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Kurt Taylor Gaubatz
Old Dominion University

Matthew MacArthur
Standford University

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*Kurt Taylor Gaubatz**
*Matthew MacArthur***

* Graduate Program in International Studies, Old Dominion University, Norfolk, VA 23529-0086, kgaubatz@odu.edu.

** Department of Political Science, Stanford University, Stanford, California 94305-2044.

We have accumulated a number of intellectual and other debts in the crafting of the argument presented here. Seminars at Stanford, Oxford, and at Old Dominion University as well as a panel at the annual meeting of the American Political Science Association were the occasion for valuable feedback on the project. Particular thanks are due to Martha Finnemore, Jay Smith, Judith Goldstein, Andrew Hurrell, Richard Steinberg, Vaughan Lowe, Charlotte Ku, Jeffrey Manns, and Robert Beck. It should be noted that not all agreed with the argument presented here, indeed some took strong exception to it. Their comments helped us hone the argument, but responsibility and blame for it and any errors of logic or fact remain with us.

ABSTRACT:
HOW INTERNATIONAL IS 'INTERNATIONAL' LAW?

The international legal community posits universality as a central characteristic of modern international law. But there has been little work to assess the degree to which international legal norms are widely shared and incorporated into the foreign policy-making of states. Previous work in this area has attempted to describe the distribution of legal values across cultures. This work has proven contradictory and inconclusive. The epistemic communities literature suggests looking at the distribution of practitioners as an alternative approach for assessing the diffusion of norms and practices. In fact, the community of litigators who practice before the International Court of Justice (ICJ) comes from a very small set of Western states. While Western states utilize their own staff lawyers when appearing before the ICJ, non-Western states hire Western lawyers. International lawyers often identify the ICJ as the premier institution of public international law. The failure of non-Western states to produce their own lawyers for use at the ICJ raises significant questions about their resources and motivation to incorporate international law into their foreign policy-making. By these measures, international law is not as 'international' as its name implies.

I. ASSESSING THE INTERNATIONAL CHARACTER OF LAW

American and international attention was focused on the growing importance of international law by a recent case before the International Court of Justice (ICJ) involving the Republic of Paraguay and the United States. In that case Paraguay sought relief for the Paraguayan citizen, Angel Francisco Breard, who faced the death penalty in the United States for a murder committed in Virginia in 1992. Facing off for the oral pleadings on April 7, 1998 at the Peace Palace in The Hague were nine Americans and two Paraguayans. The oral pleadings took a total of about three and a half hours. During that time roughly 23,500 words were spoken. Of these, 22,800 came from the mouths of the Americans, while the laconic Paraguayans uttered just 700. The two sides were not as lopsided as this might imply since three of the Americans were arguing on Paraguay's behalf.[1]

1. Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America) (oral pleadings, uncorrected verbatim transcripts), http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm (last visited February 27, 2001). The presentation of the Paraguayan case took up some 9,800 words to 13,700 words for the American case.

The case of *Paraguay v. United States* reflects a larger phenomenon in the practice of international law. The most visible practitioners of international law are predominantly from the United States and a handful of Western European countries. Despite this obvious imbalance, international legal scholars frequently assert that international law is "truly universal."[2] In this article we document the extent of the Western monopoly of international legal practice at the ICJ and argue that this domination suggests that "international" law is not as *international* as its name implies. This argument is important not just for its implications concerning international law, but also for our broader theoretical understanding of the sources, spread, and survival of norms and ideas in international relations.

The Western domination of international legal practice will not come as a surprise to anyone who has studied ICJ proceedings. We provide here the first systematic description of who practices law at the ICJ and advance an argument about its significance. Some will dismiss the phenomenon we observe as simply a manifestation of legal specialization within a region that has a longer legal tradition. We will argue that this is not an adequate explanation for the degree of imbalance we observe, and that if international law were truly an integral part of foreign policy-making in most countries there would be many more appearances of non-Western lawyers before the Court. But this is getting ahead of our argument. We begin by looking at the universality claims made by the international law community. We then set out a sociological approach to the study of legal norms that serves as the foundation for our argument. Within this context, we present the systematic evidence of the extreme Western bias in the distribution of international legal practice. Finally, we return to a broader assessment of the implications of our findings for the character and content of contemporary international law.

A. *The Universality of International Law*

The question of whether international law is really "law" has been frequently discussed.[3] Our essential question is about the *international* rather than the legal character of international law. Are international legal norms and ideas genuinely shared throughout the system, or are

2. *See, e.g.*, MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 12–13 (6th ed. 1987); SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 256 (1995); REBECCA M.M. WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 5 (1986)

3. *See, e.g.*, Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. U. L. REV. 1293 (1985).

they a set of regulations that are primarily the province of a small group of powerful states?

All legal systems assert universality within their given domain.[4] Since international law takes as its domain the set of states in the international system, it is only natural that international legal scholars would assert the global relevance of international legal principles. Nonetheless, there have been some significant changes in the universalist conceptions of international law over the past five centuries.

The philosophical roots of modern international law in the natural law tradition provided an initial basis for the assertion of universality.[5] Whether from a more humanistic standpoint, such as in the work of Bodin and Gentili, or from the theological view of Grotius or the Spanish scholastics, Vitoria and Suarez, natural law was viewed as potentially the same for all people in all places. The shift from natural to positive international law in the late 18th century coincided with a growing recognition that international law was not really international at all. Instead, as Murray Forsyth notes, "there was a specific system of 'European public law,' which had spread to a few other parts of the globe (the United States being the most obvious example), but elsewhere forms of international behavior bore only a limited resemblance to it."[6] International law publications during this period reflected this changing conception in their titles. During the late 18th and early 19th centuries, the titles of major international legal publications "referred expressly to the 'European' law of nations."[7]

Around the middle of the 19th century, universal aspirations again came to the fore. Legal scholars and activists became increasingly willing to assert the global relevance of a set of rules for international interactions. Correspondingly, the use of the term "European law of nations" was increasingly replaced by the term preferred by English and American authors: "international law."[8]

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4. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS L.J. 805, 844–48 (1987) (Richard Terdiman trans., 1987).

5. *See* Murray Forsyth, *The Tradition of International Law, in* TRADITIONS OF INTERNATIONAL ETHICS 23 (Terry Nardin & David R. Mapel eds., 1992).

6. *Id.* at 36.

7. *Id.*

8. *Id.* at 37. In his discussion of the role of the 19th century American peace movement in the development of international law, Janis provides another example of the Anglo-American penchant for universalistic language. In 1843, the First Universal Peace Conference in London was attended by 292 delegates from the UK, 26 from the US, and just 6 from continental Europe. Mark W. Janis, *Protestants, Progress and Peace: Enthusiasm for an Inernational Court in Early Nineteenth-Century America, in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 223, 235 (Mark W. Janis ed., 1991).

In the twentieth century international lawyers continued to express confidence in the genuine universality of international law. In 1921 James Brown Scott, the founding editor of the *American Journal of International Law*, opined in the pages of that journal that the Permanent Court of International Justice (PCIJ)—the precursor to the ICJ—had realized "one dream of the ages" in its integration of different civilizations and systems of law.[9] Antonio Sanchez de Bustamante, one of the original judges on the Permanent Court of International Justice, echoed this spirit of optimism about the universality of international legal procedures in his 1925 assertion that: "[a]ll the races, all the continents, all the forms of civilization are before the Court. Swiftly, and finally, the conception and practice of law and justice in international relations has conquered the world."[10]

In the rebuilding of the international system that followed World War II, the PCIJ was replaced by the ICJ. Just as the PCIJ proved less permanent than its name implied, so too post-war scholars and practitioners came to see the PCIJ as less universal than had originally been thought. With the dramatic expansion of the international system in the process of decolonization, new standards for the meaning of the universality of international law were raised. C. Wilfred Jenks expressed the essence of this new view:

> [International law] can no longer be a projection of a group of closely related legal systems based on the civil and common law traditions, but must rest on the broader intellectual foundations necessary to give it world-wide authority in an age which is no longer prepared to accept the leadership of any one nation, culture, ideology or legal system.[11]

Alongside of these new standards, however, came the same assertions that universality had at last been genuinely attained. Rebecca Wallace writes in her introductory international law textbook "[i]nternational law is no longer . . . an exclusive western club. . . . The European bias of international law has been destroyed."[12] Mohamad Shahabuddeen, a former ICJ judge, describes the PCIJ as having been directed towards a European audience,[13] and endorses the universal character of the ICJ:

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9. James Brown Scott, *The Election of Judges for the Permanent Court of International Justice*, 15 AM. J. INT'L L. 556, 558 (1921).

10. ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT 219 (1925).

11. ARTHUR LARSON & C. WILFRED JENKS, SOVEREIGNTY WITHIN THE LAW 3 (1965).

12. WALLACE, *supra* note 2, at 5.

13. MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 207 (1996).

> The Court was designed to be a World Court; it is now more truly so than ever. The disciplined play within it of the different legal cultures which compose it is essential to its capacity to speak with the authority of the principal judicial organ of the United Nations.[14]

Even some analysts who have emphasized the weak diffusion of some parts of the international system have similarly endorsed the universal character of public international law as practiced before the ICJ. Samuel Asante, for example, in a study of the practitioners of international arbitration, argues that international commercial arbitration norms have not effectively spread to African countries, but nonetheless accepts that "the term 'World Court' which is used interchangeably with the ICJ, is appropriate and well-merited."[15]

But, as this brief review has shown, international legal scholars have long made universalist claims. How are we to assess whether the current claims have more validity than the now discredited assertions of the past? Previous arguments about the international character of international law have tended to focus on the degree to which legal norms are shared across different cultures. Jenks argues that there is already a "common law of mankind."[16] Surveying world legal systems, he concluded that there is a robust base for international law across cultures. A similar argument is advanced by R.P. Anand in a survey of legal attitudes in developing countries.[17] Adda Bozeman, on the other hand, reviews traditional Asian and African values and concludes that the lack of legal norms is fundamental to these cultures and will limit their ability to be integrated into Western-style international relations.[18] James Nafziger, conducting a similar review of the relationship between international law and distinctive religious beliefs, finds several important areas where international law and cultural practices diverge, "For example, prohibitions on whaling by national and international agencies . . . may conflict with indigenous religious practices. Prescriptions to protect the rights of women . . . have been rejected by some Islamic tradi-

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14. *Id.* at 208.

15. Samuel K.B. Asante, *The Perspective of African Countries on International Commercial Arbitration*, 6 LEIDEN J. INT'L L. 331, 348 (1993).

16. LARSON & JENKS, *supra* note 11.

17. R.P. ANAND, CONFRONTATION OR COOPERATION? INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES (1986).

18. ADDA B. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 163–72 (1971).

tions."[19] More generally, while international law scholars focus on the commonalities, comparative law scholars tend to emphasize the diversity of legal cultures.[20] David and Brierley, for example, argue that "The Muslim world, India, the Far East and Africa are far from having adhered to [Western civilization] without reservation. These countries remain largely faithful to philosophies in which the place and function of law are very different from what they are in the West."[21]

The cultural analysis of the international legal environment has been a valuable contribution to our understanding of the nature of international law, but in addition to being inconclusive and contradictory, these studies have not addressed the actual incorporation of international legal norms into the preferences and practices of states.

B. *The Sociological Approach to Legal Studies*

Norms are a notoriously difficult area for empirical research. One prominent literature in international relations theory has attempted to gain empirical leverage on norms by looking at "epistemic communities." This literature emphasizes the role of groups of experts and practitioners in the diffusion of norms. An epistemic community has been defined as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[22] These professionals share belief systems and "a common policy enterprise," which they engage in "out of the conviction that human welfare will be enhanced as a consequence."[23] Epistemic communities do not merely inform state action, but educate states by causing them to reevaluate their interests.

Law is at its core a socially constructed phenomenon. Thus, the sociological analysis of communities of practitioners is a relatively common approach in the analysis of legal systems.[24] Although it has not

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19. James A. R. Nafziger, *The Functions of Religion in the International Legal System, in* THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 147, 151 (Mark W. Janis ed., 1991).

20. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance,* 1997 UTAH L. REV. 545 (1997).

21. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 26 (Stevens & Sons 1978) (1964).

22. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination,* 46 INT'L ORG. 1, 3 (1992).

23. *Id.*

24. This strategy has been used in looking at private international law in the work of Asante, *supra* note 15; YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL

been previously applied to public international law, the epistemic communities approach is particularly appropriate for the analysis of international legal norms. Practitioners play a critical role in the formation and articulation of international law. Former ICJ judge Sir Robert Jennings asserts that practicing international lawyers "have much more say in the shaping of international law... than do their counterparts in domestic law making."[25] There is no hierarchical legislative or legal system to formulate international legal principles. Instead, international law depends critically on the practice of states and on the interpretation of myriad formal and informal agreements between individual states. States learn what international law is from the lawyers who practice it.

As we will argue at more length below, who practices international law at the ICJ matters for at least two reasons. First, legal practitioners compete to articulate particular visions of the law.[26] Antonio Cassese identifies different "segments of the world community" that not only "have a different concept of international law and attribute a different role to it, but they also endeavor to give it a shape according to their own interests."[27] Cassese particularly singles out the concept of law in the developing world, which he asserts is "profoundly distinct from that predominating in the West."[28] Other scholars have emphasized the distinctive legal cultures of Asian and African states and the difficulties of their integration into international law and legal practices.[29] Anne-Marie Slaughter makes a more general argument about the different perspectives of liberal and illiberal states in their attitudes toward public international law.[30]

LEGAL ORDER (1996)). Trubek and his co-authors point to the role of lawyers both in the process of globalization and in the competition between different legal systems. David M. Trubek et al, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994). For a variety of other examples of this analytic approach, *see* KEVIN MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY (1993), ERWIN SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964), and JOHN FLOOD, BARRISTERS' CLERKS: THE LAW'S MIDDLEMEN (1983).

25. Robert Jennings, *International Lawyers and the Progressive Development of International Law, in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 413, 414 (Jerzy Makarczyk ed., 1996).

26. Bourdieu, *supra* note 4; Dezalay & Garth, *supra* note 24; and Trubek, et al., *supra* note 24.

27. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 393 (1986).

28. *Id.* at 117.

29. *See, e.g.*, DAVID & BRIERLEY, *supra* note 21 at 28–29, 477–504; Asante, *supra* note 15; Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1 (1995); Gabriele Crespi-Reghizzi, *Legal Aspects of Trade with China: The Italian Experience* 9 HARV. INT'L L.J. 85 (1968).

30. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 87 AM. J. INT'L L. 205 (1993).

We argue here that looking at the diffusion of practitioners also matters because it sheds light on the diffusion of ideas and norms in international law in particular and international relations more generally; the bias in who practices international law reveals an underlying limitation in the internalization of international legal norms among a large number of states in the international system. As is argued in the epistemic communities literature, internalized norms should be carried by a community of practitioners. The relative lack of non-Western legal practitioners at the ICJ indicates a more systematic lack of international legal expertise within non-Western foreign policy institutions. This in turn suggests an important limitation on the potential for international law to effectively constrain the behavior of states.

Before turning to these arguments in more depth, it is useful to briefly consider the nature of legal procedures at the World Court, and then to set out the fundamental data that serves as the foundation for our argument.

C. *Legal Procedures at the ICJ*

The ICJ is the principal judicial organ of the United Nations. It takes only a cursory review of any international law text to see that the ICJ has played a central role in defining and interpreting international legal norms. During its first half-century of operation—1948 to 1998—the Court dealt with some 47 contentious cases, delivered 61 judgments and offered 23 advisory opinions.[31] While the court has no direct enforcement capabilities, the record of state compliance with its decisions has been generally good.[32] Excluding orders on provisional measures, there were only four cases of non-compliance with the judgments of the ICJ in this period.[33] While it has not been the subject of significant study in the international relations literature, the importance of the ICJ in the scholarship on international law is largely taken for granted. Jeffrey

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31. I.C.J., A GUIDE TO THE HISTORY, COMPOSITION, JURISDICTION, PROCEDURE AND DECISIONS OF THE COURT, *available at, http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter1.htm* (last visited Feb. 22, 2001). For a detailed analysis of the recent increase in the ICJ caseload, *see* D.W. BOWETT ET. AL., THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE (J.P. Gardner & Chanaka Wickremasinghe eds., 1997).

32. Enforcement of ICJ judgments rests with the Security Council. *See* U.N. CHARTER art. 94, para. 2. On compliance with ICJ judgments, *See* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 7–46 (M.K. Bulterman & M. Kuijer eds., 1996).

33. These four cases are Corfu Channel (U.K. v. Alb.), which was recently settled following the collapse of the Stalinist government in Albania, Icelandic Fisheries (U.K. v. Ice.), Iranian Hostages (U.S. v. Iran), and Military and Paramilitary Activities (Nicar. v. U.S.). *See* S.M. SCHWEBEL, *Commentary, in* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS, *supra* note 32, at 39, 40–41.

Kovar, a Deputy Assistant Legal Adviser in the U.S. State Department, expresses a common view in the international law community when he writes that the ICJ is "the premier international forum for the resolution of international disputes."[34]

Legal teams before the Court are led by agents, who act on behalf of the governments they represent. An agent can be likened to "the head of a special diplomatic mission with powers to commit a sovereign State."[35] Very often, the parties' ambassadors to The Hague are chosen to serve as agents. Agents are aided by counsel and advocates who "assist. . . in the preparation of the pleadings and the delivery of oral argument."[36] These subordinate team members are also selected by the governments they represent. Counsel and advocates need not be citizens of the states they represent, but "are chosen from among those practitioners, professors of international law and jurists of all countries who appear most qualified to present the view of the country that appoints them. In practice, they form a group of specialists which was once fairly limited, but which now is tending to expand."[37]

Cases are brought before the Court either as a result of a special bilateral agreement between states, or by one state's unilateral application. Parties to a case submitted by application may raise preliminary objections, which require hearings on whether the Court has jurisdiction over the dispute. Parties may elect not even to appear before the Court, as Iran did in *United States Diplomatic and Consular Staff in Tehran*, and the United States did in the merits phase of *Military and Paramilitary Activities in and against Nicaragua*. If the Court decides that it has jurisdiction, proceedings may continue even in cases of non-appearance. Finally, third parties may request permission to intervene if they have an interest in the outcome of a dispute between other states.

Once the case is underway, the proceedings themselves are divided into written and oral stages. The oral proceedings follow the written, and take place in public sittings at the Great Hall of Justice.[38] The members of each party's legal team present various aspects of their state's

34. Jeffrey D. Kovar, *International Litigation: International Law & Resolution of International Disputes, in* CONTEMPORARY PRACTICE OF PUBLIC INTERNATIONAL LAW 221, 226 (Ellen G. Schaffer & Randall Snyder eds., 1997).

35. I.C.J., A GUIDE TO THE HISTORY, COMPOSITION, JURISDICTION, PROCEDURE AND DECISIONS OF THE COURT, *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter3.htm (last visited Feb. 22, 2001). Rosenne describes agents as essentially "political" figures. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, at 1170–71 (3d ed. 1997).

36. I.C.J., *supra* note 35.

37. *Id.*

38. For a description of the ceremonial aspects of the oral proceedings, *see* ROSENNE, *supra* note 2, at 128–29.

case. Judges are allowed to pose questions to the speakers, but have done so very rarely.[39] When questions are asked, they tend to come at the end of the proceedings and the legal teams are allowed time to prepare responses.

Shabtai Rosenne, in a broad review of the functioning of the World Court, has emphasized the importance of the oral proceedings:

> One cannot fail to be struck by the close attention with which the judges follow the oral statements, for they act as the focusing point for the work of the Court in deciding the case, and accordingly can have a great impact on the case. Skillful pleading may not win a bad case, but it can mitigate the effect of a negative decision.[40]

Rosenne admits that the requirements of simultaneous translation can have a "deadening effect" on the oral proceedings. "This notwithstanding, it is still the hearing which has the most direct impact."[41]

Keith Highet, a lawyer who has himself appeared before the ICJ on eleven different occasions representing ten different countries, has also emphasized the importance of the oral proceedings:

> [T]here is no question . . . that the written proceedings are subordinate to the oral proceedings. Stilted, lengthy, and even boring as the oral pleadings may be, it is in this phase that the parties boil down their cases to the crucial points, that counsel has to stand up and speak out, and that the judges form opinions. The length, turgidity, complexity and repetitiveness of the written pleadings make them hard for any but the most diligent of judges (or counsel) to master. It is at the oral stage that push comes to shove and that cases are, almost without exception, won or lost, saved or frittered away. As Article 60, paragraph 1 of the Rules says, the purpose, and indeed the result, of the oral proceedings is to bring out "the issues that still divide the parties," and not "go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."[42]

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39. I.C.J., A GUIDE TO THE HISTORY, COMPOSITION, JURISDICTION, PROCEDURE AND DECISIONS OF THE COURT, *available at* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter4.htm (last visited Feb. 22, 2001)..

40. ROSENNE, *supra* note 2, at 129.

41. *Id.*

42. Keith Highet, Book Review, 86 AM. J. INT'L. L. 400, 402 (1992). Highet's remarks are in reaction to the assertion of Gill that the oral proceedings are less important than the written proceedings. *See* TERRY D. GILL, LITIGATION STRATEGY AT THE INTERNATIONAL COURT: A CASE STUDY OF THE NICARAGUA V. UNITED STATES DISPUTE 89–91 (1989).

Once oral proceedings conclude, the Court deliberates privately, and then delivers its judgment in a final public sitting in the Great Hall of Justice.

II. THE DATA

In this project we compare the diffusion of international legal norms among Western and non-Western states. We have adopted current membership in the Organization for Economic Co-operation and Development (OECD) as the criterion for identifying Western states.[43] This measure is imperfect, but its deficiencies are biased against the case we make here. Israel, Liechtenstein, and South Africa, for example, have all appeared before the Court and are arguably "Western" despite not being OECD members. To the extent that these countries have been able to send legal teams of high national composition to the Court, their categorization as non-Western should bias the results against our expectations.[44] Meanwhile, Japan, South Korea, and Turkey are OECD members, yet are arguably non-Western. These states, however, have not appeared before the ICJ, so their categorization as "Western" has no impact on the main results presented here.

Our case data come directly from the *Proceedings* of the ICJ for the first fifty years of the Court's operation, from 1948 to 1998. We have examined every contentious case—brought either by application or agreement—that included oral proceedings regarding preliminary objections, interim measures, permission to intervene, or merits.[45] This set of cases ranges from *Corfu Channel* (1948) to *Fisheries Jurisdiction* (1998). We have also compiled data on the lawyers who participated in

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43. Current OECD members (and their year of admittance): Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), the Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Spain (1961), Sweden (1961), Switzerland (1961), Turkey (1961), the United Kingdom (1961), and the United States (1961). We use the term "Western" because it is commonly used for this cultural denotation. Of course it is not a geographically perfect categorization. Given the exclusion of the Latin American states, "Northwestern" might be a more appropriate appellation.

44. Israel and South Africa both sent purely national teams in their respective appearances before the Court. Liechtenstein used one Swiss and three British lawyers in its 1954 appearance in the *Nottebohm* case.

45. The complete list of cases is provided in the appendix. We have included cases in which only one side appeared. Rosenne explains that "the Court has shown itself capable of carrying out its task of reaching a decision despite the absence of formal pleadings and evidence by one of the parties." ROSENNE, *supra* note 2 at 95.

each sitting of the oral proceedings of these cases.[46] The data include information on forty-seven cases, involving fifty countries and 593 legal team members, argued over the course of approximately 1,000 public sittings.

It should be noted that in several cases documentation for some of the sittings is unavailable. There are also eight cases that were too old to have been detailed on the ICJ's website, yet too recent to be published in the ICJ's *Proceedings* series.[47] The missing records prevent us from tracking attendance over the entire course of the oral proceedings in these cases, but we were always able to utilize records from the final sittings, which are generally representative.[48]

A. *Legal Teams at the ICJ*

In Figure One we summarize the national and non-national composition of the legal teams of the OECD and non-OECD states. Each vertical bar represents the number of legal teams within each quintile for the percentage of members of the team that are nationals. Of course, every team includes at least one national. But the differences between Western and non-Western states are clearly apparent in the figure. The Western states tend to use teams with very high national composition, while the non-Western states tend to use teams with relatively low national composition.

The differences between Western and non-Western states are more succinctly summarized in Table One, which uses a 60 percent cutoff to dichotomize the ICJ legal teams on the basis of their national composition. The strong relationship between OECD membership and national composition of ICJ legal teams can be clearly seen in the main diagonal.

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46. We focus exclusively on legal specialists—individuals with such designations as "agent," "counsel," "advocate," "counsellor," "legal expert," and various combinations thereof. Other team members, such as secretaries and witnesses, are excluded.

47. These cases include: *Certain Phosphate Lands in Nauru (Nauru v. Austl.), Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), Territorial Dispute (Libyan Arab Jamahiriya/Chad), East Timor (Portugal v. Austl.), Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, the Merits phase of *Military and Paramilitary Activities in and against Nicar. (Nicar. v. U.S.)*, and *Frontier Dispute (Burkina Faso/Republic of Mali)*.

48. If there is any bias in only looking at the final sittings it should go against our argument since it is the hired non-nationals who sometimes do not show up at the last sitting. A dramatic example of this is the lengthy *Barcelona Traction* case. The final sitting was attended by only four lawyers, two from each side. Only one was a non-national. In contrast, at the first sitting of this case, there were thirty-six lawyers present, seventeen of whom were non-nationals.

FIGURE ONE
OECD MEMBERSHIP AND THE NATIONAL COMPOSITION OF ICJ LEGAL TEAMS (1948–1998)

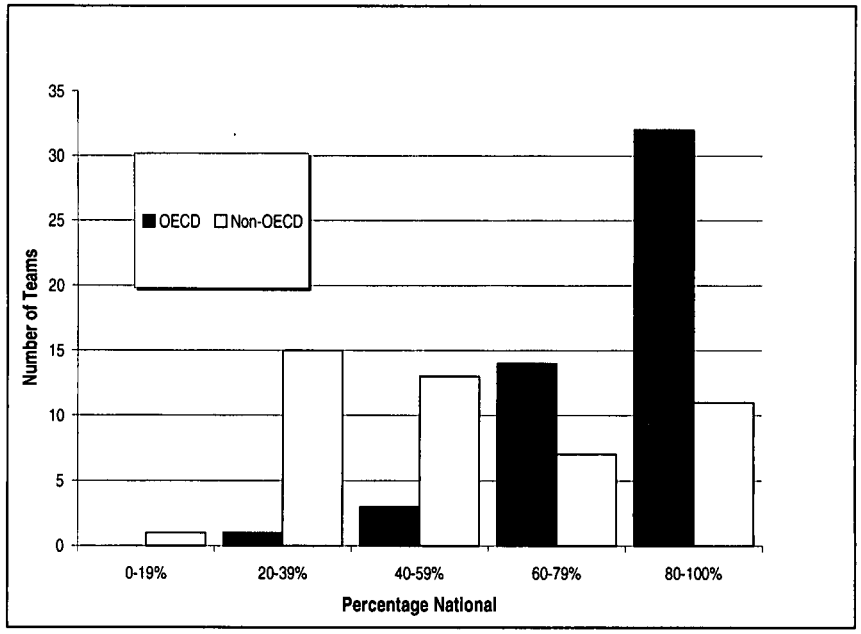

TABLE ONE
OECD MEMBERSHIP AND NATIONAL COMPOSITION OF ICJ LEGAL TEAMS (1948–1998)

National Composition	OECD Member	Non-OECD Member	Total
60% or More	46	18	64
Less than 60%	4	29	33
Total	50	47	97
$P(\chi^2[1] > 31.13)=.000$			

Of the 185 states that are members of the United Nations, only sixty have been parties before the ICJ.[49] Moreover, OECD states make up 35

49. I.C.J., *supra* 35. This covers the years between 1946 and July, 1996. U.N. membership is as of 1998. Two states on the list of sixty (Turkey and Iceland), were named as parties, but refused to participate. Two others (Lebanon and Egypt) were only involved in cases that were terminated by discontinuance. For a discussion of some of the elements in state decisions to utilize the ICJ, *see* Dana D. Fischer, *Decisions to Use the International Court of Justice*, 26 INT'L STUD. Q. 251 (1982).

percent of the parties that have appeared before the ICJ, but only account for 16 percent of the states in the United Nations. Our argument is that the bias in the nationality of international legal practitioners is an indicator of the limited diffusion of international legal norms. To the degree that the parties before the ICJ are the more legally-oriented states in the system, our results should be *understated.* Those states that do not even resort to the ICJ are presumably even less integrated into the international legal system. For example, the United States attempted to use the ICJ to resolve several disputes with the Soviet Union concerning incidents in which planes were shot at after straying into the airspace of the Soviet Union or its satellites. In each of these cases the Soviets rejected ICJ jurisdiction.[50] Meanwhile, the Soviet Union never called on the Court to resolve any of its disputes.[51]

The ICJ has been most notably underutilized by African and Asian states.[52] China, Japan, Korea, and Vietnam, for example, have never appeared before the court. In the 1948 to 1998 period, there are only four cases involving Asian states.[53] Table Two shows the regional utilization of the ICJ and the frequency of teams composed solely of national lawyers.

The data presented in Figure One and in Tables One and Two make a convincing case that non-Western states tend to have a greater proportion of non-national representation in their appearances before the Court. Nonetheless, there are a number of discrepant cases in the off-diagonal. These discrepant cases fall into two categories: there are the four cases in which Western states have had a relatively high proportion of non-national representation; and there are the seventeen cases in which non-Western states have had a low proportion of non-national

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50. *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v Hung., U.S. v U.S.S.R.); *Aerial Incident of October 7th, 1952* (U.S. v U.S.S.R., 1956); and *Aerial Incident of March 10th, 1953* (U.S. v U.S.S.R., 1956).

51. *See* GILL *supra* note 42, at 15–17. There is some evidence that Gorbachev was interested in increasing Soviet involvement in the ICJ, but that experiment was cut short. *See* NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 232–33 (Martinus Nignoff Publishers, 1989). Earlier Soviet distrust of the ICJ is reflected in the title of a 1950 article by a prominent Soviet jurist, E.A. Korovin, *The International Court in the Service of Anglo-American Imperialism* cited in ROSENNE, *supra* note 2, at 258.

52. *See* R.P. Anand, *Attitude of the Asian-African States toward Certain Problems of International Law, in* THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW (F.E. Snyder and S. Sathirathai, eds., 1987).

53. These four cases are: the dispute between Cambodia and Thailand over the Temple at Preah Vihear in 1962; The Portugal v. India dispute in the *Indian Territory* case (1960); *Appeal Relating to the Jurisdiction of the ICAO* (Pak. v India, 1972); and the *Pakistani POWs Case* (Pak. v India, 1973). Table Two only shows 6 appearances before the Court because India did not participate in the Pakistani POWs case.

representation. We turn our attention to these apparent discrepancies below.

TABLE TWO
NATIONAL COMPOSITION OF ICJ LEGAL TEAMS BY REGION (1948–1998)

Region	All-National Legal Teams	Total Legal Teams	Percentage All National
Northern Europe	19	28	68%
North America	7	11	64%
Asia	3	6	50%
Middle East	1	4	25%
Oceania	1	5	20%
Latin America	2	12	17%
Southern & Eastern Europe	1	12	8%
Africa	1	19	5%

1. Western Legal Teams with High Non-National Composition

There are four cases in which the legal team of a Western state had a relatively high non-national composition. These cases are listed in Table Three. Although these Western states had higher than expected numbers of non-nationals on their legal teams, closer examination of the actual work performed by these teams' members bears out our expectations.

In its particulars, the Belgian case corresponds most closely to our anticipated results. A simple way to gauge the relative contributions of various team members during oral arguments is to calculate the percentage of the total arguments—in pages—that they provided. As is indicated in the final column of Table Three, of the 1,790 pages of oral arguments made by the Belgian team in *Barcelona Traction*, 72 percent were made by national lawyers. Furthermore, the non-national lawyers on the Belgian team were all from Western Europe and Canada.

TABLE THREE
OECD LEGAL TEAMS WITH HIGH NON-NATIONAL COMPOSITION

Year	Case	Team	% Non-Nationals	% of Oral Argument by Non-Nationals
1953	*Ambatielos*	Greece	61%	100%
1964	*Barcelona Traction*	Belgium	53%	28%
1951	*Fisheries*	Norway	50%	73%
1964	*Barcelona Traction*	Spain	42%	68%

In the other three cases, the use of non-nationals is more substantial. Just as we have argued for the non-Western states, these outside experts have played a central role in the legal proceedings. In the *Fisheries* case, Maurice Bourquin—a Swiss lawyer—presented 73 percent of Norway's oral arguments. Spain's seven non-national lawyers provided 1,014 pages of their team's 1,487 pages of argumentation in *Barcelona Traction*. In the Greek case, two non-nationals—Belgian Henri Rolin and Britain's Frank Soskice—made *all* of the oral arguments.[54]

These four discrepant cases highlight our use of a broad definition for the category of "Western" states. In fact, the practice of international law before the ICJ is a specialization concentrated in a mere handful of states. Greece is surely a Western state by our definition, but there are no Greek international lawyers who have made arguments before the ICJ as non-nationals. In each of these cases the non-national lawyers continue to come from the same small set of Western states. In these ostensibly discrepant cases there is only one international lawyer from a non-OECD state helping to represent an OECD state. In the Barcelona Traction Case, Spain included the Uruguayan jurist Eduardo Jiminez de Arechaga on its legal team. We will return later to the exceptional case of Jiminez de Arechaga, who went on to become a judge on the court.

2. Non-Western Legal Teams with High National Composition

Most directly problematic for our argument are the eight cases in which the legal team of a non-Western state had *no* non-national composition: Colombia in the 1950 *Asylum* case, Colombia and Cuba in the 1951 *Haya de la Torre* case (an extension of the 1950 *Asylum* case), Israel in the 1959 *Aerial Incident* case, South Africa in the 1965 *Southwest*

54. The Greek agent merely introduced his team in a statement spanning barely half a page. Observations of M. Lely, (Greece v. U.K.), I.C.J. Pleadings (Ambatielos Case) 300 (May 16, 1952).

Africa case, India and Pakistan in the 1972 *ICAO* case, and Pakistan in the 1973 *Pakistani POWs* case. These eight cases represent just six states since Colombia and Pakistan each appear on the list twice. Cuba's role in the *Haya de la Torre* case was relatively incidental. The Cubans intervened as a third party into the Colombian-Peruvian asylum dispute in order to make an assertion about regional asylum conventions. Cuba sent only one representative—a Cuban—to present its brief case. Israel and South Africa, of course, have a number of Western characteristics. Perhaps India and Pakistan can be explained by their strong inheritance of British legal traditions. As Rosenne explains, "Most of the newly independent States maintain at least to some extent the legal system inherited from the former colonial power."[55]

This leaves Colombia as the most significant outlier. As we will discuss at more length below, however, it is interesting to note that in contrast to several other similarly positioned states, Colombia has long had an active legal adviser's office within the foreign ministry. We would posit that the existence of this exceptional case demonstrates that when a non-Western state has an effective and well-integrated legal staff it is possible for it to present its own case.

There are eight other cases in which the legal team of a non-Western state was composed of greater than 60 percent (but less than 100 percent) nationals. These cases are listed in Table Four. As in the exceptional Western cases we examined above, a more detailed inspection of the oral transcripts shows that the make-up of these teams is not always representative of the division of labor between nationals and non-nationals. The Western bias is more pronounced than is represented simply by the nationality of the lawyers. The rightmost column in Table Four again shows the percentage of the oral arguments made by the non-national lawyers on the team. When non-Western states hire outside legal representatives, they tend to rely strongly on those representatives in the oral proceedings. For example, Gilbert Gidel, Peru's French lawyer in *Haya de la Torre*, provided 79 percent of his team's nineteen pages of oral argument. In the *Asylum* case Peru's French lawyer Georges Schelle provided 79 percent of his team's sixty-six page oral arguments. In the *Northern Cameroons* case 90 percent of Cameroon's oral arguments were made by their non-national lawyer, Prosper Weil. The Beligian lawyer, Henri Rolin, made 87 percent of the Iranian oral arguments in th *Anglo-Iranian Oil* case.

Cameroon's co-Agent, Douala Moutomé, explicitly acknowledges a division of labor in his opening presentation for the Cameroonian oral

55. ROSENNE, *supra* note 2, at 55.

pleading in the 1998 *Land and Maritime* case: "It is neither among my duties or my capabilities to refute the Nigerian Preliminary Objections point by point; counsel for Cameroon will deal with that."[56] Western states tend to use national lawyers throughout their oral presentation. Non-Western states not only hire outside lawyers, but when their national representatives do appear they focus on historical, geographic, and political factors. The purely legal arguments are most often left to the non-national lawyers.

TABLE FOUR
NON-OECD LEGAL TEAMS WITH HIGH NATIONAL COMPOSITION

Year	Case	Team	% Non-Nationals	% of Oral Argument by Non-Nationals
1950	*Asylum*	Peru	16%	79%
1951	*Haya de la Torre*	Peru	16%	79%
1952	*Anglo-Iranian*	Iran	22%	87%
1954	*Nottebohm*	Guatemala	32%	85%
1963	*N. Cameroons*	Cameroon	14%	90%
1985	*Cont. Shelf*	Tunisia	40%	80%
1986	*Frontier Dispute*	Mali	36%	NA*
1990	*Land. . .Maritime*	El Salvador	36%	NA*
1991	*Arbitral Award*	Senegal	38%	NA*
1998	*Land/ Maritime*	Cameroon	25%	57%†

* At the time of this research, The Mali, El Salvador, and Senegal cases had not yet had their full proceedings published, and were not recent enough to appear on the ICJ web site. The percentage of non-nationals in these cases comes from the final sitting.

† The percentage in this case is based on word counts (rather than page counts) because the proceedings were only available on-line.

3. Non-National Lawyers Before the ICJ

An alternative standpoint from which to gain perspective on this issue is to shift the focus from the legal teams to the individual lawyers. When we look at the individual lawyers who have appeared before the ICJ, the evidence remains equally dramatic. Table Five lists the states that have produced lawyers who have served as non-nationals on ICJ legal teams. Of the 148 lawyers who have served on foreign teams, only six (4 percent) are citizens of non-OECD states.[57] Of the forty-four

56. Oral Pleadings of Cameroon, Land and Maritime Boundary (Cameroon. v. Nig.), at 37 (Mar. 5, 1998), *available at* http://www.icj-cij.org/icjwww/idocket/icn/icncr/cn_icr9803_translation.htm, Mr. Moutomé's testimony (last visited Nov. 9, 2000).

57. The list is also overwhelmingly male, with only ten discernable female first names.

lawyers who have appeared before the court representing a foreign country more than once, only one is from a non-OECD state. When non-national lawyers are hired, 77 percent of the time they have come from just five countries: France, the United States, the United Kingdom, Belgium, and Italy. Only eleven states have produced more than one lawyer who has appeared as a non-national before the ICJ. Only nine states have produced lawyers who have appeared more than once in that role.

TABLE FIVE
CITIZENSHIP OF NON-NATIONAL LAWYERS ON ICJ LEGAL TEAMS
(1948–1998)

OECD States		
State	Number of Lawyers	Number of Appearances
France	35	78
UK	35	74
US	27	48
Belgium	9	22
Italy	8	10
Spain	8	8
Switzerland	6	10
Germany	5	6
Netherlands	2	2
Australia	2	2
Portugal	2	2
Canada	1	1
Japan	1	1
Denmark	1	1
Total - OECD	142	265

TABLE FIVE (CONTINUED)

Non-OECD States		
State	Number of Lawyers	Number of Appearances
Uruguay	1	6
Czechoslovakia	1	1
India	1	1
Israel	1	1
Liberia	1	1
Madagascar	1	1
Total—non-OECD	6	11
GRAND TOTAL	148	276

Table Six lists the ten lawyers who have represented foreign countries before the ICJ five or more times. Only two of these lawyers have ever represented their own states before the ICJ. Bowett represented the UK in the 1973 *Fisheries Jurisdiction* case and Rolin appeared for Belgium in the 1964 *Barcelona Traction* case. The distinguished Uruguayan jurist Eduardo Jimenez de Arechaga is the one non-OECD standout in this list—and the only non-OECD citizen to have represented a foreign state more than once before the ICJ.

Jiminez de Arechega is clearly a significant exception to our argument. At the same time, he demonstrates the possibility of precisely the process of diffusion we would expect to see more often. Jiminez de Arechaga was born in Montevideo in 1918, and earned his Doctor of Law at the University of Uruguay in 1942. He was a professor of international law at the Montevideo Law School, and went on to hold a number of positions both within the Uruguayan government and in the United Nations. He joined the Court as a judge in 1970, and was elected President of the Court in 1976. Jiminez de Arechaga retired in 1979. In three of his six appearances he represented an OECD state.[58] Five of his six appearances before the Court came after his retirement. Still, his education in Uruguay coupled with his frequent appearances before the

58. Jiminez de Arechaga was part of the Spanish team that argued the *Barcelona Traction* case in 1964. He helped represent Australia in *Certain Phosphate Lands* in 1992, and Denmark in its 1993 *Maritime Delimitation* case.

Court as a non-national legal expert make him a significant but singular outlier in our data.

TABLE SIX
NON-NATIONAL LAWYERS WITH FIVE OR MORE APPEARANCES BEFORE THE ICJ (1948–1998)

Name	Citizenship	Appearances on Foreign Teams
Derek Bowett	United Kingdom	11
Keith Highet	United States	11
Ian Brownlie	United Kingdom	9
Prosper Weil	France	9
Richard Meese	France	8
Elihu Lauterpacht	United Kingdom	7
Eduardo Jimenez de Arechaga	Uruguay	6
Alain Pellet	France	6
Henri Rolin	Belgium	6
Pierre-Marie Dupuy	France	5

Although our analysis has been focused on the lawyers who practice international law, a brief look at the backgrounds of the judges who sit behind the bench provides further support for our argument that international legal norms are still relatively weakly diffused through the international system.

B. *The ICJ Judges*

The first attempt to set up a standing international court with permanent judges faltered over the issue of the apportionment of judges by nationality.[59] At the 1907 Hague Conference the large states and small states could not agree on a formula for the terms of judges that would ensure the kind of diversity demanded by the smaller powers. This disagreement arose despite the American Secretary of State Elihu Root's admonition to the American delegation that the new full time judges "should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented."[60]

59. *See* ROBERT KLEIN, THE IDEA OF EQUALITY IN INTERNATIONAL POLITICS: THE TENSION BETWEEN THE CONCEPT OF GREAT-POWER PRIMACY AND THE CONCEPT OF SOVEREIGN EQUALITY 83–87 (1966).

60. I.C.J., *supra* 31.

The principles of national diversity and the representation of diverse legal systems in the appointment of judges have been maintained in the current rules for electing ICJ judges. Article 9 of the Statute of the ICJ spells out the diversity emphasis:

> At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.[61]

This basic principle is clearly followed in terms of nationalities. The current roster of ICJ judges includes jurists from a broad range of states. Seven of the current judges are from OECD states, and eight are from non-OECD states. According to Shahabuddeen, the Court has succeeded in ensuring diversity and representation: "To some extent in composition, but to an even greater extent in outlook, the Court as a whole has been moving in the direction of keeping pace with the evolving character and structure of the international community."[62]

This appraisal may be overly optimistic. Rosenne observes that although nationality and regional representation is a significant element in the election of judges, "the representation of legal systems does not appear to constitute a major factor in the election process."[63] While the judges may be influenced by their national philosophies, ideologies and religions, they are usually trained in either continental Civil Law or Anglo-American Common Law.[64] It takes only a cursory look at the backgrounds of the current judges to raise questions about the *international* character of modern international law.

Tables Seven and Eight list the current OECD and non-OECD ICJ judges respectively with their nationalities and educational backgrounds. In both tables, schools in OECD states are indicated by ***italicized bold text***. All seven of the OECD judges in Table Seven have been educated entirely in OECD states. But, as shown in Table Eight, all but one of the non-OECD judges also received a significant part of his legal education in an OECD state. The single exception is the Russian judge, Vladlen Vereshchetin, who received his legal education at the

61. I.C.J. Statute, art. 9. *See also* ROSENNE *supra* note 2, at 54–62.

62. Mohamed Shahabuddeen, *The World Court at the Turn of the Century, in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE AFTER FIFTY YEARS 14 (A. Sam Muller, D. Raic, and J.M Thuránszky, eds., 1997).

63. ROSENNE, *supra* note 2, at 59.

64. *Id.* at 60.

University of Moscow.[65] Of the fifteen judges currently on the ICJ bench, all but one of them received a significant part of his or her legal education in OECD states.[66] The OECD criterion is a little sloppy in evaluating the Western educational connections of the ICJ judges, since we might not want to include education in Hungary in the 1950s as Western. Still, all but three of the fifteen judges received a significant part of their legal training in just four countries: France, Germany, the United Kingdom, and the United States.

TABLE SEVEN
ICJ JUDGES FROM OECD STATES:
NATIONALITY AND EDUCATIONAL BACKGROUND

Name	Citizenship	Legal Education
Shigeru Oda	Japan	*Law degree, Univ. of Tokyo* *JSD, Yale Univ.* *Dr. of Law, Univ. of Tohoku*
Gilbert Guillaume	France	*BA, law, Univ. of Paris* *Diplôme, Paris Institute of Pol. Studies* *Diploma, Univ. of Paris*
Géza Herczegh	Hungary	*BA, Ph.D., U. of Szeged (Hungary)*
Carl-August Fleischhauer	Germany	*First State Exam (Law), Heidelberg* *Fulbright Scholar, U. of Chicago Law School* *Dr. jur., Heidelberg* *Second State Exam (Law), Stuttgart*
Rosalyn Higgins	United Kingdom	*BA, LL.B. MA Cambridge* *JSD, Yale*
Pieter H. Kooijmans	Netherlands	*Econ. B., LL.M. Dr. Iuris, Free U., Amsterdam*
Thomas Buergenthal	United States	*JD New York Univ.* *LL.M, JSD, Harvard*

65. On this issue our use of OECD membership as a proxy for 'Western' may bias the results in our favor. But even a more narrow view of the 'Western' category would only change the results by one, removing Géza Herczegh—who received his education entirely in Hungary—from the list. A more narrow definition of the West would also treat Shigeru Oda's Japanese education differently, but his JSD from Yale University would keep him on the list of Western educated judges.

66. Prott, writing in 1979, makes a similar point about the roster of judges up until 1979, all of whom but one had received some part of their legal training in a "Western-type legal system." The one exception in that earlier period is Judge Wellington Koo who had no formal legal training. LYNDELL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE 203 (1979).

TABLE EIGHT
NON-OECD ICJ JUDGES:
NATIONALITY AND EDUCATIONAL BACKGROUND

Name	Citizenship	Legal Education
Mohammed Bedjaoui	Algeria	***Diploma Univ. of Grenoble*** ***Dr. of Law, Univ. of Grenoble***
Raymond Ranjeva	Madagascar	BA, law, U. of Madagascar. Diploma, Madagascar Nat'l School of Admin. ***Trainee, Judicial Div., Conseil d'Etat, Paris*** ***Advanced diploma, Pol. Sci. Univ. of Paris*** Advanced diploma, Int'l Law, U. of Madagascar ***Dr. of Law, Univ. of Paris***
Shi Jiuyong	China	BA., Gov't and Public Law, St. John's U., Shanghai ***M.A., Int'l. Law, Columbia U.***
Abdul G. Koroma	Sierra Leone	LL.M., U. of Kiev ***M.Phil. (Int'l Law), U. of London***
Vladlen S. Vereshchetin	Russia	BA, Dr. Jur. Sc., Moscow Institute of Int'l Relations
Gonzalo Parra-Aranguren	Venezuela	BA, Juridical and Pol. Sci., Central U. Venezuela ***LL.M., New York University*** ***Dr. Law, Ludwig-Maximileans U., Munich***
Francisco Rezek	Brazil	LL.B, D.E.S. U. of Minas Gerais ***Dr., Sorbonne*** ***Diploma in Law, Oxford***
Awn Shawkat Al-Khasawneh	Jordan	***M.A., LL.M., Cambridge***

Source (Tables Seven and Eight): ICJ Biographies at *http://www.icj-cij.org/icjwww/igeneralinformation/igncompos.html* (visited 1/28/01). Schools in OECD states are indicated by ***italicized bold text***. The exact title of the undergraduate degrees is not always made clear in the official biographies. In the interest of space, we have substituted 'BA' where the exact title is not discernable.

III. IS INTERNATIONAL LAW "INTERNATIONAL"?

The reality of Western predominance in the practice of international law before the ICJ is very clear. Does this predominance undermine the *international* character of international law? Our consideration of this question proceeds in four steps. We begin by outlining some of the implications of the nationality of its practitioners on the character and content of international law. We then look at the existing comparative work on the role of legal advisers in the foreign policy process. We next

confront the argument that the phenomenon we observe is merely a reflection of benign functional specialization. Finally, we set out some of the positive reasons that states might want to use national lawyers before the ICJ.

A. *Nationality and International Legal Norms*

In a world governed by truly universal international legal norms the nationality of lawyers and judges would be irrelevant. Cameroon could be represented by a Belgian lawyer, and Belgium could be represented by a Cameroonian lawyer. But as we have shown, the former happens frequently, while the latter happens not at all. The overwhelmingly Western character of the lawyers who appear before the ICJ suggests that nationality is not yet irrelevant for the practice of international law. The significance of the lack of national diversity in the practice of international law can be seen both theoretically and empirically.

Lawyers from different legal traditions compete to assert their legal values at the international level.[67] We have already set out an argument that Western and non-Western states may have different perspectives on the character and content of international law. One could go further to point to the significant differences of perspective even within these two groups, but the larger dichotomy is adequate for our purposes. We have also already outlined the epistemic communities approach and the argument that legal norms are carried by individuals, and thus that the characteristics of these individuals matters. International law is defined by its practitioners. Where different perspectives on international law are defined by national boundaries, states will want to have their own practitioners to ensure that the law is defined in the ways that they prefer.

There is a large body of literature on the relationship between representatives and their clients. States want to choose experienced and capable lawyers. But, precisely because of the gap between the knowledge of the representative and that of the state, the state has to worry about maintaining control over the representative. The extent to which non-OECD states rely on hired non-national legal expertise is surprising from this agency-theoretic perspective. A principal (the state) tries not merely to secure the most skilled agent, but also to minimize "agency losses"—the costs incurred by a principal as a result of an agent's failing to pursue fully the principal's interests.

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67. DEZALAY & GARTH, *supra* note 24, Trubek, et. al. *supra* note 24; Bourdieu, *supra* note 4.

Two important means of minimizing these losses are monitoring and interest alignment. A closely monitored agent will be more likely to carry out a principal's wishes. Monitoring can be difficult, however, when the agent has specialized knowledge that the principal does not share. When monitoring is difficult, interest alignment becomes more important. If an agent's interests are congruent with the principal's, he or she can be expected to act as the principal desires even in the absence of close monitoring. As Pratt and Zeckhauser explain, "agency loss is the most severe when the interests or values of the principal and agent diverge substantially, and information monitoring is costly."[68] Garth and Dezalay describe just such a situation in the area of international commercial arbitration. They suggest that Third World States are caught in a bind because they lack adequate competence internally, but carry a significant fear of dispossession by the experts they have to hire to represent them internationally.[69]

From the agency-theoretic perspective, an ideal legal representative for a state appearing before the ICJ would not only be a skilled international lawyer, but a lawyer whose actions can be monitored, or whose interests are aligned with those of the state he or she represents. All things being equal, national lawyers in regular government service should be more easily monitored and are more likely to share their state's interests. The advantages of relying on such agents are nicely summarized by Pratt and Zeckhauser: "Those who share one's objectives tend to carry them out; monitoring and conflict are reduced, and such people may even make themselves available at a cheaper price."[70]

Finally, there is empirical evidence from other contexts that states care intensely about the nationality of their representatives. It is difficult to imagine, for example, a state sending a non-national to represent its interests before the United Nations. States take the nationality of the individuals in international organizations very seriously. As we saw above, states demand geographic diversity in the selection of ICJ judges. The International Law Commission—a UN organization charged with the progressive development and codification of international law—uses a quota system to ensure diverse regional representation.[71] Herbert Briggs notes that "the basic requirement that the commission shall be persons of recognized competence in international law has, on occasion been minimized in the preoccupation with

68. JOHN W. PRATT & RICHARD J. ZECKHAUSER, PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 5 (1985).

69. DEZALAY & GARTH, *supra* note 24, at 66–69, 96–97.

70. PRATT & ZECKHAUSER, *supra* note 68 at 15.

71. IAN SINCLAIR, THE INTERNATIONAL LAW COMMISSION 15 (1987).

political and geographical factors."[72] Similarly, Article 101 of the United Nations Charter calls for "as wide a geographical basis as possible" in the staffing of the United Nations. Houshang Ameri has asserted that the "principles contained in Article 101 continue to be perhaps the most discussed, and therefore sensitive, principles contained in the totality of the U.N. Charter."[73] The intense concerns of non-Western states about the implementation of the diversity principle in international organizations has not translated into a willingness to use their own nationals to represent them before the ICJ.

B. *Legal Advising in Non-Western States*

There are, then, a number of reasons why states should care about the nationality of their legal representatives. The Western bias in international legal practice at the ICJ tells us something significant about the distribution of capacity to participate fully in the international legal system. The relative paucity of non-OECD lawyers who appear before the ICJ reflects directly on the international legal infrastructure within non-OECD states.

If international law were truly *international*, we would expect all states to need a cadre of international lawyers to help them make effective use of international law and the international legal system.[74] They should be training their own international lawyers to work within their foreign policy establishment, both to help them stay within the bounds of law, and to take advantage of the law where opportunities arise. Foreign office staff lawyers should be specialists on the issues that most affect their countries. We would expect to see these staff lawyers show up more often and make a more significant contribution before the ICJ.

There have been only a few attempts to directly assess the nature of legal advisers in the foreign policy machinery of states. The American Society of International Law (ASIL) sponsored a small conference of legal officials and scholars from twelve countries in 1963.[75] Although quite dated, this study still offers several conclusions that suggest support for the argument we make here. For example, the authors assert that calling upon "distinguished lawyers from outside the government establishment, including lawyers from foreign countries. . . especially

72. Quoted in *Id.* at 16.

73. HOUSHANG AMERI, POLITICS OF STAFFING THE UNITED NATIONS SECRETARIAT 151 (1996).

74. *See* Antonio Cassese, *The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards* 14 MICH. J. INT'L L. 139 (1992).

75. H.C.L. MERILLAT, LEGAL ADVISERS AND FOREIGN AFFAIRS (1964). Participants came from Argentina, Canada, Colombia, Japan, Malaysia, Mexico, the Netherlands, Nigeria, the Philippines, the United Arab Republic, the United Kingdom, and the United States.

[occurs] in countries where there is not yet a group of experienced international lawyers."[76] The study also asserts that "the tendency... appears to be to concentrate more and more on legal advising and legal representation in the regular government establishment."[77] But, as is noted in the study, "the evolution of a legal advisory service in foreign affairs, commanding respect and to which matters of highest importance are entrusted, is naturally related to the availability of highly competent, well-trained, and experienced lawyers within the country, and within the government of the country."[78]

In the details of the ASIL report it becomes clear that the non-OECD participants exhibited relatively weak institutions for incorporating international law into foreign policy. For Malaysia and Nigeria, this could be attributed to their only recent acquisition of full sovereignty. In both of those states there was no explicit legal adviser within the foreign ministry. Instead the foreign ministry had to solicit opinions from the ministry of justice, which was tasked with dealing with all aspects of law, both domestic and international, and thus was not a part of day-to-day foreign policy making.[79] But even in a long-established state like Mexico, the institutionalization of legal advice in foreign policy making was described as problematic, "There does not exist, in a direct manner, a separate organization for legal advice or planning in matters pertaining to foreign policy."[80] The problems of incorporating international law into the making of foreign policy are identified as stemming, "in the first place... from a general evil, namely the lack of experts in a sufficient number."[81]

The Philippines did have an Office of Legal Affairs within the Department of Foreign Affairs, but its legal focus is open to question, given that it was tasked not only with "providing legal assistance, as required by other offices and divisions of the Department" but also, among other things, with providing general research services to the other departments, collecting biographic information that could help in the formation and implementation of foreign policy, the translation of all communications received in foreign languages, the editing of all documents published by the Department, the enlargement and maintenance of the Department's library, and the compilation and maintenance of the official history of the Department and of the foreign affairs of the Philippines!

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76. *Id.* at 29.
77. *Id.* at 29–30.
78. *Id.* at 30.
79. *Id.* at 67–70 (Malaysia) and 84–89 (Nigeria).
80. *Id.* at 72.
81. *Id.* at 75.

Colombia, on the other hand, did have a specific legal office in the Foreign Affairs Ministry. As we saw above, it is one of the handful of non-OECD states that have appeared before the ICJ without non-national representation. In both of its 1950's appearances before the court, Colombia used only Colombian lawyers, and a significant part of its oral arguments were presented by the legal adviser himself.

More recently, Antonio Cassese has attempted to assay the role of legal advisers in disciplining foreign policy. Cassese describes the "traditional" role of legal advisers in representing their states in international litigation.[82] But his study is also limited to a small number of states.[83] He readily admits that resources prevented him from extending the research to a significant sample of non-Western states, and that the non-Western states proved less willing to participate in the study.[84] Only three non-OECD states were included in his sample—Brazil, Bulgaria, and Israel—and Brazil and Bulgaria receive only passing mention in the analysis.

Cassese also points to the problem of assessing the impact of legal offices through interviews with only a handful of individuals from each state.[85] Different participants often tell different stories about the development and implementation of foreign policy. The fact that a state has a legal advisers office does not mean that it uses the office in an effective way—as several participants in Cassese's study were quick to point out. Switzerland, the United States and the United Kingdom are singled out as having legal advisers who are well integrated into the foreign policy process. Cassese suggests that the critical factor is size: "most large countries tend to effectively integrate legal staffs into their foreign ministries."[86] "Countries with small legal staffs often relegate them to more purely bureaucratic roles."[87] He does not provide a direct accounting so it is difficult to assess this assertion. Of the three states he explicitly describes as having well-integrated legal advisers, the U.S. is clearly a large country, but Switzerland is as clearly small. Brazil has more than twice the population of the U.K., but is criticized along with Ireland, Italy (which has roughly the same population as the U.K.),

82. Cassese, *supra* note 74, at 142.

83. Cassese's sample included Brazil, Bulgaria, Ireland, France, Hungary, Israel, Italy, the Netherlands, Switzerland, the U.K. and the U.S. *Id.* at 140.

84. *Id.* at 141.

85. *Id.*

86. *Id.* at 160.

87. *Id.* at 149. One cannot help suspect that the causality runs the other way here: countries that relegate their international lawyers to more purely bureaucratic roles tend to have smaller legal staffs.

Hungary, Bulgaria, and Israel for having too few international lawyers in their foreign ministries.[88]

Although limited by the small numbers of states that could be surveyed, and by the problems of assessing true impact beyond the label on an organizational chart, both the ASIL and the Cassese studies emphasize the importance of the legal advising function for the legal constraint of foreign policy-making, and lend support to our assertion that the non-Western states may have limited domestic resources for participation in the international legal system.

This same institutional weakness can be more broadly observed in the data on legal practitioners before the ICJ. The primary critique of this argument will be that the bias we document is simply a form of benign functional specialization. It is to this important critique that we now turn.

C. *The Question of Specialization*

In principle, lawyers are advocates without underlying loyalties. It may be that foreign lawyers are hired because of the need for specialists. Few of us would venture before a tax court without taking along an attorney who specializes in taxation. Here the old adage that someone who engages in self-representation "has a fool for a client" comes to mind. States want to find the best lawyers that are available, and these tend to be a small number of Europeans and Americans. Rosenne offers this basic explanation: "There has grown up over the years a small group of international lawyers, drawn mainly from the legal professions of Belgium, England, France, Italy, Switzerland and the United States, who have specialized in practice in the International Court."[89]

1. The Supreme Court as Analogue

A starting point for thinking about the specialization argument is to draw a comparison to legal practice before the U.S. Supreme Court. The Supreme Court Bar is clearly a highly specialized form of legal practice. It can be dangerous for a litigant to go before the Court without a representative steeped in its special kind of legal practice.[90] In Supreme Court oral proceedings, the lawyers have just thirty minutes to make their case. Furthermore, they must make this case in the face of a style of vigorous questioning from the bench that gives the process a character

88. *Id.* at 167.
89. ROSENNE, *supra* note 2, at 120.
90. MCGUIRE, *supra* note 24, at ch. 1.

that one practitioner has likened to "walking into a buzz saw."[91] The style of argument and kinds of issues that are raised before the Supreme Court are also significantly different from those of the lower courts.[92] Thus, there are strong incentives for specialization in the Supreme Court bar.

Supreme Court practice has been described as dominated by Washington lawyers.[93] Nonetheless, this domination is nothing like the concentration we have documented in ICJ practice. During the 1986–87 Supreme Court session, just 8.2 percent of the Supreme Court bar came from Washington.[94] Adding New York, Chicago, Los Angeles, and San Francisco, the top five cities still account for less than 30 percent of Supreme Court practice.[95] This compares to the 71 percent of ICJ non-national practitioners who come from just three countries: France, the United States, and the United Kingdom.[96]

The Supreme Court analogy is even more telling for our argument when we break Supreme Court practice down by the kind of litigant. The highly specialized Supreme Court practitioners are almost always representing *private* parties. The most relevant comparison set for our argument is those cases in which an American *state* has been represented before the Court. Between 1950 and 1997 American states were parties before the Supreme Court sixty-three times. In all but five of those cases (92 percent) the state's oral argument was made by a state official, rather than a hired specialist.[97] Even the smallest American states have staffs tasked with managing their legal affairs. When those affairs take the state before the High Court, it is the state's own legal staff that stands before the bench.

A central lesson of the Supreme Court analogy—that there are differences between private parties and state actors—has a broader relevance for thinking about international relations. On this issue, as many others, the analogy between states and individuals is flawed. Returning to our previous example, most individuals have neither the need nor the resources to keep a tax lawyer occupied year round. States do have the resources to keep international lawyers on the payroll if they view that as a priority. If states want to incorporate international law

91. *Id.* at 49.
92. *Id.* at 1–6.
93. *Id.* at 128–70.
94. *Id.* at 38.
95. *Id.*
96. *See, supra* Table Five.
97. Data compiled from LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (Philip B. Kurland & Gerhard Casper eds.)

into the process of developing and evaluating foreign policy, we would expect them to have the necessary international legal specialists on staff.

2. The Limits of Functional Specialization

The specialization argument also fails to hold up under more careful scrutiny of the individual cases. Most importantly, an informed look at the list of the lawyers who appear most often as "hired guns" (Table Six) shows that most of these advocates are generalists, rather than specialists. Elihu Lauterpacht, for example, is the author or editor of books on a wide range of international legal issues. Keith Highet has published *American Journal of International Law* summaries of a wide range of legal decisions; reviews of books on intervention in the ICJ, and on compulsory jurisdiction before the ICJ; a review of a general international law textbook; and a review of a book by Elihu Lauterpacht on the administration of international justice. Prosper Weil has published articles on "normativity" in international law, and on the right of the Court to refuse judgement on unclear cases (the *non liquet* principle).

It might be argued that these lawyers are specialists at arguing before the ICJ, rather than specialists in particular substantive areas of the law. Keith Highet, for example, has described the ICJ bar as:

> those international lawyers who have practiced and continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.[98]

Of course, by dint of their considerable experience these eminences *are* specialists at appearing before the ICJ. Keith Highet has himself been involved in nearly a quarter of the contentious cases that have come before the ICJ. But this functional argument would predict that *all* states would utilize specialists for this process. It cannot account for the fact that Western states tend to use their own counsel, while non-Western states rely on the ICJ bar. The most prominent ICJ specialists, as listed in Table Six, have been called on to represent their own states only two times. They have represented non-Western states twice as often as they have represented the OECD states.

Moreover, given the nature of ICJ proceedings it is not obvious that specialization in ICJ oral presentations would be very functional.

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98. Keith Highet, *A Personal Memoir of Eduardo Jiminez de Arechaga: Doyen of the Invisible Bar of the International Court*, 88 AM. SOC'Y INT'L L. MTG. PROC. 577, 579 (1994).

Although important, oral argument is just one part of the overall presentation of a case before the ICJ. Oral arguments are almost always prepared statements that are simply read verbatim without the spirited kind of back and forth that one sees, for example, in the United States Supreme Court.[99] The oral phase in most ICJ cases has been conducted with no questions from the bench at all. When the judges do have questions to ask of the advocates, they usually hold their questions until the end of the oral presentations and allow the lawyers time to prepare a written response.[100] There is little reason, then, to expect the system to evolve into one in which some lawyers specialize in presentation, as you find in a domestic legal system where the vagaries of the jury system require a class of lawyers with a flair for flamboyant or emotive presentation.[101] Keith Highet, while arguing for the importance of the oral proceedings admits that they are usually "stilted" and "boring."[102]

It may be a different kind of flamboyance that non-Western states are seeking to purchase. States may present their cases through a distinguished professor of international law from Oxford or Yale in order to legitimatize their arguments in the eyes of the Court. But what would it say about the universality of international law to suggest that the Court can be influenced by the European lineage of the lawyers before it? The possibility that it takes a Western legal scholar to legitimate an oral presentation at the ICJ would only strengthen our argument that international law is seen as the special purview of a small number of Western states.

Specialization itself, therefore, cannot explain the domination of ICJ practice by a handful of American and European lawyers. Even if we accept that states will seek specialized experts as their advocates before international tribunals, we would still expect to see a broader international distribution of these experts. If international law were truly international, the specialization argument would lead us to expect to see some Indian or Nigerian lawyers representing Belgium or the Netherlands. The assertion that non-Western states simply do not have the

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99. *See* GILL, *supra* note 42, at 90. Sir Robert Jennings, a former ICJ judge, explains that "[t]he needs of the simultaneous translators encourage, if not almost require, virtual recital of a prepared text." *quoted in* ROSENNE, *supra* note 35, at 1319. On the difficulty of Supreme Court oral arguments, *See* MCGUIRE, *supra* note 24, at 49–52.

100. *See, e.g.*, the questions asked at the end of Libya v. U.K., (oral pleading, CR97/24. 10/22/97) http://www.icj-cij.org/icjwww/idocket/iluk/ilukcr/iluk_icr9724.htm (visited 11/9/00). As Rosenne observes, "It is not customary to interrupt a speech with questions, but questions are sometimes put when there is a break in presentation. The traditional coffee-break about half way through a session often affords an opportunity for this." ROSENNE, *supra* note 35, at 1340.

101. *See* ROSENNE, *supra* note 2, at 129.

102. Highet, *supra* note 42, at 402.

resources, infrastructure, legal traditions, language skills, or *whatever* to have an adequate level of indigenous legal expertise for representation before the ICJ only makes our case for us.

D. *The Case for National Representation*

Thus far, we have made the case that benign functional specialization is not an adequate explanation for the geographic bias we have identified in ICJ practice. A case can also be made for the functional *advantages* of using national representatives to present arguments before the ICJ. Derek Bowett, who sits with Keith Highet on the top of our list of hired specialists, recommends the use of national lawyers:

> So far as the lawyers are concerned, a strong "internal" element is always desirable. This increases the government's confidence in the team and also makes the presentation of the case in Court more impressive, adding to the perception that the case is important to the government.[103]

Bowett suggests two distinct logics for national representation. In the first place, as we discuss above, principle-agent problems can be minimized with the strong participation of a state's own lawyers. The arguments made before the ICJ help define international legal norms. If, as we have suggested is likely, non-OECD states have distinctive beliefs about those norms, they should feel more comfortable being represented by lawyers whose own beliefs they can more easily monitor. Dezalay and Garth suggest just such a dynamic in the evolution of private international law. In that realm too, they suggest that there is a dearth of national lawyers to represent Third World countries.[104] Third World states must turn to outsiders, but are concerned that they will not be able to control their legal representatives.[105] To deal with this agency problem, non-Western countries tend to rely on a coterie of what Dezalay and Garth call "turncoat" lawyers who express more sympathetic legal doctrines.[106] It is unlikely that anyone would use that label to describe the likes of Derek Bowett, Keith Highet, or Ian Brownlie.

Bowett's second logic is that the use of national lawyers sends a signal to the Court about the state's attitude toward the case and international law more generally. Unlike the increasingly bare-knuckled litigation in international arbitration described by Dezalay and Garth,[107]

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103. BOWETT et al., *supra* note 31, at 13.
104. Dezalay & Garth, *supra* note 24, at 66.
105. *See id.* at 68–69.
106. *See id.* at 71.
107. *See generally*, DEZALAY & GARTH, *supra* note 24.

this would seem a relatively safe strategy for ICJ oral presentations. The oral presentations, which are usually read verbatim, can always be reviewed, or even written by hired specialists. Even if states hire outside counsel to help them prepare their cases and to deal with the procedural nuances of the ICJ, there is no reason for them not to put their own nationals before the Court in the oral proceedings.

Given both the limited functional advantages of hiring Western specialists and the positive benefits of using national lawyers to make a significant part of the oral presentations before the ICJ, we can only conclude that their absence in this forum points to a broader shortage of international legal expertise within the foreign policy institutions of non-Western states. The practice of international law remains the province of a small group of Western specialists. The notion that international legal norms have attained a genuine universality is belied by this state of affairs.

E. *Prospects for Change*

The dominance of Western legal expertise in the formation and conduct of international law in the past may not be an accurate indicator of future developments. In a review of its first fifty years of operation, the ICJ pointed to the small group of non-national lawyers who have appeared before the Court, and argued that it is expanding.[108] This may be true, but it primarily reflects the increasing use of non-national lawyers by non-Western states. There has been no increase in the use of non-Westerners to argue before the Court. Indeed, the non-Western states have gone from legal teams with an average composition of about 45 percent non-nationals in the 1960s to an average of about 60 percent non-nationals in the 1980s and 1990s.[109] There is no trend towards increasing reliance on national lawyers by the non-Western states. Indeed, the last time a non-Western state appeared before the court without Western legal representation was in 1973—a quarter of a century ago. Nor is there any evidence that either Western or non-Western states are prepared to rely on non-Western legal advisors.

While appearances before the ICJ do not suggest any strong trends in the use of non-national lawyers in international law, there is one leading indicator that may suggest some greater diffusion in the practice of international law in the future. Each year the American Society for International Law sponsors an international moot court competition for

108. I.C.J., *supra* 35.

109. These two periods cross a gap in the 1970's when there was very little use of the Court in general, and in the few cases the Court did hear, the non-Western states (India and Pakistan) used all national lawyers.

international law students. Between 1960 and 1980 the Jessup competition went from being a purely American contest to having a genuine international component.[110] Between 1970 and 1980 the number of foreign teams participating increased from six to twenty-eight. Still, American teams won every year between 1960 and 1980 except for 1976, when a team from the University of Toronto took the top spot. Between 1981 and 1998, however, American teams have only won four times. The expansion of international legal expertise is suggested in the results of the past eighteen years, as presented in Table Nine. While still largely dominated by the OECD states, teams from countries outside the OECD have managed to defeat American and European teams at the competition in recent years. A Singaporean team was victorious twice in the 1980s. In the past five years non-OECD teams have had three victories compared to only two for the OECD. Furthermore, the two victorious OECD teams were from Australia and Mexico rather than from Western Europe or the United States.

The trends in the Jessup Moot Court Competition are probably the strongest indicator that international legal expertise is beginning to diffuse. That more countries are producing international lawyers, and that these new lawyers are succeeding in an important international legal competition would seem to offer some basis for the expectation that international law may become more genuinely international in the future. In the meantime, however, these talented new international lawyers and the professors who have taught them remain on the sidelines at the ICJ.

TABLE NINE
JESSUP INTERNATIONAL MOOT COURT COMPETITION WINNERS: 1981–1998

Year	Winner	OECD	Number of Countries Entered
1981	Australia Nat'l U.	Y	29
1982	Nat'l U Singapore	N	23
1983	U. Kansas	Y	25
1984	Dalhousie (CAN)	Y	28
1985	Nat'l U. Singapore	N	36
1986	Boston College	Y	26
1987	Georgetown	Y	39
1988	U. Melbourne	Y	43

110. Information about the Jessup competition and its history is *available at*: http://www.ilsa.org (last visited Nov. 9, 2000).

TABLE NINE (CONTINUED)

Year	Winner	OECD	Number of Countries Entered
1989	U. British Columbia	Y	41
1990	U. Georgia (US)	Y	42
1991	U. Saskatchewan	Y	31
1992	U. Paris	Y	22
1993	U. Melbourne	Y	36
1994	U. Singapore	N	33
1995	U. Philippines	N	40
1996	U. Sydney	Y	44
1997	U. Catolica Andres Bella Venezuela	N	38
1998	U. Nacional Autonoma de Mexico	Y	48

CONCLUSIONS

The Spanish neo-scholastic Francisco de Vitoria tried to articulate a vision of international law that could apply to South American Indians as well as the Spanish. He argued for the use of natural law instead of community norms as the foundation for international law. But, as has happened so often throughout history, he made the mistake of assuming that what were in fact the norms of a particular community were universal manifestations of natural law. He therefore concluded that the Indians were violating law, rather than concluding that European notions of natural law required reexamination.[111] The evidence we present here suggests that contemporary theorists of international relations and international law are in danger of making a similar error.

For the past three centuries international legal scholars and practitioners have been *asserting* the universal character of international law. Since 1945, scholars and advocates have been making increasingly bold claims about the effectiveness of international law and its potential to regulate state action based on its universal character. In this same period, however, there has been relatively little effort to measure or even to describe the effective internationalization of international legal practice. We have argued that the clear Western bias in legal practice before the ICJ is one such measure. At a minimum, we have presented a clearer description and fuller accounting of the Western bias in ICJ practice

111. JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 75–78 (1981).

than has been heretofore available. Of course, we have tried to go much further than this to argue that by this measure there are significant limitations in the diffusion and internalization of international legal norms. This is not necessarily a claim that international law is unimportant in the international system. As Jepperson, Wendt and Katzenstein explain, "norms may not be widely held by actors but may nevertheless be collective features of the system—either by being institutionalized (in procedures, formal rules, or law) or by being prominent in public discourse of a system."[112] According to our analysis, this may be an apt description of the present status of international legal norms.

That international law has emerged from the Western legal tradition is well known. What is novel in our presentation is the empirical demonstration of the degree to which the practice of international law remains connected to the Western states and the argument that this continuing Western bias tells us something significant about the nature of international law. The mores and principles of international law have not yet diffused to other cultures with sufficient robustness for them to train and use their own legal expertise.

There is nothing wrong with the Western foundation for international law *per se*. It is not our purpose to argue that international law needs to be some kind of cultural amalgam. International law could be the simple extension of some particular national legal tradition to a worldwide scale. Our argument is that the weak diffusion of legal practice is an effective indicator of the limited international character of international legal principles.

Given its Western foundations, it may not be surprising that lawyers who reside in the West continue to dominate international legal practice. But the weak diffusion of international legal practice ultimately suggests limitations in the diffusion of international legal norms, and a constraint on the effectiveness of international law. Recognition of this situation is particularly important for those who most earnestly call for an expansion of legalism in the relations of states.

The title of this article is in the form of a question. It is meant to be a provocative one. We have argued that the answer to this question one gets from looking at the practice of international law at the ICJ is that international law is still not very international. Because the ICJ is a particularly important and visible international legal institution, whom states choose to represent them before the ICJ is a potent indicator not merely of where international legal expertise currently resides, but also of where international legal norms have been most strongly internalized.

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112. Ronald L. Jepperson, et.al., *Norms, Identity, and Culture in National Security, in* THE CULTURE OF NATIONAL SECURITY 54 n. 69 (Peter J. Katzenstein, ed. 1996).

From the evidence of ICJ practice we have *imputed* the possibility that non-OECD states put a relatively low priority on international law in their foreign policy-making practices. This imputation will be controversial, not simply for its logical basis, but also because it is not often that the argument is made that the world needs more lawyers. But in international relations, the alternative to lawyers is often soldiers—a national resource for which Western and non-Western states have demonstrated a similar enthusiasm.[113]

Hopefully, our argument will open a debate and provoke others to look more directly at the role of law in foreign policy-making practices and to propose alternative measures of the international character of international law. We look forward to a more thorough consideration of this important issue. In the meantime we reiterate the importance of caution given the long-recognized danger that international law will be misperceived as more international than it really is. Writing in 1795, Robert Ward criticized the notion of international law as a universal normative construct:

> Rejecting therefore the laws of Nature and Reason (as the sole foundation of the law of Nations) because we do not conceive them powerful or fixed enough to bear the fabric that is erected upon them; we conclude that what is commonly called the law of nations, is not the law of all nations, but only such sets or classes of them as are united together by similar religions, and systems of morality.[114]

Two hundred years later, the evidence we have adduced suggests that the practice of international law remains the province of a handful of Western states. For the large majority of states in the international system, international legal expertise appears to be something they have to purchase abroad, rather than an indigenous capability that can serve as a regular part of their own foreign policy-making processes. Until more states develop sufficient in-house expertise, it will be difficult for international law to serve as a robust and universal constraint on international behavior.

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113. As of 1994, the non-OECD states that have appeared before the ICJ spent an average of 3.5% of their GDP on military spending, compared to 2.6% for the OECD states. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, YEARBOOK OF WORLD ARMAMENTS AND DISARMAMENT 359–78 (1996).

114. Quoted in Forsyth, *supra* note 5, at 35.

APPENDIX

PERCENTAGE OF NON-NATIONAL REPRESENTATION ON ICJ LEGAL TEAMS

Case	Legal Team	Year	% Non-National	OECD
Corfu	Albania	1948	71	0
Corfu	UK	1948	0	1
Asylum	Colombia	1950	0	0
Asylum	Peru	1950	16	0
Anglo-Iranian Oil	UK	1951	0	1
Fisheries	Norway	1951	50	1
Fisheries	UK	1951	0	1
Haya de la Torre	Colombia	1951	0	0
Haya de la Torre	Cuba	1951	0	0
Haya de la Torre	Peru	1951	16	0
Anglo-Iranian Oil	Iran	1952	22	0
Morocco	France	1952	0	1
Morocco	US	1952	0	1
Ambatielos	Greece	1953	61	1
Ambatielos	UK	1953	0	1
Minguiers-Ecrohos	France	1953	0	1
Minguiers-Ecrohos	UK	1953	0	1
Monetary Gold	France	1954	0	1
Monetary Gold	Italy	1954	0	1
Monetary Gold	UK	1954	0	1
Nottebohm	Guatemala	1954	32	0
Nottebohm	Liechtenstein	1954	74	0
Norweigian Loans	France	1957	0	1
Norweigian Loans	Norway	1957	0	1
Infants	Netherlands	1958	0	1
Infants	Sweden	1958	35	1
Interhandel	Switzerland	1958	0	1
Interhandel	US	1958	0	1
Aerial Incident	Bulgaria	1959	48	0
Aerial Incident	Israel	1959	0	0
Frontier Land	Belgium	1959	0	1
Frontier Land	Netherlands	1959	0	1
Arbitral Award	Honduras	1960	42	0
Arbitral Award	Nicaragua	1960	56	0

PERCENTAGE OF NON-NATIONAL REPRESENTATION ON ICJ LEGAL TEAMS (CONTINUED)

Case	Legal Team	Year	% Non-National	OECD
Indian Territory	India	1960	56	0
Indian Territory	Portugal	1960	33	1
Preah Vihear	Cambodia	1962	67	0
Preah Vihear	Thailand	1962	53	0
Cameroons	Cameroon	1963	14	0
Cameroons	UK	1963	0	1
Barcelona Traction	Belgium	1964	53	1
Barcelona Traction	Spain	1964	42	1
Southwest Africa	Ethiopia	1965	77	0
Southwest Africa	Liberia	1965	52	0
Southwest Africa	South Africa	1965	0	0
North Sea Shelf	Denmark	1968	33	1
North Sea Shelf	Germany	1968	29	1
North Sea Shelf	Netherlands	1968	25	1
Jurisdiction of the ICAO	India	1972	0	0
Jurisdiction of the ICAO	Pakistan	1972	0	0
Fisheries Jurisdiction	Germany	1973	0	1
Fisheries Jurisdiction	UK	1973	0	1
Pakistani POWs	Pakistan	1973	0	0
French Nuclear Testing	Australia	1974	12	1
French Nuclear Testing	New Zealand	1974	0	1
Aegean Sea	Greece	1976	40	1
Diplomatic and Consular	US	1980	0	1
Cont Shelf: Libya-Tunisia	Libya	1982	69	0
Cont Shelf: Libya-Tunisia	Tunisia	1982	42	0
Cont Shelf: Libya-Malta	Italy	1984	11	1
Cont Shelf: Libya-Malta	Libya	1984	75	0
Cont Shelf: Libya-Malta	Malta	1984	75	0
Gulf of Maine	Canada	1984	35	1
Gulf of Maine	US	1984	0	1
Military and Paramilitary Activities	Nicaragua	1984	71	0
Military and Paramilitary Activities	US	1984	0	1
Revision of Continental Shelf	Libya	1985	78	0

PERCENTAGE OF NON-NATIONAL REPRESENTATION ON ICJ LEGAL TEAMS (CONTINUED)

Case	Legal Team	Year	% Non-National	OECD
Revision of Continental Shelf	Tunisia	1985	40	0
Frontier Dispute	Burkina Faso	1986	63	0
Frontier Dispute	Mali	1986	36	0
Elettronica Sicula	Italy	1989	28	1
Elettronica Sicula	US	1989	40	1
Land, Island and Maritime Frontier	El Salvador	1990	36	0
Land, Island and Maritime Frontier	Honduras	1990	50	0
Land, Island and Maritime Frontier	Nicaragua	1990	43	0
Arbitral Award of 31 July 1989	Guinea-Bissau	1991	67	0
Arbitral Award of 31 July 1989	Senegal	1991	38	0
Certain Phosphate Lands	Australia	1992	33	1
Certain Phosphate Lands	Nauru	1992	50	0
Maritime Delimitation	Denmark	1993	17	1
Maritime Delimitation	Norway	1993	38	1
Territorial Dispute	Chad	1994	79	0
Territorial Dispute	Libya	1994	79	0
Territorial Questions	Bahrain	1994	89	0
Territorial Questions	Qatar	1994	71	0
East Timor	Australia	1995	40	1
East Timor	Portugal	1995	38	1
Lockerbie: Libya-U.K.	Libya	1997	55	0
Lockerbie: Libya-U.K.	UK	1997	0	1
Lockerbie: Libya-U.S.	Libya	1997	55	0
Lockerbie: Libya-U.S.	US	1997	13	1
Consular Relations	Paraguay	1998	50	0
Consular Relations	US	1998	0	1
Fisheries Jurisdiction	Canada	1998	10	1
Fisheries Jurisdiction	Spain	1998	25	1
Land and Maritime Boundary	Cameroon	1998	25	0
Land and Maritime Boundary	Nigeria	1998	62	0

	Mean Percent non-national	Median Percent Non-National
OECD	.15	0
Non-OECD	.44	.50