

2013

## Lawyers and Precedent

Harlan G. Cohen

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Harlan G. Cohen, *Lawyers and Precedent*, 46 *Vanderbilt Law Review* 1025 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol46/iss4/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Transnational Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Lawyers and Precedent

Harlan Grant Cohen\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1025
II.	THE PUZZLE OF INTERNATIONAL PRECEDENT.....	1027
III.	FROM PRODUCT TO PRACTICE.....	1033
IV.	PRECEDENT AS ARGUMENT.....	1035
V.	LAWYERS AND NORMAL PEOPLE.....	1038

### I. INTRODUCTION

What role do lawyers, as lawyers, play in the creation, development, and maintenance of the international legal order? This is an oddly underexplored question. It has become increasingly popular to look at the role various non-state actors—nongovernmental organizations (NGOs),<sup>1</sup> grassroots activists,<sup>2</sup> scientists,<sup>3</sup> insurgent groups,<sup>4</sup> among many others—play in the shaping of international law. It has also

---

\* Associate Professor of Law, University of Georgia School of Law. Thank you to Tim Meyer, Ingrid Wuerth, and the editors of the *Vanderbilt Journal of Transnational Law*.

1. See Suzanne Katzenstein, *Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street*, 46 VAND. J. TRANSNAT'L L. 1079, 1083–86 (2013) (discussing the shift towards a consequentialist approach to the “naming and shaming” of governments by advocacy groups); Peter J. Spiro, *Constraining Global Corporate Power: A Short Introduction*, 46 VAND. J. TRANSNAT'L L. 1101, 1104–09 (2013) (evaluating the increasingly prevalent role of NGOs as monitors of voluntary corporate codes of conduct).

2. See generally KARIMA BENNOUNE, YOUR FATWA DOES NOT APPLY HERE: UNTOLD STORIES FROM THE FIGHT AGAINST MUSLIM FUNDAMENTALISM (2013) (providing stories of men and women from more than three hundred countries who, through a variety of efforts, challenged muslim fundamentalism and terrorism).

3. See, e.g., Timothy L. Meyer, *Epistemic Institutions and Epistemic Cooperation in International Environmental Governance*, 2 TRANSNAT'L ENVTL. L. 1, 19 (2013) (discussing the relationship between scientific bodies and legal institutions in the context of environmental governance).

4. See generally Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787 (2008) (exploring the difficulties inherent in applying the laws of war to non-state combatants).

become common to talk in terms of the “disaggregated state,”<sup>5</sup> and of how various substate actors—central bankers,<sup>6</sup> regulators,<sup>7</sup> judges,<sup>8</sup> and military personnel<sup>9</sup>—shape international law and policy through their interactions with each other. Nor have international lawyers ever been particularly shy about their importance to international law. Oscar Schacter famously described “the professional community of international lawyers . . . though dispersed throughout the world and engaged in diverse occupations” as “a kind of invisible college dedicated to a common intellectual enterprise.”<sup>10</sup> Martti Koskenniemi has written that “[w]ithout international lawyers, there would have been no international law.”<sup>11</sup> The Statute of the International Court of Justice (ICJ) even recognizes the “teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>12</sup> And yet, few have focused on the

---

5. See generally ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004) (describing global governance as an international web of government networks); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 *LAW & CONTEMP. PROBS.* 195 (2004) (discussing the subnational and transnational forces and actors that weave the United States into the fabric of international regimes).

6. See generally CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2012) (considering the various actors who play roles in international financial architecture and who create international financial rules); David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 *CHI. J. INT'L L.* 547 (2005) (describing the role of central bankers in international financial regulation).

7. See Zaring, *supra* note 6, at 550 (discussing regulatory revisions made by the Basle Committee). See generally Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT'L L.* 1 (2002).

8. See SLAUGHTER, *supra* note 5, at 85–96 (discussing the role of judicial cooperation in transnational litigation); Erik Voeten, *Borrowing and Non-Borrowing Among International Courts*, 39 *J. LEGAL STUD.* 547, 547–48 (2010) (“A growing literature asserts that national and international judges increasingly communicate with each other and influence each other’s interpretations of legal issues.”).

9. See, e.g., PETER ANDREAS & ETHAN NADELMAN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 163–65, 191–99 (2006) (describing military involvement in domestic law enforcement); Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 *CONN. J. INT'L L.* 367, 407–11 (2011) (describing transnational networks of military lawyers).

10. Oscar Schacter, *The Invisible College of International Lawyers*, 72 *NW. U. L. REV.* 217, 217 (1977).

11. Martti Koskenniemi, *International Lawyers*, in *THE NEW OXFORD COMPANION TO LAW* 619, 619 (Peter Cane & Joanne Conaghan eds., 2008).

12. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 *Stat.* 1055, 1060 [hereinafter ICJ Statute]. For a discussion of this specific provision, see generally Jörg Kammerhofer, *Law-Making by Scholars*, in *RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING* (Catherine Brölmann & Yannick Radi eds., 2013).

specific and unique role lawyers might play as state, non-state, and substate actors in the international system.<sup>13</sup>

This is an important gap to fill. As Koskenniemi writes, “From Hugo Grotius to the International Criminal Court, international law has been a *project* carried out by international lawyers.”<sup>14</sup> And any account of international law that does not explain the role of lawyers will necessarily be deficient. This is particularly the case with regard to the mysterious power of precedent in international law. Regardless of precedent’s formal role in international law,<sup>15</sup> lawyers and judges regularly invoke it, respond to it, and cite it as authority.<sup>16</sup> Can studying lawyers help explain when prior interpretations of international law rules will carry weight, when those interpretations will frame future arguments, and maybe, when those interpretations will burden decisions about compliance?

## II. THE PUZZLE OF INTERNATIONAL PRECEDENT

Precedent presents something of a puzzle for international law. As a matter of international law doctrine, judicial decisions construing international law are not in and of themselves law. According to Article 38 of the Statute of the ICJ, judicial decisions are merely “subsidiary means for the determination of rules of law.”<sup>17</sup> They are not generally binding on future parties in future cases, even before the same tribunal.<sup>18</sup> In short, precedent, as a matter of doctrine, exerts no special force.

---

13. As will be discussed *infra* notes 85–86 and accompanying text, there is a rich vein of literature on the sociology of law and lawyers that starts with Pierre Bourdieu and continues through scholars like Bryant Garth and Yves Dezalay. This literature has, however, made relatively little penetration into international law scholarship.

14. Koskenniemi, *supra* note 11, at 619.

15. See *infra* notes 17–18 and accompanying text.

16. See *infra* notes 19–35 and accompanying text.

17. ICJ Statute, *supra* note 12, at art. 38.

18. *Id.* at art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”). Technically, Article 38 of the ICJ Statute is simply a directive to the court laying out the sources states have agreed it should apply in resolving disputes. That said, the sources listed there are widely regarded as the sources of international law more broadly. See, e.g., LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 56–57 (4th ed. 2001); MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 20–21 (2d ed. 2001) (“An ordinary starting point for international lawyers from most any part of the globe when thinking about the formal sources of international law is Article 38 of the International Court of Justice.”); HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 232 (4th ed. 1994) (quoting the statute and commenting that “[t]his list has significance not only for tribunals but also for officials or scholars pursuing the inquiries described above”).

And yet, precedent is ubiquitous. Reports from international investment arbitration,<sup>19</sup> international criminal law,<sup>20</sup> international human rights,<sup>21</sup> and international trade,<sup>22</sup> all testify to precedent's apparent authority. Across international law, practitioners invoke it and tribunals apply it. This would be remarkable if courts and tribunals simply cited their own precedent—international law doctrine requires no such result. But courts and tribunals go much further (following the lead of international advocates), citing positively or negatively even the decisions of unrelated courts and tribunals operating in different areas of international law and with different mandates. The precedents from one regional body are argued to others.<sup>23</sup> Precedents from human rights courts are argued

---

19. See, e.g., *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Final Award, ¶ 129 (Jan. 26, 2006), reprinted in 6 *ASPER REV. INT'L BUS. & TRADE L.* 419, 571 (2006) ("In international and international economic law – to which investment arbitration properly belongs – there may not be a formal 'stare decisis' rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence."); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1611–12 (2005) ("The fact is that investment awards are not technically precedential. . . . As a practical matter, however, private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties.")

20. See, e.g., Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 *IND. L.J.* 1063, 1073–78 (2011) (discussing international criminal tribunals' reliance on precedent, such as the Nuremberg model); William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 *TEX. INT'L L.J.* 729, 757–58 (2003) (discussing the role of precedent in international criminal law and noting that "a great deal of deference has been accorded" to the decisions of the ICTY).

21. See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 *GERMAN L.J.* 1203, 1204 (2011) (evaluating the Inter-American Court's dynamic interpretation of rights that, "at times, hardly finds a legal basis in the Convention").

22. See, e.g., Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 *TEMP. INT'L & COMP. L.J.* 221, 230 (2003) ("If we regard precedents as decisions furnishing a basis for determining later cases involving similar facts or issues we can say without hesitation that large amounts of such precedents exist in the WTO dispute settlement system."); Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 *AM. U. INT'L L. REV.* 845, 850 (1999) ("In brief, there is a body of international common law of trade emerging as a result of adjudication by the WTO's Appellate Body.")

23. See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *COLUM. L. REV.* 1832, 1871–73 (2002) (describing the migration of the ECHR precedent to other bodies); see also *EUROPEAN COURT OF HUMAN RIGHTS, REFERENCES TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS* 3–20 (2012).

to investment tribunals.<sup>24</sup> Precedents from ad hoc criminal tribunals are applied to domestic civil judgments.<sup>25</sup>

To see but one example of the pervasiveness of this pattern, take the landmark *Prosecutor v. Tadic* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>26</sup> *Tadic*, the first case heard by the ICTY, produced a range of important decisions on the jurisdiction of the court, the interpretation of its statute, and the scope of international criminal liability.<sup>27</sup> Those decisions have, of course, been widely cited in other decisions of the ICTY.<sup>28</sup> Not too surprisingly, other international criminal tribunals have cited these decisions.<sup>29</sup> The ICJ famously distinguished the test for state

24. See generally Andrea K. Bjorklund & Sophie Nappert, *Beyond Fragmentation*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW - IN MEMORIAM THOMAS WÄLDE 439 (2011) (discussing cases).

25. U.S. courts have, for example, turned to the jurisprudence of the ICTY and ICTR to ascertain the standard for aiding and abetting liability under the Alien Tort Statute, 28 U.S.C. § 1350. Compare *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), with *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

26. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

27. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2000) (considering the court's authority to issue contempt orders); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, *Tadic*, ¶¶ 115–45 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (establishing the test for state attribution); *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 4–6, 55–60, 128–30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (considering jurisdiction, role of customary international law, and scope of liability under the statute).

28. See, e.g., *Prosecutor v. Milutinovic, Sainovic & Ojdanic*, Case No. IT-99-37-AR72.2 (Int'l Crim. Trib. for the Former Yugoslavia June 8, 2004) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 4–6, 55–60, 128–30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)); *Prosecutor v. Nikolic*, Case No. IT-94-2-S, Sentencing Judgement, ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-A & IT-94-1-A, Judgement in Sentencing Appeals (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000)). The citations are in the hundreds, as a Westlaw search of the “International Criminal Tribunal for the Former Yugoslavia - Combined (INT-ICTY-ALL)” database attests.

29. See, e.g., *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-C-T, Decision on Appropriate Remedy, ¶ 46 (Int'l Crim. Trib. for Rwanda Jan. 31, 2007) (noting recognition in *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) of “certain inherent powers accruing to a Trial Chamber by virtue of its nature as a judicial body”); *Prosecutor v. Karemera, Ngrumpatse & Nzirorera*, Case No. ICTR-98-44-R73, Decision on Renewed Motion to Dismiss for Lack of Jurisdiction, ¶ 5 (Int'l Crim. Trib. for Rwanda Aug. 5, 2005) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 14–49 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) in discussion of the Tribunal's mandated function and incidental jurisdiction). A Westlaw search of the “International Criminal Tribunal for Rwanda (INT-ICTR)” database yields over one hundred citations.

attribution, “overall control,”<sup>30</sup> adopted by the ICTY in *Tadic*.<sup>31</sup> And the decisions have been cited in dozens of U.S. federal court decisions.<sup>32</sup> More surprisingly perhaps, International Centre for Settlement of Investment Disputes arbitration panels have cited *Tadic*.<sup>33</sup> It has even made a recent appearance in the U.S. Department of Justice White Paper on the legality of targeted killings.<sup>34</sup> Even this widespread pattern of citation by entities with no obligation to do so vastly understates the *Tadic* precedent’s impact. A search yields ten times as many briefs mentioning the decision to U.S. courts as decisions eventually citing it.<sup>35</sup> Less formal invocations of the decision by NGOs and other actors are impossible (or at least implausible) to count. And, as will be discussed later, the true impact of a precedent will likely be felt in arguments rather than decisions. Even citations in arguments cannot capture all the situations in which actors predict that precedents will carry weight with others and adjust their actions accordingly.

Existing accounts of international courts and their decisions have a difficult time explaining these patterns. Traditional accounts treat precedent as a deliberate design feature.<sup>36</sup> States decide at the

---

30. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 405 (Feb. 26) (“[T]he degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can . . . differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.”).

31. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, Tadic, ¶¶ 145 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“[T]he control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control*.”).

32. Westlaw Search, ALLCASES, “Tadic.”

33. See Italian Republic v. Republic of Cuba, Ad Hoc State-State Arbitration, Dissenting Opinion of Attila Tanzi at 10 (Jan. 1, 2008) (issuing a dissent from the final award based, in part, upon *Tadic*), [www.italaw.com/cases/documents/583](http://www.italaw.com/cases/documents/583); Waguih Elie George Siag, Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, at 99 n.453 (June 1, 2009) (citing to *Tadic* in reference to the idea that there exists “an inherent power of an international tribunal to deal with any issues necessary for the conduct of matters falling within its jurisdiction”); Teinver S.A., Transportes de Cercanías S.A., and Autobuses Urbanos del Sur S.A. v. Arg. Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, at 66 n.373 (Dec. 21, 2012) (noting that claimants urged for the “overall control” test articulated in *Tadic* to be applied).

34. See U.S. DEP’T OF JUSTICE, LAWFULNESS OF LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 4–5, available at [www.fas.org/irp/eprint/doj-lethal.pdf](http://www.fas.org/irp/eprint/doj-lethal.pdf) (citing *Tadic* for the proposition that armed conflicts require hostilities of a certain intensity and duration).

35. Westlaw Search, ALLBRIEFS, “Tadic.”

36. See, e.g., Bhala, *supra* note 22, at 863–68 (describing the codification of sources in the ICJ Statute and Restatement (Third) of the Foreign Relations Law of the United States as a traditional starting point for thinking about the impact of tribunal judgments on future disputes); Anthea Roberts, *Power and Persuasion in Investment*

outset how much force precedent should have based on their relative interests in either predictability or control.<sup>37</sup> These accounts look to the constitutive agreements setting up particular courts, tribunals, and other interpretive bodies, and ask how much authority they explicitly or implicitly delegate to these bodies and their decisions.<sup>38</sup> While accounts based on explicit delegation look to a body's mandate, accounts based on implicit delegation look to functional considerations like the open-endedness of the treaty's language or whether the treaty seems to create third-party rights holders.<sup>39</sup> Given that most international law regimes explicitly deny precedent force,<sup>40</sup> this former approach has a hard time explaining the reality of how lawyers argue. The latter do a better job suggesting that some regimes might be designed with precedent in mind but rely more on *ex ante* normative conclusions about precedent's desirability for a particular regime than on empirical reality.<sup>41</sup> Not surprisingly, their results are highly contested.

Other rationalist approaches suggest that precedent might emerge because it is useful.<sup>42</sup> In some contexts, states may disagree over a particular rule, each preferring a particular interpretation over others. Nonetheless, they may prefer a coordination point over continued disagreement.<sup>43</sup> To the extent third-party decision making can provide a mutually acceptable rule (i.e., one that provides sufficient benefits to each party), continuing to hew to that rule may

*Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 188 (2010) (describing the orthodox position).

37. Roberts, *supra* note 36, at 189 (discussing the balance set in investment treaties).

38. *Id.* at 189–90 (examining investment treaties as an example).

39. *See id.* (discussing this difference in the investment tribunal context); *see also* Meredith Crowley & Robert Howse, *US–Stainless Steel (Mexico)*, 9 WORLD TRADE REV. 117 (2010) (describing textual and functional perspectives on *stare decisis* at the WTO).

40. *See* Bhala, *supra* note 22, at 863–68; Roberts, *supra* note 36, at 189 (“Like the judgments of most international courts, investment awards are not given formal precedential status.”).

41. For example, functionalist accounts often suggest that because human rights treaties are vague and designed to protect third parties, human rights bodies must be seen as having implicit mandates to fill gaps. *E.g.*, Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 38–39 (2008); *see also* Crowley & Howse, *supra* note 39 (making a functional case for *stare decisis* at the WTO).

42. *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 6 (2005) (“[I]nternational adjudication can play a useful role by enabling states to overcome a limited set of cooperation problems in international affairs.”).

43. This account essentially posits a “battle of the sexes” game in which coordination is a dominant strategy, providing obvious benefit over noncooperation, but where there are multiple equilibria, each providing greater benefit to one party over others.



be desirable.<sup>44</sup> This explanation treats precedent as epiphenomenal. A precedent's force derives solely from the desirability of the rule reflected in it. Neither its status as the opinion of some body nor its internal reasoning has any independent effect. Although such an account may explain the stickiness of some international precedents, these types of accounts have a hard time explaining precedent in noncoordination games like human rights.<sup>45</sup> They also struggle to explain why arguments from precedent would have any force when the underlying decision goes against state interests.<sup>46</sup>

More sophisticated rationalist accounts treat precedent as "soft law."<sup>47</sup> As these accounts explain, from an individual state's point of view, its legal obligations are defined by predictions of what others will consider lawful and unlawful, and precedents can be suggestive of that.<sup>48</sup> States creating a regime can thus use a tribunal to create rules or adopt interpretations that they would not have been able to achieve by agreement.<sup>49</sup> States reading a court's views will have to take into account the possibility that that decision will be treated as binding law by other states and adjust their calculus and actions accordingly.<sup>50</sup> This account, though, simply assumes that actors will treat court decisions as predictive of the obligations other states will hold them to.<sup>51</sup> What it does not explain, however, is why.

Finally, still other accounts see the use of precedent as strategic. Arguing to a body from its own precedent may make it more favorably inclined to your position. This is true not only for advocates to courts or tribunals but also for courts or tribunals trying to seek the support of other courts, something empirical data regarding the European

---

44. See Posner & Yoo, *supra* note 42, at 18 ("[T]he states have a surplus to divide . . . and the present value of the payoffs from continued cooperation exceeds the short-term gains from cheating.").

45. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (objecting to some of the precedential theories presented in Posner & Yoo, *supra* note 42).

46. See *id.* at 914–15 (discussing how Posner and Yoo's theories ignore that states have increasingly been influenced by international independent courts and tribunals).

47. See generally Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515 (2009) (using the UN Human Rights Committee as a model to examine why states delegate power to make soft law to international tribunals).

48. *Id.* at 517 ("Although the decisions are binding only on states before the tribunal, the tribunal's jurisprudence forms a type of soft law that piggybacks on the hard legal obligations, and constrains all states subject to the underlying binding obligation.").

49. See *id.* at 516 (suggesting that tribunal rulings influence state behavior despite not having binding legal authority).

50. See *id.* at 530 ("A tribunal opines on some set of substantive legal rules, and its rulings affect the expectations and beliefs of states.").

51. *Id.*

Court of Justice (ECJ), the European Court of Human Rights (ECHR), and national court precedent seems to bear out.<sup>52</sup> Such accounts bring us closer to understanding precedent's role as advocacy, but they too fail to capture why advocates regularly cite precedents from courts other than the ones they are trying to convince. Perhaps citing other bodies lends prestige,<sup>53</sup> but this only begs the question where this prestige would come from. Why would particular audiences view certain citations in decisions as carrying extra weight?

### III. FROM PRODUCT TO PRACTICE

Each of these accounts seems to tell part of the story of precedent's emergence within international law, but even together they seem incapable of explaining the utter pervasiveness of precedent's attraction. The main deficiency of these accounts is that, with the exception of the last one,<sup>54</sup> they focus solely on the role of states (as opposed to various non-state actors like lawyers) in determining precedent's force. As such, they focus almost entirely on the formal moments when the state's role is most obvious: those moments when the law is made—for example, through treaties—or applied, when states choose to comply or not to comply, to enforce or not to enforce. That focus, though, misses everything that goes on before, between, and after those moments of ratification or compliance, the ways in which law is transmitted between those points, and, in turn, much of what is distinctive about law.

What is missing is how law operates as a practice. Law does not simply provide rules to be followed. Perhaps distinctively, law also sets the norms for discerning, interpreting, advocating, and debating the contents of those rules. It provides a set of spoken and unspoken ground rules that structure an ongoing claim and response over the applicable law. One party argues for one interpretation of the rules; another argues for a different one. The law frames which arguments are better or worse, which arguments will be convincing, and which will fail.

---

52. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 368–69 (1997) (examining the interplay between the ECJ and the ECHR).

53. See *id.* at 325–26 (suggesting that the ECJ and ECHR enhance each other's prestige by citing each other's decisions).

54. In fairness, Helfer & Slaughter, *see supra* note 52, were trying to understand the effectiveness of the ECJ and the ECHR, not the operation of international precedent, and their approach applied to the question here might actually yield similar answers as will be noted below. See *infra* note 77 and accompanying text.

If we really want to understand how and why the law develops as it does, we need accounts of this claim and response process, the communities of practitioners who bandy over the rules on a regular basis, and the ground rules these practitioners coalesce around. This is particularly true of precedent, which, as explained below, seems to have its greatest impact in legal argumentation.

Elsewhere, I have argued that thinking about international law as the product of specific communities of practice can help explain the philosophical, theoretical, and doctrinal differences developing between different areas of international law,<sup>55</sup> such as international human rights law,<sup>56</sup> international criminal law,<sup>57</sup> and international investment arbitration,<sup>58</sup> as well as the emergence of areas of transnational law almost completely divorced from state control like global administrative law.<sup>59</sup>

But imagining international law as a product of these communities of practice can also help unlock the mystery of precedent. Precedent is hard to understand as an objective fact disconnected from any particular group of actors. A prior decision by a particular legal body is a fact, but how much weight it should be given in future debates over a particular rule is dependent on how it is perceived by the actors reading it. Precedent is what Friedrich Kratochwil<sup>60</sup> and John Ruggie<sup>61</sup> have described as an “institutional fact.” Like a “hit” or a “strike” in baseball, precedent is only a fact within the particular rules of a particular institution or community.<sup>62</sup> Just as a student of baseball and a student of cricket will see two very different sets of facts in a group of people with bats and a ball on a field, so too will actors biased toward the authority of courts or the bindingness of precedent perceive the value of a tribunal decision differently than actors biased toward state consent, state prerogative, and pragmatism. Different international law regimes—international human rights law, international humanitarian law, international investment law, international environmental law, or international criminal law—may involve different mixes of actors—advocates, political leaders, diplomats, military personnel, scientists,

---

55. See generally Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049 (2012).

56. *Id.* at 1070–78.

57. *Id.* at 1078–84.

58. *Id.*

59. *Id.* at 1084–89.

60. See FRIEDRICH KRATOCHWIL, *RULES, NORMS AND DECISIONS* 25–28 (1989) (providing a detailed explanation of “institutional facts”).

61. John Gerard Ruggie, *Epistemology, Ontology, and Regimes, in CONSTRUCTING THE WORLD POLITY* 90–91 (1998) (discussing KRATOCHWIL, *supra* note 60).

62. See *id.* at 91 (quoting John Rawls, *Two Concepts of Justice*, 64 PHIL. REV. 3, 25 (1955)).

economists, international lawyers, and domestic lawyers. Each of these different actors will bring their own professional norms and biases to the debate, and different mixes of actors will agree on different norms and operating assumptions.<sup>63</sup> Understanding the relative weight that different decisions by different bodies seem to carry in different contexts requires understanding the communities of actors who might perceive them that way.

#### IV. PRECEDENT AS ARGUMENT

If we want to understand the weight of precedents within these communities of practice, one key group we need to understand is lawyers. Lawyers are members of each of these communities. In some areas, lawyers dominate the practice; in others, they might not. Do lawyers play a special role in precedent's force? Does the relative presence of lawyers in these areas impact the weight that certain decisions or interpretations will be given?

It is important here to think more clearly about what precedent is and what precedent does. What is precedent? Precedent might best be understood as the burden prior decisions about a particular rule put on future arguments about the content or meaning of the rule.<sup>64</sup> In its weakest form, precedent simply supplies an argument that one must respond to; one cannot make an argument about the rule's meaning without some reference to why the prior decision is right, wrong, or distinguishable.<sup>65</sup> In its strongest form, precedent creates a strong presumption that the prior interpretation of the rule is in fact the rule. The question we need to answer is not why actors follow or do not follow precedent, but instead why it places these burdens on arguments about the rule.

For lawyers, part of the answer seems to be internal to understandings of law and legal reasoning. There is a common intuition, reflected in many theories of law, that one of the core principles or qualities of law is that it treat like situations alike. Lon Fuller describes consistency as part of the internal morality of law,<sup>66</sup>

---

63. See, e.g., David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315, 318 (2013) (discussing how cultural differences between humanitarian lawyers and military lawyers might lead them to different interpretations of "the law of war").

64. See Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GER. L.J. 1005, 1019 (2011) (suggesting that prior decisions can be seen as creating argumentative burdens in similar situations going forward).

65. See *id.* ("[D]eliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce.")

66. See generally LON L. FULLER, *THE MORALITY OF LAW* (1964). See also Edwin W. Tucker, *The Morality of Law*, by Lon L. Fuller, 40 IND. L.J. 270, 274 (1965) (book review).

Ronald Dworkin's law as integrity denies the legitimacy of checkerboard laws that treat like cases differently,<sup>67</sup> and Tom Franck describes coherence and adherence as key factors in the perceived legitimacy of laws.<sup>68</sup> From this standpoint, precedent's pull can be seen as a direct articulation of rule-of-law norms. If like cases must be treated alike, future decisions must at least make reference to prior ones.<sup>69</sup> To ignore a prior decision entirely might violate basic tenets of legal professional ethics.<sup>70</sup>

The connection to rule-of-law principles gives lawyers strong normative reasons to give prior precedents at least some weight. This is true even if we remain agnostic as to whether these principles are, in Fuller's terms, part of an internal morality of the law.<sup>71</sup> Nor must we think that lawyers are particularly ethical and pulled toward precedent because they have internalized rule-of-law norms. These rule-of-law principles have been deeply embedded into the mythology of law, are reinforced in the training of lawyers, and are codified in both implicit and explicit codes of professional ethics. Lawyers may hew toward precedent simply as a matter of self-interest—a fear of professional consequences. Internalized professional ethics and fear of professional consequences are not mutually exclusive explanations; on the contrary, we should expect them to reinforce one another.

Sociological explanations reinforce these normative ones. Lawyers, as a professional group, have specific sources of political and social capital that they can use to maintain their importance and relevance in relation to other societal actors.<sup>72</sup> Among these sources of social and political capital is lawyers' purported expertise in interpreting and applying certain legal sources. This expertise includes, among other things, stylized forms of analogical reasoning.<sup>73</sup> Lawyers, seeking to maximize their own power and

---

67. RONALD DWORIN, *LAW'S EMPIRE* 176–224 (1986).

68. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988).

69. See Helfer & Slaughter, *supra* note 52, at 319–20 (“In a social or legal culture that venerates tradition for its own sake, consistency with earlier decisions provides an autonomous bulwark of legitimacy.”).

70. See Jacob, *supra* note 64 (“[D]eliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce.”).

71. See generally FULLER, *supra* note 66.

72. For a broader discussion of lawyers and their political and social capital, see generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1998).

73. See, e.g., Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 892 (2013) (“[A]nalogical reasoning is what judges and lawyers do every day.”); Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 270 (2001) (remarking that “lawyers and judges, [are] trained in analogical reasoning both in law schools and in practice”).

authority vis-à-vis other international actors, will want to emphasize the value of precedents and their unique ability to understand them.

In other words, lawyers at the U.S. Department of State or Department of Defense may argue that precedents need to be followed (a) because they believe that rule of law requires it, (b) because they fear formal or informal, professional or group sanction (i.e., shunning) if they fail to adhere to it, or (c) because arguing for precedent reinforces their authority within decision-making circles.<sup>74</sup> We do not need to choose between these reasons; they reinforce one another.

These normative and sociological explanations suggest that at least some decisions will carry a certain amount of weight among lawyers. Although they are too abstract to suggest exactly which ones, they may hint at some of the factors that might give some precedents greater pull than others. A broader account of these factors will have to wait for a (much) longer paper, but some initial thoughts follow.

Precedents may matter to traditional (nonlawyer) state actors but in specific ways. For traditional state actors, precedent places a burden on action to the extent it predicts how other states will react in the future. It reflects a prediction about state actions rather than about court or expert reasoning.<sup>75</sup> A coherent system of law is not nearly as important as a coherent account of state actions or preferences. This means, in turn, that the precedents that have authority—that carry weight—will be the ones that can best channel and articulate state preferences.<sup>76</sup>

An account of precedent as an outgrowth of legal professional reasoning suggests different sources of authority. If the weight of precedent results from a legal norm of consistent treatment, then those interpreters who can wield the strongest legal reasoning—who are most able to fit their decisions into a greater, more coherent picture of the law—will place more of a burden on future arguments than others whose decisions may be less reasoned or that may look like legal orphans, distinct from the broader legal corpus.

This is suggested by the literature on the effectiveness of judicial decision making. Larry Helfer and Anne-Marie Slaughter, for example, have suggested that some of the success of the ECHR and

---

74. Cf. Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, YALE J. INT'L L. 379–381 (forthcoming 2013) (discussing the importance of “who holds the pen” in executive branch legal decision making and how, depending on the question posed, certain actors may be given the upper hand).

75. See generally Guzman & Meyer, *supra* note 47 (reviewing the soft law effects of international tribunals).

76. This arguably tracks current debates over the relative weight that should be given to state practice versus reasoned elaboration. See Harlan Grant Cohen, *International Law's Erie Moment*, 34 MICH. J. INT'L L. 249, 280–91 (2013).

the ECJ is attributable to their tactical use and citation of precedent, both their own and that of other courts.<sup>77</sup> Even more suggestively, in a recent study of compliance with ECHR decisions, Erik Voeten found that decisions rendered by ECHR panels made up of a majority of professional judges were more likely to be complied with than decisions made by panels whose majorities hailed from other professions, such as diplomats or politicians.<sup>78</sup> Voeten suggests that this disparity might be explained by the relative importance of national judges as an audience for ECHR decisions and as compliance agents in enforcing those decisions at home.<sup>79</sup> He hypothesizes that national judges are more likely to be swayed by decisions that read like reasoned court opinions and that professional judges on the ECHR are more likely to write decisions that read that way.<sup>80</sup> This is suggestive of the argument so far that decisions that look more like judicial decisions (a) better match legal professional norms and (b) better mobilize a legal audience's political and social capital by elevating legal sources and legal reasoning over other considerations.<sup>81</sup>

This relationship between audience and authority is important because it suggests that judicialization and professionalization reinforce one another. The more courts, tribunals, and expert bodies in international law, the more legal specialists needed to respond to them; the more lawyers in the practice of international law, the more force the decisions of courts, tribunals, and expert bodies will have.

## V. LAWYERS AND NORMAL PEOPLE

So far, lawyers have been considered as a single monolithic group, separate from other potential actors. In reality, lawyers wear many different hats, and legal professional norms will only be one demand of them. Their memberships in other communities of actors may carry other obligations.<sup>82</sup> International lawyers, for example, act on behalf of

---

77. Helfer & Slaughter, *supra* note 52, at 319–20.

78. Erik Voeten, *Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights*, \*4–6 (Mar. 27, 2012) (unpublished working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2029786](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029786).

79. *See id.* (explaining that “national judges have an important discretionary role” in ECHR implementation).

80. *See id.* at \*22 (“To the extent that there is a transnational field of judicial professionals with shared ideas and practices about what constitutes legal justification, those with practice in this field may be more competent in writing judgments that meet the expectations of national judges.”).

81. *See supra* notes 71–76 and accompanying text.

82. *See generally* Luban, *supra* note 63 (comparing the culture and values of military lawyers to humanitarian lawyers); Cohen, *supra* note 9 (describing the various

the state in foreign ministries, defense ministries, and the military.<sup>83</sup> Moreover, different groups of lawyers—domestic criminal prosecutors and defense attorneys, commercial litigators, members of the U.S. Judge Advocate General's Corps—will have different operating norms.<sup>84</sup> Building on the work of Pierre Bourdieu,<sup>85</sup> a series of scholars—including Bryant Garth, Yves Dezalay, and Mikael Rask Madsen<sup>86</sup>—have begun to study the sociology of specific groups of lawyers operating in different fields and in different countries, examining their training, their culture, and the social and political capital they wield in particular political systems. International law scholars have barely begun to plumb this work, let alone embark on it themselves. Lawyers are only one type of actor within communities of practice. The specific norms lawyers as a group bring to the table must be studied as one piece in a larger mosaic.

Future work might ask, for example, how lawyers interact with other actors in specific communities of practice to develop the norms of authority in each—human rights, criminal law, trade, or investment. The different mix of actors, and the prevalence of lawyers as a group within each community,<sup>87</sup> should make a difference; it should change the mix of factors that will be considered in assessing the law.

Or, future work might explore what happens when preexisting communities overlap, bringing different community norms into dialogue or conflict. Some have argued that this is currently taking place in international investment arbitration where the professional

---

community memberships of the lawyers in the Israeli Defense Forces' International Law Department).

83. See Schacter, *supra* note 10, at 217–18 (describing how the invisible college of international lawyers extends into various governmental capacities).

84. See generally Luban, *supra* note 63 (looking at the values of military lawyers); Cohen, *supra* note 9 (describing the various community memberships of the lawyers in the Israeli Defense Forces' International Law Department); DEZALAY & GARTH, *supra* note 72 (exploring the evolution of the values of commercial arbitrators from various countries).

85. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

86. See DEZALAY & GARTH, *supra* note 72, at 18–63 (looking at the sociology of commercial arbitrators); see also Yves Dezalay & Mikael Rask Madsen, *The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law*, 8 ANN. REV. L. & SOC. SCI. 433 (2012) (discussing Bourdieu's model and the sociology of law); YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS* (2010) (discussing the role of law and lawyers in Asia); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002); *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (Yves Dezalay & Bryant G. Garth eds., 2002) (cataloguing various tools to understand the exportation of U.S.-oriented "rule of law").

87. This includes whether the principal legal actors are lawyer statesmen like Elihu Root or broad cadres of professional lawyers.



biases of commercial arbitration lawyers, international lawyers, and domestic constitutional lawyers seem to be pulling in different directions.<sup>88</sup> A similar phenomenon may explain debates over rules regarding the use of force against non-state actors.<sup>89</sup> Human rights lawyers with a bias toward judicial opinions and teleological interpretations are increasingly in conflict with traditional state and military actors who continue to look to state practice as the primary interpretive guide.<sup>90</sup>

Finally, we might study how lawyers, as citizens of multiple communities of practice, may act as conduits for normativity between them, bringing precedents from human rights to bear on investment arbitration or the law of war. In these pictures, the lawyer is key as both a state and non-state actor, maneuvering between the demands of citizenship in professional communities, communities of practice, and states.<sup>91</sup>

---

88. See generally Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013) (describing the conflicting analogies different groups of lawyers apply to investor-state arbitration).

89. See Cohen, *supra* note 76, at 288–91 (discussing scholars differing views on the right to use force in self-defense against a non-state actor in another sovereign country).

90. See *id.* at 253 (examining disputes over whether gaps in international law should be settled by state practice or international tribunals).

91. As Schacter writes, “Individuals who move from one role to another are unlikely to remain uninfluenced by the ideas and considerations which impinge on them in their different capacities. The mingling of the scholarly and the official affects both categories, and often creates tension as individuals move from one role to another or perceive themselves as acting in the dual capacity of objective scientist and government advocate.” Schacter, *supra* note 10, at 218.