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A TYPOLOGY OF TRANSJUDICIAL COMMUNICATION

*Anne-Marie Slaughter**

Courts are talking to one another all over the world. Mary Ann Glendon describes a "brisk international traffic in ideas about rights," conducted by judges.¹ "In Europe generally," she adds, "and in Australia, Canada, and New Zealand, national law is increasingly caught up in a process of cross-fertilization among legal systems."² Similarly, Anthony Lester writes:

When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.³

The Supreme Court of Zimbabwe cites decisions of the European Court of Human Rights to support its determination that corporal punishment of an adult constitutes cruel and unusual punishment⁴ and that corporal punishment of a juvenile is unconstitutional.⁵ The European Court of Justice and the Euro-

* Professor of Law, Harvard Law School. Formerly Anne-Marie Burley. I am grateful to David Zaring for excellent research assistance. Many thanks also to the University of Richmond Law School and the Allen family for a delightful week as the Allen Chair Professor and the opportunity to contribute to this symposium.

1. MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991).

2. *Id.*

3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

4. *State v. Ncube*, 2 S. AFR. L. REP. 702 (1988) (Zimb.) (citing *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978)).

5. Judgment of June 19, 1989 (*Juvenile v. State*), Judgment No. 64/89 (Zimb.) (citing *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978) and *Campbell v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1982)); see Keith Highet et al., *Zimbabwe—Human Rights—Inhuman or Degrading Punishment—Incorporation of International Standards in Domestic Law: Juvenile v. State. Judgement No. 64/89, Crim. App. No. 156/88. Supreme Court of Zimbabwe, March 22 and June 19, 1989*, 84 AM.

pean Court of Human Rights cite one another's decisions; the Inter-American Court of Human Rights looks frequently to the European Court's caselaw. Approximately 60% of the citations of Quebec courts are to sources other than Quebec decisions, including French authors and decisions, common law decisions and authors from a range of countries.⁶

Within both the European Union and the Council of Europe, courts are entering into forms of judicial dialogue. The most advanced form of such interaction is the recent call by the German Constitutional Court for a "relationship of co-operation" with the European Court of Justice, in which both entities would form a kind of partnership in delimiting the boundaries of the competences of the European Community.⁷ More generally, many observers of the European Court of Justice ("ECJ"), including a number of judges, attribute its success to its establishment of a dialogue with the lower national courts, whereby these courts refer cases raising European law issues to the ECJ and then use its analysis of these issues to guide their disposition of the case.⁸ At the same time, national courts are also talking to one another. Joseph Weiler argues that national supreme courts in Europe took account of one another's position on the acceptance of European Community ("EC") law in deciding whether, and how far, to push or commit their own governments.⁹ Finally, moving beyond the European Union to the Council of Europe, Polakiewicz and Jacob-Foltzer observe, in a major review of the impact of the European Human Rights Convention in domestic law, that "even in the absence of a

J. INT'L L. 768 (1990).

6. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 294 (1987). Common law courts in Canada are similarly eclectic. *Id.* at 295-97.

7. Judgment of Oct. 12, 1993, (Brunner v. The European Union Treaty), Bundesverfassungsgericht (2. Senat) [Federal Constitutional Court, 2d Chamber], [1994] 1 C.M.L.R. 57 (F.R.G.). See *infra* notes 37-40 and accompanying text.

8. See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 609-11 (1989); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 2 (1981); Ulrich Everling, *The Court of Justice as a Decision-making Authority*, 82 MICH. L. REV. 1294, 1302-04 (1984); T. Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925, 927 (1986).

9. J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 521-23 (1994).

formal procedure that regulates the relationship between the European Court and national jurisdictions . . . we are witnessing the beginning of a dialogue between these different jurisdictions."¹⁰

Are all these examples part of a single phenomenon? They are all forms of transjudicial communication: communication among courts—whether national or supranational—across borders. They vary enormously, however, in form, function, and degree of reciprocal engagement. The dialogue between the German Constitutional Court and the ECJ suggests the possibility of a relationship of collective deliberation on common legal problems; the citation of a U.S. Supreme Court decision in India, or a European Court of Human Rights decision in Zimbabwe, reflects a less interactive process of intellectual cross-fertilization. Alternatively, taking account of the position of fellow national courts in accepting the obligations of a common treaty may simply be an instance of taking advantage of a quick source of information about the degree of reciprocal acceptance of these obligations, without any overlay of special “judicial” communication.

Behind these differences also lie important structural differences. European national courts interact with the ECJ within the framework of a treaty providing for a referral mechanism and specifying that rulings of the ECJ are binding on the member states of the European Community.¹¹ Similarly, the European Convention on Human Rights and the Optional Protocol to the International Convention on Civil and Political Rights provide for mechanisms of individual petition whereby individual citizens can, in effect, challenge the decisions of their national courts before a supranational tribunal.¹² A practice of cross-

10. Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect is Given to the Convention* (pt. 2), 12 HUM. RTS. L.J. 125, 142 (1991).

11. Article 177 of the Treaty of Rome provides that “the validity and interpretation of acts of the institutions of the community and the ECB, the interpretation of the statutes of bodies established by an act of the Council” may be referred to the ECJ by any court of a member-state, and must be referred by a “court or tribunal from whose decision not appeal lies under municipal law.” Article 171 requires member states to “take the measures required for the implementation of the judgment” of the European Court of Justice. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter Treaty of Rome].

12. See Optional Protocol to the International Covenant on Civil and Political

citation to foreign courts, on the other hand, takes place outside any formal treaty context. If structured at all, it is more likely to flow from a common substantive mission, such as the protection of human rights, at a national, regional, or international level.

These differences notwithstanding, I suggest that there are important commonalities that do in fact link all the above examples as part of a common phenomenon. Before exploring these commonalities, however, it is useful to develop a pure phenomenological approach a bit further, identifying and analyzing examples of the phenomenon under observation. I thus begin by developing a typology of transjudicial communication according to both form and function. Part II will then investigate the underlying preconditions or attributes that unify a wide range of discrete examples. In particular, I contend that all these instances display, indeed require, certain unifying features: an emphasis on judicial autonomy; a reliance on persuasive authority; and a sense of common judicial identity and enterprise. These common features do not dissolve relevant differences with regard to different types of transjudicial communication, but at least help to locate these differences along a single spectrum. Finally, Part IV speculates on the deeper causes and consequences of the phenomenon of transjudicial communication.

A final caveat. This article is intended as an exploratory essay, and thus relies on a relatively small universe of examples. Even an anecdotal survey suggests, however, that many more instances of transjudicial communication could be identified. It is my hope that labeling and analyzing this phenomenon, even on an exploratory basis, will stimulate further research and discussion.

Rights, G.A. Res 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 2, at 59, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368, 369; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 48, 312 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. The European Court of Human Rights ("ECHR") can only hear a case after all domestic remedies have been exhausted through the domestic legal system. *See* European Convention on Human Rights art. 26. Thus, if a complainant chooses to pursue her complaint in Strasbourg, and her complaint is deemed admissible, the ECHR effectively sits in judgment on the action taken by the domestic courts of the complainant's state.

I. FORMS OF TRANSJUDICIAL COMMUNICATION

The geometry of transjudicial communication varies according to the national or supranational status of the courts talking to one another. I identify three distinct forms of such communication: horizontal, vertical, and mixed vertical-horizontal. A related difference flows from the relative status of courts in a national or supranational hierarchy. National supreme courts, for instance, may be more likely to take account of each other's judgments than of the judgments of lower foreign courts.

A. *Horizontal Communication*

Horizontal communication takes place between courts of the same status, whether national or supranational, across national or regional borders. The best developed form of such communication is among the constitutional courts of Europe, where judges actually meet in a triennial conference.¹³ My focus here is not on actual face-to-face conversation among judges, however, but rather on the awareness of each other's decisions that such meetings bring about or reinforce. These courts are not bound to follow or even take account of one another's jurisprudence by any formal relationship. Nor are they necessarily likely to acknowledge the fruits of such communication by actual citation to each other's decisions.¹⁴ Nevertheless, informal conversations with European supreme court judges and their clerks suggest that increasing cross-fertilization is indeed taking place.

Beyond Europe, Anthony Lester, Mary Ann Glendon, and Louis Henkin have all chronicled the flow of ideas from the U.S. Supreme Court to supreme courts all over the world.¹⁵

13. The Conference of European Constitutional Courts periodically publishes its proceedings. See, e.g., VI CONFERENCIA DE TRIBUNALES CONSTITUCIONALES EUROPEOS, TRIBUNALES CONSTITUCIONALES Europeos y Autonomas Territoriales (1985). See also GLENDON, *supra* note 1, at 158 n.38.

14. *But see* Judgment of June 8, 1984 (soc. Granital v. Ministero di Finanze), Corte Costituzionale [Constitutional Court], I Foro It. 2062 (Italy) (citing evidence of application of Community regulations in other member states, particularly in the German federal system).

15. See Glendon, *supra* note 1; Lester, *supra* note 3; Louis Henkin, *Constitutionalism and Human Rights*, in CONSTITUTIONALISM AND RIGHTS 383, 392-95

This communication is as yet markedly one-sided, as the U.S. Supreme Court has not seen fit to reciprocate in kind. Even in its present form, however, it bears the same hallmark of courts of equal status in their respective national legal systems taking account of one another's opinions.

National courts below the level of supreme courts may also engage in at least tacit communication with one another. In addition to cross-citation, recognition of foreign judgments constitutes a form of horizontal transjudicial communication. Such acts are usually considered instances of static deference to a tribunal of original jurisdiction; nevertheless, in some instances the communication between the two courts concerned is direct and active. In *Remington Rand Corp. v. Business Systems Inc.*,¹⁶ a case involving recognition of a decree of a Dutch bankruptcy court, the Third Circuit directed the lower court to seek assurances of reciprocity from the Dutch court before rendering a final judgment.¹⁷ Several other instances of prolonged litigation involving British and U.S. parties have resulted in fairly direct communication between U.S. and British courts in which each side acknowledged direct conflict with the other,¹⁸ and in one case a U.S. court modified its judgment following non-recognition of a particular portion by a British court.¹⁹

(Louis Henkin, ed. 1990). The Canadian Supreme Court, for example, observed in an early decision under the 1982 Canadian Charter of Rights and Freedoms that "it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts." *Law Society of Upper Canada v. Skapinker*, 1 S.C.R. 357, 367 (Can. 1984) The court's concern is not new. United States cases constituted approximately twenty-five percent of cases cited by the earliest manifestation of the current court. J.M. MacIntyre, *The Use of American Cases in Canadian Courts*, 1966 U. BRIT. COLUM. L. REV. 478, 486. The Court continues to cite extensively to United States cases. Glenn, *supra* note 6, at 296.

16. 830 F.2d 1260 (3d Cir. 1987).

17. *Id.* at 1273.

18. For example, in *Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), the D.C. Circuit noted a British appellate court's conclusion that the *Laker* case had been handled by an American federal district court in a manner "wholly untriable" that could result in a "total denial of justice" to the British airline involved. *Id.* at 920 (citing *British Airways Board v. Laker Airways*, [1983] 3 W.L.R. 544, 573, 591 (Eng. C.A.)).

19. An early example of Anglo-American judicial dialogue appeared in the Nylon Patent litigation in the mid-1950s. The United States brought a suit against DuPont and Imperial Chemical Industries (ICI), a British company, for concluding a global market-sharing agreement for nylon sales. A U.S. court ordered ICI to license its U.S. nylon patents on a reasonable royalty basis and tried to fashion a similar remedy

Such communication may also arise during the process of determining where a suit should be heard. The consideration of motions for the granting of an anti-suit injunction to block litigation in a foreign court and of dismissal on *forum non conveniens* grounds to direct litigation to a foreign court both may involve U.S. courts in a form of communication with the foreign court.²⁰ To the extent that the foreign court is engaged in a reciprocal determination, both courts can be seen as cooperating in an effort to direct the litigation to the natural or most appropriate forum.

Supranational courts also engage in horizontal communication, as evidenced both by direct citation and tacit emulation. Professor Merrills, highlighting the worldwide impact of Europe-

applicable to the United Kingdom by ordering ICI not to challenge violations of its British patents by nylon importers into Britain. *U.S. v. Imperial Chem. Indus. Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952). In a subsequent suit against ICI by one of its subsidiaries for specific performance on a contract for exclusive patents, a British court rejected the portion of the American decree that attempted to affect rights created under British law, arguing that the U.S. court would not regard this action "as in any way inappropriate." *British Nylon Spinners, Ltd. v. Imperial Chem. Indus.*, [1955] Ch. 37, 53 (Ch. 1955). For excerpts from this judicial dialogue, see 1 ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* 397-402 (1968).

20. See *Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984). The *Laker* litigation began in the D.C. District Court as an antitrust action against a number of transatlantic airlines. The defendants obtained a preliminary injunction in the British High Court of Justice forbidding Laker from prosecuting its American antitrust action. The British Court of Appeal subsequently issued a permanent injunction requiring Laker to dismiss its suit against the British defendants, and characterized the American action as "wholly untriable." *British Airways Board v. Laker Airways*, [1983] 3 W.L.R. 545, 573 (C.A. 1983). Laker then obtained an American injunction preventing the remaining defendants from duplicating the request for an English injunction. The D.C. Circuit affirmed the propriety of Laker's move. The court recognized that in some cases "it may even be necessary to issue a counterinjunction to thwart another state's attempt to assert exclusive jurisdiction over a matter legitimately subject to concurrent jurisdiction." 731 F.2d at 934. For an account of the back-and-forth court decisions in the *Laker* litigation, see Daryl A. Libow, Note, *The Laker Antitrust Litigation: The Jurisdictional 'Rule of Reason' Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645, 655-661 (1986). See also *Bano Bi v. Union Carbide*, 984 F.2d 582 (2d Cir. 1993). The Second Circuit, in interpreting the effect it would give an Indian statute settling litigation in the aftermath of the Bhopal disaster, looked to the conclusions of the Indian Supreme Court on that statute for guidance. *Id.* at 585. See also *Cargill, Inc. v. Hartford Accident and Indem. Co.*, 531 F. Supp. 710 (D. Minn. 1982) (enjoining insurer from pursuing suit in an equally convenient foreign forum to avoid unnecessary duplication and referring to suit filed by plaintiff in the High Court of Justice in London); *Harrison v. Wyeth Lab.*, 510 F.Supp. 1 (E.D. Pa. 1980) (dismissing products liability suit by British plaintiffs on *forum non conveniens* grounds).

an human rights jurisprudence in a recent study of the ECHR, notes that "the interpretations and, more crucially, the general approach of the [ECHR] can be important" in construing other human rights treaties.²¹ He documents numerous instances in which the reasoning and interpretative methodologies first developed in Europe were later accepted by the Inter-American Court of Human Rights and the United Nations Human Rights Committee.²² There is one crucial difference, however, in the manner in which European precedents were used by these two human rights institutions. Whereas the Inter-American Court expressly cited to European Court and Commission case law as persuasive authority, the Human Rights Committee's echoing of a previously developed European approach could only be discovered by carefully comparing the relevant decisions. Even where "the Committee's reasoning [was] virtually identical" to that of the European Court, the Committee made no express reference to the court's judgments.²³

B. *Vertical Communication*

Vertical communication takes place between national and supranational courts. The most developed form of such communication has emerged within the framework of a treaty establishing a supranational tribunal with a specialized jurisdiction that overlaps the jurisdiction of national courts. The Treaty of Rome granted the ECJ jurisdiction over particular categories of suits between member states of the European Community and between the European Commission and member states.²⁴ As

21. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 18 (2d ed. 1993)

22. *Id.* at 19.

23. A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 62-63 (3d ed. 1989) (comparing *Hartikainen v. Finland*, No. 9/40, U.N. GAOR, 36th Sess., Supp. No. 40, Annex XV at 147 (1981) and *Danish Sex Education Case* (*Kjeldsen v. Denmark*), 23 Eur. Ct. H.R. (ser. A) (1976)). Other areas in which the Committee's case law parallels that of the European human rights tribunals include the standard for measuring invidious discrimination, the adoption of a margin of discretion when reviewing the actions of states parties, see ROBERTSON & MERRILLS, *supra* at 64, and the extension of the right of privacy to homosexual conduct between consenting adults in private. Compare *Toonen v. Australia*, No. 488/1992, Human Rights Committee 50th Sess., slip op. (1994) with *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

24. Treaty of Rome, *supra* note 11, arts. 169, 170, 298 U.N.T.S. at 75.

discussed above, it also empowered the ECJ to resolve questions of European law referred to it by national courts.²⁵ The ECHR, the Inter-American Commission on Human Rights, and the United Nations Human Rights Committee are all empowered to adjudicate disputes arising in the first instance within the jurisdiction of a national court.²⁶ The structural framework within which these tribunals operate thus establishes a relationship between them and the national courts of the states whose obligations they monitor and enforce. Further, the practical effectiveness of these tribunals will depend in large part on the extent to which national courts take account of their decisions.

The following examples of vertical dialogue are drawn from the experience of the ECJ; although some elements of its relationship with national courts may be unique to the development of the legal system of the European Community, others are likely to prove more generalizable. The functions of this vertical dialogue and the motives behind it will be discussed below; the purpose here is primarily to provide illustrations of this phenomenon.

Most of the landmark decisions of the ECJ address themselves quite explicitly both to national courts and to the individual litigants (and their lawyers) who form the constituency of those national courts. They are opinions designed to persuade, to educate, even to cajole. The landmark decision of *Van Gend & Loos*,²⁷ in which the ECJ first announced the doctrine that certain provisions of the Treaty of Rome could be directly invoked by individual litigants before national courts even in the absence of implementing legislation by national governments,²⁸

25. *Id.* art. 177, 298 U.N.T.S. at 76-77. See *supra* text accompanying note 12.

26. As noted above, the ECHR can only hear cases after all domestic remedies have been exhausted. See *supra* text accompanying note 12. Article 46 of the American Convention on Human Rights also requires exhaustion of domestic remedies before the Inter-American Commission on Human Rights may admit a petition for examination. American Convention on Human Rights, July 18, 1978, art. 46, 1144 U.N.T.S. 144, 155. Under Article 61 of that convention, the Inter-American Court of Human Rights may only exercise jurisdiction over cases referred to it by states after it is satisfied that the admission procedures applicable to the Commission have been satisfied. *Id.* art. 61, 1144 U.N.T.S. at 159.

27. Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

28. *Id.* at 10-12.

set the tone and the terms of this dialogue. The court, faced with one of its first references from a national court (the Dutch Tariefcommissie), was anxious to encourage additional references while simultaneously establishing its own authority within the sphere of Community law. It thus adopted a strategy of manifest deference to national courts acting within their proper sphere of jurisdiction, combined with an appeal to these courts to use Community law in exercising their primary function of protecting individual rights. For instance, in response to a contention by the Belgian government that no ruling by the ECJ could have any bearing on further proceedings in the Tariefcommissie, the ECJ emphasized that it was up to the national court to decide whether to seek assistance on questions of Community law, and that the "considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice."²⁹ After holding that Article 12 of the Treaty of Rome was directly applicable before the national courts, the court concluded that the actual application of that article on the specific facts of the case presented was a matter for the Tariefcommissie to resolve, contenting itself with a final declaration that "Article 12 . . . produces direct effects and creates individual rights which national courts must protect."³⁰

The ECJ repeated these formulae in case after case. It next confronted the task of encouraging direct references from lower national courts in the face of opposition from their own supreme courts. The court responded by again emphasizing, court to court, the duties of the national courts to protect individual rights. In *Amministrazione delle Finanze dello Stato v. Simmenthal*,³¹ a lower Italian court asked the ECJ to resolve a conflict between a provision of Community law and an apparently conflicting provision of the Italian Constitution, notwithstanding a decision by the Italian Constitutional Court that such conflicts should be referred to the Constitutional Court itself.³² The ECJ held that the provisions of Community law

29. *Id.* at 10.

30. *Id.* at 15.

31. Case 106/77, 1978 E.C.R. 629.

32. *Id.* at 629.

are . . . a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law. This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.³³

It followed that any provision of national law that threatened to impede the ability of national courts to enforce Community law was itself a violation of Community law, and should thus be disregarded by the national court.³⁴

Here the ECJ depicted itself in partnership with the national courts, collaborating together to enforce Community law. National courts responded in kind, increasing the number of references under Article 177 from 9 in 1968 to 119 in 1978.³⁵ Moreover, some national courts became active rhetorical participants in this emerging dialogue, challenging the ECJ to harmonize EC law with national law. The German Constitutional Court has been the ECJ's most active interlocutor in this regard. It announced in the early 1970s that it would not accept the ultimate authority of the ECJ in cases involving the human rights of German citizens because the ECJ had not established a comparable system of human rights protections in EC law. When the ECJ did establish such a system in response to the German court, blending a mixture of national and international human rights guarantees, the German court in turn softened its stance.³⁶

33. *Id.* at 642.

34. *Id.* at 643.

35. HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 254 (1986).

36. See Judgment of May 29, 1974, (*Internationale Handelsgesellschaft mbH v. Einfuhr-undVorratsstelle für Getreide und Futtermittel*), Bundesverfassungsgericht [Federal Constitutional Court], 37 BVerfGE 271, [1974] 2 C.M.L.R. 540 (F.R.G.) [hereinafter *Solange I*]; Judgment of October 22, 1986, (*Re the Application of Wünsche Handelsgesellschaft*), Bundesverfassungsgericht [Federal Constitutional Court], 73 BVerfGE 339, [1987] 3 C.M.L.R. 225 (F.R.G.) [hereinafter *Solange II*]. In *Solange I*, the German constitutional court concluded that EC law, which did not protect fundamental rights to a degree constitutionally required by the Federal Republic, would not be accorded priority over German law designed to protect those rights. In *Solange II* the German court concluded that the preceding 14 years of ECJ practice had created a climate of effective protection of fundamental rights within Community law. Accordingly, the German court declined to further police the compatibility of EC law

This pattern was repeated in the German Constitutional Court's recent decision in *Brunner v. The European Union Treaty*,³⁷ a case challenging the constitutionality of the Maastricht Treaty establishing the European Union. The German court found the treaty constitutional, but only so long as the competences of the European Union remained sufficiently limited to assure German citizens of the guarantees of democracy provided them in their constitution.³⁸ To keep the institutions of the Union within these limits, the German court proposed that it enter into a "relationship of co-operation" with the European Court of Justice, by which the German court 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.³⁹ As its opening contribution to this new relationship, the German court further warned the ECJ to be more circumspect in interpreting the competences of the European Union in the future, noting that overly expansive interpretations "would not produce any binding effects for Germany."⁴⁰

The system proposed by the German Constitutional Court—a partnership in which two courts with different but overlapping spheres of jurisdiction interpret the same texts and monitor each other's interpretations—may well prove unworkable when generalized to all courts, even if only the supreme courts, of the member states of the European Union. The current dialogue will thus continue, with the ECJ responding to the German Constitutional Court's challenge. For present purposes, the

with German fundamental rights. For an account of this trajectory, see J.A. Frowein, *Recent Case*, 25 COMMON MKT. L. REV. 201, 205 (1988); Weiler, *supra* note 8, at 2428.

37. Judgment of Oct. 12, 1993, (*Brunner v. The European Union Treaty*), Bundesverfassungsgericht (2. Senat) [Federal Constitutional Court, 2d Chamber], [1994] 1 C.M.L.R. 57 (F.R.G.).

38. *Id.* at 76-78.

39. *Id.* at 79.

40. *Id.* at 105

[I]n [the] future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.

Id.

point is not the feasibility of the particular architecture proposed, but the mode of proposal. It reflects a highly developed form of vertical transjudicial communication.

Other examples of vertical communication are far less structured, and indeed far less interactive. First is the citation of ECHR decisions by a handful of national courts of states party to the European Convention on Human Rights.⁴¹ Although judgments of the ECHR are formally binding on these states, it is noteworthy that these courts have referred to ECHR decisions on their own motion, without pressure from the executive or legislative branches of government. Such citations can be read as the beginning of a direct court-to-court communication.

Second is the citation of ECHR decisions by national courts that are not within the European system.⁴² These courts have no formal allegiance to the supranational authority in question, but nevertheless invoke its judgments. This form of vertical communication may thus ultimately resemble the horizontal communication discussed above. It is also possible, however, that the supranational status of the tribunal cited lends it additional authority.

C. *Mixed Vertical-Horizontal Communication*

The vertical and horizontal forms of transjudicial communication described above can also combine in several different ways. First, supranational tribunals can serve as a conduit for horizontal communication. Among states party to the European Convention on Human Rights, for instance, national legal rules and principles are spreading through the medium of ECHR decisions. According to Polakiewicz and Jacob-Foltzer:

domestic courts have gradually abandoned their reserved attitude with regard to the Convention. We are witnessing the beginning of a true dialogue between the European Human Rights Court and national jurisdictions whereby

41. See MERRILLS, *supra* note 21 at 20. For a general survey of the impact of the Convention within Europe, see THE EUROPEAN COURT FOR THE PROTECTION OF HUMAN RIGHTS 101-278 (M. Delmas-Marty, ed. 1992).

42. See, e.g., the Zimbabwean high court's citations to the ECHR cited *supra* notes 4-5.

principles like the proportionality test that have been developed in certain national legal orders are taken up by the European Court of Human Rights and later accepted in other countries as part of a common European standard.⁴³

A second variant of mixed communication assumes the presence of common legal principles in national legal orders that can be distilled and disseminated by a supranational tribunal. Rein Myullerson, a member of the U.N. Human Rights Committee, observes that, through the system of individual communications to the Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, "the universal experience of mankind may enter national practice."⁴⁴ In this conception, the supranational tribunal acts less as a conduit of diverse national experience than as a distiller of a limited set of universal principles which can then be communicated to national courts through the medium of a vertical complaint procedure.

II. DEGREE OF RECIPROCAL ENGAGEMENT

A second way of distinguishing between different types of transjudicial communication is according to the degree of reciprocal engagement manifested by the courts involved. The examples discussed above neatly illustrate the potential range of such involvement; the discussion here will thus be relatively brief.

A. *Direct Dialogue*

The interaction between the ECJ and the national courts of the member states of the European Union ("EU") represents a genuine "dialogue," communication between two courts that is effectively initiated by one and responded to by the other. In some sense, the national courts in the EU system initiate the

43. Polakiewicz & Jacob-Foltzer, *supra* note 10, (pt. 1), 12 HUM. RTS. L.J. 65, 66 (1991).

44. Rein A. Myullerson, *Monitoring Compliance with International Human Rights Standards: Experience of the United Nations Human Rights Committee, 1991-92* CAN. HUM. RTS. Y.B. 105, 118.

dialogue by referring a case under Article 177, or by addressing their decisions directly to the ECJ.⁴⁵ On the other hand, most of the judges on the ECJ would regard themselves as having opened a conversation by encouraging Article 177 references. The key distinguishing feature between this type of dialogue and other forms of judicial communication is the awareness on the part of both participants of whom they are talking to and a corresponding willingness to take account of the response.

B. *Monologue*

The examples of horizontal communication discussed above are more readily conceptualized as monologue than dialogue, in the sense that a court whose ideas or conclusions are borrowed by foreign courts, whether on the national or supranational level, is not a self-conscious participant in an ongoing conversation. The originating court may indeed have little idea that its views have a foreign audience. It speaks to the litigants in the case before it, and perhaps also to the courts and the political branches in a particular national legal system. Its ability to communicate to foreign listeners depends on the initiative of the listeners themselves.

C. *Intermediated Dialogue*

The example discussed above of dialogue among national courts of states party to the European Convention on Human Rights is an instance of "intermediated dialogue," in which the ECHR effectively brokers communication among national courts. On the one hand, this dialogue is closer to a monologue, in the sense that the originating national court does not have control over the dissemination of its ideas. On the other hand, the ECHR is self-consciously undertaking this dissemination, with a specific audience of national courts, and governments, in mind. A similar phenomenon may emerge in the EU legal system, as the national courts of some member states begin to realize that ECJ syntheses of the national law and legal traditions of mem-

45. Treaty on European Union and Final Act, Feb. 7, 1992, art. 177, 1992 O.J. (C 224) 1, (signed at Maastricht), reprinted in 31 I.L.M. 247 [hereinafter Treaty of Maastricht].

ber states rely more heavily on the experience of some member states than others. British courts, for instance, may begin to conclude that the human rights jurisprudence developed by the ECJ draws more heavily on the human rights guarantees in the German constitution than the British constitution.⁴⁶ To the extent that national courts respond by challenging the ECJ to take account of their own national traditions, and the ECJ refines its synthesis for reception by other national courts in the European Union, the result will also be an intermediated dialogue.

III. FUNCTIONS

Yet a third mode of typologizing transjudicial communication is according to the various functions such communication performs. Some of these functions can be easily discerned from the form of communication itself; others require an investigation of the context in which the communication takes place.

A. *Enhancing the Effectiveness of Supranational Tribunals*

International law has long recognized the value, and often the necessity, of domestic enforcement, either through domestic implementing legislation or through direct enforcement of international obligations by domestic courts.⁴⁷ Supranational tribunals such as the ECJ and the ECHR thus have an incentive to woo national courts. Consider in this regard the following reflections from Judge Mancini of the ECJ. Commenting on the surprising acceptance of ECJ judgments by courts of the member states of the European Union, he notes:

Why did this happen? The only reason I can see . . . is the cleverness of my predecessors. If what makes a judge "good" is his awareness of the constraints on judicial decision-making and the knowledge that rulings must be convincing in order to evoke obedience, the Luxembourg judges of the

46. I am indebted for this insight to Tom de la Mare, a participant in a conference on the Reception of European Community Law by National Courts at the Robert Schuman Centre of the European University Institute, Florence, June 1994.

47. See Derrick Wyatt, *New Legal Order, or Old?*, 7 EUR. L. REV. 147 (1982).

1960s and 1970s were obviously *very* good. . . . [T]hey developed a style that may be drab and repetitive, but explains as well as declares the law and they showed unlimited patience *vis-à-vis* the national judges, reformulating the questions couched in imprecise terms or extracting from the documents concerning the main proceedings the elements of Community law which needed to be interpreted with regard to the subject matter of the dispute.

It was by following this courteously didactic method that the Luxembourg judges won the confidence of their colleagues from Palermo to Edinburgh and from Bordeaux to Berlin; and it was by winning their confidence that they were able to transform the procedure of Article 177 whereby private individuals may challenge their national legislation for incompatibility with Community law.⁴⁸

In the discussion in Part I, I suggested other ways in which the ECJ courted the national courts, by appealing to their traditional role of protecting individual rights and by overtly deferring to their authority within their defined sphere of jurisdiction. Joseph Weiler has also speculated on the role of "judicial empowerment," suggesting that lower national courts found that they could enhance their power with regard to higher national courts by operating in tandem with the ECJ.⁴⁹ The *Economist* has noted a similar phenomenon with respect to the ECHR, noting that lower courts in Britain are increasingly likely to cite decisions handed down by the ECHR, though the Convention, or indeed any written bill of rights, has not been enacted into British law by parliament.⁵⁰

Regardless of the specific motives of the national courts involved, the point remains that supranational tribunals can use transjudicial communication to bolster their effectiveness by convincing national courts to follow their lead. Indeed, Mancini suggests that dialogue with the national courts is one of the few tools that supranational tribunals have at their disposal.⁵¹

48. Mancini, *supra* note 8, at 605-06.

49. Weiler, *supra* note 8, at 2426.

50. *Human Rights: Unconventional*, *ECONOMIST*, Sept. 24, 1994, at 56 ("British judges are starting to act as if the convention had already been incorporated into British law."). The *Economist* observes that this has also allowed lower courts to enhance their power with regard to the national legislature. *Id.*

51. Mancini, *supra* 8, at 597.

The resulting communication may be a form of didacticism or a more strategic effort to sound notes that will resonate with a particular audience. It is nonetheless a conversation between courts with the aim of strengthening the authority of the supranational court.

B. Assuring and Promoting Acceptance of Reciprocal International Obligations

Enhancement of the effectiveness of a supranational tribunal will strengthen the international regime that the tribunal is charged with enforcing. Horizontal judicial communication can play a further role in promoting the acceptance and effectiveness of international obligations. In a situation in which a number of states are contemplating acceptance of a particular international legal obligation, references to the activity of fellow courts in other states can act as both a security blanket and a stick. On the one hand, by pointing to the actions of fellow states, a national court can reassure itself (and its government) that it will not disadvantage the nation in dealing with other nations. On the other hand, an advocate arguing before such a court can urge the government to get in line with fellow governments, suggesting the possibility of exclusion if a government remains a hold-out.

Joseph Weiler has identified these phenomena in the context of acceptance of European Community law by national supreme courts. He notes:

One reason why national courts, especially higher courts but also lower courts, might have been tempted to resist the [acceptance of Community law] could perhaps be in the fear that they would be disadvantaging their national system and their governments in their dealings with other member states. Accepting Community discipline does, after all, restrict national autonomy. . . . Thus, when national courts are satisfied that they are part of a trend, their own acceptance is facilitated. Additionally, holding out against accepting a new doctrine when other similar positioned courts have committed themselves might be seen to compro-

mise the professional pride and prestige of the recalcitrant court.⁵²

He surveys a number of decisions of European constitutional courts accepting Community law, concluding that "transnational reciprocity is employed as a device of both persuasion and justification."⁵³

This function of horizontal judicial communication has a dual character: it can function equally to weaken or at least to hinder enforcement of international obligations where evidence of reciprocal acceptance of such obligations is lacking. Weiler's observations can thus be contrasted with Eyal Benvenisti's survey of reasons for the reluctance of national courts to enforce customary international law. Where national courts cannot find evidence of reciprocal acceptance of international obligations on the part of their foreign counterparts, they hesitate to place a unilateral burden on their own governments.⁵⁴

C. *Cross-Fertilization*

The first two functions discussed above concern the role of transjudicial communication in strengthening international regimes, such as human rights treaties, and the tribunals established to monitor and enforce them. A more general function, one that may accompany all the other functions identified or may serve as an end in itself, is more general and harder to direct or control. It is the simple dissemination of ideas from one national legal system to another, from one regional legal system to another, or from the international legal system or a particular regional legal system to national legal systems. The purpose or effect of such cross-fertilization may be to provide inspiration for the solution of a particular legal problem, such as the appropriate balance between individual freedom of expression and the needs of the community.⁵⁵ Alternatively, and more broadly, cross-fertilization may foster the development of

52. Weiler, *supra* note 9, at 521-22.

53. *Id.* at 522.

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

55. See GLENDON, *supra* note 1, at 158-59.

fledgling national legal systems through the reception of entire bodies of foreign law.⁵⁶

The dissemination of particular ideas in a form useful to judges is a form of transjudicial communication that requires little direction or targeting. As the metaphor of cross-fertilization suggests, the court that is the source of the legal rules or principles in question casts them into the transnational winds without any particular knowledge of, or concern for, where they will land. Switching metaphors, to the extent that the disseminating court can be understood as conducting a monologue, as discussed above, it is up to the listeners to determine which parts of that monologue they choose to take away, build upon, and communicate to someone else. Neither the speaking nor the listening court is bound by a treaty structure or any other direct and formal links. I will argue below, however, that informal links and common constraints nevertheless bind courts participating in this form of communication into a loose community.

Pure cross-fertilization through transjudicial communication is likely to be very difficult to track. If the listening court genuinely seeks only ideas or inspiration from a foreign court, it has no incentive to credit the source of those ideas in its opinion. On the contrary, personal and national pride would seem to give a judge every incentive to adopt a line of reasoning as her own. Considerable anecdotal evidence, gleaned from confidential interviews with law clerks of foreign courts and from careful reading between the lines,⁵⁷ demonstrates that courts draw on the opinions of foreign courts without attribution.

It follows that evidence of foreign intellectual influences, through direct citation or comparison to a foreign decision, is likely to reflect something more than simple cross-fertilization. In such cases evidence that a foreign court has reached the same conclusion apparently has independent value, leading the listening court not only to borrow the idea, but to publicize its source. Indeed, the listening court may reach the same legal

56. See Glenn, *supra* note 6. Note that this phenomenon extends beyond transjudicial communication per se, potentially extending to the borrowing of entire areas of statutory law.

57. See cases cited *supra* note 23.

conclusion or formulate the same line of reasoning independently, yet nevertheless search for and cite evidence that foreign courts are like-minded.

D. *Enhancing the Persuasiveness, Authority, or Legitimacy of Individual Judicial Decisions*

Whether or not the listening court has in fact borrowed an idea or a legal solution from a foreign decision, citation of such a decision seems most likely to reflect a calculation by the listening court that evidence of foreign support or parallel reasoning will strengthen its own decision. Absent a defined judicial hierarchy, such a calculation can have several meanings. First, for courts adhering to what American lawyers would define as a highly formalist view of the law—a view that the law is discovered rather than made—evidence that courts around the world have reached similar conclusions to a similar legal problem would constitute *per se* evidence that the decision in question was a correct statement of “the law.” Second, for courts with a more realist view of the law—understanding the law’s potential indeterminacy yet nevertheless committed to the need to persuade as well as to coerce their audience of litigants, lawyers, and citizens in any particular case—the persuasiveness of any one particular decision may be enhanced by a simple demonstration that others have trodden a similar path. Third, historical and cultural traditions may endow the decisions of particular foreign courts with particular authority or legitimacy. Decisions of the courts of a former colonial power may enjoy this status after the colonial relationship has ended, as in the case of the authority of English decisions in the young U.S. legal system.

E. *Collective Deliberation*

A fifth function of transjudicial communication is the fostering of a process of collective judicial deliberation on a set of common problems. The examples in Part I reflect both specific and general forms of collective deliberation.

The specific phenomenon results from the explicit relationship of judicial cooperation called for by the German Constitu-

tional Court with regard to the ECJ. The German court invites common deliberation over the question of the competences of the European Union, as delineated by the Treaty of Maastricht. The court further proposes a division of labor whereby the German court will set forth absolute limits flowing from the German constitution and the ECJ will determine specific competences within the remaining realm. At the same time, however, the German court reserves the right to review the ECJ's determination of competences under the Maastricht Treaty, with the corresponding possibility that it will effectively overrule ECJ decisions that, in its judgment, do not conform with the provisions of the Treaty. The ECJ, for its part, is free to consider the provisions of the German constitution and the constitutions of other members of the European Union when interpreting the Treaty.

Should the ECJ accept the German court's invitation, the relationship established would represent a further step in the process of collective deliberation between the German Constitutional Court and the ECJ over the EC law of human rights.⁵⁸ As discussed above, the German Constitutional Court, as required by the German constitution, had previously reserved the right to determine minimum human rights safeguards for Community legislation. The ECJ responded by fashioning a Community law of human rights that incorporated the constitutional traditions of all the EC member states. The result was a joint sharing of jurisdiction, and hence deliberation, over the interpretation of both national constitutions and community law. This ongoing process of transjudicial communication eased jurisdictional conflicts between national courts and a supranational tribunal by substituting an image of judicial collaboration in pursuit of the same substantive goals.

A less developed example of a specific form of collective judicial deliberation through transjudicial communication is emerging among the states party to the European Convention on Human Rights. As the European Court of Human Rights ("ECHR") surveys the common constitutional provisions and practices of the states under its jurisdiction and disseminates national norms from one country to another through the medi-

58. *See supra* text accompanying note 36.

um of national courts, it is effectively collaborating with these national courts on the development of a common European law of human rights.⁵⁹ Assume, for instance, that the ECHR emphasizes the German principle of proportionality as an important element of the protection of human rights under the European Convention, and that a British court then accepts and applies this principle in the process of interpreting the Convention as part of British law. Its interpretation is likely to be conditioned by British understandings of due process of law. When the ECHR next surveys the national practice of states party to the Convention, it will have to take account of this British variant on the German principle, and alter its formulation of the European principle accordingly. The ultimate result is likely to resemble the product of collective deliberation by judges from different national legal traditions, resembling the actual decision-making processes of the ECJ.⁶⁰

The more general example of collective judicial deliberation is more fragile and speculative. It is also thus far limited to the human rights domain. The growing willingness of national and regional courts to follow the jurisprudence of the European Court of Human Rights—such as the citation of ECHR decisions by Zimbabwean courts and by the Inter-American Commission on Human Rights—suggests recognition of a global set

59. Laurence R. Helfer notes that the ECHR and the Commission “weigh deference to national decision-makers against their conviction that the treaty must be interpreted in light of progressive European conditions and attitudes.” Laurence R. Helfer, *Consensus, Coherence, and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 135 (1993). The human rights tribunals therefore defer to states on the margin of compatibility with the Convention, but may find violations when they discern a broadly defined “consensus” among the contracting states that expand the scope of a right beyond the level espoused by the defendant state. *Id.* at 137-38. To find this consensus, the tribunals look in part to the legal institutions of the member states. *Id.* at 139.

Mark Janis has urged for the formalization of a similar kind of collaboration among the European regional courts. He has called for a “cooperative mechanism” and the referral of cases between the ECJ and the ECHR. Mark Janis, *Human Rights Protection in Europe, in Contemporary International Law Issues: Opportunities at a Time of Momentous Change*, 1994 PRO. ASIL/NVIR JOINT CONF. 22, 29-32.

60. For a description of the wide variations in legal approaches among lawyers and judges in the European Union, see Francis G. Jacobs, *Preparing English Lawyers for Europe*, 17 EUR. L. REV. 232 (1992). Ulrich Everling suggests that “each Judge has the important function of introducing the legal thinking and basic concepts of the Member State to which he belongs into the Court’s consideration.” Everling, *supra* note 8 at 1296.

of human rights issues to be resolved by courts around the world in colloquy with one another. Such recognition flows from the ideology of universal human rights embedded in the U.N. Universal Declaration of Human Rights.⁶¹ The premise of universalism, however, does not anoint any one tribunal with universal authority to interpret and apply these rights. Collective judicial deliberation, through awareness, acknowledgment, and use of decisions rendered by fellow human rights tribunals, frames a universal process of judicial deliberation and decision.

IV. COMMON PRECONDITIONS FOR TRANSJUDICIAL COMMUNICATION

Parts I-III establish a typology of transjudicial communication. All the examples listed are forms of communication among courts across borders. Yet do they all actually relate to one another sufficiently to be classified as aspects of a common phenomenon? Do they share common elements or attributes that serve to make the generation of such a typology useful as more than an exercise in classification? More concretely, is the dialogue between the ECJ and the national courts structured by Article 177 part of the same general phenomenon as the cross-fertilization of ideas among national constitutional courts?

I argue that common elements can be identified, and that their identification offers a different and valuable perspective on transjudicial communication. This section will identify three such attributes, related but distinct. First is a conception of judicial identity that emphasizes judicial autonomy, a self-understanding whereby courts engaged in transjudicial communication conceive of themselves and their foreign counterparts as courts independent of their fellow governmental institutions, even in the unfamiliar and traditionally trencherous world of international relations. Second is a reliance on persuasive rather than coercive authority. Third is an implicit conception of a common judicial enterprise among courts in a particular region or even world-wide, a mutual recognition of one another as similarly situated institutions performing similar functions under broadly similar rules.

61. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

A. *Courts as Autonomous International Actors*

Courts typically disappear behind the facade of the unitary state in international relations. Domestically, they are the servants of, but also the checks on, the national legislature and executive. Internationally, they are inclined to present a united front, deferring to the executive in any case with significant foreign policy implications.⁶²

Courts engaged in transjudicial communication, however, conceive of themselves as autonomous actors forging an autonomous relationship with their foreign or supranational counterparts. The relationship between the German Constitutional Court and the ECJ again offers the most striking example: two courts interacting largely independently of either the German government or the European Community's Council of Ministers. Other examples include the willingness of lower national courts within the European Union to engage in independent dialogue with the European Court of Justice, frequently against the will of higher national courts and of the national executive.⁶³ Finally, the search for foreign inspiration or support by national courts confronting specific cases is a search by courts willing to look beyond the boundaries of their national legal systems and beyond the constraints of their relationship with other branches of their national governments, to their counterparts abroad. The image of collective judicial deliberation outlined above is one that emerges quite apart from the rough and tumble of international politics.

This autonomous self-conception does not necessarily entail a commitment to internationalism or universal interests, however. As discussed above, it is quite possible for national courts to engage in dialogue with one another to protect what they perceive as their government's interests. But it does require that

62. See Benvenisti, *supra* note 54, for a discussion of the deferential postures taken by British, French, and American courts in foreign affairs. For a discussion of the position taken by French courts, see ELIZABETH ZOLLER, *DROIT DES RELATIONS EXTÉRIEURES [THE LAW OF FOREIGN RELATIONS]* (1992); by German courts, see Thomas M. Franck, *POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); by U.S. courts, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

63. See, e.g., Weiler, *supra* note 8 at 2426.

courts have a conception of themselves as actors capable of determining those interests on their own account, even if they then choose to consider the views of other government departments.

B. *Persuasive Authority*

All the functions listed above, from enhancement of the effectiveness of supranational tribunals and international regimes to intellectual cross-fertilization, assume a judicial interaction based on persuasive rather than coercive authority. Patrick Glenn describes persuasive authority as "authority which attracts adherence as opposed to obliging it."⁶⁴ As every domestic lawyer knows, persuasive authority remains very important in national legal systems, notwithstanding the existence of a formal hierarchy and instruments of state power at the disposal of the courts. Judges would not otherwise feel compelled to offer reasons for their decisions.⁶⁵ Nevertheless, as long as the over-

64. Glenn, *supra* note 6, at 263. Glenn's understanding of persuasive authority encompasses the entire phenomenon of the reception of foreign law by a national legal system, such as the Canadian embrace of British common law or the German reception of Roman law. *See id.* at 269-73, 274-76. Law is accepted not by virtue of political obligation, as the words spoken by the voice of the people, or the monarch, or God, but rather because it satisfies particular political and cultural needs at a particular historical moment. *See id.* at 273-74.

65. A typical example of persuasive authority within a national legal system arises in the instance of a case of first impression that generates several different resolutions to a particular legal problem. Over time, subsequent courts adopt the reasoning that they find most persuasive, which then becomes established caselaw. *See, for example,* the extension of the Foreign Sovereign Immunities Act of 1976 ("FSIA") to cover suits against individual governmental officials. Several early decisions concluded, based on a reading of the text and legislative history of the FSIA, that the term "agencies or instrumentalities" of a foreign state could not be read to cover individuals. Other courts, however, disagreed, reasoning that in many cases a suit against an individual governmental official was in fact a suit against the state. In *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), the Ninth Circuit reviewed these conflicting lines of decision and sided with those courts that had extended the act. This view has subsequently been followed without exception. *See Trajano v. Marcos*, 978 F.2d 493, 497 n.8 (9th Cir. 1992), *aff'd* 25 F.3d 1467 (9th Cir. 1994) (stating that an individual acting in his personal capacity and beyond his official capacity is liable, but not otherwise); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *U.S. v. Hendron*, 813 F. Supp. 973 (E.D.N.Y. 1993). *See also* *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662 (C.D.Cal. 1993) (accord- ing individual state-run university employees the same immunity as the institution itself). Here, then, is an example of persuasive authority within a national judicial system. It lacks the other attributes, however, of judicial dialogue.

all legitimacy of a national legal system remains intact, any particular judicial decision will be followed, even if it is manifestly unpersuasive, due to the actual or potential coercive authority of the judge.⁶⁶

That authority is not available transnationally. Even where a body of supranational law is formally binding, the ECJ or the ECHR has no coercive power to compel adherence. They must instead rely on persuasion. Similarly, courts described above as "listening courts" in a process of cross-fertilization are likely to take up a particular idea only if they are persuaded or if they conclude that either the content of the idea and/or its source will enable them better to persuade their own audience.

In this regard, consider again Judge Mancini's reflections on the mechanisms used by the ECJ to enhance its effectiveness. "Knowing that the Court had almost no powers that were not traceable to its institutional standing and the persuasiveness of its judgments," he writes, the ECJ judges "made the most of these assets."⁶⁷ The ECJ had no authority beyond the power of its written text and the force of the arguments used to illuminate it. Yet national courts ultimately used its judgments to defy and circumvent higher national courts, and to bind their own governments.

C. A Common Judicial Identity and Methodology

Communication requires a modicum of common ground. At a minimum, courts must perceive their interlocutors as *courts*, as institutions engaged in the application and interpretation of the law. Further, there must be tokens of recognition by which courts can recognize each other as courts and can ensure that they are operating on a similar conception of what it means to be a court. For the courts of liberal democracies, the evidence required will be evidence of commitment to, and understanding of, the rule of law. At a minimum, such courts must perceive that their interlocutors conceive of themselves as servants of

66. Of course, civil law decisions technically do not bind other judges. Nonetheless, "as a practical matter it is generally recognized in civil law systems that judges do and should take heed of prior decisions." MARY A. GLENDON, ET AL., *COMPARATIVE LEGAL TRADITIONS* 208 (1994). Common law decisions do bind future judges to decide similar cases the same way, under the doctrine of *stare decisis*.

67. Mancini, *supra* note 8, at 605-06.

the law—of rules and standards neutrally and uniformly applied—rather than as the direct instruments or agents of political masters.⁶⁸ More generally, evidence of common methods of legal reasoning will be important: the solemnity of *stare decisis*, even in legal systems in which judicial precedent is not formally binding; the importance, indeed centrality, of texts, at least where texts exist; the ability to formulate a rule of general applicability and to generate coherent distinctions between the outcome in the case at hand and divergent outcomes in apparently similar cases; and logical clarity and consistency across time.⁶⁹

All of the examples of transjudicial communication given above have assumptions of commonality embedded in them. In the European Community context, Mancini's account relies on an underlying assumption of a common metric of "good" legal reasoning: an assumption that all national courts would respond to the same qualities in the ECJ's decisions.⁷⁰ The passage cited from the *Van Gend & Loos* case also reveals that the ECJ assumed that all national courts within the Community conceived of their primary function as protecting individual rights. Similar assumptions underpin the intermediated dialogue among European national courts brokered by the European Court of Human Rights.⁷¹ And in cases of horizontal communication in which a national court seeks to assess the degree of acceptance of mutual international obligations by canvassing the decisions of foreign courts, it is assuming that the executive and legislative branches of the foreign state in question are bound by the decisions of their courts to the same extent as it expects its decision to bind its own executive and legislative branches.

The phenomenon of judicial cross-fertilization per se, on the other hand, does not require a prior level of mutual recognition.

68. Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1916-22 (1992).

69. These commonalities can transcend apparent differences of deductive and analogical reasoning apparently embedded in common and civil law systems. As Cass Sunstein argues, both methods contain elements of the other, and indeed can together contribute to balanced legal decision-making. Cass Sunstein, *POLITICAL CONFLICT AND LEGAL AGREEMENT*, 1966 PANNER LECTURES IN HUMAN VALUES.

70. Mancini, *supra* note 8, at 597.

71. See *supra* note 27 and accompanying text.

The pure exchange of ideas can occur across radically different contexts; a U.S. court could conceivably borrow a particular legal formulation or conclusion from a court of the former Soviet Union, even if the two courts in question conceived of themselves, their function, and the law itself very differently. Actual citation of a foreign court as persuasive authority, however, assumes that the audience for a particular decision will recognize the foreign court as sufficiently like the national court, or at least sufficiently embodying the aspirations of the national legal system, to give weight to its words.

How is such mutual recognition among courts fostered and encouraged? In the European Community context, Joseph Weiler offers the following explanation:

The constitutional interpretations given to the Treaty of Rome by the ECJ carried a legitimacy deriving from two sources. First was from the composition of the ECJ, which had as members senior jurists from all member states. The second was from the legal language itself: the language of reasoned interpretation, logical deduction, systemic and temporal coherence—the artifacts that national courts would partly rely on to enlist obedience within their own national orders.⁷²

This explanation recapitulates the two factors identified above. The easiest way to foster a common judicial identity is to appoint judges to a supranational tribunal from the national judiciary; the second is to ensure the use of a common language.⁷³

A third factor, however, is awareness of a common enterprise, even if only in the sense of confrontation of common issues or problems. Courts must be able to transpose each other's decisions to their own circumstances to be able to use them. Recognition of this commonality does not obviate cultural differences, but it assumes the possibility that generic legal problems such as the balancing of rights and duties, individual and community interests, and the protection of individual expectations, may transcend those differences.⁷⁴

72. Weiler, *supra* note 8, at 521.

73. *Id.*

74. *See id.* at 520-21.

In the European Community, the ECJ succeeded in defining and promoting the enterprise of building a European legal system as part of the larger project of giving content and effect to the Treaty of Rome and building an "ever closer union of the Peoples of Europe."⁷⁵ Beyond the European Community, however, awareness of a common enterprise can flow either from a particular self-conception or a common substantive focus. Constitutional courts, for instance, may see their foreign counterparts as collaborators in a larger project of promoting constitutionalism—the commitment to a legal code of political, economic, and social conduct embodied in a written text or embedded in national practice. Additionally, the courts of some subset of countries may see their primary function as the protection of individual rights against the government. From this perspective, it is not surprising that one of the most active areas of transjudicial communication outside the European Community is among courts specifically charged with the interpretation and application of international instruments concerning human rights.

By no means does an awareness of a common enterprise entail identical outcomes in different national legal systems. On the contrary, the same rule of law principles that may empower courts to conceive of themselves as autonomous and to identify with foreign courts governed by the same principles may also impose powerful national and cultural constraints. The U.S. Supreme Court must expound "a Constitution for the United States of America," not for Britain or Zimbabwe.⁷⁶ So too must the British and the Zimbabwean courts follow both the text and subtext of their national laws. However, as Glendon, Lester, and Henkin persuasively argue with respect to the U.S. Supreme Court, the task of interpreting and applying national laws can be enriched and facilitated by taking foreign judicial opinions on similar questions into account.⁷⁷ I argue more generally that it is the awareness of the similarity or commonality of the judicial enterprise across countries, an awareness bol-

75. See Preamble, Treaty of Rome, *supra* note 11.

76. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2716 n.4 (1988) (Scalia, J., dissenting).

77. See GLENDON, *supra* note 1, at 145-170; LESTER, *supra* note 3; HENKIN, *supra* note 62, at 5; Henkin, *supra* note 15.

stered in turn by a mutual recognition of a common judicial identity and an openness to persuasive authority, that fosters a willingness to look abroad.

V. CAUSES AND CONSEQUENCES

Transjudicial communication is not a new phenomenon, but anecdotal evidence suggests that it is increasing. To the extent that the various examples of transjudicial communication are in fact part of a discrete phenomenon unified by underlying characteristics and preconditions, it is tempting to speculate on both its causes and potential implications.⁷⁸ I use the word "cause" deliberately loosely; factors such as mutual recognition of a common judicial identity and a judicial self-conception as an autonomous actor free to interact with other national and supranational courts are causes of transjudicial communication in the sense that they are preconditions for it. In this concluding section I seek to probe more generally, to investigate larger social, economic, and political trends both within nations and in the international community that might have a bearing on transjudicial communication. In the spirit of such speculation, I will close with a brief discussion of the potential consequences of increased transjudicial communication as a permanent phenomenon.

A. *Causes*

The most obvious cause of increased transjudicial communication is the increased internationalization of all domestic transactions due to historical and technological trends. As the subjects of domestic adjudication take on an increased international dimension, courts will be forced into contact with other legal systems and hence other courts. Alternatively, to the extent that internationalization of these various substantive areas of

78. Some of the causes listed below would apply equally to the simple citation or use of foreign or international law as to transjudicial communication between the tribunals charged with interpreting and applying that law. I suggest that the second is a subset of the first. If a "listening" or "receiving" court does not acknowledge the validity of the law that the "speaking" court is interpreting and applying, transjudicial communication would be pointless.

the law is driven by still deeper technological factors, those factors may bear equally on courts. Access to global legal data bases, for instance, would certainly facilitate awareness of foreign law.⁷⁹

The internationalization of subject areas such as human rights leads to a second cause of increased transjudicial communication: the growing number of supranational tribunals that can communicate with domestic courts and other supranational tribunals. Justice M.D. Kirby, President of the New South Wales Court of Appeal in Australia, argues that the development of caselaw by supranational tribunals interpreting international human rights treaties "make[s] it likely that judges and lawyers of the future in every land will pay increasing attention to the backdrop of international legal norms."⁸⁰ What is striking about this analysis is the implicit claim that it is *courts* that make the difference; that the existence of international legal instruments alone will have relatively little impact until they are interpreted and applied by courts.⁸¹ The point here may be a very commonsensical one—national courts may seek guidance on specific questions that the instrument itself cannot answer. Conversely, supranational tribunals that are actually adjudicating a fair number of cases under an international instrument are likely to have begun the hard work of actually interpreting and applying general formulae.

A third cause encompasses a range of structural factors encouraging transjudicial communication. This category has several subcategories. First is the existence of international instruments that intentionally structure specific kinds of transjudicial communication. The best example is Article 177 of the Treaty of Rome. Even though the drafters of that treaty did not envision the kind of judicial dialogue that ultimately resulted from the combined efforts of the ECJ and the national courts, they did

79. See M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTRALIAN L.J. 514, 516 (1988) on increasing awareness due to technological factors of events and ideas in other countries.

80. *Id.*

81. In explaining why British and Australian courts appear willing to look to human rights treaties for guidance in constitutional and statutory construction, Kirby notes: "The existence of a tribunal with an accepted jurisdiction may explain why such law will be taken into account by the English courts in practice." *Id.* at 515.

at least establish a structure providing for the referral of cases originally appearing before a national court to a supranational court. Second are the provisions for direct individual access to supranational tribunals contained in the Optional Protocols to the European Convention for the Protection of Human Rights and the International Covenant on Civil and Political Rights.⁸² These provisions do not require court-to-court communication, but they ensure that the supranational tribunal in question is likely to be reviewing the work of national courts, whether directly or indirectly. Further, they guarantee a symmetry and basic commonality between the national and supranational entities by ensuring that they are performing the same function for the same parties under the same integrated body of law. A third structural factor is actually negative: the *absence* of national law on point. Kirby notes that in countries such as Australia without a "comprehensive constitutional statement of human rights," judges and lawyers may find international instruments "useful starting points."⁸³ Similar arguments have been made in the British context.

A fourth cause may emerge from a more general global trend: the "third wave" of democratization resulting in a growing community of "liberal states."⁸⁴ Virtually all the examples cited in this article involve the courts of either established or aspiring liberal democracies. Further, all the most intensive and interactive examples of transjudicial communication, such as the cases of direct judicial dialogue, arise in the context of the world's most established community of liberal states, the European Union. The unifying factors of autonomous judicial identity, persuasive authority, and mutual recognition as participants in a common enterprise are all likely to be stronger among the courts of liberal democracies, and between national courts in

82. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (entered into force Mar. 23, 1976); Eleventh Protocol to the European Convention for the Protections of Fundamental Rights and Freedoms, Europ. T.S. No. 155. The protocol was signed by representatives of 31 of the 32 parties to the European Convention. See generally Henry G. Schermers, *The European Court of Human Rights After the Merger*, 18 EUR. L. REV. 493 (1993).

83. Kirby, *supra* note 79, at 516.

84. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, (pts. 1 & 2), 12 PHIL. & PUB. AFF. 205, 323 (1983).

liberal democracies and supranational tribunals charged with overseeing liberal democracies.⁸⁵ The spread of liberal democracy holds the promise of a widening community of liberal states, emboldens courts to act as autonomous foreign policy actors, and enhances awareness of a common effort to construct and preserve the rule of law.

B. *Consequences*

Imagine a world of regular and interactive transjudicial communication—among national courts, between national courts and supranational tribunals, and among supranational tribunals. It would be a world in which courts perceived themselves independent of, although linked to, their fellow political institutions, open to persuasive authority, and engaged in a common enterprise of interpreting and applying national and international law, protecting individual rights, and ensuring that power is corralled by law. National differences would be recognized and often given priority, but would not obscure common problems nor block the adoption of foreign solutions. Courts would relate to one another in ways that could circumvent and constrain other branches of national governments and that could forge an independent link between national and international institutions. In this conception, the phenomenon of transjudicial communication is a pillar of a compelling vision of global legal relations. It is a vision that is particularly potent in the human rights field, but potentially extends to all fields.

Consider some of the potential implications of this vision. First, the quality of judicial decision-making should improve worldwide, on the simple Madisonian premise that collective deliberation will produce a better solution than can be arrived at by any one individual.⁸⁶ As Glendon writes about the European Court of Human Rights, its composition “guarantees that

85. I suggest, in this regard, that courts in countries such as Australia, India, and Zimbabwe, would be less likely to cite the judgments of a supranational tribunal whose decisions bore the hallmark of brokered ideological conflict.

86. Glendon contends that “the current brisk international traffic in ideas about rights” offers to judges potent analytical tools tested by other decision-makers and an awareness of alternative approaches to legal problems—these are the standard benefits of the comparative method. See Glendon *supra* note 1, at 158.

the collective wisdom of a wide variety of legal systems will be brought to bear on any issue that comes before it."⁸⁷ Regular and intensive transjudicial communication promises an equivalent amount of information, even if it cannot replicate collective personal deliberation. Ongoing relationships between national and supranational courts offer a form of collective deliberation over time, as both sides work their way toward a mutually satisfactory position on legal issues of common concern and impact. Moreover, courts sharing insights with their counterparts from other nations will be forced to examine their own legal systems in comparative perspective, a perspective that often casts features we take for granted into sharp relief.

A second consequence of established and frequent transjudicial communication is that courts engaged in such communication could come to perceive themselves as members of a transnational community of law. This community of law would be co-extensive with, but distinct from, the corollary community of states. It could emerge in two ways. On the one hand, communication among courts in a particular subset of states could add a legal dimension to an existing cultural or ideological community. The best example is Western Europe, a group of states in which a combination of convergent cultural, political, and economic factors have long led scholars to imagine a "common law of Europe."⁸⁸ Even beyond Western Europe, however, the interest in and acceptance of foreign judicial ideas, or the willingness to engage with a supranational tribunal on a court-to-court rather than a court-to-state basis, strongly suggests a prior convergence of deep-seated principles and values, as well as modes of legal reasoning about those principles and values. On the other hand, the creation or generation of a legal community through transjudicial communication could itself

87. *Id.*

88. *See, e.g.,* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE (Mauro Cappelletti, ed., 1978). Cappelletti contends that the need to overcome the tragedies of the past century, combined with the risks of division in a world that demands larger markets, has led to an explosion of transnational public law. *Id.* at 24. He argues that this law can not only be identified in tribunals such as the ECJ and ECHR, but also that "the rise and growth of constitutional adjudication (with or without the establishment of special constitutional courts), . . . is a feature which is making *tache d'huile* in modern constitutional systems." *Id.* He claims that these institutional and constitutional judicial commonalities have even reduced the differences between civil and common law within Europe. *Id.*

help define and strengthen common political and economic values in the states concerned. The court of a fledgling democracy, for instance, might look to the opinions of courts in older and more established democracies as a way of binding its country to this existing community of states.

A third consequence of increased transjudicial communication should be an increased blurring of the lines between national and international law. National courts borrowing ideas from supranational tribunals; supranational tribunals synthesizing national law; national and supranational courts acknowledging overlapping jurisdiction and sharing responsibility: a dualist vision of watertight spheres of national and international law cannot be sustained. This vision has always been more hypothetical than real; many international lawyers will argue that such interpenetration is as old as the international legal system. As defined in the Statute of the International Court of Justice, international law itself is composed, in part, of "general principles of law recognized by civilized nations."⁸⁹ Nevertheless, the direct interaction of courts across the traditionally hypothesized boundaries between national and international legal systems would create unprecedented opportunities for the intermeshing of national and international law. Furthermore, to the extent that such interaction requires and/or fosters an awareness of a common enterprise, the very notion of a national versus an international legal system could begin to dissolve.

The fourth and final consequence of increased transjudicial communication would be the spread and enhanced protection of universal human rights. It should be evident from the many examples given above that this phenomenon is particularly pronounced among courts explicitly charged with the protection of human rights, whether as embodied in international treaties or national constitutions. Protection of individual rights comprises, the core of judicial identity for many courts; rights discourse, particularly in a more nuanced European mode,⁹⁰ appears to be readily accessible to courts around the world; and

89. Statute of the International Court of Justice, art. 38(1)(c), 1947 I.C.J. Acts & Docs. 46.

90. The difference between a European-style discourse emphasizing rights as defined and constrained by complementary responsibilities and an American emphasis on absolute rights is the subject of GLENDON, *supra* note 1, at 145-70.

ideas about rights can be directly and efficiently communicated through judicial opinions, even if they are translated and applied very differently by the receiving court. These are all factors suggesting that an increase in transjudicial communication is likely to spell an increase in communication about human rights protection.

In addition to these factors, a network of courts self-consciously communicating with one another around the world would reflect a strengthening of separation of powers principles on a global level. The principle of separation of powers protects human rights by providing a fundamental curb on the abuse of state power. To the extent that either a cause or a result of a transnational network of courts communicating with one another and with supranational courts is courts' conception of themselves as autonomous actors even beyond state boundaries, as opposed to integral and effectively invisible sub-components of state actors in the international system, the possibility of checking more repressive elements of national governments is increased. Such courts might come to see themselves as part of a judicial network of protection for individuals and groups in domestic and transnational society. Members of this network would rely on "the law" as interpreted and applied by the courts of many states, even where it is temporarily disregarded or distorted in the hands of a particular ruler holding sway over a national legal system. The immediate impact on human rights in such a system is likely to be minimal. But over time, courts bolstered by communication with other national and supranational courts will be bolstered in their efforts to make their own voices heard.

VI. CONCLUSION

The primary purpose of this article has been to develop a typology of transjudicial communication. I have classified such communication by form, degree of reciprocal engagement, and function. The results define a spectrum running from self-consciously interactive dialogue between a national and a supranational court at one end, to a national court's unacknowledged use of a foreign court's ideas or mode of reasoning at the other. Having identified different phenomena that could be classified

as transjudicial communication, I posed the question whether, in fact, they could be said to form part of a larger phenomenon. I suggest that they can, as they are unified by an underlying set of common elements, assumptions, or preconditions.

Transjudicial communication, in all the forms described here, presupposes that the courts involved conceive of themselves as autonomous governmental actors even beyond national borders; that they speak a sufficient common language to interact in terms of persuasion rather than compulsion; and that they understand themselves as similar entities engaged in a common enterprise. The entire range of examples relied on exhibit these preconditions to a greater or lesser degree. That these preconditions appear to exist among a growing number of national courts and supranational tribunals throughout the world in turn opens the door to a new vision of global legal relations.

The reinforcement of courts as autonomous international and transnational actors is a step toward the disaggregation of state sovereignty into component executive, legislative, and judicial institutions that can interact independently across borders. The fruits of such interaction could be envisioned as networks of institutions, or of institutionalized relations, that would emulate the form and substance of a world government without in fact transcending or displacing nation-states. To take one example, networks of national and supranational courts talking to one another in a process of collective deliberation over the protection of human rights would, in effect, create a multi-dimensional mechanism for creating and enforcing the human rights provisions of a hypothetical global constitution. But they would do so with a minimum of global machinery. Even the supranational elements in this network would depend for their effectiveness on the responsiveness of national courts.

The political philosopher Michael Sandel called recently for the creation of institutions that will institute and safeguard democracy at a global level.⁹¹ Such calls are typically under-

91. Sandel observed that "[o]ne of the biggest challenges for democracy in our time is to develop political institutions that will be powerful enough to deal with global markets, but accountable enough to enable citizens to feel that they are still in control." Thomas I. Friedman, *When Money Talks, Governments Listen*, N.Y. TIMES, July 24, 1994 at D3. Those governments that refuse the challenge, Sandel chides, are

stood as appeals to the framers of a global constitution, and to the forgers of international institutions analogous to domestic courts, legislatures, and executives. In fact, however, communication and interaction between existing national institutions is likely to serve far better.⁹² Transjudicial communication, while a seemingly small phenomenon in the face of such a grand vision, is nevertheless an important instance of interaction among judicial institutions around the world. Many of these institutions are bound by multiple ties, both formal and informal, but ultimately by none so powerful as a common commitment to the rule of law. The meshing of that commitment, through increasingly direct interaction, is more likely to establish an international rule of law than a single international court. International government requires common formal institutions; international governance is more likely to require communication and coordination among existing institutions. Courts are a fine place to start.

"like the king who stood on the beach and tried to stop the tide." *Id.*

92. Such communication and interaction may nevertheless benefit from catalyzing and coordinating functions generated by international institutions. These institutions will have a very different function, however, from institutions charged with the substance of global regulation.

