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Judicial Globalization

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“Globalization” summons images more of corporations than courts. The compression of distance and the dissolution of borders that drives globalization has proved far more efficient at producing global markets than global justice. Computers may transcend culture and a new generation of migrants may weave together a global society, but law – particularly the law handed down by judges – still seems inherently national. Yet, notwithstanding this perception, judges are globalizing as well, in ways that have important implications for foreign, comparative, and international law.

The existing literature on the role of national courts in an emerging global legal system typically focuses on the ways in which these relationships enhance the salience and impact of international law. National courts are the vehicles through which international treaties and customary law that have not been independently incorporated into domestic statutes enter domestic legal systems.¹ As such, they have long been a source of hope for inter-

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1. See, e.g., John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373, 383 (Thomas M. Franck & Gregory H. Fox eds., 1996). This important study of the “[s]ynergy [b]etween [n]ational and [I]nternational [j]udiciaries” emphasizes above all the joint role that national and international courts play in monitoring and implementing international law rules. *Id.* at 3. This role is particularly important as a check on the delegitimization of international legal rules that are not enforced.

national lawyers: a 1993 resolution by the French Institute of International Law calls upon national courts to become independent actors in the international arena, and to apply international norms impartially, without deferring to their governments.²

Judicial globalization, by contrast, describes a much more diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law. This essay sets forth five different categories of judicial interaction: relations between national courts and the European Court of Justice (ECJ) in the European Union (EU); interactions between the European Court of Human Rights and national courts; the emergence of "judicial comity" in transnational litigation; constitutional cross-fertilization; and face-to-face meetings among judges around the world. The contexts are very different, involving both "vertical" relations between national and international tribunals and "horizontal" relations across national borders. The factors driving these forms of interaction also vary widely, including a structural provision in an international treaty, the globalization of commerce, and the need for judicial training in many fledgling democracies.

The activities of the many different types of courts involved in this process do not conform to a template of an emerging global legal system in which national and international tribunals play defined and coordinated roles. But all are examples of judges looking, talking, and sometimes acting beyond the confines of national legal systems, responding to the myriad forces of globalization. All are also contingent on a deep sense of participation in a common global enterprise of judging, an awareness that provides a foundation for a global community of law.

I. THE ROLE OF NATIONAL COURTS IN THE CONSTRUCTION OF THE EUROPEAN COMMUNITY LEGAL SYSTEM

The legal system of the European Community, now the European Union, was built through the decisions of lower national courts to send cases up to the European Court of Justice (ECJ). The ECJ was regarded not as a Supreme Court, but as a supranational court, often against the wishes of higher national courts and

2. For a discussion of this resolution, see generally Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on the 'Activities of National Courts and the International Relations of their States'*, 5 EUR. J. INT'L L. 423 (1994).

the Executive.³ The ECJ in turn, took the opportunity to lay the foundation of what it originally called “a new legal order,” in which the Treaty of Rome and much legislation passed in Brussels was “directly effective” (“self-executing” in U.S. terms) and thus able to be invoked by individuals in national courts.⁴ The result was to empower individual litigants and lower national courts to hold governments (executive and legislatures) to their international commitments.

Higher national courts, particularly constitutional courts, ultimately realized that their power was being eroded and fought back; the result is what the German Constitutional Court has called a “cooperative relationship” between the ECJ and national high courts. This is a relationship defined court-to-court and based explicitly on respective competencies of both entities in domestic and European law. It is the basis for a European “community of law.”

A new generation of scholarship has focused on the motives driving national courts to ally themselves with the ECJ, noting substantial variation in the willingness both of different courts within the same country and of courts in different countries to send references to the ECJ and to abide by the resulting judgments. What is most striking about these findings is the extent to which specific national courts acted independently not only of other national courts, but also of the executive and legislative branches of their respective governments.⁵ For example, a lower

3. For classic accounts of the construction of the EC legal system, often referred to as the “constitutionalization” of the Treaty of Rome, see Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). For accounts from ECJ judges themselves, see generally Ulrich Everling, *The Member States of the European Community Before Their Court of Justice*, 9 EUR. L. REV. 215 (1984); Thijmen Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493 (1991); and G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989).

4. See Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (allowing a private Dutch importer to invoke certain common market provisions of the Treaty of Rome directly against the Dutch government); see also Case 6/64, *Costa v. Ente Nazionale per L’Energia Elettrica (ENEL)*, 1964 E.C.R. 585 (asserting that where a treaty term conflicts with a subsequent national statute, the treaty must prevail). For a discussion of “direct effect” jurisprudence, see GEORGE BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 166-203 (1993).

5. This view is not uncontroverted. Some political scientists have argued that these national courts were in fact following the wishes of their respective governments, notwithstanding their governments’ expressed opposition before the ECJ. The claim is that all

German financial court insisted on following an ECJ judgment in the face of strong opposition not only from a higher financial court but also from the German government.⁶ The French Court of Cassation accepted the supremacy of EC law, following the dictate of the ECJ, even in the face of threats from the French legislature to strip its jurisdiction amid age-old charges of “gouvernement par juges.”⁷ British courts overturned the sacrosanct doctrine of parliamentary sovereignty and issued an injunction blocking the effect of a British law pending judicial review at the European level.⁸

Community member states agreed to economic integration as being in their best interests in 1959. They understood, however, that they needed a mechanism to bind one another to the obligations undertaken in the original treaty. They thus established a court to hold each state to its respective word. See Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533, 553-59 (1992); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests and Institutions: Constructing the European Community's Internal Market*, in IDEAS & FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE 173, 197-98 (Judith Goldstein & Robert O. Keohane, eds., 1993); see generally Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) (analyzing strategic interactions between the European Court of Justice and the European Union member governments).

This rationalist reconstruction ignores the apparent intent of the member states to establish a court whose judgments they could all too easily prevent or avoid; it also flies in the face of the actual history recounted above. For a debate on precisely this point, see generally Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995); Walter Mattli & Anne-Marie Slaughter, *Law and Politics in the European Union: A Reply to Garrett*, 49 INT'L ORG. 183 (1995).

6. Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 134-35 (1998); see also Karen J. Alter, *The Making of a Rule of Law: The European Court and the National Judiciaries* 132-33 (1996) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology, forthcoming 2000 as book, KAREN ALTER, *THE MAKING OF A SUPRANATIONAL RULE OF LAW IN EUROPE: THE EUROPEAN COURT OF JUSTICE AND THE NATIONAL JUDICIARIES*) (on file with author).

7. See Jens Plötner, *Report on France*, in THE EUROPEAN COURTS AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 41, 44-45, 61-75 (Anne-Marie Slaughter et al. eds., 1998) [hereinafter THE EUROPEAN COURTS AND NATIONAL COURTS] (noting that the Cour de Cassation was the first of France's three supreme courts to respond substantially to the ECJ's fundamental jurisprudence); see also Alter, *supra* note 6, at 229-30.

8. Case 213/89, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.* [1990] 3 C.M.L.R. 867 (ECJ preliminary ruling that the British courts could grant interim relief to the applicants by setting aside the national law forbidding such relief); *Regina v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991], 1 App. Cas. 603 (House of Lords decision awarding interim relief against the Crown). For a full discussion of these decisions and their implications, see P. P. Craig, *Report on the United Kingdom*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 195, 200-03 (citing dicta of the House of Lords that clearly curtails parliamentary sovereignty by stating that it is the duty of courts to resolve conflicts in favor of EC law over national law).

Such judicial action might be unremarkable in the domestic context. However, particularly in the early days of the construction of the European Community, steps toward further integrating the Treaty of Rome were considered foreign policy decisions to be made by the executive on the basis of calculations of relative advantage and disadvantage among competing member states. How then to explain why national courts did not line up behind the executive and await instructions? The motives of these various national courts were multiple: a desire for “empowerment”;⁹ competition with other courts for relative prestige and power;¹⁰ a particular view of the law that could be achieved by following EC precedents over national precedent¹¹; or the desire to advantage or at least not to disadvantage a particular constituency of litigants.¹²

For many, the experience of national courts in the European Union is likely to be discounted either as a *sui generis* phenomenon or as more analogous to the experience of state courts the early decades of the United States than of contemporary courts worldwide. It is certainly possible, of course, that the European Union is an emerging federal state, but federalism is still hotly debated among member governments. More important for the argument advanced here, a federalist vision of the Union has been rejected by leading national courts, who see themselves as still interacting with a supranational rather than a federal tribunal.

The German Federal Constitutional Court (*Bundesverfassungsgericht*, or BvG) in particular has a long history of engaging and challenging the ECJ as a co-equal rather than a superior court.¹³ In its decision in *Brunner v. The European Union Treaty*¹⁴

9. Joseph Weiler was among the first to claim that national judges were motivated by dreams of “judicial empowerment,” by which he seems to have meant the heady experience of engaging in judicial review of national law for conformity with European law. See Weiler, *supra* note 3 at 2426; see also Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41, 63-64 (1993).

10. Karen Alter has pioneered this thesis in several important articles and a forthcoming book. See generally Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 227-52.

11. See generally Walter Mattli & Anne-Marie Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 253-76.

12. See Plötner, *supra* note 7, at 61 (arguing that the Cour de Cassation accepted the supremacy of EC law out of a desire to not disadvantage French merchants who were a prime constituency).

13. For a concise but thorough account of the principal cases in this dialogue, see generally Juliane Kokott, *Report on Germany*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 77-131.

– a case that challenged the constitutionality of the Maastricht Treaty – the BvG explicitly proposed a “relationship of cooperation” with the ECJ, by which the BvG would establish a threshold of constitutional guarantees and the ECJ would adjudicate the application of these and additional guarantees on a case by case basis.¹⁵ Within this relationship, both courts are to ensure that both Community law and national law are properly respected by the government institutions most directly within their jurisdiction and to acknowledge their “mutual influence” on one another.¹⁶

The BvG has been the most outspoken and perhaps the most assertive in its relations with the ECJ. But it is not alone, garnering support from the Italian and Belgian high courts in more subtle guises.¹⁷ The tug of war between the ECJ and all national courts, both high and low, will continue, even as their relations and their jurisprudence become increasingly intertwined. However, just as the BvG declared the European Union to be not a “confederation” but a “community of states,”¹⁸ so too is its legal system best characterized as a community of courts. Within this community, each court is a check on the other, but not a decisive one, asserting their respective claims through dialogue of incremental decisions signaling opposition or cooperation. It is a dialogue of constitutionalism within a national-supranational framework that is potentially adoptable and adaptable by courts around the world.¹⁹

14. Brunner v. European Union Treaty, 1 C.M.L.R. 57 (1994) (F.R.G.).

15. 1 C.M.L.R. at 79. The BvG also continues to recognize the ECJ's exclusive competence as interpreter of European law in the sense that the BvG will not offer an alternative interpretation of a particular legal provision, but will only decide whether that provision as interpreted is *ultra vires*. The recognition of the ECJ's interpretive competence was laid down in the BvG's *Vielleicht-Beschluß* (“Maybe” decision) of 1979. 52 BVerfG 187 (1979).

16. Kokott, *supra* note 13, at 109.

17. See, e.g., Joseph H.H. Weiler, *Epilogue: The European Courts of Justice: Beyond ‘Beyond Doctrine’ or the Legitimacy Crisis of European Constitutionalism*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 365, 367.

18. The Maastricht decision uses the term, “staatenverbund” (community of states) to describe the EU rather than “staatenbund” (confederation). Brunner, 1 C.M.L.R. at paras. 36-38.

19. See Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in THE EUROPEAN COURTS AND NATIONAL COURTS, *supra* note 7, at 305, 305-08; Weiler, *supra* note 17, at 368 (“Constitutionalism . . . constitutes the official vocabulary of the inter-court dialogues . . .”).

II. TOWARD A GLOBAL COMMUNITY OF HUMAN RIGHTS LAW

The second example of judicial globalization also begins in Europe, with the European Court of Human Rights (ECHR).²⁰ The European Convention on Human Rights sets forth a substantive catalogue of human rights and creates an intricate enforcement mechanism to permit individuals and groups to file complaints against their national governments. Although the treaty does not compel State parties to recognize this right of petition and the compulsory jurisdiction of the ECHR, in practice all of the treaty's signatories have filed permanent or renewable declarations accepting both of these obligations.²¹ Like the ECJ, the ECHR has succeeded in transforming a empty docket into a teeming one. It has declared its principal text, the European Convention, a "constitutional instrument of European public order in the field of human rights"²² and has successfully established itself as the exclusive interpreter of the Convention's provisions. And it has begun to see its rulings change the shape of domestic law, through legislative revision and administrative decree as well as judicial decision.²³ In particular, it has had an impact on national courts, to the point that some commentators claim that Europe is "witnessing the beginning of a true dialogue between the [ECHR] and national jurisdictions"²⁴

Beyond Europe, the ECHR has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority, either because its role as interpreter of the European Convention has not been recognized

20. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

21. The European Convention on Human Rights codifies a basic catalogue of civil and political rights and confirms the desire of its signatories to achieve "a common understanding and observance" of those rights. *Id.* at 222. Although originally ratified principally by the nations of Western Europe, as of August 10, 2000, more than 40 nations from Iceland to Russia have signed on to the treaty and one or more of its various protocols. See Council of Europe Treaty Office, *Member States of the Council of Europe* (visited Aug. 10, 2000) <<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>> (noting that the total number of ratifications/accessions totaling 41 as of Aug. 10, 2000).

22. *Chrysostomos v. Turkey*, App. No. 15299/89, 68 Eur. Comm'n H.R. Dec & Rep. 216, 242 (1991).

23. See generally J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 12-18 (2d ed. 1993); Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INTL. L. 217, 218 (1993).

24. Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect Is Given to the Convention*, 12 HUM. RTS. L.J. 65, 66 (1991).

as a matter of domestic law, or, much more strikingly, because the national court's state is not a party to the European Convention in the first place. The South African Supreme Court cited ECHR decisions in a landmark decision finding the death penalty unconstitutional under the South African constitution.²⁵ The Supreme Court of Zimbabwe similarly cited ECHR decisions to support its determination that corporal punishment of an adult constitutes cruel and unusual punishment and that corporal punishment of a juvenile is unconstitutional.²⁶ The British Privy Council, sitting as the Constitutional Court of Jamaica, relied on the ECHR's decision in *Soering v. United Kingdom* (as well as a decision by the U.N. Human Rights Committee) to commute a Jamaican death penalty to life in prison.²⁷ Professor Merrills has also documented numerous instances in which the reasoning and interpretative methodologies first developed by the ECHR were later accepted by the Inter-American Court of Human Rights and the U.N. Human Rights Committee.²⁸ Reviewing these cases, one commentator has described the ECHR as a "sort of world court of human rights," whose judgments are increasingly quoted by national courts and accepted by them.²⁹

25. *State v. Makwanyane*, 1995 SACLX 218, at *1 (CC June 6, 1995).

26. See, e.g., *Ncube v. State*, 1988 (2) SA 702 (citing *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978)); *Juvenile v. State*, Judgment No. 64/89, Crim. App. No. 156/88 (Zimb. 1989) (citing both *Tyrer v. United Kingdom* and *Campbell & Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1982)); see also Hurst Hannum, *Recent Case*, 84 AM. J. INT'L L. 768 (1990) (analyzing *Juvenile v. State*).

27. *Pratt v. Attorney General for Jamaica*, 4 All E.R. 769 (P.C. 1993) (en banc). For a discussion of the case, see Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT 688, 689-95 (1995). In *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), the ECHR held that extradition of a prisoner held in Great Britain to a state in the United States where he might face the death penalty violated Art. 3 of the European Convention.

28. MERRILLS, *supra* note 23, at 18.

29. John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 1, at 373, 383. Supranational human rights tribunals outside Europe are also beginning to develop an audience among national courts, but more slowly. In 1992, the Supreme Court of Argentina reversed a lower court decision as well as its own precedent in reliance on an advisory opinion of the Inter-American Human Rights Court. *Ekmekdjian v. Sofovich*, [1992-III] J.A. 199 (plaintiff claimed that he was unlawfully denied the right to reply to a television program alleged to be morally offensive and damaging to him). For a discussion of the case, see Holly Dawn Jarmul, *Effects of Decisions of Regional Human Rights Tribunals on National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 1, at 247, 258-59.

What is striking, of course, is that the ECHR has no formal authority over any courts outside Europe. Its decisions have only persuasive authority; weight is accorded to them out of respect for their legitimacy, care, and quality by judges worldwide engaged in a common enterprise of protecting human rights. Commentators have adduced various explanations for this phenomenon, including the dictates of domestic or international law,³⁰ the increased publication and hence availability of human rights decisions,³¹ and a growing sense that other countries are taking these treaties seriously, a sense enhanced by the explicitly universal rhetoric surrounding human rights law.³²

These factors may well encourage a particular awareness of the presence of international tribunals and a willingness to consult their decisions as persuasive authority in the human rights field. Courts may also feel a particular common bond with one another in adjudicating human rights cases because such cases engage a core judicial function in many countries around the world. They ask courts to protect individuals against abuses of state power, requiring them to determine the appropriate level of protection in light of a complex matrix of historical, cultural, and political needs and expectations. Actual decisions must be highly individualized.³³

30. The South African constitution, for instance, requires that South African courts "must consider international law" when interpreting South Africa's Bill of Rights. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Ch. III §35(1). Many of the new or revised constitutions of the emerging democracies in Eastern and Central Europe also incorporate international law into domestic legal rules. See Vladlen S. Vereschetin, *New Constitutions and the Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT'L L. 29, 40-41 (1996). Similarly, Justice Kirby of the Australian Supreme Court notes that in many common law countries, domestic courts have historically referred to international treaties ratified by their country as a source of guidance in constitutional and statutory construction and in the development of common law principles. M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514, 515 (1988).

Note, however, that such requirements do not require a national court to look to the decisions of other courts for guidance; they could equally well interpret the relevant treaties themselves. Kirby notes that the invocation of international treaties by common law courts has been "politically controversial," but cites "the development of an increasingly large jurisprudence around such treaties" as one of the factors that will make it difficult for judges and lawyers to ignore them. *Id.* at 515-16.

31. Eyal Benvenisti, *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28 ISRAEL L. REV. 136, 147-48, 151-53 (1994).

32. Buergenthal, *supra* note 27, at 700; Kirby, *supra* note 30, at 515.

33. The South African Constitutional Court clearly recognized this point. While acknowledging the value of comparative law approaches, the Court added the following caveat: "[W]e must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circum-

But in the process of sifting and balancing rights, powers, and privileges, as the South African court acknowledged, courts can “derive assistance from public international law and foreign case law,” even while they “are in no way bound to follow it.”³⁴ In this context, it is not surprising that the other area of law to witness substantial and growing judicial cross-fertilization is national constitutional law, a phenomenon described further below.

III. TRANSNATIONAL JUDICIAL COOPERATION: THE EMERGENCE OF “JUDICIAL COMITY”

The first two examples of judicial globalization were examples of “vertical” relations between national courts and supranational courts. The next two are of “horizontal” relations between national courts interacting across borders. The first is judicial cooperation in resolving transnational disputes, specifically the emergence of “judicial comity.” The second is the cross-fertilization of national judicial decisions, particularly among constitutional courts.

The global economy creates increasingly global litigation. When products can have their components manufactured in three different countries, be assembled in a fourth, and be marketed and distributed in five or six others, the number of potential fora for resolving disputes multiplies rapidly, leading litigants to battle as fiercely over jurisdiction and choice of forum as over the merits. Such battles have long been the stuff of private international law; they have also fueled the growth of international commercial arbitration. And courts are increasingly aware of their responsibilities to “promote predictability and stability through satisfaction of mutual expectations,” in the words of the D.C. Circuit.³⁵

What is new is the rise of a distinct and meaningful concept of “judicial comity,” deference not to foreign law or foreign national interests, but specifically to foreign courts.³⁶ This emerging doc-

stances, and the structure and language of our own Constitution.” *State v. Makwanyane*, 1995 SACL R LEXIS 218, at *1, *76-77 (CC June 6, 1995).

34. *Id.*

35. *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937-38 (D.C. Cir. 1984).

36. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (distinguishing “judicial comity” from “prescriptive comity”). As authority for this distinction, Justice Scalia turned to Joseph Story’s *COMMENTARIES ON THE CONFLICT OF LAWS*. Story did distinguish between “the comity of the courts” and “the comity of the nation,” emphasizing that courts did not defer to foreign law as a matter of judicial courtesy, but rather based on an interpretive principle requiring courts to read legislative silence regarding the effect of foreign law as tacit adoption of such law unless repugnant to

trine has four strands. First is a respect for foreign courts *qua* courts, rather than simply as the face of a foreign government, and hence for their ability to resolve disputes and interpret and apply the law honestly and competently.³⁷ Second is the corollary recognition that courts in different nations are entitled to their fair share of disputes – both as co-equals in the global task of judging and as the instruments of a strong “local interest in having localized controversies decided at home.”³⁸ Third is a distinctive emphasis on individual rights and the judicial role in protecting them.³⁹

A fourth and final strand of judicial comity involves recognition of a kind of legal globalization that is both cause and consequence of economic globalization. The question facing judges around the world, in the words of Judge, now Justice, Stephen Breyer, is how to “help the world’s legal systems work together, in harmony, rather than at cross purposes.”⁴⁰ Similarly, Judge Calabresi of the Second Circuit, interpreted a U.S. discovery statute as follows: the U.S. statute “contemplates international cooperation, and such cooperation presupposes an ongoing dialogue between the adjudicative bodies of the world community”⁴¹

fundamental public policy. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (1872). Taken in context, however, Story does not appear to be distinguishing between different types of comity, so much as he is insisting that the principle of comity is not a judicial creation but rather a corollary of a general legal principle embedded in international and U.S. law. For a more detailed discussion of judicial comity than space allows here, see generally Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT’L L. 703 (1998).

37. *Roby v. Corporation of Lloyd’s*, 996 F.2d 1353, 1363 (2d Cir. 1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (noting “international comity dictates that American courts enforce [forum selection clauses] out of respect for the integrity and competence of foreign tribunals”)).

38. *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501, 509 (1947) (applying the *forum non conveniens* doctrine to dismiss a New York case in favor of a Virginia forum); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (dismissing a case brought in the United States in favor of a Scottish forum).

39. In the *Laker Airways* litigation, a complex series of cases involving parallel proceedings between the United States and Great Britain and efforts by litigants on both sides to block the suit in the other forum, Lord Scarman argued that individuals have a right to pursue causes of action under foreign law because they have a right to pursue “the process of justice.” *British Airways Board v. Laker Airways Ltd.*, 1 App. Cas. 58 (H.L. 1984)

40. *Howe v. Goldcorp Investments Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991).

41. In the *Matter of the Application of Euromepa, S.A.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

What a *vision*. "Dialogue between the adjudicative bodies of the world community." Not U.S. courts, French courts, German courts, Japanese courts, and associated international tribunals, but simply adjudicative entities engaging in resolving disputes, interpreting and applying the law as best they can. It is a vision of a global community of law, established not by the World Court in The Hague, but by national courts working together around the world. It is also a vision of a shift from deference to dialogue, from passive acceptance to active interaction, from negative comity to positive comity.⁴²

This dialogue can be very direct. In bankruptcy law, for instance, judges increasingly communicate directly with one another with or without an international treaty or guidelines to ensure a cooperative and efficient distribution of assets. When Maxwell Communication Corporation, an English holding company with more than four hundred subsidiaries worldwide, began to falter, it filed for Chapter 11 bankruptcy in the Southern District of New York and entered insolvency proceedings in the United Kingdom simultaneously.⁴³ To determine what laws and procedures to apply in the reorganization, judges in both countries appointed administrators or liquidators, who engaged in extensive discussions and ultimately reached an agreement setting forth procedures and assigning responsibility for the liquidation. This "mini-treaty" was then memorialized by an "Order and Protocol" approved and adopted by the two courts within two weeks of each other.⁴⁴ Other areas of law, like antitrust, securities, and even criminal law are likely to follow.

It should not be supposed, however, that transjudicial relations are always so smooth and solicitous. In the same case in which

42. "Positive comity" is a concept developed by antitrust regulators in the U.S. and the EU. It imposes a requirement on national authorities not simply to defer to the regulatory investigations of the other side, but also to notify the other side of allegedly anticompetitive activity within its jurisdiction and give it the opportunity to take action itself. See Charles S. Stark, *International Antitrust Cooperation in NAFTA: The International Antitrust Assistance Act of 1994*, 4 U.S.-MEX. L.J. 169, 171-72 (1996) (discussing developments in U.S.-Canada antitrust cooperation stemming from the Fulton-Rogers understanding); see also generally Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAW. 117 (1995).

43. *In re Maxwell Communication Corp. v. Barclays Bank*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

44. Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037 (1997); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991).

Judge Calabresi wrote so glowingly of judicial dialogue, the dissenting member of the panel accused him of blatant interference with the French legal system.⁴⁵ In another example, a U.S. judge and a Hong Kong judge squared off over an insider trading case. Judge Owen of the Southern District of New York refused to defer jurisdiction to the Hong Kong court, declaring: "I am not going to do this. I'm an American judge and this is an American agency and I will keep jurisdiction and I will direct payment into court."⁴⁶ In setting forth his reasoning, Judge Owen paraphrased the defendant's justification for litigating in Hong Kong in provocative terms: "[O]ut here in Hong Kong they practically give you a medal for doing this kind of thing."⁴⁷ Judge Cruden in Hong Kong subsequently countered: "[T]his court will always take whatever effective steps are legally available to it under Hong Kong law, to deal with illegal or morally reprehensible commercial conduct Where a conflict of laws situation does arise . . . the dispute should be approached in a spirit of judicial comity rather than judicial competitiveness."⁴⁸

The combination of active collaboration and vigorous conflict is likely to mark the next phase of judicial globalization: a move from comity among what Justice Breyer called the "world's legal systems," in which judges view one another as operating in equal but distinct legal spheres, to the presumption of an integrated global legal system. This presumption, in turn, rests on a conception of a single global economy in which borders are increasingly irrelevant and an accompanying legal system in which litigants can choose among multiple fora to resolve a dispute, but each of those fora has an equal interest in seeing the dispute resolved. Paradoxically, however, whereas a presumption of a world of separate sovereigns mandates courtesy and periodic deference between them, the presumption of an integrated system takes mutual respect for granted and focuses instead on how well that system works. It is a shift that is likely to result in more dialogue but *less* deference.

45. *In the Matter of the Application of Euromepa, S.A.*, 51 F.3d at 1104.

46. *Nanus Asia Co. v. Standard Charter Bank*, 1988 H.K.C. Lexis 410, at *1, *8 (High Ct. Sept. 22, 1988).

47. *Id.* at *31.

48. *Id.* at *30.

IV. CONSTITUTIONAL CROSS-FERTILIZATION

The South African death penalty decision discussed in Part II is a paradigm for another mode of transjudicial interaction: cross-fertilization of decisions, particularly among constitutional courts. The South African Court looked not only to decisions of supranational tribunals such as the ECHR, but also to decisions of its fellow constitutional courts around the world: the U.S. Supreme Court, the Canadian Constitutional Court, the German Constitutional Court, the Indian Supreme Court, the Hungarian Constitutional Court and the Tanzanian Court of Appeal.⁴⁹ It also took note of decisions from two state courts in the United States, California and Massachusetts.⁵⁰ Such cross-citation is the most informal level of transnational judicial contact. While opinions rendered by the courts of other national legal systems are never binding, national constitutional courts turn to foreign decisions for different perspectives on similar issues.

Legal cross-fertilization generally is also not new, particularly among imperial powers and their colonies.⁵¹ There has long been such fertilization in the Commonwealth.⁵² Plenty of evidence can be also found in 19th century U.S. and federal reports. In this century, the traffic has largely flowed in the other direction; since 1945 recent constitutional courts around the world, frequently established either by the United States or on the model of the U.S. Supreme Court, have borrowed heavily from U.S. Supreme Court jurisprudence.⁵³

49. *State v. Makwanyane*, 1995 SACL R LEXIS 218, at *1, *33-41 (CC June 6, 1995).

50. *Id.*

51. To take the most obvious example, the architects of the United States Constitution were steeped in the principles of the common law and in the political theories of the Age of Enlightenment. The legal ideas expounded in the Constitution in turn influenced the framing of the French Declaration of the Rights of Man and of the Citizen and in turn spread to other continents through imperial rule. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988). On the reception and internalization of foreign law generally, see H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 296 (1987).

52. David McClean, *A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth*, in RECUEIL DES COURS 1996: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 19-98 (1997).

53. This phenomenon is well documented. See generally Lester, *supra* note 51, at 541; Helmut Coing, *Europaisierung der Rechtswissenschaft*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 937 (1990); Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 407 (Louis Henkin & Albert J. Rosenthal eds., 1989); Bruce Ackerman, *The Rise of World Constitutionalism*, 83

As a more general phenomenon, however, judicial cross-fertilization appears to be increasing in the 1990s. According to Sujit Choudhry, “[e]xtensive and detailed treatments of foreign materials have become familiar features of constitutional adjudication in many courts outside the United States.”⁵⁴ Apparent catalysts include the end of the Cold War and the emergence of many fledgling democracies with new constitutional courts seeking to emulate their more established counterparts. A flood of foundation and government funding for judicial seminars, training programs, and educational materials under the banner of “rule of law” programs has significantly expanded the opportunities for cross-fertilization. Equally important, however, is a growing sense of participation in a common enterprise, backed up by the growing opportunities for face-to-face meetings among judges described below.

Many judges themselves seem quite aware of this trend and are willing to speculate on its causes. In 1993, the British House of Lords upheld a ruling of the British Court of Appeals barring a libel suit on the ground that a local authority cannot sue for libel.⁵⁵ As the Lords noted, the Court of Appeal had considered American jurisprudence on the point and found that while it pertained most directly to provisions of the U.S. Constitution, the underlying public policy considerations of free speech and uninhibited public interaction were no less valid in the U.K.⁵⁶ More generally, according to one British scholar, “[s]everal senior members of the British judiciary” have recently suggested that they are “increasingly prepared to accord persuasive authority to the constitutional values of other democratic nations when dealing with ambiguous statutory or common law provisions which impact upon civil liberties issues.”⁵⁷

Even the United States Supreme Court, regarded by many foreign judges and lawyers as resolutely parochial in its refusal to

VA. L. REV. 771 (1997); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158 (1991).

54. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 819 (1999).

55. *Derbyshire County Council v. Times Newspapers Ltd.*, 1 Q.B. 770 (1992); see also *Derbyshire County Council v. Times Newspapers Ltd.*, ___ C.A. 534 (1993).

56. *Derbyshire County Council v. Times Newspapers Ltd.*, reported in BULLETIN OF LEGAL DEVELOPMENTS, Mar. 5, 1993 at 40.

57. Ian Loveland, *The Criminalization of Racist Violence*, in A SPECIAL RELATIONSHIP? AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 253, 257 (Ian Loveland, ed. 1995) (citing comments by Lord Browne-Wilkinson).

look either to international or foreign law, has begun to stir. Justice Scalia took a strong stand on this issue in 1988. When confronted with evidence of how other countries view the death penalty, he wrote: “[w]e must never forget that it is a Constitution for the United States that we are expounding.”⁵⁸ But now he has been answered. Justice Breyer recently noted in a dissent, that the experience of foreign courts and legal systems “may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”⁵⁹ And in a 1997 case brought by several Members of Congress challenging the line item veto, Chief Justice Rehnquist pointed out that “[t]here would be nothing irrational about a system which granted standing [to legislators] in these cases; some European constitutional courts operate under one or another variant of such a regime But it is obviously not the regime that has obtained under our Constitution to date.”⁶⁰

This debate is ongoing. In November 1999, the Court denied cert to a petition submitted by two prisoners, both of whom had been on death row for more than twenty years. In a concurring opinion, Justice Thomas noted that there was nothing in the American constitutional tradition or in the Court’s jurisprudence that supports the “proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”⁶¹ In dissent, Justice Breyer responded that the jurisprudence both in the United States and in a growing number of foreign countries suggests that lengthy delays in administering the death penalty undermine its basic purposes of retribution and deterrence, and render the ultimate execution inhuman, degrading or unusually cruel. He noted further that although the views of the foreign authorities are not binding, the “[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”⁶²

Off the bench, Justice Sandra Day O’Connor has been exhorting U.S. lawyers around the country to pay more attention to foreign

58. *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988).

59. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J. dissenting). Writing for the majority in the *Printz* case, Justice Scalia again rejected Justice Breyer’s invitation to comparative analysis with the assertion that “such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.” *Id.* at 921 n.11.

60. *Raines v. Byrd*, 521 U.S. 811, 828 (1997).

61. *Knight v. Florida*, 120 S. Ct. 459, 459 (1999).

62. *Id.* at 464.

law.⁶³ Following a day-long exchange of views with ECJ members and the opportunity to attend a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions "and perhaps use them and cite them in future decisions."⁶⁴ She has been equally vocal on the need for U.S. judges to look beyond their own jurisdictions to both foreign and international law, not only for comparative purposes but also to facilitate the flow of international commerce. At the 41st Congress of the Union Internationale des Advocates in September 1997, Justice O'Connor lamented the fact that lawyers and judges in America and elsewhere tend to forget that other legal systems exist.⁶⁵

Beyond the Supreme Court, Judge Calabresi has been one of a handful of U.S. judges urging his U.S. colleagues to join a global trend and pay more attention to foreign decisions, not only decisions in the same dispute but more general precedents on point for the simple purpose of learning and cross-fertilization. In a concurring opinion in *United States v. Then*, he argued that U.S. courts should follow the lead of the German and the Italian constitutional courts in finding ways to signal the legislature that a particular statute is "heading toward unconstitutionality," rather than striking it down immediately or declaring it constitutional.⁶⁶ He also observed that the United States no longer holds a "monopoly on constitutional judicial review," having helped spawn a new generation of constitutional courts around the world.⁶⁷ "Wise parents," he added in conclusion, "do not hesitate to learn from their children."⁶⁸

63. See, e.g., Associate Justice Sandra Day O'Connor, *Our Shrinking World: Why Lawyers Need International Awareness*, Keynote Address to the Union Internationale des Advocates, Philadelphia, Pa. (Sept. 3, 1997) (transcript on file with author).

64. Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24 (quoting Justice O'Connor). Justice Breyer added the following comment: "Lawyers in America may cite an EU ruling to our court to further a point, and this increases the cross-fertilization of U.S.-EU legal ideas." *Id.*

65. O'Connor, *supra* note 63.

66. *United States v. Then*, 56 F.3d 464, 468-69 (1995).

67. *Id.* at 469.

68. *Id.*

V. MEETING FACE TO FACE

Judges are also meeting face to face. Justice O'Connor has led several delegations of Supreme Court justices to meet with their counterparts in France, Germany, England, and India. Most recently have been two "summits" between the U.S. Supreme Court and the ECJ. In 1998, Justices O'Connor, Breyer, Ginsberg, and Kennedy went to Brussels; they had both private meetings and several public sessions with their European counterparts and sat in on an ECJ hearing.⁶⁹ In April 2000 several members of the ECJ came to Washington for a second meeting with Supreme Court justices.⁷⁰

Judges in other parts of the world have increasingly institutionalized such exchanges. Beginning in the early 1980s, judges from the Constitutional Courts in Western European countries began meeting every two or three years and publishing their proceedings.⁷¹ Supreme Court Justices in the Americas have taken one step further, establishing the Organization of Supreme Courts of the Americas (OCSA). At a conference of representatives of the Supreme Courts of twenty-five countries of the Western Hemisphere in October 1995, delegates approved a Charter for the organization with the stated aims of promoting and strengthening "judicial independence and the rule of law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the State."⁷² These objectives are to be achieved through activities such as the provision of "a permanent link" between national judicial systems and various educational and technical assistance systems "designed to promote international judicial cooperation in the hemisphere."⁷³

69. The U.S. Supreme Court delegation was also scheduled to meet with judges on the European Court of Human Rights and members of both the German Constitutional Court and various French courts. Other members of the delegation included Chief Judge Richard Arnold of the 8th Circuit and Texas Chief Justice Tom Phillips. See U.S. Justices Compare U.S., EU Judicial Systems, Press Briefing in Brussels, July 8, 1998 (transcript on file with author).

70. See Linda Greenhouse, *Justices Force 2 New Hearings on Death Row*, N.Y. TIMES, Apr. 19, 2000, at A1 (including captioned photo entitled, "The Supreme Court justices gathered in the East Conference Room yesterday to greet members of the European Court of Justice").

71. See, e.g., EUROPEOS, TRIBUNALES CONSTITUCIONALES EUROPEOS Y AUTONOMIAS TERRITORIALES: VI CONFERENCIA DE TRIBUNALES CONSTITUCIONALES (1985).

72. CHARTER OF THE ORGANIZATION OF THE SUPREME COURTS OF THE AMERICAS, art. II, §2.1.

73. *Id.* §2.2.

Common law countries have similarly institutionalized their bi-annual meetings in order to promote face-to-face contact and dialogue among the judiciaries of these countries who operate in similar legal systems.⁷⁴ The First Worldwide Common Law Judiciary Conference was sponsored by the Judiciary Leadership Development Council, a non-profit organization located in Washington, D.C. whose goal is to encourage judicial education through seminars and conferences. The purpose of the conference, according to Judge A. Paul Cotter of the U.S. Nuclear Regulatory Commission, was to bring together judges to discuss common problems, mutual interests, and recent developments: "A pragmatic judge-to-judge exchange of information on, and analyses of, particular elements of their respective courts, law, and procedures will enable the participants to take home immediate, practical benefits both for themselves individually and for their respective courts."⁷⁵ In yet another region, judges from Estonia, Latvia, and Lithuania have formed the Association of Judges of the Baltic States.⁷⁶

Less formal meetings have been sponsored by various aid agencies and non-governmental organizations and organizations such as the London-based human rights organization InterRights. Similarly, the Law Association for Asia and the Pacific (LAWASIA) with its Secretariat in Australia fosters judicial exchange through annual meetings of its Judicial Section.⁷⁷ The ABA Central and Eastern European Law Initiative (CEELI) periodically sends American judges to various central and eastern European countries to assist with law reform, codification efforts,

74. Delegates from Australia, New Zealand, Ireland, India, the United States, Canada, and Great Britain attended the First Worldwide Common Law Judiciary Conference, May 28-June 2, 1995. See *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, 1 INT'L JUD. OBSERVER 1 (Sept. 1995). The Second Worldwide Common Law Judiciary Conference was held in May in Washington, D.C., at which representatives of the countries of Israel, Singapore, and South Africa joined the seven countries who participated in the first conference. See *Judges from Ten Common-Law Countries Meet in Washington for Five-Day Conference*, 4 INT'L JUD. OBSERVER 1 (June 1997).

75. *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, *supra* note 74, at 1.

76. See Hon. Rait Maruste, Chief Justice, National Court of Estonia, *Estonia: Leading Central Europe in Judicial Reform*, 2 INT'L JUD. OBSERVER 3 (Jan. 1996).

77. See LAWASIA, *Biennial Conference of Chief Justices of the Asia-Pacific Region* (visited Aug. 10, 2000) <<http://www.lawasia.asn.au/CJ%20Conference.htm>>. LAWASIA member countries are: Afghanistan; Australia; Bangladesh; China; Fiji; Hong Kong; China; India; Iran; Japan; DPR of Korea; Korea; Macao; Malaysia; Nepal; New Zealand; Pakistan; Papua New Guinea; Philippines; Russian Federation; Singapore; Sri Lanka; Thailand; Western Samoa. See LAWASIA, *LAWASIA Member Countries* (visited Aug. 10, 2000) <<http://www.lawasia.asn.au/countries.html>>.

and judicial training.⁷⁸ Closer to home, the Washington-based Center for Democracy has sponsored three conferences to date involving courts of “ultimate appeal” of central and eastern Europe and the new independent states, a grouping of countries that fits both the regional and similar legal system categories.⁷⁹

Law schools have also played an important role. N.Y.U. Law School’s Center for International Studies and Institute of Judicial Administration hosted a major conference of judges from both national and international tribunals from around the world in February 1995 under the auspices of N.Y.U.’s Global Law School Program.⁸⁰ Similarly, Harvard Law School hosted part of the Anglo-American Exchange.⁸¹ For its part, Yale Law School has established a seminar for members of constitutional courts from around the globe to meet annually as a means of promoting intellectual exchange among the judges.⁸² The participants in these seminars exchange precedents and personal experiences, creating judicial networks that are powerful channels for continuing cross-fertilization. Finally, academic and public institutions also contribute to the international exchange of judicial ideas through compilations of websites for courts to access through the Internet information of the activities of national and supranational courts and tribunals from around the world.⁸³

Perhaps the most persuasive example that judicial globalization is here to stay is the formation of an actual “foreign policy” arm of the U.S. Federal judiciary. Chief Justice Rehnquist and the U.S. Judicial Conference created the “Committee on International Judicial Relations,” chaired by U.S. District Court Judge Michael Mihm of the Central District of Illinois. According to Judge Mihm, the purpose of the Committee is to “coordinate the federal

78. See *CEELI Update*, ABA INT’L LAW NEWS, July 19, 1991, at 3.

79. See James G. Apple, *European Justices Meet in Washington to Discuss Common Issues, Problems*, 1 INT’L JUD. OBSERVER 3 (Jan. 1996).

80. See Thomas M. Franck, *NYU Conference Discusses Impact of International Tribunals*, 1 INT’L JUD. OBSERVER 3 (Sept. 1995). Papers from the conference have subsequently been published. See INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 1.

81. See James G. Apple, *British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns*, 2 INT’L JUD. OBSERVER 1 (Jan. 1996).

82. See *Yale Law School Establishes Seminar on Global Constitutional Issues*, 4 INT’L JUD. OBSERVER 2 (June 1997).

83. See, e.g., *The Center for Global Change and Governance* (visited Aug. 10, 2000) <<http://www.andromeda.rutgers.edu/~cgcg/home.html>>; see also *The Library of Congress of the United States of America Global Legal Information Network* (visited Aug. 10, 2000) <<http://lcweb2.loc.gov/law/GLINv1/glintro.htm>>.

judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice."⁸⁴

VI. CONCLUSION

Judges are globalizing. So what? This distinguished Journal has devoted itself over its lifetime to the discussion of important questions of international law and world order. The international community currently faces critical questions concerning the legality of humanitarian intervention, the relationship between the Security Council and regional security organizations, the clash between international trade law and environmental, human rights, and labor law, and the effort to establish an international criminal court, to name only a few. Why focus on conversations and cross-fertilization of ideas and cases among national and international judges?

Judicial globalization could not have stopped the bombing in Kosovo or the ethnic cleansing that both triggered and accompanied it. But Serbian soldiers, officers, and political leaders guilty of war crimes, genocide, or crimes against humanity in Kosovo are liable before any national court in any country they may choose to visit outside of Serbia. Further, the International Criminal Tribunal for the former Yugoslavia may request such a court to hand over such soldier or officer or political leader to it, in an example of vertical judicial relations. Alternatively, if an International Criminal Court is established and the Security Council authorizes the prosecution, the ICC will be able to prosecute these individuals directly upon a determination that Serbian courts are unable or unwilling to do so.

Perhaps even more powerfully, Albanian victims and their families, as well as the nationals of any other countries injured in Kosovo, may someday be able to trigger a prosecution against Slobodan Milosevic like that launched against Pinochet in Spain. A court undertaking the ensuing investigation, or upon petition from a prosecutor, could then request extradition from a fellow court in another country where an alleged perpetrator might be located. The ensuing decision would be made, in large part although not exclusively, court to court.

84. Chief Judge Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, 1 INT'L JUD. OBSERVER 1 (Sept. 1995).

On the economic side, courts around the world will be paying increasing attention to WTO law, both as written and as interpreted by WTO panels. They will also be paying attention to *each other* paying attention, often receiving international law through the medium of foreign law. At the same time, many national courts will be crafting their own national compromises between the conflicting demands of national legislation and international treaties, as well as applying national legislation extraterritorially in ways that are likely to trigger executive and legislative action.⁸⁵ And they will be hammering out both doctrinal solutions and direct relationships to manage the increasingly complex job of multi-jurisdictional dispute resolution.

Constitutional courts – or any courts concerned with constitutional issues – will be forging a deeply pluralist and contextualized understanding of human rights law as it spans countries, cultures, and national and international institutions. The interactions between these courts and formal human rights tribunals established by treaty will indirectly involve national and international legislators – parliamentarians and treaty-drafters – on vital questions reflecting both the universality and diversity of humanity. Direct judicial exchanges can only further these processes, although they are quite likely to highlight the fault-lines of conflict as well as the opportunities for cooperation.

All this activity, from the most passive form of cross-fertilization to the most active cooperation in dispute resolution, requires recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems. It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders. This recognition is the core of judicial globalization, and judges, like the litigants and lawyers before them, are coming to understand that they inhabit a wider world.

85. See, e.g., William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 164 n.356 (1998).