is far from reaching its desired ambition, which is a "progressive universal federalism." See Cassese, *supra* note 11, at 216-17. Still, the growing centrality of private actors in the transnational scene challenges state sovereignty—a desired goal in its own right in Scelle's view. See *id.* at 216.

⁴⁹ Scelle sees them as having "*dédoublement fonctionnel*"—national and international alike. See GROSS, *supra* note 11. Whytock sees them as "global governors" additional to their traditional domestic functions. See Whytock, *supra* note 12, at 71.

⁵⁰ See GROSS, *supra* note 11, at 211-12; Whytock, *supra* note 12, at 115.

⁵¹ On Scelle's observations, see Cassese, *supra* note 11, at 211-12.

⁵² See, e.g., Whytock, *supra* note 12, at 75 nn.21, 94. Whytock adopts Philip Jessup's concept of transnational law as "the body of law that regulates actions or events that transcend national frontiers," a concept meant to embody *both public and private international law*." *Id.* at 115 (quoting PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956)). He agrees with Jessup's objection to the "distinction between national and international law as a basis for legal classification" to also include in his definition "domestic legal rules that apply to transnational activity." Whytock, *supra* note 12, at 115-16.

⁵³ Private international law seems the most dominant system in Whytock's theory; its centrality is also evident in his preliminary attempt at presenting a systemic analysis of the global governance functions of domestic courts. See Christopher A. Whytock, *Domestic Courts and Global Governance: The Politics of Private International Law* (2007) (unpublished Ph.D. dissertation, Duke University) (on file with the author), available at <http://dukespace.lib.duke.edu/dspace/handle/10161/452>.

⁵⁴ While international judicial institutions are generally restricted to the application of public international law, and usually specific branches of it (with the exception of the ICJ), national courts are unlimited in this respect and can adjudicate any legal conflict and under some circumstances can also apply any system of laws based on the rules of private international law. Furthermore, international courts and tribunals usually adjudicate conflicts between states (with the exception of courts such as the ECHR and the ACHR), while national courts—which generally do not have such an authority—adjudicate cases between individuals, private and public institutions, transnational corporations etc., and between any of the former and states, subject to the doctrine of state immunity. See U.N. Convention on Jurisdictional Immunities of States and their Property, G.A. Res. 59/38, U.N. Doc A/RES/59/38 (Dec. 2, 2004) (The convention has not yet entered into force).

It stands to reason that the differences between Scelle's and Whytock's views of national courts simply emanate from significant world developments between 1930 (Scelle) and today (Whytock). Still, much like Scelle's approach, and contrary to this article's, Whytock's functional approach envisions courts as legal-professional bodies and does not ascribe international political characteristics to them. Whytock also focuses on transnational activity, whereas this article focuses on inter-state relations.⁵⁵

C. *Slaughter's Model*

As previously argued, national courts transcend the boundaries of their traditional role as state organs by becoming IPAs, and function in some respects as independent actors in the international arena. In this context, my argument corresponds with Slaughter's theory on the "disaggregated state,"⁵⁶ and extends her idea of national courts as autonomous foreign policy actors.⁵⁷ According to Slaughter, actors such as regulators, judges, and legislators, who were traditionally considered integral organs of the "unitary state," are increasingly joining border-crossing networks with their counterparts around the world.⁵⁸ Slaughter considers the practice of national judges and suggests that they create horizontal networks by engaging in dialogue with their counterparts in different states, citing and debating their judicial decisions, and participating in designated bodies and organizations (such as the International Commission of Jurists and the International Judicial Academy).⁵⁹ Vertical networks are created when governments delegate simultaneous judicial power on specific issues to international courts, and national courts communicate with the latter on the same matters.⁶⁰ Ultimately national courts perceive themselves to be autonomous actors. Rather than automatically identifying themselves with their states, they are committed to a wider, transnational society.

⁵⁵ See Whytock, *supra* note 112, at 96-114. Whytock does not ignore the political "shadow of law" effect that national court decisions can have on both the national and international spheres. Nevertheless, he does not specifically analyze political IR implications of domestic court decisions. *Id.*

⁵⁶ For an initial explanation of the concept, see SLAUGHTER, *supra* note 13, at 12-15.

⁵⁷ Slaughter, *supra* note 13, at 62.

⁵⁸ See SLAUGHTER, *supra* note 13, at 5-6, 12-15.

⁵⁹ *Id.* at 67-69; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112-1123 (2000).

⁶⁰ SLAUGHTER, *supra* note 13, at 82-85; Slaughter, *supra* note 59, at 1105-1108; Abbott, *supra* note 5, at 417-418. Slaughter specifically studies the ECJ and focuses on the European experience, in which judges talk "above and below" national governments when implementing EU law.

Although Slaughter does not neglect the international-political aspect of national courts' functions,⁶¹ our models only partially overlap. Slaughter concentrates more on the relationships between courts and their counterparts (or governments and legislatures and their counterparts) around the world and less on the "diagonal" interaction between courts and foreign governments. Concentrating on the latter is yet another step toward construing national courts as IPAs.

To conclude, both Scelle's and Whytock's models apply to involuntarily influencing or to active/proactive courts. Slaughter's model is more suited for the actively and proactively-motivated, internationally-minded courts and judges. Each has their analytical strengths and weaknesses. This article's concept of IPAs is designed to capture the whole spectrum of national courts' performance in the international arena, which runs on a scale from "weak" IPAs (passively/involuntarily motivated) to "strong" IPAs (actively/proactively motivated), as explained before.

IV. DIRECT INFLUENCE ON INTERNATIONAL RELATIONS

Taking a position on specific matters with IR-implications is part of what transforms national courts and judges into IPAs. This is true whether they do so willingly or unwillingly (depending on their degree of internationalist inclination), or voluntarily or involuntarily (depending on whether international law is embedded in the case). Some types of cases, like extradition, affect IR and are unavoidable. They effectively force courts into the role of IPAs regardless of their will. Conversely, many of the IR-influencing cases can be avoided with familiar "avoidance doctrines" such as justiciability, standing, and act of state, which courts have previously applied.⁶² Deciding the merits of the latter cases reflects an independent judicial choice to adopt a position bearing an IR impact. This section demonstrates how national courts and judges have directly affected states' IR through judicial decisions on immunities of states and officials, extradition, consular notification, and universal jurisdiction.

⁶¹ According to Slaughter, "[t]he spread of liberal democracy holds the promise of a widening community of liberal states, *emboldens courts to act as autonomous foreign policy actors*, and enhances awareness of a common effort to construct and preserve the rule of law." Slaughter, *supra* note 13, at 62 (emphasis added). However, the impact of domestic courts on states' foreign policies and their relations with their own political branches and foreign states remains underdeveloped in her writing.

⁶² Eyal Benvenisti, *Judicial Misgiving Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 169–173 (1993).

A. *Adjudicating Lawsuits Against Foreign and Quasi-States—the Question of Sovereign Immunity*

Statehood and self-determination of peoples are undoubtedly matters of a highly political nature attached to states' international relations. As such, it would be expected that answering the question of whether an entity is a state would remain in the hands of governments, not courts. Consequently, a court's decision on the statehood of an entity might interfere with its (or another) state's standing in the international arena and with its foreign relations. Thus, for example, the decision to take a position on the question of the Palestinian Authority's ("PA") statehood, in a world constantly preoccupied with the Israeli-Palestinian conflict and the Palestinian's right to self-determination, has a clear international-political character. This character was recently demonstrated in the UN General Assembly decision to accord "to Palestine non-member observer state status,"⁶³ which may allow Palestine to initiate ICC proceedings against Israeli officials for alleged war crimes in the Occupied Territories.⁶⁴

Such considerations have not prevented some American and Israeli judges from delving into the statehood question and its sovereign immunity derivative. In *Ungar v. The Palestinian Authority*⁶⁵ and *Nuritz v. The Palestinian Authority*,⁶⁶ victims of terrorist attacks and their families sued the Palestinian Authority in US and Israeli courts, respectively.⁶⁷ The judges who addressed this question analyzed it under the Montevideo Convention on the Rights and Duties of States, which defines a state as a person in

⁶³ G.A. Res. 67/19, no. 2, U.N. Doc. A/RES/67/19 (Nov. 29, 2012).

⁶⁴ For a comprehensive analysis of the consequences of recognition of the PA as a state, see Gilad Noam, *The Palestinian Petition to the United Nations for Recognition of a Palestinian State: A Legal/Political Analysis*, THE JERUSALEM INST. FOR ISRAEL STUD. (2012), <http://www.jiis.org/upload/palestinian%20state-eng.pdf>. A complete version of the document (in Hebrew) is available at <http://www.jiis.org.il/upload/palestinian%20state.pdf>. See also Amichai Cohen, *An Observer State Status to the Palestinian Authority*, THE ISRAEL DEMOCRACY INST. (Nov. 29, 2012), <http://en.idi.org.il/analysis/articles/un-recognition-of-a-palestinian-state-a-legal-analysis-updated/>.

⁶⁵ *Estates of Ungar and Ungar ex rel Strachman v. Palestinian Authority*, 325 F. Supp. 2d 15 (D.R.I. 2004), *aff'd*, 402 F.3d 274 (1st Cir. 2005).

⁶⁶ CC (Jer) 2538/00 *Nuritz v. The Palestinian Authority and Yasser Arafat*, Tak-Mech 2003(1) 4968 [2003] (Isr.).

⁶⁷ For additional discussion and American examples, see XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 493 n.239 (2012). In Israel, see CReq (Jer) 1008/06 *Elon Mo're Seminar Association v. The State of Israel*, Tel-Mech 2006(2) 1718 [2006] (Isr.) (concerning lack of enforcement of Israeli court judgments by the PA).

international law.⁶⁸ In *Ungar*, the U.S. District Court held that the Palestinian Authority was not a state under international law and awarded damages to the Ungar family.⁶⁹ In its Israeli companion case, *Nuritz*, two of the three sitting judges opined that the question was political in nature, and that the Ministry of Foreign Affairs should answer this in the form of an executive certification announcing the formal position of Israel regarding the statehood (or lack thereof) of the Palestinian Authority.⁷⁰ The third judge, however, delved into a substantial examination regarding the fulfillment of the Montevideo Convention's conditions by the Palestinian Authority.⁷¹ The judge concluded that the Palestinian Authority has not yet reached the status of a state under international law, and is therefore not entitled to sovereign immunity.⁷² The Israeli legislature responded to this adjudication by enacting the Foreign States Immunity Law 2008, which authorizes the Minister of Foreign Affairs to notify the court on the "application of immunity to a political entity which is not a foreign state."⁷³

Adjudicating claims against established states on noncommercial matters (or those that do not fall under established exceptions to sovereign immunity)⁷⁴ can also have implications for international relations. An illuminating example is the Italian-German experience, where Italian courts attempted to establish an innovative and controversial exception to the principle of sovereign immunity in compensation suits against Germany for atrocities committed by the Nazi regime. In the *Ferrini* case,⁷⁵ the Italian

⁶⁸ Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 ("The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.").

⁶⁹ *Estates of Ungar v. Palestinian Authority*, 325 F. Supp. 2d at 21.

⁷⁰ See CC (Jer) 2538/00 *Nuritz v. The Palestinian Authority and Yasser Arafat*, Tak-Mech 2003(1) 4968, ¶ 11, 14, 16-18 [2003] (Isr.) (majority opinion).

⁷¹ See *id.* at ¶ 64-65 (opinion of Drori J.).

⁷² See *id.* For a discussion on this decision, see Guy Harpaz, *The Palestinian Authority and Sovereign Immunity in Israeli Courts*, 40 *Isr. L. Rev.* 198 (2007). The end result of the judgment was that the PA was denied immunity (whether on grounds that it was not a state, or that it did not present an executive certificate from the Israeli Minister of Foreign Affairs that affirmed its statehood). The opinion of the majority was affirmed by the Supreme Court of Israel in a later case: CA 4060/03 *The Palestinian Authority v. Elyahu Dayan*, Tak-El 2007(3), 1194 [2007] (Isr.).

⁷³ The Foreign States Immunity Law, 5769-2008, SH No. 2189 p. 76, art. 20 (Isr.), available at http://www.coe.int/t/dlapil/cahdi/Source/state_immunities/Israel%20Immunities%20January%202009.pdf.

⁷⁴ In principle, sovereign immunity covers acts that are *iure imperii*. The main exception is private-commercial acts, but other exceptions, such as torts and labor, have emerged over the years and recently found their expression in the UN Convention on Jurisdictional Immunities of States and their Property.

⁷⁵ Cass., sez. un. 11 marzo 2004, n. 5044, *Foro It.* 2004, I (It.). See also Andrea Bianchi, *Ferrini v. Federal Republic of Germany, Italian Court of Cassation, March 11, 2004*, 99 *AM. J. INT'L L.* 242 (2005).

Court of Cassation determined that fundamental human rights (*jus cogens*) prevailed over the principle of state immunity (in that case, the immunity of Germany). This groundbreaking decision was followed by other similar judgments in Italian courts that led Germany to initiate proceedings against Italy before the International Court of Justice (ICJ).⁷⁶ In its application to the ICJ, Germany stated that “[r]epeated representations with the Italian Government ha[d] been of no avail.”⁷⁷ The Italian government, for its part, was far from happy with the decisions of its courts, which created unnecessary diplomatic tension with Germany.⁷⁸ However, due to public pressure, Italy made a counter-claim to the ICJ, asserting that Germany violated its obligation of reparation owed to Italian victims of the Third Reich.⁷⁹ ICJ denied the counter-claim,⁸⁰ accepted Germany’s application, and rejected the Italian courts’ attempt to establish an international human rights law (“IHRL”) exception to state immunity.⁸¹

B. *Extradition*

Extradition cases, where states are obliged to assist each other in national criminal proceedings, create a platform for judicial influence on international relations between states. In this respect, two opposite scenarios may arise. The first scenario is a situation in which the state’s adherence to its international obligations is not assured either for political reasons or because national law disrupts their fulfillment, and courts are bound to decide for or against compliance with international law. The second scenario is when a state wishes to comply with a treaty obligation to extradite, but courts prevent the extradition on grounds of conflicting international obligations (specifically IHRL).

In the first scenario, judges’ pro-IR position usually goes hand in hand with a pro-IL stance. When the Israeli Supreme Court, for instance, decided

⁷⁶ Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2012 I.C.J. 99 (Feb. 3).

⁷⁷ Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Application Instituting Proceedings, 2008 I.C.J. 143 (Dec. 23), available at <http://www.icj-cij.org/docket/files/143/14923.pdf>.

⁷⁸ Interview with Dr. Maria Varaki, legal scholar, Hebrew University of Jerusalem (Mar. 20, 2012). Dr. Varaki is an expert in international criminal law and institutions, and is personally familiar with the case and with the Greek and Italian professionals who were involved in the case.

⁷⁹ Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Counter-Memorial of Italy 2009 I.C.J. 128 (Dec. 22), available at <http://www.icj-cij.org/docket/files/143/16017.pdf>.

⁸⁰ Counter-Claim, Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), 2010 I.C.J. Reports 310, 321 (July 6).

⁸¹ Jurisdictional Immunities of the State, 2012 I.C.J. 99, at 139.

some sensitive extradition cases in which Israel stood to breach international obligations, justices who also took a pro-IR position expressed a higher IL-commitment while making some highly controversial declarations.⁸² Still, since the cases were inherently IR-related, all of the judges, including those who did not expressly take a pro-IL or pro-IR position (or the contrary), performed as IPAs. The following two cases are illustrative.

The *Aloni* decision (also known as the *Nakash* case)⁸³ was one of the earliest cases in which the Israeli Supreme Court practically neutralized the doctrines of standing and justiciability while invalidating the Minister of Justice's decision not to extradite William Nakash to France after he was declared fit for extradition by the Court. Nakash argued that if extradited, his life would be in jeopardy from Arab prisoners in the French prison because he was a Jew convicted of murdering an Arab man. Stressing the important implications of the case for the relationship between Israel and France, the Court's majority revoked the Minister of Justice's decision not to abide by Israel's treaty obligation to extradite.⁸⁴ The court asserted that this fear was not based on well-proven and solid grounds, and as such, should be outweighed by IR interests.⁸⁵

Another example is the *Sheinbein* case,⁸⁶ in which President Barak⁸⁷ made an "interpretive effort" to declare Sheinbein, an American juvenile with only formal Israeli nationality, fit for extradition to the United States. This was despite the explicit wording of the Israeli Extradition Law, granting him immunity from extradition as an Israeli national.⁸⁸ President Barak analyzed the rationales for the nationality exception common in international extradition law and concluded that formal nationality, in the absence of substantial links to the country of nationality, should not prevent extradition, despite the wording of the national extradition law.⁸⁹ Barak's opinion was rejected by the majority of the court, which preferred the language of the Israeli Extradition Law. The majority was aware of the problematic consequences to Israel-US relations of a decision not to

⁸² See, e.g., CrimA 6182/98 *Sheinbein v. Attorney General* 63(1) PD 625 [1999] (Isr.); HCJ 852/86 *Aloni et al v. Minister of Justice* 41(2) PD 1 [1987] (Isr.).

⁸³ HCJ 852/86 *Aloni et al v. Minister of Justice* 41(2) PD 1 [1987] (Isr.).

⁸⁴ *Id.* at ¶ 6(d), 13-17.

⁸⁵ See *id.* at ¶ 13-17, 20, 29.

⁸⁶ *Sheinbein* 63(1) PD 625.

⁸⁷ Then Chief Justice of the Supreme Court Kedmi J., concurring.

⁸⁸ See Law To Amend Extraterritorial Offences Laws, 5738-1978, 881 L.S.I. 53, art. 2 (1978) (Isr.).

⁸⁹ *Sheinbein* 63(1) PD 625, ¶ 12-24 (Barak, P., separate).

extradite—consequences that were unavoidably attached to the case.⁹⁰ In this respect, the majority judges performed “passively” as IPAs despite their clear reluctance to impact Israel-US relations.⁹¹

The second scenario of judicial influence on states’ international relations in this context is when courts prevent states’ compliance with a treaty obligation to extradite on grounds of conflicting international obligations, specifically IHRL.⁹² This practice also transforms national courts into IPAs, establishing them not as bridges, but as barriers between contracting states. In such cases, the interference of national courts with the international relations of their states leans on external support and legitimization by other states and international actors, which act so as to advance the international rules protected by the court.⁹³

An example of the second scenario is the Czech Constitutional Court’s “Decision on Extradition in the Case of a Collision of Obligations

⁹⁰ *Id.* at ¶ 20 (majority opinion). The Washington Post reported direct IR consequences, stating: “Congress had threatened to hold up aid to Israel to force Sheinbein’s extradition.” Laura Blumenfeld and Katherine Shaver, *Sheinbein Can’t Be Extradited*, WASH. POST (Feb. 26, 1999), <http://www.washingtonpost.com/wp-srv/local/daily/feb99/sheinbein26.htm>.

⁹¹ *Id.* The Israeli Extradition Law was consequently amended to make sure that only those who are both Israeli nationals *and residents* at the time the crime was committed would benefit. It also determined that they will not enjoy complete immunity from extradition, but only the privilege of serving out their punishments in Israeli prisons, close to their families and friends. *See* Extradition Law, 5714-1954, 8 L.S.I. 144, art. 1A (1953–1954).

⁹² *See, e.g.,* Nález Ústavního soudu zed ne 15.04.2003 (ÚS) [Decision of the Constitutional Court of Apr. 15, 2003], sp.zn. I. ÚS 752/02 (Czech), available at <http://www.refworld.org/docid/403a1884f.html> (discussed below). *See also*, HR 15 september 2006, NJ 2007, 277 m.nt. AH Klip (Minister of Justice/N Ke sbir) (Neth.), available at http://www.oxfordlawreports.com/subscriber_article?id=/oril/Cases/law-ildc-851nl06. In this case the Dutch Supreme Court encountered the dilemma of deciding between conflicting extradition obligations and IHRL: Turkey requested the extradition of the petitioner, a former member of the PKK suspected of criminal activity, who protested the request, fearing torture by Turkish authorities. The Court established the supremacy of human rights under Article 3 of the ECHR over the Netherlands’ extradition obligations to Turkey under the European Convention on Extradition 1957 (ECE). It decided that the legitimate expectation doctrine in extradition law (rule of non-inquiry), which was part of the ECE, and invoked by Turkey, does not preclude judicial review over potential violations of *other treaty obligations* that apply to the litigating states, such as the obligations of the ECHR (¶ 3.3. & 3.4.4. to the ILDC version). Therefore, the Court subjected the Netherlands’ extradition obligation under the ECE to Turkish authorities’ concrete guarantees of protecting the petitioner from torture, inhuman or degrading treatment, or punishment (¶ 3.4.2.).

⁹³ In EC countries, courts may lean extensively on ECHR jurisprudence, prohibiting extradition, rendition, deportation, and other forms of expulsion of a person by a country in the event that such an act would risk that person’s fundamental rights for life, liberty, and physical dignity. *See, e.g.,* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); Vilvarajah v. United Kingdom, 215 Eur. Ct. H.R. (ser. A) (1991); Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991); Chahal v. United Kingdom, 23 Eur. H.R. Rep. 314 (1997); Ahmed v. Austria, 24 Eur. H.R. Rep. 278 (1997).

Arising from International Treaties.”⁹⁴ In this case, the Czech Constitutional Court examined a constitutional complaint against the decisions of the Czech general courts and Minister of Justice to permit the extradition of the complainant, a Moldovan citizen, to Moldova for alleged large-scale property crimes.⁹⁵ These decisions originated from the Czech law of extradition and the European Convention on Extradition, to which both Moldova and the Czech Republic are parties. The complainant argued that extradition would violate his rights under Article 3 of the European Convention on Human Rights (“ECHR”) and Article 3 of the Convention against Torture (“CAT”), as he would be exposed to the risk of torture, or inhuman or degrading treatment or punishment in Moldova.⁹⁶ After establishing it had the power to review the constitutionality of the minister’s and the general courts’ decisions under the ECHR and CAT,⁹⁷ the Constitutional Court went on to assess the factual basis for the complaint. The Court requested certain entities that monitor the condition of human rights, specifically the Office of the UN High Commissioner for Refugees in Prague and the Czech Helsinki Committee, provided it with information on and an evaluation of the human rights record in Moldovan prisons.⁹⁸ Preferring this information over data relied on by the Minister of Justice (in particular, a report from the U.S. State Department that affirmed that the Moldovan government “generally respects human rights,” the Court concluded that there were substantial grounds to believe that there was a danger of violation of the prohibition of torture, inhuman and degrading treatment or punishment in the event of extradition.⁹⁹

From the text of the decision, it is evident that the Court was fully aware of the gravity of the consequences of its decision, both in terms of

⁹⁴ *Decision of the Constitutional Court of Apr. 15, 2003*, I. ÚS 752/02, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Jan Kratochvíl, analyzing another decision that cites this adjudication, explains that “[t]he present holding constituted one of several examples of the Czech Constitutional Court favouring a ‘human rights-friendly’ reading of the Constitution. Most controversially this was exemplified by its refusal to adhere to the 2001 amendment of the Constitution to the extent that it cancelled its power to strike down laws if they contravened any international human rights obligations of the Czech Republic.” See Jan Kratochvíl, *Analysis of Recognition of a Sentence Imposed by a Thai Court, Constitutional Complaint* (Novotný (Emil) v Ministry of Justice, Constitutional Complaint, (I. ÚS 601/04; ILDC 990 (CZ 2007)), available at <http://opil.ouplaw.com/view/10.1093/law:ildc/990cz07.case.1/law-ildc-990cz07>. See also *The Notion of the Constitutional Order*, Decision on an Application to Annul an Act, Pl. ÚS 36/01, 25 June 2002. In that case, it interpreted the Constitution in a way which retained such a power.

⁹⁸ *Decision of the Constitutional Court of Apr. 15, 2003*, I. ÚS 752/02 (Czech).

⁹⁹ *Id.*

invalidating a ministerial decision, precluding compliance with a treaty obligation to extradite, and upholding serious accusations against a neighboring state.¹⁰⁰ These consequences have a clear political character and direct IR implications. As such, they are also open to criticism. Such a critique was made by Roger O’Keefe with regards to a similar practice of inquiry by a UK judge into the risk of torture in Russia. Criticizing the court, O’Keefe argues:

As for the court’s inquiry into whether the defendant would be subject to torture in the requesting state, which amounted to an inquiry into whether a foreign state was likely to act in violation of international law, there can be no objection that *this contravenes the traditional constitutional wisdom, rooted in the separation of powers (and on which the practice of executive certification is based)*, that the courts should defer to the executive in matters of foreign affairs.¹⁰¹

Note that this case cannot be classified as pro-IL or counter-IL, since the court actually decided between competing IL norms, preferring IHRL over extradition obligations. However, the court’s practice surely reflects a greater commitment to a wider “audience” of “IHRL promoters” that cuts across national borders, again performing as an IPA.¹⁰²

¹⁰⁰ The Czech Republic, an EU member state, is tied to Moldova under the European Neighborhood Policy, through which “[t]he EU is developing an increasingly close relationship with Moldova, going beyond co-operation, to gradual economic integration and a deepening of political co-operation.” *Moldova*, EUR. UNION EXTERNAL ACTION, http://www.eeas.europa.eu/moldova/index_en.htm (last visited Oct. 3, 2014).

¹⁰¹ Roger O’Keefe, *Analysis of Government of the Russian Federation v Akhmed Zakaev*, First instance, ILDC 259 (UK 2003) unreported (Bow Street Magistrates’ Court), Nov. 13, 2003 (emphasis added), available at <http://opil.ouplaw.com/view/10.1093/law/ildc/259uk03.case.1/law-ildc259uk03?rskey=pGo9xw&result=1&prd=ORIL>. On the separation between the factual premises, which should be established by the executive, and their legal interpretation, which is to be left for the court, see INSTITUT DE DROIT INTERNATIONAL, *THE ACTIVITIES OF NATIONAL JUDGES AND THE INTERNATIONAL RELATIONS OF THEIR STATES* art. 7 (1993), available at http://www.idi-ii.org/idiE/resolutionsE/1993_mil_01_en.PDF.

¹⁰² This notion resembles Judge Bork’s concept of the “New Class,” which is comprised of groups of like-minded liberal, socialist, and leftist people across the globe. See ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 135 (2003). It also brings to mind Slaughter’s theory of “transnational networks.” See SLAUGHTER, *supra* note 13, at 12-15.

C. Consular Notification

According to Vienna Convention on Consular Relations, state authorities who detain or arrest a foreign national must inform that person "without delay" of her right to have her consulate notified of her arrest.¹⁰³ Failure to comply with this obligation opens the door for judicial involvement of both international and national courts in a situation with significant IR implications. Cases involving the United States provide instructive examples.

In *Avena (Mexico v. United States)*,¹⁰⁴ the ICJ established that U.S. authorities violated Article 36 of the 1963 Vienna Convention on Consular Relations¹⁰⁵ by not informing Mexican nationals of their right to consular notification when they were investigated for suspected crimes. The ICJ instructed the United States to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence."¹⁰⁶ However, in *Medellin v. Texas*,¹⁰⁷ the U.S. Supreme Court established that although the ICJ's decision created a valid international obligation, it had no binding power within American law without incorporating legislation.¹⁰⁸ Therefore, the Court denied a petition to review the case of Medellin, a Mexican national whose interest was represented by Mexico in *Avena*. Medellin was eventually executed.¹⁰⁹

Subsequently, in *Garcia v. Texas*,¹¹⁰ Humberto Leal Garcia ("Leal") invoked the ICJ's decision in his petition to review his case in a way similar to *Medellin*. Garcia distinguished his motion from that in *Medellin* by pointing to a bill introduced by Senator Patrick Leahy, which purported to implement *Avena*,¹¹¹ and asked the Court to stay his execution until after the bill was discussed in Congress.¹¹² The majority opinion rejected the

¹⁰³ Vienna Convention on Consular Relations art. 36, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

¹⁰⁴ *Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12.

¹⁰⁵ See Vienna Convention on Consular Relations, *supra* note 103.

¹⁰⁶ *Avena*, 2004 I.C.J. 12, ¶ 153.9.

¹⁰⁷ *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁰⁸ *Id.* at 498-499.

¹⁰⁹ See Margaret E. McGuinness, *International Decisions: Medellin v. Texas*, 102 AM. J. INT'L L. 622 (2008).

¹¹⁰ *Garcia v. Texas*, 564 U.S. ____, 131 S. Ct. 2866 (2011) (per curiam).

¹¹¹ Consular Notification Compliance Act of 2011, S.B. 1194, 112th Cong. (2011).

¹¹² *Garcia*, 131 S. Ct. at 2866.

petition, stressing that it makes decisions on the basis of existing, not hypothetical, legislation.¹¹³

The *Garcia* minority appeared to give significant weight to the IR-implications of the Court's decision.¹¹⁴ Justice Breyer's dissenting opinion (joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan) held that granting a stay of execution would be appropriate since in this case, the Obama Administration had requested the Court to allow some time for Leahy's bill to be considered in Congress, and denying this request may "cause irreparable harm" to "foreign-policy interests of the highest order."¹¹⁵ Justice Breyer continued by presenting the Government's position, agreeing that failing to halt Leal's execution would place the United States in irremediable breach of its international-law obligation, with "*serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico*, and the ability of American citizens traveling abroad to obtain the benefits of consular assistance in the event of detention."¹¹⁶ Mexico stated that declining to delay Leal's execution "would *seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States* on a number of joint ventures, including extraditions, mutual judicial assistance, and efforts to strengthen . . . common border."¹¹⁷

Despite these clearly pronounced official statements, the majority of judges decided to decline *Garcia*'s request to review his case in light of impending legislation that implements *Avena*,¹¹⁸ and in doing so, behaved as (disruptive) IPAs. Again, due to the nature of the case, all of the judges were potential IPAs, influencing (by contributing to or disturbing) their state's IR. Recalling a comment made earlier, it is interesting to note that the minority's pro-IR position was also pro-IL (and the majority's indifferent position toward IR was also indifferent to IL).

¹¹³ *Id.* at 2868.

¹¹⁴ *Id.* at 2869-70 (Breyer, J., dissenting).

¹¹⁵ *Id.* at 2870 (quoting the Solicitor General).

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ *Id.* at 2870 (citing Brief for United Mexican States as Amicus Curiae Supporting Petitioner at 23) (emphasis added).

¹¹⁸ *Id.* at 2868.

D. Universal Jurisdiction

Universal Jurisdiction is a legal doctrine that allows states to try defendants with no traditional jurisdictional links (e.g., personal, territorial) due to the severity of the crimes and their character as *erga omnes*. The application of the universal jurisdiction doctrine against foreign officials gave rise to some heavy IR concerns in different countries. Such concerns were expressed, for instance, by the Republic of the Congo in its application to the ICJ against France:

The proceedings in question are *perturbing the international relations of the Republic of the Congo* as a result of the publicity accorded, in flagrant breach of French law governing the secrecy of criminal investigations, to the actions of the investigating judge, which impugn the honour and reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces and, in consequence, *the international standing of the Congo*. Furthermore, those proceedings are *damaging to the traditional links of Franco-Congolese friendship*. If these injurious proceedings were to continue, *that damage would become irreparable*.¹¹⁹

Indeed, the implementation of the universal jurisdiction doctrine by national judges has been the source of some high-profile diplomatic incidents between states over the past decade.¹²⁰ This was true specifically in cases that made claims against senior foreign officials and military officers.¹²¹

Máximo Langer examined five case-studies of “universal jurisdiction states”—Germany, England, France, Belgium, and Spain—all having different arrangements for distribution of authority and control over universal jurisdiction proceedings between the judicial system and the political/executive branches. His survey illustrates the ways in which courts and judges’ behave in states where they had the authority to autonomously

¹¹⁹ Certain Criminal Proceedings in France (Republic of the Congo v. France), Request for the Indication of a Provisional Measure, 2003 I.C.J. 129 ¶ 26 (June 17) (emphasis added), *available at* <http://www.icj-cij.org/docket/files/129/8204.pdf>.

¹²⁰ Langer, *supra* note 22.

¹²¹ A comprehensive description of the most famous incidents (and others) is found in Langer’s study. *See id.* at 10-41.

engage in universal jurisdiction proceedings and generated “IR costs” for their governments.¹²² According to Langer, the IR costs of universal jurisdiction cases will generally be determined by the existence (or lack thereof) of a broad international agreement that the defendant should stand trial; the position of the defendant’s nation state in protesting his prosecution or not; the strength of international leverage of the defendant’s nation state,¹²³ and, so it seems, by the rank (or supremacy) of the defendant in his country. Langer’s empirical findings are conclusive. The only cases that eventually made trial were against Rwandans, former Yugoslavs, Nazis, Afghans, one Congolese and one Argentinean; the rest of the prompted or self-initiated prosecutions (over 1,050 complaints, including against British, Canadian, Chinese, French, Israeli, Russian and American nationals) had excessive IR costs.¹²⁴

Langer maps the incentives and disincentives of the political and executive branches to implement the power of universal jurisdiction. He demonstrates the part played by courts and judges, who may naturally sympathize with the goals of some political actors, and can contribute to achieving these goals.¹²⁵ For the most part, he portrays the political and judicial branches as opposing authorities with regards to IR matters. Political authorities have more IR concerns in contrast to courts and judges who choose to promote universal jurisdiction. He notes that “[a]s we move along the spectrum of greater to lesser executive branch control over criminal proceedings, the spectrum of expected costs to the prosecuting state of defendants against whom formal proceedings are opened moves in the opposite direction.”¹²⁶ That is to say, the more the judicial system controls universal jurisdiction application, the more influential it becomes on its state’s international relations.

In some respects, universal jurisdiction proceedings have become a mechanism in the rapidly developing “lawfare,” which transforms courthouses into “battlefields” in international and non-international armed

¹²² Langer includes in what is referred to in this article as “IR costs,” economic costs that may be induced from diplomatic tension between states. *See id.* at 6-7.

¹²³ Concluded from Langer’s analysis. *See id.* at 6-7, 9-10. Some obvious examples of high-leverage states are the US, the UK, China, and Russia. The vast majority of the African states possess low international leverage.

¹²⁴ *See id.* at 8-9.

¹²⁵ *See id.*

¹²⁶ *Id.* at 2.

conflicts.¹²⁷ The Israeli experience is illustrative. In December 2009, Tzipi Livni, former Minister of Foreign Affairs, was forced to cancel an official visit to the UK after she learned that a UK judge issued an arrest warrant against her by following a private petition.¹²⁸ The basis for this warrant was alleged war crimes committed during Operation Cast Lead (December 2008 through January 2009) in Gaza by Israel when Livni was the Minister of Foreign Affairs and a member of the Israeli Government war cabinet.¹²⁹ The warrant was issued based upon the universal jurisdiction doctrine. This caused deep embarrassment to the UK Foreign Office, which stated:

The UK is determined to do all it can to promote peace in the Middle East and to be a strategic partner of Israel. To do this, Israel's leaders need to be able to come to the UK for talks with the British government. We are looking urgently at the implications of this case.¹³⁰

This event followed an earlier case occurring in the UK: Israeli Major General Doron Almog was accused of committing alleged war crimes.¹³¹ This warrant, too, was initiated privately and was founded on the universal jurisdiction doctrine. The British Foreign Minister formally apologized for the “embarrassing incident.”¹³²

Approximately one year before the Livni incident, an investigating judge in Spain opened criminal proceedings against several Israeli politicians and military officers based on the universal jurisdiction principle.¹³³ These officials were involved in the targeted killing of Hamas leader Salah Shehadeh, which caused the death of 15 civilians, including eight children—an action allegedly amounting to a war crime.¹³⁴ These

¹²⁷ On “lawfare,” see Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT’L L. 279 (2010).

¹²⁸ See Langer, *supra* note 22, at 17; see also Ian Black & Ian Cobain, *British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni*, THE GUARDIAN (Dec. 14, 2009), <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>.

¹²⁹ See Langer, *supra* note 22, at 17; see also Black & Cobain, *supra* note 128.

¹³⁰ Black & Cobain, *supra* note 128.

¹³¹ See Langer, *supra* note 22, at 17.

¹³² See Editorial, *Straw Apology for Israeli Arrest*, BBC NEWS (Sep. 22, 2005), http://news.bbc.co.uk/2/hi/uk_news/politics/4270664.stm; see also Dominic Casciani, *Police Feared ‘Airport Stand-Off’*, BBC NEWS (Feb. 19, 2008), http://news.bbc.co.uk/2/hi/uk_news/7251954.stm.

¹³³ See Langer, *supra* note 22, at 38.

¹³⁴ *Id.*

proceedings, alongside other criminal proceedings initiated by Spanish judges against other foreign leaders (e.g., the US and China) “embarrassed the Spanish government, which wants to play an active diplomatic role in efforts to bring peace to the Middle East.”¹³⁵

The national political branches in both the UK and Spain reacted similarly: government members expressed concerns for their states’ international relations with the state of Israel.¹³⁶ In addition, national laws and policies were amended so as to prevent a similar future incident¹³⁷ (a backlash development this author further discusses in a different paper).¹³⁸

¹³⁵ See *Spanish Prosecutor Seeks to Shelve Israel Case*, EXPATICA.COM, (Apr. 2, 2009), http://www.expatica.co.uk/news/british-news/Spanish-prosecutors-seek-to-shelve-Israel-case_51244.html?ppager=0.

¹³⁶ While in the UK case these concerns were publicly expressed, in Spain these concerns were at the “backstage” of the diplomatic scene. See, e.g., Editorial, *Straw Apology for Israeli Arrest*, *supra* 132; Ian Black, *Gordon Brown Reassures Israel Over Tzipi Livni Arrest Warrant*, THE GUARDIAN (Dec. 16, 2009), <http://www.theguardian.com/world/2009/dec/16/tzipi-livni-israel-arrest-warrant>. In Spain, the School of Diplomacy of the Ministry of Foreign Affairs and Cooperation published the 2013 Notebook Number 49 (Memories of Master Students in Diplomacy and International Relations, 2011-2012) titled “Current Issues of Diplomacy and International Relations in the Early Twenty-First Century.” The publication was dedicated to the study of “Universal Jurisdiction and the impact of its application in foreign policy,” acknowledging the diplomatic tensions between Spain and other states—such as Israel, the United States, and China—caused by judges’ application of the universal jurisdiction principle against these states’ officials. See MINISTRY OF FOREIGN AFF. AND COOPERATION, *Current Issues of Diplomacy and International Relations in the Early Twenty-First Century*, 49 J. OF THE DIPLOMATIC SCH. (2013), <http://www.exteriores.gob.es/Portal/es/Ministerio/EscuelaDiplomatica/Documents/cuadernos%2049.pdf>.

¹³⁷ At a conference at The Hebrew University of Jerusalem, Baroness Scotland, the UK Attorney General, stated, “The government is looking urgently at ways in which the UK system might be changed to avoid this situation arising again. Israel’s leaders should always be able to travel freely to the UK.” See MATTHEW TAYLOR, *Ministers Plan Law Change to Stop Arrests of Foreign Officials*, THE GUARDIAN (Jan. 15, 2010), <http://www.guardian.co.uk/uk/2010/jan/15/foreign-officials-arrest-law-changes>. In a story by David Bosco, the author reports that the Spanish parliament overwhelmingly passed a measure that would require judges to take only cases that had some demonstrable link to Spain. If the measure is implemented, Spain will follow the path of Belgium, which scaled back its own universal jurisdiction law in 2003 after a Belgian judge opened an investigation of U.S. General Tommy Franks for the use of cluster bombs in Iraq. An American threat to move NATO headquarters out of Brussels persuaded Belgium to alter its law. See David Bosco, *The Inquisition, Part II?*, WASH. POST (May 24, 2009), <http://www.washingtonpost.com/wpdyn/content/article/2009/05/22/AR2009052201749.html>. For more on the amendment of the Belgian law, see Michele Hirsch & Nathalie Kumps, *The Belgian Law of Universal Jurisdiction Put to the Test*, 35 JUSTICE/THE INT’L ASS’N OF JEWISH LAW. & JURISTS 20 (2003). For more on the Spanish case, see Thomas Catan, *Spain is Moving to Rein In Its Crusading Judges*, WALL ST. J. (May 20, 2009), <http://online.wsj.com/article/SB124276949318736375.html>. See also Langer’s instructive summary of the dynamics of political and legislative reaction to the IR-implications of the universal jurisdiction application by their courts. Langer refers specifically to the British and Spanish cases, where the law has indeed gone through significant reform to limit judges’ power to initiate/cooperate with private initiatives for universal jurisdiction proceedings. See Langer, *supra* note 22, at 15-19, 32-41.

¹³⁸ Osnat Grady Schwartz, *International Law and National Courts: Between Mutual empowerment and Mutual Weakening*, 23 CARDOZO J. OF INT’L & COMP. L. (Spring 2015, *forthcoming*).

Israeli (and other foreign) officials have faced similar proceedings in Belgium, too, although in a quite distinctive manner. Both in the UK and Spain, judges demonstrated willingness, and sometimes eagerness, to initiate and cooperate with private criminal proceedings against foreign officials, occasionally in opposition to their government's sentiment.¹³⁹ Conversely, the Belgian prosecution and courts were at first rather hesitant to give full effect to similar private initiatives and tried to introduce restrictions—such as requiring the physical presence of the accused in Belgium.¹⁴⁰ It was actually the political branches (government and parliament alike) that encouraged such proceedings and later¹⁴¹ amended the Belgium law to that effect.¹⁴² The Court of Cassation, Second Chamber followed the political branches' line (while respecting restrictions set by the ICJ in *Congo v. Belgium* regarding the immunity of serving senior officials)¹⁴³ by allowing the trial *in absentia* of foreign former senior officials on the condition that their immunity had expired.¹⁴⁴

These events indeed had diplomatic implications and IR costs for Israel-Belgium relations, including the temporary withdrawal by Israel of its ambassador from Belgium.¹⁴⁵ Still, it should be noticed that these costs were primarily induced by a conscious policy of the authorities responsible for Belgium's foreign relations: its political branches.¹⁴⁶ The latter deliberately

¹³⁹ See Editorial, *Straw Apology for Israeli Arrest*, *supra* note 132; Casciani, *Police Feared 'Airport Stand-Off'*, *supra* note 132.

¹⁴⁰ Langer, *supra* note 22, at 29 n.170. See also Aluf Ben, *The Foreign Minister's Office Attempts to Prevent Belgium Legislation that Would Allow Sharon's Prosecution*, HA'ARETZ (July 11, 2002), <http://www.haaretz.co.il/misc/1.808807> (Isr.).

¹⁴¹ Apr. 23, 2003. See Langer, *supra* note 22, at 30.

¹⁴² Yossi Melmen, *Prime Minister of Belgium Supports a Law that Allows Sharon's Adjudication*, HA'ARETZ (Jan. 14, 2003), <http://www.haaretz.co.il/misc/1.854352> (Isr.).

¹⁴³ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Apr. 11).

¹⁴⁴ Langer, *supra* note 22, at 29 n.171 (citing Cass., Feb. 11, 2003, No. P.02.1139.F, *reprinted in* 42 ILM 596 (2003) (Eng. trans.)). See also Ayel Gross, *Doubtful the Belgians Will Exhaust Legal Proceedings*, YNET (February 13, 2003), <http://www.ynet.co.il/articles/1,7340,L-2432833,00.html> (Isr.); Haaretz Editorial, *Ambassador to Belgium Will be Returned Shortly to Brussels*, HA'ARETZ (Apr. 14, 2003), <http://www.haaretz.co.il/misc/1.875668> (Isr.); Diana Bahoor & Efrat Weiss, *Netanyahu to the Belgian Ambassador: This is Blood Libel*, YNET (Feb. 13, 2003), <http://www.ynet.co.il/articles/0,7340,L-2429614,00.html> (Isr.).

¹⁴⁵ Langer, *supra* note 22, at 29. See also Diana Bahoor, *Israel Will Not Boycott Procedures Against Sharon in Belgium*, YNET (Feb. 19, 2003), <http://www.ynet.co.il/articles/0,7340,L-2444934,00.html> (Isr.).

¹⁴⁶ Langer, *supra* note 22, at 30. IR costs naturally encompass other states whose officials were investigated or prosecuted in Belgium, including the United States, which threatened to remove North Atlantic Trade Organization ("NATO") headquarters from Brussels, and Iran, whose parliament demanded financial compensation for the "pain inflicted upon the Iranian people" from the complaint against former

expanded the scope of the universal jurisdiction laws in Belgium¹⁴⁷ and allowed and even encouraged private initiatives (with which judges could cooperate), by, inter alia, not placing any significant restraints on them.¹⁴⁸ The Belgian courts' performance as IPAs was, thus, a direct consequence of deliberate political choice to use them as a tool for international involvement. Legislation amendments in August 2003 finally "relieved" the courts of this "extended role."¹⁴⁹ An amendment to the Belgian law practically left the power to begin universal jurisdiction investigations in the hands of the federal prosecutor (i.e., a body that is subject to the executive), who will carefully pick the cases so as not to impede Belgium's international relations.¹⁵⁰

The IR influence of national courts not only motivated actions in those countries whose courts issued the warrants, but also in states whose officials were the ones targeted. Israel, for instance, based on previous experience, and aware of future risks, has established a special advocacy unit aimed at taking preemptive actions to guarantee acting and former officials will not be arrested on foreign soil in universal jurisdiction proceedings.¹⁵¹ Israel has also founded public and governmental investigation commissions to examine the conduct of the authorities (both governmental and military) in serious events in which it was accused of violating the laws of war (e.g., the Second Lebanon War in 2006 (the Winograd Commission)¹⁵² and the Gaza Flotilla in 2010 (the Turkel Commission).¹⁵³ Such investigations would prove—or so it was hoped—Israel's seriousness and respect for IL and avert foreign and international judicial involvement based on the

president Rafsanjani. Alain Winants, *The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 503 n.65 (2003).

¹⁴⁷ Langer's survey, see Langer, *supra* note 22, at 26-28.

¹⁴⁸ In Belgium, the law is lax in "punishing" complainants who wrongfully sued defendants in civil cases that were dismissed by court. At most the law requires compensation for legal expenses. Langer, *supra* note 22, at 27-28, n.157 (citing C.I.C.R. Art. 128; C.JUD. Art. 1022). In comparison, in France, a private party who initiates proceedings that are finally dismissed by a judge may have to be fined (if the prosecutor convinced the judge that the initiation was abusive or dilatory), and all the accused persons may pursue damages. *Id.* at 20, nn.102-04 (citing C. PR. P'EN. Art. 88, 88-1, 91, 177-2, 177-3).

¹⁴⁹ Langer, *supra* note 22, at 31 n.188 (citing Loi relative aux violations graves du droit international humanitaire of Aug. 5, 2003, Art. 27, MONITEUR BELGE [M.B.], Aug. 7, 2003, 21, 182 (Belg)).

¹⁵⁰ Langer, *supra* note 22, at 31-32.

¹⁵¹ See MINISTRY OF JUSTICE-DEPARTMENT OF SPECIAL INTERNATIONAL AFFAIRS, OFFICE OF THE STATE ATTORNEY, <http://www.igf.org.il/listItem.aspx?CID=1315> (last visited Nov. 15, 2014).

¹⁵² See *Winograd Commission*, WIKIPEDIA, http://en.wikipedia.org/wiki/Winograd_Commission (last visited May 7, 2014).

¹⁵³ See *Turkel Commission*, WIKIPEDIA, http://en.wikipedia.org/wiki/Turkel_Commission (last visited May 7, 2014).

doctrines of complementarity (relative to the ICC)¹⁵⁴ and subsidiarity (relative to foreign national courts).¹⁵⁵

V. INDIRECT INFLUENCE: SUPPORTING THE TRENDS OF LEGALIZATION AND JUDICIALIZATION OF INTERNATIONAL POLITICS BY EMPOWERING INTERNATIONAL LAW

The legalization of international politics is a precondition for national courts and judges to become IPAs. It allows them a foothold in the international arena, creating an opportunity for judges to have an international impact through engagement with international law. International law also empowers national courts in various ways, creating an incentive for them to engage with it.¹⁵⁶ At the same time, judicial engagement with international law empowers international law, as is discussed below. It thus generates a circle of mutual empowerment between national courts and international law, which further supports the trends of international legalization and judicialization. The three most important interrelated ways of empowerment between international law and IPAs are recognizing international law as a legitimate and binding legal system, enhancing the effectiveness and legitimacy of international courts and tribunals, and further developing international law.¹⁵⁷

A. *Recognizing International Law as a Legitimate and Binding Legal System*

Today, international law is largely considered a “legal system.” However, indicative of the skeptical views still held by national actors, some judges and scholars still feel the need to stress this point.¹⁵⁸ Enforcement is

¹⁵⁴ This is a “vertical” principle that applies to the relations between states and an international court (the ICC). See *supra* Part III.A.

¹⁵⁵ This doctrine operated horizontally—between states—and not vertically. See Langer, *Supra* note 22, at 39; Grady Schwartz, *supra* note 138.

¹⁵⁶ On ways of empowerment of national courts by international law, see Grady Schwartz, *supra* note 138, at 6-24.

¹⁵⁷ Several more ways of empowerment are discussed in Grady Schwartz. See Grady Schwartz, *supra* note 138, at 25-34.

¹⁵⁸ See, e.g., H CJ 7957/04 Mara'abe et al v. The Prime Minister of Israel et al 60(2) PD 477 [2005] (Isr.) (Cheshin, Vice President) (acknowledging that the international law “became stronger and began to stand on its own two feet as a legal system worthy of the title ‘law’”). For a scholarly discussion of the matter see YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS,

crucial in defeating this skepticism and contributing to the entrenchment of international law as a legal system. Given that non-enforced law remains only “a symbol of the moral aspiration of its authors,”¹⁵⁹ and due to the weakness (and sometimes absence) of enforcement by international judicial bodies, references to and enforcement of international law by national courts and judges serve to recognize it in practice.

By applying international law as comparative law or a canon of interpretation, national courts further substantiate international law as having enforceable power that binds (or at least ought to bind) governments. This clearly occurs when national courts cite and enforce international “hard law” such as treaties and international customs.¹⁶⁰ International law is also reinforced by approvingly referring to its “soft law,” such as the resolutions and special committees’ reports of United Nation organs,¹⁶¹ and its subsidiary sources, including the decisions of international judicial bodies.¹⁶²

Quoting international courts’ decisions does two things. First, it legitimizes these decisions¹⁶³ which helps to establish authoritative

93-94 (Philippe Sands et al. eds., 2003). See also Frédéric Mégret, *International Law as Law*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 64 (James Crawford & Martti Koskeniemi eds., 2012).

¹⁵⁹ See also Fiona de Londras, *Dualism, National Courts, and the Rule of International Law*, in THE RULE OF LAW IN COMPARATIVE PERSPECTIVE 217, 218 (M. Sellers & T. Tomaszewski eds., 2010); ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 265 (Oxford Univ. Press, 2011).

¹⁶⁰ See Statute of the International Court of Justice arts. 38(1)(a), 38(1)(b), June 26 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute].

¹⁶¹ See, e.g., *Cuzco Bar Association and ors v. Congress of the Republic*, Original petition, Accumulated Claims 050-2004-A1/TC, 051-2004.A1/TC, 004-2005-P1/TC, 007-2005-P1/TC, 009-2005-P1/TC; ILDC 679 (PE 2005), June 3, 2005 (Peru) (citing General Comment 3, Nature of State Parties’ Obligations, U.N. Committee on Economic, Social and Cultural Rights, 5th Sess. (1990), U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003)); *Constantinou v. Cyprus*, Judicial Review Decision, Case No. 302/80; ILDC 917 (CY 1984), Mar. 24, 1984 [Sup. Ct.] (Cyprus) (citing Declaration on the Rights of Disabled Persons, G.A. Res. 3447/XXX, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 at 88 (Dec. 9, 1975); *Minister of Home Affairs and Director-General of Home Affairs v. Fourie and Bonthuys*, Lesbian and Gay Equality Project and 18 ors v. Minister of Home Affairs and ors, Application for Leave to Appeal, Appeal, and Cross-Appeal, 2005 CCT60/04; CCT10/05; ILDC 282 (Dec. 1, 2005) (S. Afr.) (citing U.N. Human Rights Committee in *Joslin v. New Zealand* to address the question of the legal recognition and protection of homosexual marriage); *Filártiga v. Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (citing, inter alia, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc A/8028, at 121 (Oct. 24, 1970); Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3532/XXX, Annex, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034, at 91 (Dec. 9, 1975) (in the quest for determination whether official torture constituted a violation of customary IL)).

¹⁶² See ICJ Statute, *supra* note 160, art. 38(1)(d).

¹⁶³ See *Slaughter*, *supra* note 59, at 1103 (binding enforcement with legitimacy ‘and the delegitimization of international legal rules that are not enforced’). See also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 375

international “hard law.” Second, it increases the effectiveness of cited international courts, supporting their role as the judiciary of the international legal system. This brings us to national courts and judges’ contribution to the judicialization of international relations.

B. Enhancing the Effectiveness and Legitimacy of International Courts and Tribunals—Supporting the Judicialization of International Politics.

National courts contribute to the effectiveness and legitimacy of international courts and tribunals when they cite, recognize, and enforce their decisions.¹⁶⁴ Examples are found in all liberal democracies,¹⁶⁵ demonstrating varying degrees of respect for or acceptance of international courts’ decisions amongst national courts. National courts and judges’ application of decisions made by international courts significantly increases the chance states will comply with the latter’s rulings.¹⁶⁶ A good example of this is the European experience regarding the ECJ and ECHR.¹⁶⁷ According to Mattli and Slaughter, “the primary mechanism for the expansion of European law has been the . . . cooperation of judges (and lawyers) in the member states [with the ECJ], thereby creating a community of actors *above and below the state*.”¹⁶⁸ To Alter, such “vertical networking” was essential since governments often resented the ECJ’s authority.¹⁶⁹

The importance of cooperation amongst national courts for the success of international law and its judiciary in governing transnational activity has been recognized by various scholars and organizations.¹⁷⁰ In a

(1997), n.460 (regarding the Eur. Ct. H.R. decision in *Soering v United Kingdom*, App no 14038/88 (A/161) Eur. Ct. H.R. 1989).

¹⁶⁴ Whytock, *supra* note 12, at 108; Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 467-69 (2000).

¹⁶⁵ See *Oxford Reports on International Law*, OXFORD PUB. INT’L LAW, <http://opil.oup.com/home/oril> (last visited Oct 7, 2014). The Oxford Reports on International Law’s website includes hundreds of cases from many states under the module International Law in Domestic Courts (ILDC).

¹⁶⁶ See Joseph H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 519 (1994). According to Weiler, states will have a harder time resisting their own courts’ decisions than international bodies’ decisions.

¹⁶⁷ See Keohane et al., *supra* note 164; Whytock, *supra* note 12, at 108-09.

¹⁶⁸ Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49(1) INT’L ORG. 183, 184 (1995) (emphasis added).

¹⁶⁹ KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 219-20 (2001).

¹⁷⁰ See, e.g., Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 393 (2000) (“[T]he primary site for the enforcement of international law is ultimately domestic . . .

resolution from 1993, the Institut de Droit International acknowledged the importance of national courts in properly implementing international law.¹⁷¹ It deemed the willingness of national courts to cooperate with international courts necessary for effective international institutions.¹⁷² Some scholars believe that in order to achieve this, national courts should set aside “judicial restraints” based on political doctrines, which sometimes yield results contradictory to international law.¹⁷³

These suggestions are not without detractors. Judicial restraints and political doctrines aim to protect separation of powers. Some argue that setting aside such restraints may disturb the balance of power between the three branches of government, and further empower the judiciary at the expense of the legislature and the executive.¹⁷⁴ This debate sharpens the mutual-empowerment relationship between national courts and international law, and demonstrates how national courts’ contribution to the empowerment of international law is intertwined with gaining more political power, allowing them to act as IPAs.

C. *Developing International Law*

Judgments made by national courts constitute “subsidiary means for the determination of rules of [international] law.”¹⁷⁵ National courts contribute to the development of both customary rules and treaty law. Regarding customary law, national courts can clarify the existence,

The more important incentives for compliance are ultimately domestic.”). See, e.g., Whytock, *supra* note 12; Helfer & Slaughter, *supra* note 163; John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 374 (Thomas M. Franck & Gregory H. Fox eds., 1996).

¹⁷¹ INSTITUT DE DROIT INTERNATIONAL, *The Activities of National Judges and the International Relations of their State*, NINTH COMMISSION, RAPPORTEUR: MR BENEDETTO CONFORTI, SESSION OF MILAN (1993), http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF. See also Eyal Benvenisti, *Judges and Foreign Affairs: A Comment in the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'*, 5 EUR. J. INT'L L. 423 (1994).

¹⁷² See INSTITUT DE DROIT INTERNATIONAL, *supra* note 171.

¹⁷³ Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753, 785 (1999). Conversely, it can be argued that, to the extent that avoidance doctrines express *comity* towards international courts, these doctrines can actually strengthen international courts’ authoritativeness.

¹⁷⁴ This is the main argument against a domestic court’s voluntary application of international law, as mentioned before. For further discussion, see, e.g., Kochan, *supra* note 21; Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003).

¹⁷⁵ See Statute of the International Court of Justice arts. 38(1)(d), June 26 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

emergence, and scope of an international custom.¹⁷⁶ Their decisions can also help create international customs, as they present both state practice and *opinio juris*. They constitute state practice due to the fact that national courts are state organs and therefore their decisions are attributed to their states.¹⁷⁷ They articulate *opinio juris* because of their normative and deliberative character.¹⁷⁸ The formation of a new custom is, of course, dependent on compliance from the state with the decisions of its courts¹⁷⁹ and on the compliance of other states with practice and *opinio juris*, which in turn can arise from their own courts.

As for treaty law, national courts' application and interpretation of international law substantiates "the agreement of the parties regarding [the treaty's] interpretation."¹⁸⁰ Engaging in "transjudicial communication," one court's interpretation of a treaty can influence the interpretation of that treaty by foreign courts, which, in turn, substantiates their states' understanding of cited treaties and helps build treaties' authoritativeness.¹⁸¹ Regardless of the "correctness" of their decisions¹⁸² or their methods of interpretation,¹⁸³ as long as other states and courts' respond to them affirmatively, a national courts' application of international treaties forms an additional layer in the development of international law.

National courts have made a special contribution to the development of IHRL through at least two types of decisions: first, utilizing IHRL instruments to support domestic-in-essence decisions that deal with

¹⁷⁶ See Whytock, *supra* note 12, at 104-107; NOLLKAEMPER, *supra* note 8, at 264-279.

¹⁷⁷ See Int'l L. Ass'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. ch.IV.E.1, 4 Supplement No. 10 (A/56/10) (Nov. 2001), available at <http://www.refworld.org/docid/3ddb8f804.html>.

¹⁶⁵ See also NOLLKAEMPER, *supra* note 8, at 267-68; Whytock, *supra* note 12, at 106; BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF NATIONAL LEGAL SYSTEMS* 79 (1993).

¹⁷⁹ See *Committee on Formation of Customary (General) International Law*, INT'L L. ASS'N (2000), <http://www.ila-hq.org/en/committees/index.cfm/cid/30>; NOLLKAEMPER, *supra* note 8, at 270-271 ("In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the . . . national courts."). *Germany v. Italy* demonstrates how courts' decisions contradict their governments' expressed positions. Due to the fact that the executive bears the 'primary responsibility for the conduct of foreign relations,' the executive's position should prevail.

¹⁸⁰ Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (VCLT).

¹⁸¹ See Slaughter, *supra* note 13; NOLLKAEMPER, *supra* note 8, at 244-279.

¹⁸² See Tzanakopoulos, *supra* note 24, at 159-160. To Tzanakopoulos, international law development can also evolve from an 'incorrect' or even a 'violating' interpretation of international treaties.

¹⁸³ Although courts do not always refer to international law rules of interpretation (Articles 31-32 of the VCLT), their interpretation methods, based on their national law, are usually similar.

consubstantial norms (i.e., “domestic rules that are *in substance* reflective of an existing international rule”);¹⁸⁴ second, deciding between competing international norms, such as IHRL on the one hand, and United Nations Security Council resolutions,¹⁸⁵ the principle of state immunity,¹⁸⁶ and treaty obligations regarding extradition¹⁸⁷ on the other hand. These decisions help define relationships between rules and norms of international law by recognizing some of them as *jus cogens*, by classifying them as substantial or procedural, and by establishing hierarchy between them.

VI. CONCLUSION

The behavior of national courts as IPAs is a multi-layered phenomenon with various implications for relations between states. It contains both legal and political aspects, exogenous constraints and voluntary motivations. The IPA model advanced here—as distinct from other models relating to the role of national courts at the international level—highlights the international, political impact of national courts and judges, and the diagonal interaction between them and foreign political branches of government. As IPAs, national courts and judges affect international politics both directly and indirectly, in a focal or dispersed fashion, and in either a general or particular manner: directly—by taking position on issues colored with a clear political hue, influencing the behavior and policy making of foreign states; indirectly—by supporting the development of the trends of legalization and judicialization of IR, which shape the “rules of the game” in contemporary global governance and international relations. The inherent political tension introduced by this

¹⁸⁴ Tzanakopoulos, *supra* note 24, at 143.

¹⁸⁵ *See, e.g.*, R (Al-Jedda) v. Secretary of State for Defense, [2007] Q.B. 621 (Eng.). The decision was overturned by the Eur. Ct. H.R. (*Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rep. 789 (2011)), but its subsequent scholarly analysis and discussion contributes to IHRL development. *See, e.g.*, Zgonec-Rozej, *Al-Jedda v. United Kingdom*, 106(4) AM. J. INT'L L. 830 (2012); Marko Milanovic, *Al-Skeini and Al-Jedda in Strasburg*, 23(1) EUR. J. INT'L L. 121 (2012); *see also* NOLLAEMPER, *supra* note 8, at 7-8.

¹⁸⁶ Unlike the Greek and Italian courts which attempted to limit Germany's state immunity in cases of IHRL peremptory norms, the British court rejected this notion in *Jones v. Saudi Arabia*, [2006] UKHL 26 (U.K.). The Greek and Italian courts attempts also prompted an international court (ICJ) judgment, which determined the hierarchy of IHRL and state immunity norms, thus contributing to the further development of international law as a whole.

¹⁸⁷ *See, e.g.*, HR 15 september 2006, NJ 2007, 277 m.nt. AHK (Ministerie van Justitie/N. Kesbir) (Neth.) (on the extradition from the Netherland to Turkey of a PKK former member who was accused of criminal activity).

development in court-governmental relations will probably play a major role in determining whether this development will flourish or diminish over time. But as things stand, the study of IR-IL should further consider the international political impact of national courts and judges and its interwoven connection to their engagement with international law.