JUDICIAL DISCRETION IN INTERNATIONAL JURISPRUDENCE: ARTICLE 38(1)(C) AND "GENERAL PRINCIPLES OF LAW"

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I. INTRODUCTION

The exercise of discretion is at the heart of the institutional and social function known as judgment. Judges doubtless spend most of their time applying well-established law to disputed circumstances of fact, but while there is judgment and discernment involved in such endeavors, such activities do not involve the articulation of *new* legal norms. Where judging excites the imagination, pricks the conscience and excites passions of all varieties, is in the rarer cases where real law is made, new precedents set, and new rules established where before different ones—or none—clearly existed. This is the exercise of judicial discretion. Not surprisingly, its exercise remains deeply controversial.

American legal history, particularly with respect to the development of American constitutional theory, has long suggested a close nexus between a legal system's approach to the exercise of such discretion and the fundamental notions of legitimacy that underlie that system.[1] Nor is this dynamic unique to American jurisprudence;

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1. The great debates earlier in this century between legal "Realists" and adherents to the more traditional "Formalist" school, for example, developed this theme considerably. Since the 1880s, Formalists had claimed that some almost Platonic ideal of law existed and could be understood by careful study of seminal cases. *See generally* A. GILMORE, THE AGES OF AMERICAN LAW 42-68 (1974). By the 1920s and 1930s, however, Realist scholars preached "the relatively subordinate importance of rules," JEROME FRANK, LAW AND THE MODERN MIND 283-84 (1935), and advocated that "the creative action of the judge," be used to advance the goals of wise social policy unhindered by the constraints of traditional doctrine. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 125 (1924). As shall be seen, American constitutional

rather, it has characterized—even convulsed—many of the world's most highly-developed legal regimes.[2] Indeed, tension between judges' creative function and the doctrinal legitimacy of legal rules is a characteristic of any legal system in which norms generally rely for their legitimacy upon institutions or processes that lie outside the conference chamber of its highest court.[3] For unless we are to pretend that judges may have *no* creative and interpretive role, it will be necessary to find boundaries within which somehow to confine the exercise of that discretion, lest in overreaching it rob the law of the legitimacy acquired from its origination in those extra-judicial institutions or processes.

Discussions of the uses of judicial discretion have hitherto largely been confined to debates about judicial self-assertiveness in domestic jurisprudence. This Article, however, will attempt to draw lessons from these discussions and apply them to the *international* jurisprudence of the International Court of Justice (ICJ), by means of examining the Court's approach to the derivation of "general principles of law recognized by civilized nations" under Article 38(1)(c) of the Statute of the ICJ.[4] The legitimacy-dilemma of judicial discretion is no less acute in international law than in other fields of law such as American constitutionalism. If the legitimacy of international norms derives from something more than the mere agreement of five judges in the Hague, we must conceptualize an approach to the exercise of *international* judicial discretion that allows us to begin to deal with these legitimacy-dilemmas, and we must develop an understanding of judicial discretion that will allow judges wisely to use it—and to limit it—when its employ is required.

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theory is quite preoccupied by tensions between the need for flexible interpretation and the danger that too long a drink from the cup of realism would lead to the conclusion that even constitutional law need be no more deeply grounded than the momentary caprice of five Justices.

2. French jurists, for example, have struggled since 1789 with the difficulties of balancing the need for judicial discretion and the traditional refusal of French legal doctrine to admit its legitimacy. *See, e.g.*, Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 92 (1994). Further afield, Muslim jurisprudence has struggled with similar tensions for many centuries. *See, e.g.*, NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 3-19 (1969).

3. Such extra-judicial sources might include statutes enacted by an elected legislature, written constitutions, the proclamations of an absolute monarch, or Divine revelation. In all cases there is inevitably some tension when the judge—who is not a legislature, constitutional convention, monarch or deity—attempts to fill gaps in the law or re-interpret rules through the exercise of his own reasoning.

4. 59 Stat. 1055, 3 Bevans 1179.

Part I of this Article briefly recounts different approaches to these problems as they have been worked out in American constitutional jurisprudence. Because American law derives its legitimacy from a 200-year-old written constitution now required to provide the foundational law for a society radically different from that in which it was adopted, theorists of American constitutionalism have given these legitimacy-dilemmas intense and sustained scrutiny for several generations. The lessons of these great debates, I submit, can usefully inform our attempt to develop a theory of *international* judicial discretion. Specifically, since the international system lacks a written constitution of the variety that makes judicial discretion so problematic in the American context, and since the Statute of the International Court of Justice actually calls for the exercise of judicial discretion in provisions such as Article 38(1)(c), I argue that the exercise of international judicial discretion can learn much from what might be called the "responsivist" approach to American constitutionalism.

Part II of this Article proceeds to outline this model of judicial discretion as articulated by perhaps its foremost modern proponent, Justice Aharon Barak of the Israeli Supreme Court. At root, Barak attempts to deal with the legitimacy-tensions of judicial discretion by advising jurists to "step outside themselves" in exercising such discretion, attempting to decide with reference to the values of the legal communities of which they are a part—rather than with reference to the personal values of the judge himself. Despite dramatic differences in both theory and context between international and domestic legal regimes, I argue that models of judicial norm-articulation that exhort such judicial deference to the values of the "legal community" are *particularly* useful in the international context—especially in the articulation of "general principles" under Article 38(1)(c), an express textual warrant for gap-filling judicial discretion.

Part III of this Article examines the history of jurists' attempts to articulate a workable general principles doctrine under Article 38, exploring what may be called rival "comparativist" and "categoricist" approaches, and outlining the emergence of a doctrinal synthesis of these two schools. This synthesis, I suggest, allows us to incorporate some of the insights of the Barakian model of judicial discretion. I then suggest that the structure of the International Court—with its judges elected with specific concern to ensure that the various legal "communities" of the world are represented on the international

bench—makes it particularly well-adapted to applying Barak's approach.

While domestic jurisprudence may struggle only inconclusively with some of the questions to which Barak suggests that we find answers if we are wisely to regulate the exercise of judicial discretion, his model of judicial discretion is very useful in understanding judicial discretion in the *international* context. General principles doctrine under Article 38(1)(c) and the "constituency-representative" structure of the International Court of Justice, in turn, represent the response of international law to the legitimacy-dilemmas of judicial discretion and to the challenges posed by the Barakian model. Properly understood, therefore, they may help point the way to a manageable and coherent approach to its exercise.

II. THE PROBLEM OF JUDICIAL DISCRETION

Much of American constitutional legal theory is devoted to debates over whether or not norm-articulation is a legitimate judicial function. At the heart of such controversies is the dilemma of constitutionalism, or what Alexander Bickel called the "counter-majoritarian" difficulty:[5] how is it that in a system of democratic self-government, unelected (constitutional) judges have the power to strike down the enactments of the duly-elected legislature—the voice of the majority of the population?[6] International jurisprudence has not traditionally faced this dilemma of course, since its jurists are not in a position to exercise judicial discretion so as to invalidate an international agreement for incongruity with some foundational legitimizing text. As we shall see, however, the debates over the uses and abuses of judicial discretion within constitutionalist regimes may help inform our understanding of international judicial discretion.

American constitutional thinkers have tried to escape the Constitutional dilemma in various ways, but none with conspicuous success. Writing more than a century ago, Christopher Tiedeman[7]

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5. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

6. Akhil Amar argues that, in fact, elected branches often poorly reflect the genuine popular will. *See* Akhil R. Amar, *Philadelphia Revisited: Amending The Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1080-85 (1988). For the sake of clarity, however, this paper will assume, *arguendo*, that legislative enactments indeed reflect the wishes of majoritarian self-government.

7. CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES (1890). The account of American constitutional theory and theorists appearing in this

unabashedly championed the idea that judges should use their positions as expositors of constitutional law in order to keep the foundational law in conformity with the "prevailing sense of right" of the nation.[8] Recognizing "the present will of the people as the living source of law," he wrote, judges are "obliged, in construing the law, to follow, and give effect to, the present intentions and meaning of the people."[9] This is quite a bold assertion, but it throws Tiedeman into the teeth of the counter-majoritarian difficulty. Were he to assert that judges must invariably follow the present will of the people as expressed by the political branches, he would indeed avoid counter-majoritarianism, but at the cost of abandoning constitutionalism itself: the counter-majoritarian difficulty only bites where judicial review enables the Court to nullify the popular (but unconstitutional) enactments of the legislature. In still defending the idea that judges can strike down laws for unconstitutionality, therefore, Tiedeman could take refuge only in the claim that judges can discern the difference between the people's "whim" and their genuine "will," striking down laws resulting from the former but affirming those grounded in the latter.[10]

Former U.S. Supreme Court Justice William Brennan, another member of this "responsive" school,[11] believed that a constitution should function as a "living document" that changes with the times "to cope with current problems and current needs."[12] Justice Brennan went even further than Tiedeman, rooting the legitimacy of judicial review in the justices' responsibility to shape the *future* national ethos, to "point toward a different path . . . [and] embody a community, although perhaps not yet arrived, striving for human

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section owes much to the guidance and suggestions of Prof. Jed Rubenfeld of the Yale Law School. For a much more elaborate account and critique of these approaches, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. (forthcoming March 1995).

8. TIEDEMAN, *supra* note 7, at 149 (arguing that judge should "not enforce that shade of meaning which was intended by the lawgiver, but [rather] that shade which best reflects the prevalent sense of right").

9. *Id.* at 154.

10. *Id.* at 164 ("[T]he popular will shall prevail . . . but [not] . . . their whims and ill-considered wishes . . . .").

11. The term "responsive" was coined by Robert Post. *See* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19 (1990). Post follows Tiedeman and Brennan in suggesting that judges should appeal to the prevailing "national ethos" in adjudicating constitutional questions. *See generally, id.* at 23-26 (discussing the authority of national ethos).

12. William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1985).

dignity for all."[13] Again, however, this future-oriented view[14] cannot escape Bickel's paradox of constitutional self-government: even if the future will *were* knowable, what justification do judges have to thwart that of the present?

Originalist theorists, who ground judicial review of the present popular will in an appeal to some decisive sovereign consent of the "people" in the *past* (namely, at the point of constitutional founding), roundly criticize both Tiedeman's and Brennan's approaches on counter-majoritarian grounds. Any departure from the meaning of the constitution as understood at the time of its original ratification, argue the originalists, is tyranny: the imposition of judges' personal values upon the sovereign people.[15] For originalists such as U.S. Supreme Court Justice Antonin Scalia, any efforts to make the Court "speak . . . for the[] constitutional ideals" of the nation represent a frightening "Imperial Judiciary . . . [a] Nietzschean vision of . . . judges—leading a Volk who will be 'tested by following.'"[16] In reality, argue the originalists, the role of a constitutional court is to enforce the sovereign will of the people as expressed in the ratified constitution, while leaving everything not mentioned therein to self-rule by the modern majority.[17] Present will matters not a whit until the present people take it upon themselves formally to amend the founding document.

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13. *Id.* at 444.

14. Robert Post also suggests such a *future*-directed role. There is, for Post, an ongoing dialogue between bench and people: if the Court's "vision of national ethos" does not agree with our own, for example, "our protests will create a reconstituted political perspective that will in turn alter the character of future judicial appointments." Post, *supra* note 11, at 36. He thus seems to suggest, as does Brennan more explicitly, that an American-style constitutional court can, for its part, help *shape* the "national ethos" of the future.

15. For originalists, the People enshrined their supreme will in the constitutional text, and until this document should be formally amended, it must constrain the policy-activism of judges in the same way it requires ordinary legislative acts not to cross the boundaries it sets up. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 144-46, 252 (1990); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977).

16. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., dissenting in part). This criticism was directed, however, not solely at liberal "responsive" theorists like Brennan, Tiedeman and Post, but also at Scalia's otherwise fairly conservative fellow justices Sandra Day O'Connor, David Souter and Anthony Kennedy—who in their joint opinion in the *Casey* case articulated a view of constitutional adjudication in which judges play a role analogous to that of a common law court deciding whether or not to overrule ordinary precedents. *Cf. Casey*, 112 S. Ct. at 2806-15 (opinion of O'Connor, Souter, and Kennedy, J.J.).

17. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175-76 (1803) (finding constitutional authority in authorship by the People); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (Cir. Ct. D. Penn. 1795) (same).

Yet originalists do not easily escape the counter-majoritarian difficulty either. Indeed, their emphasis upon the importance of majority self-government (which they aver is traduced by the judicial imposition of value judgments) highlights Bickel's paradox, by focusing our inquiry upon how the "plain meaning" of the constitution can be enforced against the will of today's majority. Formal amendment of the constitution is the *sine qua non* of originalist constitutional change, yet—at least by its own terms[18]—constitutional amendment is difficult. According to the U.S. Constitution, amendment requires an effective "supermajority": the concurrence of either two-thirds of both houses of Congress or two-thirds of the state legislatures is needed to propose amendments. Its ratification requires agreement by the legislatures of—or popular referenda in—three-quarters of the states.[19] The constitutional choices of the past *do* constrain present majority rule in vastly important ways: the ratifiers of the Constitution are long dust: how can their "dead hand" legitimately control people today?

The American debates among "originalists," "responsivists," and their progeny[20] illustrate recurring problems with the theoretical legitimacy of judicial review—and particularly judicial discretion in norm-articulation—within the context of a written constitutionalism.[21] Though Bickel's dilemma is one peculiar to

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18. Akhil Amar, though certainly no originalist, has argued forcefully that "We the People" retain an inherent and inalienable right to amend (or abolish) the Constitution by simple majority vote at any time. Article V of the U.S. Constitution, he contends, pertains only to limiting the amendment-powers of the ordinary institutions of government created under the aegis of constitutional authority, and does not (indeed, cannot) limit the people's inherent right to choose the mechanisms of its self-government. *See generally* Amar, *supra* note 6, at 1051-52.

19. U.S. CONST. art. V.

20. John Hart Ely has suggested an alternative approach, in which judicial activism is justified to the extent that it "ensure[s] that the political process—which is where [substantive] values *are* properly identified, weighed, and accommodated—[is] open to those of all viewpoints on something approaching an equal basis." JOHN HART ELY, DEMOCRACY AND DISTRUST 74 (1980). This article will not further explore Ely's "process"-based approach to judicial discretion, however, since its focus upon the need to ensure individual access to the political process is presently of only arguable relevance to international jurisprudence.

21. American constitutional law, of course, pioneered this concept. Most famously, in the early years of the American Republic, Chief Justice John Marshall struck down a Congressional statute enlarging the appellate jurisdiction of the U.S. Supreme Court in Marbury v. Madison, 5 U.S. (1 Cranch) at 137. The very idea of written constitutionalism, wrote Marshall, requires that the Constitution be considered a law superior to the ordinary enactments of legislatures constituted thereunder. "If . . . [in the event of a conflict between a constitutional rule and an ordinary law] the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply." *Id.* at 177; *see also Vanhorne's Lessee*, 2 U.S. (2 Dall.), at 308

constitutional law, exchanges over the legitimacy of judicial review form part of a broader jurisprudential dialogue over the role of norm-creation through judicial discretion. Debates over the role of judicial discretion, of course, are not confined to American constitutional law. While the common law tradition tacitly accepts a judicial role in the elaboration of sub-constitutional legal norms,[22] civil law countries such as France, for example, often have difficulty with a judge's creative role in the legal system.[23]

Even absent a solution to the counter-majoritarian problem, theories of judicial discretion may usefully inform our approach to jurisprudential arenas outside that of formal written constitutionalism—and in particular, international law. International law conspicuously lacks a formal grounding document: within the terms of the American constitutional debates, the state-consensualist traditions of international jurisprudence may be said to be uniquely rooted in the paradigm of "present popular will." International legal doctrines such as that of peremptory law (*jus cogens*), for example, strongly suggest a jurisprudential orientation toward what Robert Post calls a "responsive" approach to foundational law[24]—an approach in which founding norms are tied to the development of the "prevalent sense of right."[25] For such a system (in the international context), there is no counter-majoritarian problem of the sort identified by

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("Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.").

22. Even common law countries have often struggled over the propriety of a self-assertive judicial role in law-creation, however, as early 20th-century debates between so-called "Legal Realists" and "Positivists" amply illustrate.

23. Indeed, the leaders of the French Revolution once went so far as to forbid judges from proclaiming general rules and to bar judicial review of legislation. Rather, it was decreed, judges should refer to the legislature whenever questions of any real novelty arose. To this day, French legal opinions—even ones that significantly change prior legal rules and powerfully affect citizens' reliance interests—are remarkably opaque, as if by offering no reasons for rulings the role of the willful jurist might be obscured and the mythology of mere *application* preserved. *See generally* Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 92-108 (1994).

24. Post, *supra* note 11, at 23-26. The Vienna Convention on the Law of Treaties provides that treaties are void if they "conflict[] with a peremptory norm of general international law," by which is meant a rule "accepted and recognized by the international community of States as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344. A norm of *jus cogens*, therefore, binds all states irrespective of contrary practice until such point as the international community "as a whole" agrees upon a supervening rule.

25. TIEDEMAN, *supra* note 7, at 7. *Jus cogens* jurisprudence is perhaps the closest thing to domestic "constitutionalism" seen in the international arena.

Bickel, as it is unambiguously the task of judges to ascertain the values of the relevant "people" of today. Expressions of past popular will (even constitutional expressions) do not constrain those of today.[26]

The clearest indication of the entrenchment of international law in responsivist foundational jurisprudence—and of its distance from the counter-majoritarian paradoxes of written constitutionalism—is to be found in the Statute of the International Court of Justice itself, Article 38(1)(c), which seems expressly to authorize the international bench to look to prevailing legal sensibilities as a source of law to guide its adjudication of disputes. Article 38 reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> (b) international custom, as evidence of a general practice accepted as law;
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> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
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> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.[27]

The reference to present custom as "evidence of general practice accepted as law" clearly ties customary rules to an *opinio juris* likely to be favored by Tiedeman. However, the key to the role of the International Court *itself* articulating hitherto unexpressed interna-

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26. International law has, however, a different theoretical difficulty: that of defining exactly what is meant by this "people." Suspended, in some sense, between a "Grotian" individual-human-rights paradigm and a "Vattelian" ideal of state-sovereignty, modern international jurisprudence has some difficulty discerning its relevant constituent components. *See generally* Paul W. Kahn, *From Nuremberg to the Hague: The United States Position in* Nicaragua v. United States *and the Development of International Law*, 12 YALE J. INT'L L. 1, 58-60 (1987). As we shall see, however, the International Court of Justice takes as its value-constitutive starting point the various legal "communities" of the world's state-territorial units.

27. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1179, 1187.

tional legal norms lies in Article 38(1)(c), authorizing recourse to "general principles of law recognized by civilized nations."

While written constitutionalism presents the nagging legitimacy problems of Bickel's counter-majoritarian dilemma, international jurisprudence, a non-constitutional and expressly "present will" oriented legal regime, provides an intriguing "test case" for the applicability of theories of responsivist norm-articulating judicial discretion. The general principles jurisprudence of the ICJ should be examined in this light. The vehicle for this examination will be what is perhaps the most comprehensive exposition of the responsive ideal of judicial discretion yet produced: Israeli Supreme Court Justice Aharon Barak's 1989 work *Judicial Discretion*.[28]

Although with respect to the exercise of discretion, international jurists face structural and doctrinal constraints tremendously different—and in many ways more formidable—than those encountered by domestic judges, Barak's analysis applies with considerable force in the international arena. Indeed, if there is anything to the strong criticisms levelled at responsive jurisprudential *constitutional* scholarship by originalist thinkers such as Justice Scalia or anything in the as yet unanswerable legitimacy problems of the Bickelian dilemma, a Barakian approach to judicial discretion—which owes much to Tiedeman's ideal of following the "prevailing sense of right" and partakes, also, of its weaknesses—might be *more* useful in the international arena than in systems with written constitutions and well-developed systems of judicial review.

A. The Barakian Model of Discretion

1. *Discretion and the Challenge of the "Objectivity" Test.* It is the guiding assumption of Justice Barak's examination of the use of judicial discretion that judges and courts occasionally find themselves

28. AHARON BARAK, JUDICIAL DISCRETION (Yadin Kaufmann trans., 1989). Justice Barak's basic arguments—that in occasional "hard cases" judges may be confronted with situations for which established legal principles provide no answer and must in such circumstances exercise their reason in order to create law—were themes emphasized as early as 1931 in U.S. Supreme Court Justice Benjamin Cardozo's *Storrs Lectures* at Yale Law School. *See* B.N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 165-67 (1931) (noting that in some small percentage of cases there is no clear answer consistent with established principles of law, requiring a "balancing of judgment . . . [and] testing and sorting of considerations of analogy and logic and utility and fairness . . . [by] the judge [as he] assumes the function of lawgiver"). While these ideas have a long realist genealogy, however, Aaron Barak provides their most systematic (and most modern) articulation.

confronted with a "hard case." In some circumstances, in other words, they will be presented with a situation in which "the judge is faced with a number of [outcome] possibilities, all of which are lawful within the context of the system."[29] In "easy" and even "intermediate" cases, in Barak's characterization, well-accepted rules of law may be applied such that, "[e]very lawyer who belongs to the legal community . . . will come to [a particular] conclusion—that only one lawful solution exists—such that if a judge were to decide otherwise, the community's reaction would be that he was mistaken."[30]

Justice Barak maintains that judicial discretion exists precisely because of "hard" cases.[31] He defines discretion as "the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful."[32] Hard cases present the decision-maker with two (or more) equally "legitimate" alternative holdings: no option can clearly be said to be the "right" answer

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29. BARAK, *supra* note 28, at 40. Barak's analysis focuses almost exclusively upon the use of judicial discretion in deciding matters of law—that is, in the choice of norms and their application to a given set of facts—rather than in determining matters of fact. He admits that in reality "[t]here exists . . . an intimate link between norm and fact" such that "[t]he norm sifts through facts and focuses only on those that are relevant [and] . . . [t]he facts sort through the norms and concentrate only on those that apply." *Id.* at 17. Judicial discretion, he writes, plays a vital role in determining the facts presented in a particular case—in fact, this use of discretion is "arguably the most important in the judicial process, since most disputes that are brought before the courts concern only facts." *Id.* at 13. "Discretion" in the sense Barak uses the term, becomes very problematic when used in the context of courts' determinations of fact.

> [D]oes the judge have discretion in the sense in which we are using this term, that is, can he choose between two or more lawful results? This is a difficult question, tied as it is to philosophical and psychological debates about the nature of reality. Is there a reality that the judge simply "finds" and "uncovers," or is there rather no objective reality at all, and does the judge "invent" and determine the facts? If only one "real" and "true" reality exists, does the judge have any discretion, or is he instead obligated to choose that reality and to find it as fact for the purpose of deciding the conflict?

Id. at 13-14 (footnote omitted). Barak, however, declines to wrestle with these questions, confining his study to "judicial discretion in the normative plane, not in the factual plane." *Id.* at 14.

30. *Id.* at 39.

31. Barak borrows the term "hard cases" from Ronald Dworkin, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977), with whom, on the subject of judicial discretion, Barak strongly disagrees. *See* BARAK, *supra* note 28, at 28-33. Barak asserts that Dworkin is of the opinion that every legal problem possesses a single lawful solution, so that even in "hard" cases "the legal norm directs the judge, forcing him to choose one of the possibilities, and only that one." *Id.* at 28. In Dworkin's view, therefore, there is no judicial discretion because it is impossible for a judge to be presented with more than one legitimate alternative. According to Barak's critique, Dworkin mistakes the existence of limits upon the exercise of judicial discretion for the absence of such discretion. *Id.* at 33. Barak feels that discretion does exist, but that it is not and cannot be absolute. *See id.* at 20-27. He argues that judges are limited to choices between lawful outcomes and the means by which they may legitimately make their choice.

32. BARAK, *supra* note 28, at 7.

under the law as understood up to that point in time. Such cases are concededly quite rare,[33] but they make possible—indeed, they require—the exercise of judicial discretion. Judicial discretion, then, is:

> a legal condition in which the judge has the freedom to choose among a number of options. Where judicial discretion exists, it is as though the law were saying, "I have determined the contents of the legal norm up to this point. From here on, it is for you, the judge, to determine the contents of the legal norm, for I, the legal system, am not unable to tell you which solution to choose." It is as though the path of the law came to a junction, and the judge must decide—with no clear path and precise standard to guide him—which road to take.[34]

The heart of the answer to the question "How is a judge properly to exercise judicial discretion?" is to be found in what Barak calls the test of "objectivity." At root, a judge must exercise discretion so as to reach the result he feels most faithful to the values of the legal system as a whole, balancing the conflicting values presented and formulating a new judicial policy by articulating a new norm.[35] Though it is obviously the judge who must make this decision, it must be made—insofar as possible—without reference to the judge's own values. A judge must, Barak writes, make a deliberate transition from his personal perspective as "the judge" to that of "the court," a process which is intended to enable him to apply the standards of the broader legal community of which he is a part.

> When the judge is required to identify the values of society, he looks for those values that are shared by the members of the society, even if they are not his own. He avoids imposing on the society his subjective values, to the extent that they are inconsistent with the articles of faith of the society in which he lives. . . . When the judge must balance various values according to their weight, he

33. *See id.* at 41-42; "Only a small part of all the decisions in a [legal] system are in the sphere of hard cases, and only a small percentage of all the cases that are brought before the various instances raise problems of judicial discretion." *Id.* at 42.

34. *Id.* at 8.

35. *Id.* at 125. Barak consistently uses the masculine third-person singular to indicate an unspecified individual; this convention will thus be followed herein in order to avoid confusion in juxtaposing textual material and quoted matter.

> should strive to do so according to what seems to him to be the society's fundamental conception.[36]

Thus, "the judge must be capable of looking at himself from 'the outside'"[37] and of balancing values against each other in the way that he believes is most faithful to the ideals of the legal community of which he, as judge, is the authoritative representative.

In Barak's characterization, discretion exists "only when each of the options open to . . . [the judge] is permissible from the perspective of the system."[38] Despite the lack of a clear test for unlawfulness, Barak believes that there still exist "possibilities that every knowledgeable lawyer can readily identify as lawful, and there are other possible solutions that any lawyer would immediately understand to be unlawful. Between these poles exist possibilities as to which knowledgeable lawyers might disagree about the degree of their lawfulness."[39] The test of lawfulness, then, is a test of the general belief of "knowledgeable lawyers or the legal community."[40] There are at least four serious challenges to anyone seeking to apply Barak's approach.

a. The Problem of Stepping Outside One's Self. First, there is the difficulty of actually achieving the *personal* perspective required. Though legal systems often go to great lengths to protect judges from external influences which might taint their objectivity,[41] any judge's ability to take a mental step "outside himself" is necessarily limited in that he cannot, in any ultimate sense, really *be* anyone else.

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36. *Id.* at 125-26.

37. *Id.* at 127.

38. *Id.* at 10.

39. *Id.* at 10-11.

40. *Id.* at 11. "Thus, we can say that judicial discretion exists where the legal community believes a legal problem has more than one lawful solution." *Id.*

41. Most familiarly, the U.S. Constitution's Article III provides for great independence of judges from political pressures by giving them life tenure (subject only to extraordinary removal) and salary protection. U.S. CONST., art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). In most legal systems, a complex ritual of evidentiary rules limits what a factfinder may formally consider, while applications of norms to facts must be formally explained and justified through the medium of the recorded opinion—for the preservation and retrieval of which elaborate and extensive information-management institutions have been developed. In all but the highest courts, formal written explanations of judicial reasoning are subjected to appellate scrutiny; even supreme courts' decisions face something of a "judgment of history," as such bodies are at liberty to overrule their own precedent.

Admitting that complete success is impossible, however, Barak still feels there to be value in the attempt:

> If the judge is not aware that judicial discretion exists, he will not make any conscious effort to distinguish between his own out-of-the-ordinary subjective feelings and the need to make an objective decision. . . . Awareness of the exercise of discretion puts the judge on guard and makes it possible for him to cut himself off from those subjective factors that he should not take into account.[42]

To fail to recognize the nature of the discretionary project would be to invite far greater infidelity to the values which the judge should apply—even to the point, as the American originalists most fear, of a judge imposing his *own* substantive values upon the legal system.

b. The Problem of Identifying Cases Requiring Discretion. Another challenge exists at the level of distinguishing those cases which are genuinely hard cases. Mistaking an intermediate or easy case for a hard one would presumably be an error of the first magnitude: a judge would hazard, unnecessarily, all the pitfalls of Barak's objectivity analysis, and could very easily reach a flatly incorrect result. Mistaking a hard case for an easier one, on the other hand, would be to decide a genuinely discretionary issue in simple ignorance; such a result might or might not do justice in the instant case, but could hardly, as precedent, provide a satisfactory articulation of the new norm in fact created thereby.

"We do not possess an instrument that lets us distinguish in a precise manner between a lawful possibility and an unlawful possibility." Barak argues that there still exists, in these categories, "a solid nucleus of certainty . . . [around which] rotates the entire structure, with all its broad spectrum,"[43] but for a judge faced with a particular case this is surely little consolation. Again, however, Barak's

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42. BARAK, *supra* note 28, at 139.

43. *Id.* at 43. Between outcomes obviously lawful and obviously unlawful, Barak writes, there exist

> a number of situations about which the legal community is itself divided. These scenarios should not be called unlawful, just as one cannot say about them that they are lawful. Indeed, it is the judicial decision itself that will determine the lawfulness of these possibilities. . . . Where the views of the legal community are divided, the judge has discretion to determine whether or not judicial discretion exists.

Id. at 11. Thus, paradoxically, there is a degree of discretion in whether or not a particular case requires the exercise of discretion.

formulation is not useless, since it may still provide an important means for judges to structure their approach to an issue—and, through articulate self-awareness, to improve the quality of their legal analysis.[44] While a Barakian judge might easily err, a judge unaware that there might even *be* such things as hard cases would fall short every time such a case arose.

c. The Problem of Finding the "Fundamental" Conception. A more daunting challenge is that of identifying the "fundamental conception" of the legal community. Perhaps unconsciously echoing Tiedeman's awkward claim that judges are able to distinguish between the genuine popular "will," which a judge must obey, and transitory popular "whim," which may be disregarded,[45] Barak writes:

> The objective tests force the judge to give expression to the fundamental values of the society and not to its subjective values, to the extent the two are different. The objective element does not require the judge to give expression to the temporary and the fleeting. He must give expression to the central and the basic. Thus, when a given society is not faithful to itself, the objective test does not mean the judge must give expression to the mood of the hour. He must stand firm against this mood, while expressing the basic values of the society in which he lives.[46]

How is this to be done? The sort of wisdom necessary for a judge to "step outside" himself surely pales beside the necessity, here, of his "stepping outside" the immediate currents of his entire legal culture in order to identify some greater scheme embodying values perhaps contradicting those presently held by many—or most, or all—members of that community. In part because of the need to distinguish ephemeral values from "fundamental" ones, a judge seeking in good faith to follow Barak's guidelines cannot simply "conduct a public opinion survey to ascertain the views of the legal community. Each judge must make this decision for himself . . . [in

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44. Barak understands the difficulty of asking unerring distinctions of judges, and writes that "it is impossible to condition the lawfulness of a judge's ruling on the existence of awareness" of the nature of the case (hard, intermediate, or easy) being decided. *Id.* at 136-37. "[L]ack of awareness does not invalidate the decision. But it seems to me that the lack of awareness must affect the status of the decision in the normative realm. The normative weight of a new judicial creation that was arrived at out of an awareness that it was a new creation differs from the weight of this same creation if it was produced without any awareness." *Id.* at 137.

45. TIEDEMAN, *supra* note 7, at 164.

46. BARAK, *supra* note 28, at 130.

order to] give expression to what appears to him to be the basic conception of the society (the community) in which he lives and acts."[47] Particularly for a society in which the fundamental legal values change and develop over time, this task cannot but be vastly difficult.

This problem is at the root of the criticism leveled by Justice Scalia and others at those who would have constitutional courts "speak before all others for [the people's] constitutional ideals."[48] In the Scalia/Bork view, "community" norm-articulation results in nothing more than the imposition of judges' personal values[49] upon an unwilling sovereign people by an "Imperial Judiciary."[50] Any system seeking to invoke judicial discretion must be able to resolve this difficulty, or at least to minimize the problems associated therewith.

d. The Problem of Value Sub-Communities. Even assuming the contours of the relevant legal community to be clearly discernible,[51] in any society in which values in fact do change and develop over time, a judge faces the possibility not simply that the values of the moment might traduce more fundamental values, but also that his community may lie somewhere along a continuum between one fundamental vision and the next. This, Barak feels, demands particular care from the judge:

> The judge must not feed into his system values that have not yet matured nor values that are the subject of bitter controversy. In this way one can ensure that the values of the legal system faithfully reflect the values of the society, and that only a mature change of the values of the society produces a change in the legal values. Thereby the coherence of the legal system will be guaranteed, for new values that are channeled into the legal system have a way of being formulated slowly, through reciprocal relations and strong connections with the values that already exist in the system.[52]

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47. *Id.* at 12.

48. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816 (1992) (opinion of O'Connor, Souter and Kennedy, JJ.).

49. BORK, *supra* note 15, at 251-52 ("At some point, every theory not based on the original understanding [of the constitutional Framers] . . . requires the judge to make a major moral decision.").

50. *Casey*, 112 S. Ct. at 2882 (Scalia, J., dissenting in part).

51. *See infra* part II.D.2.

52. BARAK, *supra* note 28, at 159.

Perhaps more problematically, the legal community might in fact be divided between fundamental visions, or on certain issues no such fundamental value could be said to have coalesced. Could, for example, the American legal community—divided as it is between originalists and responsivists—be said to have a single grounding approach to constitutional interpretation, which might inform a judge's approach to the application of an especially problematic provision in a particular case?

This problem of value-heterogeneity is critical, as it suggests that for certain issues the "legal community" that the judge must represent may in fact be made up of multiple communities—each with a fundamental vision too inconsistent with its rivals to permit harmonization but too consistently held to constitute an ephemeral departure from some prior fundamental conception. And yet, at least in the domestic context,[53] judges have no alternative but to decide the case presented to them.

Robert Post tried to deal with this problem by hypothesizing that a judge's appeal to the "national ethos" might reveal different answers on different questions. Thus, for him, while the underlying dynamic remains tied to Barak's appeal to community values, the community might demand that different interpretive methods be used for different substantive issues. A court, he wrote:

> can justifiably use ... [originalist] interpretation with respect to an issue in a case if it believes that the national ethos supports an identification with a past act of consent relative to that issue. But it can justifiably use responsive interpretation if it can discern with respect to that issue the presence of a national ethos that in a pertinent way historically embodies the essential content and spirit of the Constitution, and that precludes identification with any past act of consent. Hence the choice between historical and responsive interpretation can turn on an appraisal of the national ethos.[54]

This fails to answer the question fully, however, since it presumes that a "national ethos" will be unambiguously identifiable with respect even to a particular substantive claim. Can it really be said with certainty that Americans as a "legal community" endorse either an "originalist" or a "responsivist" interpretive method with respect to

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53. The possibility of *non liquet* outcomes in the international context will be discussed herein. *See infra* text accompanying notes 88-92. No commentator, to my knowledge, has yet suggested that modern domestic jurisprudence permit *non liquet.*

54. Post, *supra* note 11, at 35.

the Equal Protection Clause[55] of the U.S. Constitution? Justice Brennan, as we have seen, tried to escape the problem of divided value-communities by claiming the right to "point toward a different path" and help forge a new value-consensus on a particular issue.[56] But if the "true" national "ethos" of the *present* is difficult to discern, how much more so must be that of the *future?*

For Barak, all of these problems make the judge's task much more difficult, but far from futile. They are challenges to the wise judge, he seems to suggest, but they should not be taken as reasons for despair. While few judges might be able to achieve the objectivity for which Barak calls, there remains considerable value in asking all to try—and to be aware of the responsibilities of their task. This, again, is the heuristic value of the model: as an ideal to which it is posited that judgment should aspire, it encourages the decision-maker explicitly to consider the various factors that go into the use of judicial discretion. A judge, writes Barak,

> must be aware of the fundamental problems that lie at the basis of the exercise of judicial discretion. He must be aware of the fundamental normative problems. Thus, for example, he must understand that a reasonable exercise of judicial discretion requires consideration not only of the existing fundamental values, but also of new values. He must be conscious of the need for organic growth. He must be aware that he fills a dual role of deciding the particular conflict before him and establishing a general norm, and that between these two tasks there is constant tension. He must recognize the need to ensure consistency and neutrality, while showing special understanding for the problem of retroactivity. At the same time, he must be aware of the institutional problems that lie at the foundation of judicial discretion and of the incidentality of the exercise thereof. He must understand that in the exercise of discretion he is limited in information and in means. He must realize that he must do justice and that justice must also appear to have been done. For this, he must act objectively. In addition to all these requirements, he must be aware of the place of the judge in the system of separation of powers. He must be cognizant of the

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55. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

56. Brennan, *supra* note 12, at 444. Justice Brennan referred here to his opposition to capital punishment, despite the fact that his view of the death penalty "is an interpretation to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe." *Id.*

> problem of democracy and of the society's conception of the judicial role. He must also take into account the relations among the various governmental authorities.
>
> Such broad awareness imposes a difficult burden upon the judge.[57]

Even if the resulting analysis is flawed in important ways, Barak assumes that these judicial values will be better served by a judge's awareness of the nature of the undertaking—and the explicit articulation of his resulting reasoning—than they would were hard cases to be decided in ways opaque even to the judge himself. Thus Barak asks three kinds of awareness of the legal decision-maker: (1) awareness of the existence of judicial discretion; (2) awareness of what it means to use judicial discretion; and (3) awareness of the need to formulate the purpose behind a legal norm created through judicial discretion.[58]

2. *Domestic vs. International Judicial Discretion.* Barak's analysis focuses upon the use of discretion by judges in a domestic legal system, applying statutory and precedential caselaw to the problem at hand in the context of a well-developed system of law enforcement the functions of which are generally accepted as legitimate by the community within which they operate. International jurists, however, face rather different circumstances, both structurally and politically.

The most fundamental difference between the situations in which domestic and international jurists find themselves is in the power the system allows them with which to give force to their judgments. Domestic tribunals have an enormous advantage here, as they are able to rely upon the coercive monopoly of the state for the enforcement of the law as pronounced by the courts. In criminal proceedings, for example—a category of law virtually nonexistent in international jurisprudence[59]—marshals or sergeants-at-arms physically compel the presence of the defendant, and should adjudication result in conviction, the state can call upon a small army of probation officers, guards, correctional institutions, and even executioners to ensure that the sentence is carried out. Civil proceedings are backed

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57. BARAK, *supra* note 28, at 146-47.

58. *Id.* at 138.

59. *See generally* Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 205-11 (1946).

by a government-enforced power of forfeiture and contempt, regulatory law may be enforced by civil or criminal penalties,[60] and even the pronouncements of constitutional law can be backed by the coercive power of the state—up to and including the use of military force to ensure obedience to the law of the land.[61]

Though positivist theories long insisted that judges could or should not engage in "law creation,"[62] it is also widely accepted in most domestic jurisdictions that judges indeed do play a role in developing jurisprudence.[63] Where gaps should be found to exist in the settled law, it is considered the responsibility of the court to fill them. During the great efforts to codify domestic law in 19th-century Europe, much debate occurred over how judges were to deal with *lacunae* in the law presented by a particular case. Today many domestic jurisdictions expressly provide for such gap-filling.[64] As Barak notes,[65] for example, Swiss law provides that the judge is to provide law to cover such an eventuality as if he were the legislature,[66] while Austrian law authorizes recourse to the "natural principles of justice,"[67] and Italian and Mexican law suggest turning to the general principles of the legal order of the state.[68] Such

60. Some U.S. food-safety laws, for example, provide not only for administrative fines but for criminal penalties for their violation. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (affirming criminal conviction of corporate official for company's violation of laws requiring sanitary food storage).

61. After the U.S. Supreme Court's decision in Cooper v. Aaron, 358 U.S. 1 (1958), for example, President Dwight Eisenhower federalized the Arkansas National Guard in order to compel recalcitrant state officials to integrate public schooling there.

62. *See generally*, Frank, *supra* note 1, at 49.

63. Even in countries such as France, which prize a terse and opaque form of legal opinion and in which judges have traditionally disowned any role in "creating" law through precedent, judge-made law is of cardinal importance. French administrative law, for example, has been fashioned "out of whole cloth" by the courts. *See* Wells, *supra* note 23.

64. International law attempts to deal with this problem by authorizing the I.C.J. to invoke "general principles" under Article 38(1)(c) of the Statute of the Court. By the time the Statute of the P.C.I.J. was drawn up in 1920, the national legal systems of three of the ten members of the Committee of Jurists which drafted it had adopted a "general principles of law" formulation to deal with this challenge. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 18-19 (1987).

65. BARAK, *supra* note 28, at 88-89.

66. SCHWEIZERISCHES ZIVILGESETZBUCH art. 1, § 2 (Switz.), CODE CIVIL SUISSE art. 1, § 2 (Switz.), CODICE CIVILE SVIZZERO art. 1, § 2 (Switz.).

67. ALLGEMEINES BÜRGERLICHES GESETZBUCH art. 7 (Aus.).

68. CODICE CIVILE art. 12 (Italy); CÓDIGO CIVIL PARA EL DISTRITO FEDERAL § 19 (Mex.). Section 370a of the Mexican Code also refers to such "general principles." *See* BARAK, *supra* note 28, at 88.

formal gap-filling provisions are not at all uncommon.[69] In common law jurisdictions, of course, the law-creating role of the courts is well understood. It is possible, for example, for courts to find "implied" private rights of action in statutory law otherwise silent on the subject[70] or even, apparently, to find new constitutionally-protected fundamental rights lurking in the "penumbra" of constitutional doctrine.[71]

These broad enforcement powers, of course, stand in stark contrast to those possessed by international tribunals such as the International Court of Justice. There are no sergeants-at-arms in international law; the international legal system enjoys no monopoly of coercive power of the sort possessed by domestic jurisdictions. Indeed, it is often described as a defining feature of the international arena that it is characterized by "anarchy"—that is, a situation in which coercive force is employed by actors themselves in "self-help" rather than by any form of central authority.[72] Due to this lack of enforced sovereign command, some writers have even gone so far as to deny that international law is "law" at all.[73]

In an environment of legal "subjects" who are generally quite well armed and often willing to "enforce" their perceived rights independent of the imprimatur of international legality, the international jurist can only really rely upon persuasive power for the enforcement of his judgments. This places particular constraints upon the exercise of judicial discretion—and even upon the adjudication of intermediate and easy cases. An international tribunal, unable to rely upon compelling institutional means of enforcing the law it declares,

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69. *See* Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 742-44 (1957) (recounting domestic jurisdictions then permitting recourse to "general principles" of law in order to fill *lacunae*).

70. In Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971), for example, the U.S. Supreme Court permitted private suits under a provision of federal securities law, 15 U.S.C. § 78j(b) (1934), which contained no provision for such a private cause of action.

71. The U.S. Supreme Court, for example, found a constitutionally-protected right of privacy to exist in the "penumbra" of the Bill of Rights, "formed by emanations from those guarantees." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). This right of privacy subsequently became the core of the Court's establishment of a constitutional right to abort a pregnancy in its first trimester in Roe v. Wade, 410 U.S. 113 (1973). Though the focus of bitter and prolonged domestic political controversy, the "essential holding" of Roe—that a woman's right to abort a pregnancy before fetal viability may not "unduly" be infringed—was reaffirmed as a constitutional requirement by a majority of the Supreme Court in Casey v. Planned Parenthood, 112 S. Ct. 2791 (1992).

72. *See, e.g.*, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 127-36 (1977).

73. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (1954).

faces a considerable challenge. The law, in such circumstances, will only be obeyed to the extent that the articulate jurist can make his case logically and morally irresistible, and to the extent that the perceived disadvantages of compliance are not such that governments will disregard the political compliance pull of a persuasive argument. While it might even be true that most nations obey most international laws most of the time,[74] this international context makes the exercise of judicial discretion particularly delicate.

a. The Problem of Lacunae. Hard cases, the jurisprudential situs of discretion, may occur not only when prevailing legal norms permit more than one legitimate legal outcome, but also when a gap in settled law leaves the jurist with nothing to say on a matter presented to it without resorting to the purposeful and discretionary formulation of a new norm.[75] Such outcomes of *non liquet* are hard cases as surely as are Barak's multiple-solution problems. For a variety of reasons, international law is particularly threatened by the possibility of *non liquet.*

Lacking the formal institution of a legislature, international "statutory" law[76] is notoriously thin, consisting only of the body of written treaty and convention texts upon which the world's jealous sovereigns can bring themselves to agree. Customary international law, a normative source also explicitly endorsed by the Statute of the International Court of Justice,[77] may provide useful guidance. However, customary international law's ability to create generally applicable norms is constrained by the need not only to demonstrate a clear customary practice not derogated by non-observance, but by the possibility that "persistent objector" status could limit obligations upon any particular state. Moreover, if customary law is to be taken as "evidence of a general practice accepted as law," the element of

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74. Thomas Franck, for example, has noted the remarkable degree to which even superpowers observe inconvenient rules, and examines the characteristics of international legal norms which can bring about compliance in the absence of coercive enforcement. *See* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3-4 (1990).

75. *See, e.g.*, BARAK, *supra* note 28, at 40 (arguing that in "hard" cases, "the judge is faced with a number of possibilities, all of which are lawful within the context of the system").

76. Article 38 of the Statute of the International Court of Justice, as we have seen, authorizes the court to consider those "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1055, T.S. 993, 3 Bevans 1179.

77. *Id.* at art. 38, § 1(b) (authorizing recourse to "international custom, as evidence of a general practice accepted as law").

opinio juris is required—international actors must follow the rule because they believe it a legitimate and binding rule, and not for other reasons.[78]

To make matters worse, Article 38 of the Statute of the ICJ restricts reliance upon international judicial precedent. By such a view, "judicial decisions" are relegated to the status of mere "subsidiary means for the determination of rules of law"—of no more importance than the mere opinion of legal scholars.[79] Nevertheless, Article 38 would still permit prior ICJ case law to constitute a formal "source of law." More worrisome is Article 59 of the Statute of the Court, which provides that a decision of the ICJ "has no binding force except between the parties and in respect of that particular case."[80] The stark terms of Article 59 appear, on their face, to "preclude[] the Court from adopting any doctrine similar to the Anglo-American doctrine of stare decisis."[81] As is suggested by its reference to "parties" and "decision," however, Article 59 may concern itself solely with the binding character of what Shabtai Rosenne has called "contentious litigation"[82]—namely, litigation between two disputants rather than at the request of the UN General Assembly, the Security Council or other duly authorized UN agencies or organs pursuant to Article 96 of the UN Charter and Article 65 of the Statute of the Court.[83] By this interpretation, Kenneth Keith has written: "Article

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78. The existence of a customary rule may be seen by examining: (1) the extent, consistency and frequency of departures from the candidate norm; (2) the relation of both adhering and departing states concerned to the subject matter of the rule; (3) the time over which the norm is alleged to have developed; and (4) whether or not adhering states consider such a rule to be the law (*opinio juris*). *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 37-40 (2d ed. 1987).

79. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187.

80. *Id.* art. 59.

81. MANLEY OTTMER HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 536 (1934).

82. SHABTAI ROSENNE, 2 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT v (1965).

83. *See, e.g.*, KENNETH KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 28-29 (1971) (arguing that Article 59 phrasing suggests limitation to "contentious decisions" and that choice of word "decision" over broader term "judgment" suggests application only to "the operative portion of a judgment"). Rosenne includes his discussion of res judicata and Article 59 under his discussion of "contentious litigation" rather than that concerned with advisory opinions, see ROSENNE, *supra* note 82, at 624 ("Article 59 determines the material limits of *res judicata*, and Article 60 its formal value."), and even in discussing Article 59, seems to accord the Court the ability to develop precedent on general rules of law, *id.* at 624 ("The protracted proceedings in the *Corfu Channel* and *Asylum* cases gave the present Court an opportunity of developing its jurisprudence on the

59 relates solely to the operative part of the judgment and to the question of res judicata [as specifically binding upon disputants] and accordingly is not concerned, in any way with the value of earlier cases as authoritative statements of law."[84]

> [I]n applying general rules of law to particular cases, it was inevitable that the Court should perform a law-developing function. In course of time, through what in French has been called "*une jurisprudence constante*" and because of jurisdictional continuity between the [Permanent Court of International Justice and the ICJ], a sizeable body of case-law has accumulated which is "a tangible contribution to the development and clarification of the rules and principles of international law."[85]

Even on Keith's view of the validity of ICJ judicial precedent, however, Article 38 still expressly relegates international decision law to the status of a "subsidiary" source of dispositive rules.[86]

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subject.").

84. KEITH, *supra* note 83, at 29.

85. DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 260 (1972); *see also* Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, at 64 (Feb. 5) (Separate Opinion of Judge Fitzmaurice) ("[S]ince specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development."), *quoted in* LYNDELL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE 78 (1979).

86. Moreover, some nations, such as the United States, a principal architect of both the League of Nations and the United Nations systems, have long resisted the compulsory jurisdiction of the ICJ. On the eve of the ICJ's jurisdictional consideration of the *Military and Paramilitary Activities* case, the United States formally attempted to withdraw from the Court's jurisdiction by modifying its 1946 Declaration of Acceptance. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (detailing the dispute over U.S. attempt to withdraw from compulsory jurisdiction). Article 36 of the Statute of the Court provides that states may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning" the interpretation of a treaty, questions of international law or fact, or the nature and extent of reparations for breach of international law. Statute of the International Court of Justice, June 26, 1945, art. 36(2)(a)-(d), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. The U.S.'s Declaration of Acceptance pursuant to Article 36 had reserved a right to withdraw from jurisdiction upon six months notice, but did not expressly contain a right to "modify." Thus the Court found that the alleged 1984 "modification" was ineffective for lack of the six months notice required under the 1946 document. The I.C.J. noted, however, that "the declarations made under Article 36 by a number of other States" do in fact reserve a "right of modification" similar to that unsuccessfully asserted by the U.S. in 1984. Military and Paramilitary Activities (Nicar. v. U.S.) 1984 I.C.J. 392, § 53 (Nov. 26).

i. International Judicial Law-Creation. The contractual tradition of international law—seeing international obligations as deriving exclusively from the express or implied consent of sovereign states—has made it very difficult for international jurisprudence to embrace any law-creating role for international courts. In the traditional view, echoed, for example, in the case of the S.S. *"Lotus,"* "the very nature and existing conditions of international law" ensured that "[r]estrictions upon the independence of States cannot be presumed."[87] The law reached only what sovereign states agreed to permit it to reach; all that was not expressly prohibited was, in effect, permitted. More precisely, relations between states were governed, not by "law," but by the traditional checks and balances of military and economic force.[88] In such a system, *non liquet* was clearly not an embarrassing exception, an example of law's failure; it was, rather, the default mode of international jurisprudence, and therefore entirely unsurprising. By such an interpretation, *non liquet* hard cases might be endemic, since the law could frequently fail to provide a clear answer to a problem submitted for decision. This was not felt to be a problem, however. International legal tribunals were not expected to have any power to "create" law to fill such interstices, and unlike Barak's domestic judges, international jurists were neither expected nor permitted to use judicial discretion. As *non liquet* was a permissible outcome, the use of judicial discretion in the creation of legal norms was unnecessary.

The adjudication of international cases became problematic, however, when this assumption changed—when *non liquet* came to be felt as an impermissible outcome. A corresponding revolution in the power granted international jurists in the exercise of discretion was necessary. By the early years of this century, the balance of opinion in the international legal community had shifted powerfully against *non liquet.*[89] Many leading scholars came to feel a prohibition upon

87. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

88. In the *Lotus* case, the French government had contended that in order for Turkey to be able to extend its jurisdiction to the high seas collision at issue, it must be able to "point to some title to jurisdiction recognized by international law." The Court disagreed, finding that international law "leaves [States] in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." *Id.*

89. Part of this shift may have been due to the influence of the late-19th century drive for the codification of both domestic and international law. Jeremy Bentham was apparently the first to suggest compiling international law into a great "Digest." *See* 8 JEREMY BENTHAM,

non liquet to be virtually an *a priori* axiom of law,[90] or one so firmly entrenched that it constituted "one of the most undisputably established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice."[91]

ii. The Need for Discretion. To ban *non liquet*, however, was to institutionalize the need for judicial discretion. Scholars such as Roscoe Pound soon realized that

> [g]iven the rule, common to so many systems, that the judge must render a decision regardless of the silence or apparent contradiction of the texts, a respectable name, if not a substitute, must be found for the personal, professional, or community preference, the rule of thumb or hunch, to which he must have recourse. Since codes cannot cover all contingencies, and since cases of first impression must occur in common law jurisdictions, the prohibition of *non liquet* demands recognition of such *rationes decidendi* as have been

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WORKS 537 (Bowring ed., 1843), *quoted in* P.J. Baker, *The Codification of International Law*, 5 BRIT. Y.B. INT'L L. 38, 38 (1924). It was, however, the advent of the great "law-making treaty" in the late 19th century—beginning with the provisions of the Congress of Vienna regulating the regime of international rivers and the slave trade, *see* R.Y. Jennings, *The Progress of International Law*, 34 BRIT. Y.B. INT'L L. 334, 342 n.2 (1958) [hereinafter Jennings, *Progress*]—which marked the arrival of a powerful movement dedicated to international legal codification. *See* R.Y. Jennings, *The Progressive Development of International Law and its Codification*, 24 BRIT. Y.B. INT'L L. 301, 301 n.2 (1947) [hereinafter Jennings, *Codification*] (recounting major multinational efforts at codification from 1815 Congress of Vienna to 1930 Hague Conference). Many of the great societies of international law were founded expressly for the purpose of aiding codification, *see, e.g.*, Jennings, *Progress*, *supra*, at 344 n.3, and leading scholars flocked to its banner. *See* Baker, *supra*, at 38 (recounting prominent 19th-century legal thinkers who supported codification, including Bluntschli, Mancini, Field, Levy, and Fiore). Drawing strength from the success of efforts to codify domestic law, *see generally* J.L. Brierly, *The Future of Codification*, 12 BRIT. Y.B. INT'L L. 1 (1931), the movement for the codification of international law apparently came to see *non liquet* outcomes as embarrassing failures that highlighted the "incompleteness" of international law and inhibited its progressive development. A prohibition upon *non liquet*, it may have been felt, would not only prevent particular cases from inconclusive outcome, but also harness the engine of judicial discretion to the development of international jurisprudence.

90. Julius Stone credits Kelsen, Radbruch, Cossio and Garcia Maynez with this view. Julius Stone, Non Liquet *and the Function of Law in the International Community*, 35 BRIT. Y.B. INT'L L. 124, 127 (1959).

91. Hersch Lauterpacht, *Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law*, *in* SYMBOLAE VERZIJL 196, 200 (1958), *quoted in* Stone, *supra* note 90, at 128.

> found in "natural law," "natural equity," "reason," or "general principles of law."[92]

This clearly describes something that begins to approach what Barak sees in judges' exercises of judicial discretion.[93] The central issue in the *non liquet* debate, therefore, was less at "the technical legal level" than at the level of "the law-creative as distinct from the merely law-applying competence of international courts."[94] As Julius Stone observed, "to prohibit *non liquet* entails the imposition upon the Court of a duty to develop new rules limited only by the novelty and range of the matters coming before it for decision."[95] Significantly, the need for a gap-filling rule, noted Pound, was particularly important in international law, where "most of the normative material is not only in dispute but also in constant flux."[96]

By the early twentieth century, judicial discretion was not felt to be as problematic as it had been for the legal positivists. The impact of legal realist theory upon legal scholarship—fostering an appreciation of the role of the judge as "an intelligent collaborator of the legislator in the application of this living law"[97] in the international as well as the domestic context—made it possible to conceive of a system which depended upon the exercise of discretion in order to avoid *non liquet* in international jurisprudence. Baron Descamps, the chairman of the Committee of Jurists that drafted the statute of the

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92. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 483-84 (1933).

93. *Cf.* BARAK, *supra* note 28, at 133. Barak, however, is unwilling to leave merely "a respectable name" to cover a situation in which "personal considerations are decisive . . ." *Id.* at 121. In his formulation, the judge must articulate each step in the reasoning taken and justify any "intuitive" insights in rational terms:

> In determining the best solution, the judge is sometimes aided by his intuition. He operates according to that internal sense that creates a link between the problem and its solution. At times the judge senses the desired result even before he has given himself an accounting as to the appropriate path for getting to the appropriate result.
> . . . .
> Thus, intuition plays a role in judicial discretion. The judge is human, and intuition plays an important role in the activities of every person. But it does not follow that judicial discretion begins and ends with intuition. Intuition must be reviewed, must go through a process of rationalization. . . .
> . . . In the final analysis, judicial discretion must be expressed in rational thought, not in a subjective sense. This is the responsibility required of the judicial function.

Id. at 133-35.

94. Stone, *supra* note 90, at 127.

95. *Id.* at 132.

96. Pound, *supra* note 92, at 484.

97. CHENG, *supra* note 64, at 17.

Permanent Court of International Justice (PCIJ), for example, went so far as to argue that the Court ought to be permitted recourse to

> the law of objective justice, at any rate in so far as it has twofold confirmation of the concurrent teachings of jurisconsults of authority and of the public conscience of civilised nations. . . . [T]he conception of justice and injustice as indelibly written on the hearts of civilised peoples [is] . . . an indispensable complement to the application of law, and as such essential to the judge in the performance of the great task entrusted to him.[98]

This contention resonates strongly with natural law theory, a theory which Barak does not endorse. Insofar, however, as Descamps would permit an international jurist to invoke the broader values of the legal community (here, in the international context, the whole of humanity), these sentiments dovetail neatly with Barak's understanding of judicial discretion in the domestic arena.

Despite the sovereign-contractarian traditions of European international law, the use of judicial discretion in international jurisprudence gradually became conceivable. As Pound suggests, moreover, international law would seem likely—to the extent that it presents its tribunals with cases at all[99]—to provide jurists with a *lacuna* type of hard case with greater frequency than occurs in domestic jurisprudence. Yet international law deprives its jurists of many of the tools—by, for example, constraining their ability to formulate new norms binding upon parties as precedent[100]—which assist domestic judges in the exercise of their judicial discretion.

These crucial differences in context between domestic and international adjudication suggest an exacerbation of the problems associated with Barak's model of judicial discretion: (1) the difficulty of a judge's "stepping outside himself;" (2) the difficulty of determining the cases which genuinely call for the use of discretion; (3) the difficulty of ascertaining the "value" of the "legal community;" and

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98. Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th, 1920, with Annexes, at 324-25 (1920) [hereinafter Procès-Verbaux], *quoted in* Frances T. Freeman Jalet, *The Quest for General Principles of Law Recognized by Civilized Nations—A Study*, 10 U.C.L.A. L. REV. 1041, 1073 (1963).

99. Because of the often-contested legitimacy of the International Court of Justice, its lack of enforcement power, and the difficulties of securing jurisdiction over sovereign states frequently at liberty to decline it, the ICJ is presented with only a tiny fraction of the caseload faced by domestic courts.

100. *See supra* text accompanying notes 79-86.

(4) the difficulty posed by the possibility of divided community values. There remains, however, at least one clear doctrinal window through which international jurists may exercise this discretion—the "general principles of law recognized by civilized nations" authorized as a source of decisional law by Article 38(1)(c) of the Statute of the International Court of Justice.

B. General Principles Doctrine and the ICJ

Article 38(1)(c) is the ICJ's analog to the authorizations for the use of discretion to fill legal *lacunae* given by statute to domestic courts in many jurisdictions.[101] At the time the Statute of the PCIJ[102] was drafted in 1920, the idea that international tribunals could invoke general principles in order to fill gaps was already well established in certain international contexts. Some international treaties and tribunals expressly endorsed the consideration of general principles of law in the settlement of disputes arising thereunder[103]—especially where, in the absence of directly applicable international law, obtaining rules of decision directly from the jurisprudence of one disputant would likely be unacceptable to the other. This sort of reasoning was employed, for example, in Lord Asquith's arbitration of the *Abu Dhabi* dispute in 1952.[104] The use

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101. *See supra* text accompanying notes 62-71.

102. The ICJ inherited Article 38 verbatim from the Statute of the Permanent Court of International Justice, the supreme judicial organ of the League of Nations System.

103. The British-U.S. Claims Arbitral Tribunal of 1910, for example, noted that

> [i]nternational law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find . . . the solution to the problem.

Quoted by Georg Schwarzenberger, *Foreword* to CHENG, *supra* note 64, at xiii.

104. Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144. In *Abu Dhabi*, a dispute arose under a 1939 agreement under which the Sheikh had sold oil development rights within his territorial waters to the Petroleum Development Company. Lord Asquith concluded that a clause in the agreement which authorized reference to general principles "repels the notion that the municipal Law of any country, as such, could be appropriate. The terms of that Clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of 'modern law of nature.'" *Id.* at 149. Treaty provisions like that in the *Abu Dhabi* case were not uncommon. Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 283 (1963) [hereinafter Friedmann, *General Principles*]. Lord McNair argued that natural resource concessions between industrialized Western powers and less developed states would be particularly well-suited for arbitration according to "general principles." McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 1-9 (1957) (arguing that arbitration between industrialized Western powers and less developed states might

of such principles also appears to have occurred implicitly, or even without the conscious acknowledgment of the users. As Ignaz Seidl-Hohenveldern's study of the Conciliation Commissions established under the Italian Peace Treaty of 1947 illustrated, "[r]ecourse to general principles is by no means limited to cases where decisions explicitly refer to these principles. In many more cases such recourse has to be implied from the general context."[105]

Article 38 merely extended this concept to the ICJ, providing the Court with authority, through the use of judicial discretion, to invoke such principles in order to prevent *non liquet*[106]—an idea that gained broad acceptance in international law.[107] As Lauterpacht noted in 1927, Article 38(1)(c) gave the official imprimatur of law to the importation of legal concepts from outside conventional international treaty and customary law for the purposes of preventing *non liquet.*

> The adoption . . . of "general principles of law recognized by civilized States" as a binding . . . source of decision in the judicial settlement of disputes signifies that practice, hitherto unsupported by universal and authoritative international enactment, and regarded by many as derogating from the strictly judicial character of international arbitration, has now received formal approval on the part of practically the whole international community. There lies the outstanding, and to a certain extent, revolutionary contribution made by the Statute to international law as a whole.[108]

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often require the adoption of legal norms as occurred in *Abu Dhabi*); *see also* Derek W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach,* 59 BRIT. Y.B. INT'L L. 49, 53 n.19 (1988) (giving as examples of "general principles" the arbitral cases of Societe Rialet v. Eth., 8 Trib. Arb. Mixtes 742 (1929), and the *Aramco* arbitration, Saudi Arabia v. Arabian Oil Co., 27 I.L.R. 117, at 168-70 (1963)); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 16 (1990) (noting common use of "general principles" formulations in arbitral tribunals in the 19th century).

105. Ignaz Seidl-Hohenveldern, *General Principles of Law as Applied by the Conciliation Commissions Established Under the Peace Treaty with Italy of 1947,* 53 AM. J. INT'L L. 853, 872 (1959).

106. Procès-Verbaux, *supra* note 98, at 338; *see generally,* Michael Akehurst, *The Hierarchy of the Sources of International Law,* 47 BRIT. Y.B. INT'L L. 274, 279 (1975).

107. In his dissent in the *Right of Passage* case, for example, Judge Fernandez referred to "general principles of law . . . inherent in the international legal system," of the existence of which he claimed there was no doubt. "Whatever view may be held in regard to these principles, . . . whatever, I say, may be the attitude of each towards the origin and basis of these principles, all are agreed in accepting their existence and their application as a source of positive law." Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, at 136-37 (Apr. 12) (dissenting opinion of Judge Fernandez).

108. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW viii (2d ed. 1970).

Georg Schwartzenberger believed that Article 38's legitimization of the use of judicial discretion in international law through the invocation of general principles,

> enabled the Court to replenish [sic], without subterfuge, the rules of international law by principles of law tested within the shelter of more mature and closely integrated legal systems. [It] opened a new channel through which concepts of natural law could be received into international law .... [It] made it possible for the World Court to strike out a bolder line in its application of international law than, in the absence of such wide reserve powers, the Court might have found it possible to take.... [It] threw out a challenge to the Doctrine of International Law to sail into new and uncharted seas.[109]

The drafters of Article 38 deliberately empowered future Courts "to develop and refine the principles of international jurisprudence."[110]

The invocation of general principles under the aegis of Article 38(1)(c) is thus, at least potentially, an important area of international law. Indeed, as we have seen, it appears to be virtually the only doctrinally-permissible way that judicial discretion may be employed by the ICJ. How, then, are international jurists to pick, from among the universe of candidate norms, those which are "general principles of law recognized by civilized nations?"

1. *The Invocation of General Principles.* International legal scholars have long disagreed over how general principles are to be identified. To begin with, the "civilized nations" phrasing, though depicted by Judge Ammoun in the *North Sea Continental Shelf Cases* as a relic of European chauvinism,[111] is today regarded as a term of art referring merely to states with well-developed legal systems and implying no racial or cultural prejudice.[112] Evaluating the "general"

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109. Georg Schwarzenberger, *Foreword* to CHENG, *supra* note 64, at xi.

110. BROWNLIE, *supra* note 104, at 16.

111. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 4, at 132-40 (Feb. 20) (separate opinion of Judge Fouad Ammoun).

112. According to Hugh Thirlway,

> the only intention of the inclusion [of this phrase] was surely to limit consideration of municipal systems to those which are sufficiently developed to reveal the extent to which they share underlying principles, rather as in the *Abu Dhabi* arbitration it was necessary to exclude the local law simply because that law had nothing to say on the subject.

nature of a particular norm, however, is much more difficult. Two basic schools of thought exist on the subject, which will here be called the *comparativist* approach and the *categoricist* approach. Neither school, however, supplies a means of determining general principles that Justice Barak would find to be an acceptable use of judicial discretion. It is only with the development of a synthesis of these two approaches—a process apparently now underway—that general principles doctrine has begun to fit itself into Barak's scheme of judicial discretion and the objectivity test.

a. Comparativism. One approach to the determination of general principles under Article 38 has been simply to treat paragraph (1)(c) as an international jurist's invitation to undertake a colossal comparative-law project.

> [A]n examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement on the principles relevant to the case at hand. . . . [T]he aim is to use comparative law as a guide . . . . This will, in most though by no means in all cases, involve a comparison of the relevant principles of the most representative systems of the common-law and the civil law world. In certain cases it may be necessary to examine some of the non-Western legal systems, such as Muslim or Hindu law, now actively represented in the family of nations.[113]

Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Two,* 61 BRIT. Y.B. INT'L L. 1, 124 [hereinafter Thirlway, *Law and Procedure: Part Two*]. Jennings argues that the term refers to those societies which have organized themselves into governments capable of acting in the international arena. "The international test of civilization," he contends, is "simply government." Jennings, *Progress, supra* note 89, at 352.

113. Friedmann, *General Principles, supra* note 104, at 284-85. Note, however, that in writing that purely comparativist scholarship would be needed to determine "the principles that, in the circumstances of the case, are most appropriate and equitable," Friedmann presupposes some antecedent standards for judging propriety and equity. Despite the scientific pretensions of the comparativist method, the need to pick "proper and equitable" principles still necessitates the employment of judicial discretion. As Barak notes, judges are frequently asked to interpret legal norms according to principles such as "morality" and "justice"—to which Friedmann would apparently have us add "propriety" and "equity." "Principles," writes Barak, "do not come equipped with a list of the situations to which they will apply in the future. They constitute the starting point for balancing and weighing." BARAK, *supra* note 28, at 50. "In certain cases . . . no principle is sufficiently specific under the circumstances, so the judge is left with discretion in making the choice among the different (narrow or broad) possibilities." *Id.* at 51. It is crucial to Barak's argument that at some point, even if only in the interpretation of norms expressed in the imprecisions of everyday human language, judicial discretion is always necessary. *See id.* at 46-50.

The test of a "general principle" was said by the comparativists to be that "it is recognized in substance by all the main systems of law," and that by applying it the judge would not be "doing violence to the fundamental concepts of any of those systems."[114] "A principle of law is a general one," it was felt, "if it is being applied by the most representative systems of municipal law . . . . What is usually required is that the principle pervades the municipal law of nations in general."[115]

To this end, massive comparative law projects were begun by academics like Rudolf Schlesinger, dedicated to discovering in the apparent legal diversity of the world[116] some "common sub-stratum of institutions and concepts."[117] Surveys of municipal law systems were expected to yield a harvest of legal principles general by virtue simply of ubiquity,[118] principles "so common to the various national legal systems of the world that they compose, independently of custom or treaty, general international law."[119] In an attempt to bolster its position in the *Right of Passage Case,* for example, Portugal undertook a survey of sixty-four municipal legal systems in order to

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114. H.C. GUTTERIDGE, COMPARATIVE LAW 65 (2nd ed., 1949), *quoted in* Friedmann, *General Principles, supra* note 104, at 285.

115. F.A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20, 38-39 (1957). The term "municipal" is employed here—and will be employed hereafter—as a synonym for "domestic" and as the opposite of "international."

116. It is this comparativist approach which held the most attraction for those who despaired at making much progress in otherwise defining substantive rules of law in a world divided between starkly contrasting theories of socio-economic organization. As Friedmann put it,

> [i]n the present greatly diversified family of nations—which comprises states of starkly differing stages of economic development, as well as of conflicting political and social ideologies—the notions, for example, of "equity," "reasonableness" or "abuse of rights" with respect [for example] to the terms of nationalization of a foreign monopoly or a vital natural resource do, and are bound to, differ widely. What to the one party is an abuse is to the other the reassertion of a long withheld "natural" right.

Friedmann, *General Principles, supra* note 104, at 289. For Mann, cleavages between "States having heterogenous legal systems" required close attention to the comparativist derivation of "general" legal rules. Mann, *supra* note 115, at 38-39.

117. Sarfatti, *Roman Law and Common Law: Forerunners of a General Unification of Law*, 3 INT'L & COMP. L.Q. 110 (1954), *quoted in* Schlesinger, *supra* note 69, at 741 n.29.

118. Such surveys might also be of use in clarifying, for international purposes, terms and concepts without previous definition in international jurisprudence. In a study of international law with respect to the International Monetary Fund, for example, Fawcett suggested that the "general principles" formulation could be useful in allowing jurists to construe terms such as "loan," "net income," and "capital" by means of "a comparative study of their use in different systems of municipal law, which may uncover similar concepts generally applied." J.E.S. Fawcett, *The Place of Law in an International Organization,* 36 BRIT. Y.B. INT'L L. 321, 342 (1960).

119. William R. Hearn, *The International Legal Regime Regulating Nuclear Deterrence and Warfare*, 61 BRIT. Y.B. INT'L L. 199, 225 (1990).

show the general acceptance of rules recognizing a right of passage for enclaved territory. Its finding that sixty-one of these systems recognized such a right prompted Portugal to conclude that "the municipal laws of the civilized nations are unanimous."[120]

As the Portuguese example suggests, however, this comparative method was ponderous. Worse, it produced few results. One discouraged comparativist scholar complained in 1944:

> It is not possible to enumerate the principles of private law which can be regarded as "general" principles which are "recognized by civilized nations," [and] it would seem that such principles must be rare, partly because there is little or no scope for the employment of any save the main principles of law for this purpose, and, partly because such exploration of the field as has been attempted appears to indicate that there are few principles of this description.[121]

Not only were the scholarly efforts involved enormously time-consuming, they produced few results in an ideologically and economically polarized twentieth-century world that found universal agreement on most ideas enormously difficult.[122]

To avoid making findings of general principles hostage to the unlikely existence of jurisprudential consensus under such circumstances, some legal scholars propounded a variant upon general

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120. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 at 11-12 (Portuguese final submissions). Because Portugal's argument was based primarily upon general and special practice rather than upon "general principles," however, the Court did not reach this issue. *See generally* Thirlway, *Law and Procedure: Part Two, supra* note 112, at 120.

121. H.C. Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L L. 1, 5 (1944) [hereinafter Gutteridge, *Law of Nations*]. Gutteridge noted that "[a] high degree of caution is, in fact, essential before any private law principle or analogy can be accepted as conforming to the standard of universal or general recognition which has been adopted as the test for its employment for international purposes." *Id.* at 1.

122. One study of the decisions of the Conciliation Commissions established under the Italian Peace Treaty of 1947 indicated, for example, that even when jurists were taken only from Western European legal backgrounds they had enormous difficulty in agreeing upon dispositive substantive rules. "Not only the parties to the disputes or the national members but also the various neutral members sometimes disagree as to the existence or content of general principles. Such disagreement seems to result at least partially from a sub-conscious assumption that the general principles of national law of the member concerned will or ought to be recognized universally as general principles." Though all of them were Western Europeans there were still "some differences in approach between Commission members from civil law countries and Anglo-American members." The study concluded that: "[i]f researches were to be extended so as to test each alleged general principle as to whether it is really recognized as such by all the legal systems of the world, comparatively few 'principles' will emerge as being indeed generally recognized." Seidl-Hohenveldern, *supra* note 105, at 872.

acceptance. These scholars aspired to judge the universality of a proposition, not against a census of municipal systems, but by looking to whether it received the support of a representative sample of the different types of socio-economic organization—such as, for example, the leading states of each of the world's capitalist, socialist and "non-aligned" blocs.[123] Such a standard of "system-representative" support would find propositions general to the extent they gained support from suitably representative states of the principal systemic ordering of countries.[124]

In addition to its practical problems—for example, not all general principles explicitly or implicitly cited by the Court or its judges had clear origins in municipal law[125]—deriving general principles from

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123. This was, for example, the position of many Soviet scholars, such as Tunkin, with respect to the law-creating power of General Assembly resolutions. *See, e.g.*, GRIGORI TUNKIN, THEORY OF INTERNATIONAL LAW 170-172 (Butler trans., 1974).

124. This representativeness test was also employed in the Texaco Overseas Petroleum arbitration, where an arbiter found UN Resolution 1803 (XVII) of December 14, 1962 to have controlling legal force on a question relating to the nationalization of Western firms involved in natural resource extraction. This resolution was deemed authoritative because, in contrast to Resolutions 3171 (XXVII), 3201 (S-VI), and 3281 (XXIX), it had been supported by a systemic cross-section of the international community:

> It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The principles stated in this Resolution were therefore assented to by a great many States representing not only all geographic areas but also all economic systems.

Texaco Overseas Pet. et al. v. Lib. Arab Rep., Jan. 19, 1977, 17 I.L.M. 1, paras. 84-85, at 28-29 (1978).

Some of the decision-making processes of the UN Commission for International Trade are also said "to be guided by the principle of equitable geographical distribution, and also to have regard to the principle that, in the Commission as a whole, an adequate representation of countries of free enterprise and centrally-planned economies, and of developed and developing countries, should be assured." T.O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 387 (2d ed. 1992).

In the North Sea Continental Shelf Cases, Judge Manfred Lachs' dissenting opinion spelled out a standard for judging the "general acceptance of a given instrument" by looking at its support among states "considered as having a special and immediate interest" in that instrument. There, Lachs concluded that "from the viewpoints both of number and of representativity, the participation in the Convention constitutes a solid basis for the formation of a general rule of law." North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, at 222-28 (Feb. 20) (dissenting opinion of Judge Lachs).

125. Without any suggestion that the principle derived from universality in municipal law, for example, the ICJ ruled in *Temple of Preah Vihear* that it was "an established rule of law" that "the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error." Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, at 26 (June 15). In the same case, Judge Alfaro also argued that certain estoppel effects were controlling by virtue of having been "known to the world since

comprehensive surveys of municipal law was felt to have theoretical weaknesses as well. As South African Judge *ad hoc* Van Wyk explained in the *South West Africa* cases in 1966, Article 38 did not authorize "the application of the laws of civilized nations," but rather "limits the Court to 'the general principles of law' of these nations. It certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation."[126] Something more was needed than simply a comparative-law census, as even Judge Tanaka agreed.[127]

A rigidly comparativist approach also seemed inconsistent with the generally accepted maxim[128] that one should not be held accountable for failing to observe laws the existence of which one was unaware:

> When the Court takes into consideration an alleged rule or principle of law, it is doing so, as it were, retrospectively, in order to measure against it the conduct or claims of a State. It must, however, be possible equally to refer to the same rule or principle prospectively: a State which is considering a particular course of action must be able to ascertain whether that course would or would not infringe a rule of law. . . . The legal adviser of a foreign ministry is however unlikely to be a specialist in comparative law. . . . The conclusion must be that it is insufficient to point to unanimity of municipal legal systems on a particular point unless

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the days of the Romans." *Id.* at 42-43. In the *North Sea Continental Shelf Cases*, the Court seemed to suggest that general principles of a sort could be derived not only through adoption from municipal systems but through international custom, *see* Thirlway, *Law and Procedure: Part Two, supra* note 112, at 122-23, such that municipal acceptance is not always required. The ICJ's holding in the 1966 *South West Africa* case that no right to sue in the public interest could be found in international law despite existing in certain municipal systems suggests that the Court might not have recognized an *actio popularis* even if present in all domestic systems of law. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, at 45 (July 18). *See also* Thirlway, *Law and Procedure: Part Two, supra* note 112, at 113; *see also South West Africa Case*, 1966 I.C.J. at 44 (July 18) (noting the difference between international law and domestic law in that "[i]n the international field, the existence of legal obligations that cannot in the last resort be enforced . . . has always been the rule rather than the exception.").

126. 1966 I.C.J. at 170. *But see* Thirlway, *Law and Procedure: Part Two, supra* note 112, at 119 (arguing that "general principles" are characterized by "ubiquity or near ubiquity" in municipal law).

127. *South West Africa*, 1966 I.C.J. at 296-97. (dissenting opinion of Judge Tanaka) (recounting Art. 38(1)(c) to be "the product of a compromise" between positivist and naturalist ideas, so that natural law plays some role in idea of "general principles"); *see also* Thirlway, *The Law and Procedure: Part Two, supra* note 112, at 120-21.

128. "Generally accepted" is used here entirely in the colloquial sense: most legal scholars appear to feel this an important principle of law, but no comparativist effort has been made either to canvas the population of legal academics or to survey domestic municipal systems.

> the rule which it is sought to derive from them possesses such a degree of reasonableness and appropriateness for application on the international plane for a State which acts in a contrary manner at least to have been conscious of a possibility that a rule of law might point in the opposite direction. Put another way, . . . the Court will be slow to recognize the existence of a general principle of law, even if there is good evidence of unanimity of municipal legal systems, unless it is such that it would be likely to guide or inspire State action.[129]

Moreover, it was feared, if the general principle test of *near* universal application in domestic systems was taken too rigidly, comparative law might offer only meager contributions to international legal development.[130]

Justice Barak's articulation of standards to guide the exercise of judicial discretion also suggests difficulties with the comparativist paradigm. Barak emphasizes the importance of forcing judges to think through the process of using judicial discretion. Judges must be aware of the existence of judicial discretion, aware of what it means to use discretion, and aware of the need to formulate the purpose behind legal norms created by discretion.[131] The utility of Justice Barak's approach lies precisely in fostering judges' self-awareness and in encouraging them to understand and articulate each step in their reasoning. The defect of the comparativist paradigm, however, is that it pretends that no discretion is being used.

Despite its aspiration to reduce the discretionary process from one of actual norm-articulation to one of mere jurisprudential poll-taking, the comparativist approach does not eliminate the need for discretion. The jurist seeking to employ this method must pick "the most representative systems of municipal law"[132] in order to evaluate their acceptance of a given norm. In applying such a norm, the jurist must do no "violence to the fundamental concepts of any of those systems."[133] Indeed, the comparative jurist has been said to have as his goal the identification of "the principles that, in the

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129. Thirlway, *Law and Procedure: Part Two, supra* note 112, at 112-13.

130. *See, e.g.*, Gutteridge, *Law of Nations, supra* note 121, at 9. *See also* Seidl-Hohenveldern, *supra* note 105, at 872 ("[i]f researches were to be extended so as to test each alleged general principle as to whether it is really recognized as such by all the legal systems of the world, comparatively few 'principles' will emerge as being indeed generally recognized.").

131. BARAK, *supra* note 28, at 138.

132. Mann, *supra* note 115, at 38.

133. GUTTERIDGE, *supra* note 114, *quoted in* Friedmann, *General Principles, supra* note 105, at 285.

circumstances of the case, are most appropriate and equitable."[134]

All of these determinations require the exercise of discretion in interpreting their meaning and applying them. The acceptance of which principle must a judge evaluate? Which municipal legal systems are representative enough (and of what?) that their acceptance of a given principle should be assessed? How similarly must two systems apply a given principle for it to be considered accepted by them both? Which version of this principle should be imputed to international law? What are these municipal systems' fundamental values and how might they be furthered or harmed by the application of this norm to the case at hand? On those occasions when the ICJ has used principles without clear domestic analog,[135] where on earth did they come from? To say merely that a particular rule is accepted by different systems is not necessarily to say that these systems place the same normative value upon the rule, or that they employ it for the same reason or purpose. In fact, "the existence in one or more municipal systems of a solution to the problem which is attributable to a quite different principle undermines the credibility of the principle asserted as a *general* principle."[136]

Such questions clearly implicate judicial discretion, yet the comparativist approach hides this discretion behind the purported certainty of the survey process. It is not admitted that judges are themselves *deciding* anything. Rather, judges are said to be merely canvassing municipal systems in order to determine their common principles. No effort is made to work through the steps of discretionary reasoning because it is pretended that no discretion is employed.[137] Barak's effort to compel judges to understand and explain their decision making is fundamentally betrayed by the purportedly scientific nature of the comparativist project.

b. Categoricism. Rather than discovering general precepts through comparative legal scholarship, the categoricist is more inclined to follow Lord Asquith's reasoning in the *Abu Dhabi*

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134. Friedmann, *General Principles, supra* note 104, at 285.

135. *See supra* note 126.

136. Thirlway, *Law and Procedure: Part Two, supra* note 112, at 119.

137. Michael Wells' comparison of French and American judicial opinions provides an interesting illustration. Wells, *supra* note 23. American legal writing, long and discursive almost to a fault—especially in an era when law clerks have access both to on-line legal databases and sophisticated word-processing—contrasts sharply with the abbreviated, syllogistic style of French judicial opinions, in which judges indulge the fiction that they are merely applying the law without themselves adding to it.

arbitration. *Abu Dhabi* adopted certain tenets of statutory construction from English jurisprudence, not because English law applied to the facts of the case or because most countries accepted these tenets, but simply because these principles were felt "so firmly grounded in reason as to form part of . . . [a] 'modern law of nature.'"[138]

For the categoricist school, the comparativist project was pointless. "There is no need to undertake a [comparativist] quest for that which [in any event] forms the basis of all law."[139] Concepts which were truly "general principles of law recognized by civilized nations"—certain notions, perhaps, of procedural fairness, legal reasoning and inference, or statutory construction[140]—were seen to be "general" by virtue of being inherent in the very idea of law. They would exist in domestic systems, and would perhaps be discernible by comparative inquiry, but the real test was not universal domestic consensus but a sort of transcendental propriety. As Bin Cheng explained, "[t]his part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law."[141] It would therefore be to "no avail," he wrote,

> to ask whether these principles are general principles of international law or of municipal law; for it is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all. The general principles of law envisaged by Article 38(1)(c) of the Statute of the World Court are indeed

138. *In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, 1 INT'L & COMP. L. Q. 251 (1952). Judge Fernandez, in the Right of Passage case, seems to have reasoned in this fashion, concluding that the principle of "mutual respect for sovereignties" entailed, "as a logical consequence," that India's recognition of Portuguese sovereignty also included India's recognition of a right of passage between the constituent parts of an enclaved territory. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 at 135-36 (dissenting opinion of Judge Fernandez).

139. Jalet, *supra* note 98, at 1086.

140. Even more broadly, certain basic patterns of legal discourse, it has been suggested, "the formal properties of arguments which satisfy neither the conditions of induction nor those of deduction, and in which value considerations figure prominently beyond the ends-means nexus of instrumental rationality," have a characteristic structure and analytical rigor to them which can generally be recognized as legal reasoning—even though not formally logical in a mathematical sense. FRIEDRICH R. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS FOR PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTICS AFFAIRS 12 (1989).

141. CHENG, *supra* note 64, at 24.

> the fundamental principles of every legal system. Their existence bears witness to the fundamental unity of law.[142]

Thus, for Lord Asquith and his intellectual progeny, exhaustive comparative legal scholarship was not needed; general principles were inherent in the very nature of law, and might even be discernible from a single legal system or without reference to any municipal system at all.

Whereas the comparativist approach possessed a relatively straightforward, if cumbersome, process by which to evaluate the general acceptance of a particular principle, categoricism placed itself solely at the mercy of the decision maker. In the *Abu Dhabi* arbitration, being content entirely on his own to winnow principles general from those particular and to interpret the "'modern law of nature,'" Lord Asquith had no qualms about exercising his delegated powers as arbiter. If there is anything to the charges levelled at responsive schools of judicial method by originalist scholars such as Judge Bork and Justice Scalia,[143] it is perhaps that they ask so frighteningly much of judicial decision makers. This may, in fact, be a general weakness of theories focused on legal-community values. Even by these standards, however, the categoricist self-assurance of Lord Asquith's general principles jurisprudence seems curiously boundless.

For this reason, the categoricist approach also falls far short of Justice Barak's ideal. Here the exercise of discretion is not at all concealed, of course, yet neither is it channeled through a careful process of consideration and explanation. To rule no more than that a principle is "inherent in the very idea of law" or "so firmly grounded in reason" as to constitute a natural law is in large part to abandon the principled exercise of discretion. What is lacking is not an awareness of the existence of discretion—for this, of course, is abundant—but any indication of the decision maker's consciousness of the responsibilities inherent in the exercise of that discretion. It is not simply the judge's job to make the right decision; he must do so

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142. *Id.* at 390. Adherents of this categoricist paradigm could turn, for example, to Jellinek and Oppenheim, who argued that similarities between certain aspects of private and international jurisprudence were the result not of conceptual borrowing but of the fact that the jurisprudential genealogy of each was grounded in prior "conceptions of general jurisprudence to which by the very nature of things similar rules must apply." LAUTERPACHT, *supra* note 108, at 19-20.

143. *See supra* notes 15-16.

for the right reasons and explain himself in such a way that the new norm and the reasoning behind it are apparent both to the disputants and to third parties, both present and future.[144] By providing no apparent need for judges to justify themselves, the categoricist approach encourages judges to take the path of least resistance and avoid both actual consideration of those factors critical to the proper use of discretion[145] and the careful explication of each decision.

c. An Emerging Synthesis. A more productive approach to the derivation of general principles (and one more faithful to Justice Barak) would provide a means of norm-identification that was both simple enough to be practical but which contained some internal mechanism for checking the bald exercise of personal judicial preference. It would, in short, be more faithful to Barak's call for the informed, self-aware, and articulate exercise of judicial discretion. A synthesis of these two approaches to general principles jurisprudence would agree with the categoricists that general principles are somehow inherent in the concept of legal order and discernible by the wise and careful judge. Judges, therefore, need neither hold courts hostage to encyclopedic feats of comparative law scholarship nor mask the exercise of judicial discretion.

This third approach, however, might nonetheless look to comparative methods to evaluate the genuine character of candidate principles and to act as something of a "reality check" on the exercise of judicial discretion. While judges need not undertake exhaustive studies of municipal systems, it must be a part of the judge's reasoning process—of his stepping outside himself in order to evaluate the general acceptance of a particular principle—to explicitly consider the likely receptiveness of different legal systems to the candidate rule.

Acceptance by a majority of municipal systems, even if ascertainable, however, would not necessarily be dispositive. The role of law in the international system may differ in crucial ways from that of law in domestic society. It is not preordained that every domestic principle has a meaningful international analogue at all. The comparative method, however, might be a useful evaluative tool—a

144. "It is not enough that justice be done; justice must also appear to have been done." BARAK, *supra* note 28, at 23-24.

145. *See supra* note 62.

check upon the creeping arrogance which might overtake a categoricist jurist left entirely to his own devices.

Happily, the outlines of such a theoretical synthesis appear to be increasingly understood in Court doctrine. Thus we find that legal scholars disown comparativist surveys, yet insist that the widespread presence of a particular principle in municipal law is still usually necessary[146] for the principle to be considered general. Municipal legal systems give the judge a window through which to view other approaches to justice and proper legal order,[147] but the inquiry neither starts nor ends there. The recognition of a principle in municipal law "gives the necessary confirmation and evidence of the juridical character of the principle concerned,"[148] but "the recognition of a principle by civilized nations . . . does not mean recognition by *all* civilized nations."[149]

The key factor, of which the comparative-categorical synthesis freely admits, is the role of judicial discretion in interpreting values and applying norms from areas of well-established law to areas of indeterminacy through steps of reasoned and carefully explained inference. As McNair explained, international law "has recruited and continues to recruit many of its rules and institutions from private systems of law" not by direct adoption but by "regard[ing] any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles."[150]

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146. An exception to this would be, of course, any "general principles" which might arise in international law itself, independently of municipal law. *See supra* note 126. In such circumstances, the judge would be expected to attempt to "step outside" both himself and systems of municipal law in order to evaluate the principle in terms of the values he finds in the international legal order itself.

147. For Hugh Thirlway, for example, a "recognized general principle" under Article 38(1)(c) is one which "can be regarded, on the basis of the universal or near universal testimony of municipal legal systems, as part and parcel of universal justice." Thirlway, *Law and Procedure: Part Two, supra* note 112, at 125.

148. CHENG, *supra* note 64, at 25.

149. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, at 299 (dissenting opinion of Judge Tanaka).

150. International Status of South-West Africa, 1950 I.C.J. 128, at 148 (July 11) (separate opinion of Sir Arnold McNair). *Cf.* Thirlway, *Law and Procedure: Part Two, supra* note 112, at 118:

> When having recourse to municipal law, in search of a principle which may be sufficiently general to warrant its being treated as 'accepted' by nations, the principle must be defined in a pure form: the individual subjects of law between whom it operates must be replaced, as in an algebraic equation, by x and y. Then, in the context of international law, x and y may be given the values of 'State A' and 'State B', or 'State' and 'international organization,' for example, and the congruity of the

The ways in which a given rule may be applied and its role within a system of legal order vary significantly with context. For example, while international law and domestic law both follow something akin to *pacta sunt servanda*, they have very different ideas about how far supervening changes in circumstances may be treated as a release from obligation.[151] Direct translations between domestic and international jurisprudence may well do violence to the real values and policies served by principles ostensibly accepted at both levels. The suitability of adopting norms from one legal context to another can only be assessed by a judge aware of the importance and responsibilities of his discretion in the decision-making process and willing explicitly to examine the role such borrowed rules play in each legal order.

General principles, then, may be adopted from municipal law, but they should not reflexively be borrowed "after a census of domestic systems." Rather, international tribunals should employ

> elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. . . . It is impossible, or at least difficult, for state practice to evolve the rule of procedure or evidence which a[n international] court must employ. An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.[152]

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principle assessed.

See generally Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1954-1959: General Principles and Sources of International Law*, 35 BRIT. Y.B. INT'L L. 183 (1959).

151. *See* Gutteridge, *Law of Nations, supra* note 121, at 6. With the coming into force of the Vienna Convention on the Law of Treaties, however, international law may have acquired an analog to domestic jurisprudential "public policy exceptions" to private contractual freedom, in the form of the *jus cogens* clause of the Convention. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344; *see also supra* note 24.

The different context of international law may sometimes turn even the most generally accepted of principles on its head. The principle that one should not be a judge in one's own case, for example, is unquestioned in most municipal systems and has even been called one of the "general principles of law recognized by civilized nations." *See* Friedmann, *General Principles, supra* note 104, at 290. As we will see, however, the "own case" prohibition finds a notable exception in the jurisprudence of the ICJ. *See infra* text accompanying note 163.

152. BROWNLIE, *supra* note 104, at 16.

Finding a general principle by reference to municipal law is a process of principled and analogical reasoning—the sort inescapably requiring a self-aware decision maker.

Some method of comparative analysis can indeed inform this process, in particular by encouraging judges to consider whether or not domestic systems tend to agree on the issue.[153] Just as Justice Barak's self-awareness is intended to help a judge distance himself from purely individual processes, a comparativist mental process can serve as a useful "corrective to any tendency there may be . . . to employ concepts or rules which either belong exclusively to a single system or are only to be found in a few of such systems."[154] The heart of the process, however, is not comparison but the exercise of judicial discretion.

> The object seems to be . . . to provide the judge, on the one hand, with a guide to the exercise of his choice of a new principle and, on the other hand, to prevent him from "blindly following the teaching" of jurists with which he is most familiar "without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice" if applied to the particular case before him . . . [by] considering whether it is one which finds acceptance in the main systems of civilized law.[155]

Comparative studies of the approaches to a problem taken by different systems of municipal law, therefore, are not rigid tests of a general principle but merely guideposts to legal decision-making.[156]

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153. Thirlway, *Law and Procedure: Part Two, supra* note 112, at 119.

154. Gutteridge, *Law of Nations, supra* note 121, at 10.

155. *Id.* at 9.

156. Seidl-Hohenveldern, *supra* note 105, at 290. *See also* Friedmann, *General Principles, supra* note 104, at 289. Judge Tanaka, in a dissenting opinion in the 1966 *South-West Africa* cases, articulated an approach which partook of the natural law tradition: "[I]t is undeniable that in Article 38, paragraph 1(c), some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State." South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6, 298 (July 18) (dissenting opinion of Judge Tanaka). Elsewhere in his opinion Tanaka buttressed his naturalist theories with reference to an academic study showing that some basic non-discrimination principle is to be found in "the municipal system of virtually every State" (though the survey cited actually indicated only that 73% of domestic constitutions had clauses somehow mandating equality). *Id.* at 299. Tanaka appeared thus to reflect the modern synthesis of comparativist and categoricist thinking about Article 38(1)(c): broad domestic acceptance of a general principle was "the manifestation and concretization of already existing general principles" rather than their actual source—but both elements were apparently important. *Id.* at 300.

Therefore, the doctrinal synthesis of the comparativist and categoricist approaches to the derivation of general principles of law under Article 38(1)(c) goes a long way toward meeting the criteria suggested by Justice Barak for the proper exercise of responsivist judicial discretion. The reader will recall, however, that even if his view of discretionary adjudication is fully accepted by the legal decision maker, Barak's model poses several interrelated challenges for the jurist: (1) the challenge of stepping outside one's person in order to apply the objectivity test; (2) the challenge of distinguishing discretionary hard cases from those of the intermediate and easy varieties; (3) the challenge of identifying the values of the legal community which are to guide the formulation of the new norm; and (4) the challenge of dealing with potentially divided loyalties among one's value-constituents.

With respect to the second of these difficulties, an international judge can hope for little help from this doctrinal synthesis. The lack of international statutory law, the indeterminacy of customary practice, and the weakness of judicial precedent as a source of law under the Statute of the ICJ suggest that hard cases will come up more frequently in the international, than in the domestic, arena. With respect to the third and the fourth difficulties, the judge must be left similarly on his own.

General principles doctrine, however, may be able to help judges accomplish the task of stepping outside themselves by suggesting the test of municipal acceptance as one way to help gauge the general acceptance of a candidate norm. Furthermore, bolstering the exercise of discretion with a series of comparativist guideposts helps international jurists cope with their greatest weakness—the structural incapacity of the ICJ to enforce its judgments. Significantly, the retention of a municipal acceptance test in general principles doctrine gives the Court some defense against accusations of what Hersch Lauterpacht called international "judicial legislation,"[157] an international term of opprobrium with the substance, though not quite the spirit, of Justice Scalia's attacks upon the "Imperial Judiciary."

In the peculiar circumstances of ICJ jurisprudence—since the idea of judicial law-creation has long been resisted by sovereign governments, the enforcement of Court judgments depends almost entirely

157. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 45 (1934), *quoted in* Jalet, *supra* note 98, at 1061 n.117.

upon moral suasion—the exercise of even the most responsible and restrained judicial discretion requires a very delicate touch. While general principles doctrine forswears rigid reliance upon comparative study for the derivation of general principles, its retention of comparativist guideposts may be an important tool for the legitimization of ICJ judgments: even the most jealously independent of national sovereigns might find it difficult to deny the legal authority of a rule accepted as fundamental by his own domestic legal system.

2. *Discretion and Value-Communities.* Over and above any subtle doctrinal approaches to deriving general principles under Article 38(1)(c), the exercise of discretion in the ICJ—in ways of which Barak would approve—is facilitated by the structure and procedures of the Court itself. Justice Barak's objectivity test asks a judge "to give expression to what appears to him to be the basic conception of the society (the community) in which he lives and acts."[158] As we have seen, however, this exhortation can pose great difficulties where the relevant legal community is divided on a subject, or where no clear values can be identified.

The domestic judge takes his legal community as a given: in norm-creating situations, the legal community test forces him to represent the values of a legal community possessing particular geographic and jurisdictional frontiers. In the American legal system, for example, this might be a particular state (say, Ohio), a particular Federal Circuit, or the United States as a whole. Though the boundaries of this community are clear, problems with the application of Justice Barak's methodology increase as the defined community grows larger. The greater and more diverse the population falling within its borders, the greater the likelihood of value-heterogeneity on a particular issue. Thus, it is more difficult for the judge to identify a basic conception capable of guiding his articulation of a new legal norm. There are, in effect, diseconomies of scale in the exercise of judicial discretion.

These problems are potentially the most acute, of course, at the international level. The ICJ has a jurisdictional constituency encompassing virtually all of humanity—the value-diversity within its legal community is definitionally maximal. Thus, if international jurists were expected to act exactly like domestic jurists, the application of Justice Barak's objectivity test would be very difficult indeed.

158. BARAK, *supra* note 28, at 12.

Fortunately, however, ICJ judges are different from domestic judges in some crucial ways; the structure and procedures of the ICJ are remarkably well adapted to coping with the challenges of exercising judicial discretion.

3. *The Structure and Procedure of the ICJ.* Under Article 2 of the ICJ Statute, no more than two of the Court's fifteen judges may be of the same nationality.[159] This rule guarantees considerable national diversity. Under Article 4, furthermore, they are to be elected by the General Assembly and the Security Council from a list of persons "nominated by the national groups in the Permanent Court of Arbitration."[160] Most importantly, however, their selection is intended to advance certain important values of "representativeness."[161] According to Article 9 of the Statute, the electors in the General Assembly and the Security Council are instructed to "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 be assured."[162]

ICJ adjudication differs dramatically from municipal adjudication in another important way. In domestic courts, a judge with an interest in the outcome is generally expected to recuse himself from consideration of the matter in which his interest lies, but under Article 31 of the Statute of the ICJ, a party to a dispute whose nationality is not represented on the bench is entitled to appoint its own judge *ad hoc*.[163] This measure highlights the peculiar constituency-representative function of ICJ decision making; it helps to ensure the perceived political and doctrinal legitimacy of any general principles thereafter relied upon in decisions—a vital function

159. Statute of the International Court of Justice, June 26, 1945, art. 2, 59 Stat. 1055, T.S. 993, 3 Bevans 1179.

160. *Id.* art. 4.

161. *Id.*

162. *Id.* art. 9.

163. "Judges of the nationality of each of the parties [to a dispute before the Court] shall retain their right to sit in the case before the Court." Statute of the International Court of Justice, June 26, 1945, art. 31(1), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. "If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge." *Id.* art. 31(2). "If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge. . . ." *Id.* art. 31(3).

in a system in which judicial pronouncements can rely on little more than moral suasion for their enforcement.[164]

The members of the ICJ are thus in a very different position than domestic judges. While both domestic and international jurists aspire to *personal* objectivity, there is no domestic analogue to an international jurist's representation of his legal community. Both varieties of judge must at some point step outside the legal systems at the head of which they sit: just as it is the role of Barak's domestic jurist to exercise discretion as the agent of the entire community, it is the role of the ICJ, as a whole, to decide legal questions and to exercise judicial discretion as the legal embodiment of the entire international community. Crucially, however, individual international judges must also be value-partisans. They must represent the values of their home legal communities on the Court in order to ensure the jurisprudential interaction deemed essential to the proper exercise of *international* judicial discretion.

It should be emphasized that it is not the international jurist's only responsibility to serve as a partisan of his own domestic legal values. Since the values and policies served by legal principles in the international and domestic arenas may vary considerably, a Court consisting of jurists loyal only to their own domestic legal systems would betray its obligation to exercise discretion with attention to the unique circumstances of international jurisprudence.[165] International law often requires methods very different than merely the analogical adoption of domestic rules and concepts. Nor, it should be added, is it the function of a judge actually to represent his country's position or claims before the Court; particularly where a judge's home country is a disputant, this would be a great corruption of his role in the exercise of judgment, and is in any case presumably adequately filled by his country's litigation counsel. A judge must be able to *judge*, be able independently to evaluate the merits of the claim according to both his domestic and his international value-community—and, since national governments by no means invariably live up to their legal

164. *See* PROTT, *supra* note 85, at 110-13 (noting importance of judge *ad hoc* in playing a "conciliatory role" and bolstering "the acceptability of the Court's entire activity" whether he votes with majority or minority).

165. Furthermore, some apparently general principles invoked by the Court have no clear origins in domestic jurisprudence, and may reflect the belief that the international system itself can call forth, on its own, principles satisfying the criteria of Article 38(1)(c). *See supra* note 125 and accompanying text.

ideals, this may well include finding for the opposing litigant.[166] It is therefore essential that the judge *ad hoc* possess at least some "freedom to disregard his role as a patriot."[167] Individual judges must therefore wear two hats: that of a representative of their own legal civilizations *and* that of a member of a bench having special responsibilities within the system of international legal order.[168]

The Court's structural design, therefore, effectively incorporates a methodology with powerful comparativist overtones. Article 9 suggests that the approval of a majority of the judicial "representatives" of the world's "main forms of civilization and . . . principal legal systems," is required before any decision can be reached.[169] The Committee of Jurists which drafted the PCIJ Statute (a direct forerunner to the ICJ Statute), included these provisions in order to ensure that, "whenever a particular legal system is involved in a case . . . the other systems of law [will] be brought into line with it, so that the Bench may really and permanently represent the legal conceptions of all nations."[170] In exercising judicial discretion under Article 38(1)(c) therefore, the Court has generally supported the confluence of its jurists' opinions.

> Such a method affords sufficient safeguards, the judges having been elected so as ensure "the representation of the main forms of civilization and the principal legal systems of the world" . . . . [I]n view of this it may be conceded that anything which all the judges of the Court are prepared to accept as a "general principle of law" must in fact be "recognized by all civilized nations."[171]

The quasi-comparativist method incorporated, *sub silentio*, into ICJ decision making thus closely parallels the requirements of both

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166. Though "[t]he performance of the various judges *ad hoc* has been very uneven," even some *ad hoc* judges, for example, have the courage to do precisely this. *See* PROTT, *supra* note 85, at 111-13.

167. *Id.* at 19. The challenges of what Prott calls "inter-role conflict" are thus particularly acute for judges appointed *ad hoc*. While present to some degree with any judge on the Court, this conflict is particularly severe with respect to judges *ad hoc*—who have been appointed by their home government specifically with a mind to their likely stand in a single case.

168. *See, e.g., id.* at 122 ("[The judge *ad hoc*] has been chosen by his countrymen because they believe that he also shares their values and norms. At the same time he is a lawyer and should share values and norms with the permanent members of the ICJ-bench. He must fulfil the same conditions as the other judges (Article 31(6) [of the Statute of the Court]).").

169. *See supra* note 162.

170. League of Nations Doc. V.1920.2, at 710 (1920).

171. Virally, *The Sources of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 143-48 (M. Sorensen ed. 1968), *quoted in* HENKIN, *supra* note 78, at 90.

Barak's model of discretion and the doctrinal synthesis of general principles law under Article 38(1)(c).

IV. CONCLUSION

The ICJ's approach to exercises of judicial discretion in adjudicating "general principles of law recognized by civilized nations" provides some assistance in meeting the four principal challenges posed by Justice Barak. First, while the Court's structure itself does little to alleviate the general difficulties of self-awareness, the doctrinal synthesis of general principles law expressly reminds judges to resist allowing their personal values to interfere with their public judgment. It urges judges to check their assessments of the generality of a candidate norm against its likely acceptance by major systems of municipal law. As with Barak's own prescriptions, this is not an *answer* to the problem of transcending one's self. However, the explicit reminders of general principles doctrine may have some value simply in their exhortation. Judges, at the least, will be aware of the nature of the project upon which they embark: this cannot but improve the quality of the decision-making which results. Nor, it should be added, does discretionary general principles adjudication require *complete* objectivity by an international judge. In the ICJ's context, Article 9 and the structure of the bench make it clear that advocacy of one's own *legal system's* values is indeed permissible; it is even encouraged. Whatever legal subculture from which he may have come, this is a luxury denied to the domestic jurist.

The Court's approach to general principles doctrine has little to say, however, about the second principal challenge facing Barak's jurist: that of distinguishing hard cases from others. International law, as we have seen, has quite a thin body of caselaw and fairly attenuated principles of stare decisis and preclusion. If *non liquet* is indeed prohibited, one might assume that genuinely hard cases would come up with greater relative frequency than they do in domestic litigation.[172] This second challenge is poorly addressed by general principles doctrine, and is perhaps unanswerable: hard cases are probably, at best, visible only upon actual encounter.

172. At the same time, however, the ICJ relies upon party consent to bring litigants before the bar, and hears very few cases even in its most active of years. The actual number of hard cases may thus be small indeed—to which the present paucity of existing general principles decisions may attest.

The Court's constituency-representative structure and the doctrinal general principles synthesis, however, do provide a partial answer to our third challenge: that of discerning the values of the relevant legal community. To the extent that international judges (and the Court) retain a broad responsibility for administering the values of the international community as a whole, they will still face great difficulties in divining these values. To the extent, however, that general principles inquiries can be answered through the quasi-comparativist methodology of the doctrinal synthesis, the relevant legal community to which a judge must look is subdivided into rather more manageable parts. It is no easier a task than that faced by domestic jurists—indeed, the phrasing of Article 9 suggests that judges' value-constituencies are unlikely to be any smaller than an individual territorial state, and may well be much larger—but the structure of the Court lightens some of the burdens facing the international bench.

The fourth challenge facing a Barakian jurist, that of discerning guiding values from a legal community, however identified, that itself possesses internal value-subcommunities, still bedevils international judges both at the "micro" and at the "macro" levels. They must determine the fundamental conceptions of their home constituencies, and then must decide whether the international legal order itself contains guiding values applicable to the case at hand. The Court's structure and the doctrinal synthesis provide no easy approach to this difficulty except, again, to encourage maximal judicial awareness of the challenges of the judicial process.

The problems faced by the international bench are in may ways more extreme than those faced by domestic jurists. International law lacks a foundational text of the sort that supports domestic constitutionalism. It expressly authorizes judges to look to the values of "civilized nations" in adjudicating "general principles." Thus, international law, under Article 38(1)(c), remains fundamentally wedded to the responsivist paradigm, and with it to the willful exercise of judicial discretion on Barak's model. The constituency-representative structure of the ICJ itself, moreover, is well suited to the exercise of responsivist discretion and powerfully complements quasi-comparativist articulations of general principles doctrine. These complementary approaches do not solve the problems faced by the ICJ in exercising judicial discretion. They point the way, however, to as manageable a methodology as one

might reasonably hope to achieve, and may provide a model for discretionary exercises in other areas of international jurisprudence.