

Navigating the Judicialization of International Law in Troubled Waters: Some Reflections on a Generation of International Lawyers

Charles N. Brower and Daniel Litwin*

INTRODUCTION**

It has become a familiar trope to recite that we live in an era marked by an unprecedented growth in international courts and tribunals.¹ Besides its empiricist overtones and familiar focus on the evolution of international law, this ritualized incantation serves to signal the increased importance of international

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* Judge Charles N. Brower has been a Judge of the Iran-United States Claims Tribunal since 1983, where David D. Caron was his first law clerk; has served as Judge *ad hoc* at the Inter-American Court of Human Rights; currently serves as Judge *ad hoc* in three cases at the International Court of Justice; and is an Arbitrator Member of Twenty Essex Chambers in London. Daniel Litwin has been a Legal Adviser at the Iran-United States Claims Tribunal since 2016. He has served in this function as David D. Caron's first legal adviser and subsequently as legal adviser to Sir Christopher Greenwood GBE GMG QC. Daniel is a graduate of McGill University and the University of Cambridge.

** This Article is an extension and elaboration of the Keynote Address entitled "David D. Caron: The Theoretician of International Courts and Tribunals" delivered by Judge Brower at the closing dinner on September 15, 2018 of UC Berkeley Law School's "David D. Caron Memorial and Conference" held September 14–15, 2018.

1. The formulaic consistency of this type of introductory remark in the opening sentences of the literature is remarkable. *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 3 (2005) ("[i]n the last few years, international dispute settlement has assumed an unprecedented prominence in international politics."); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 778 (2012) ("[t]he past half-century has seen the development of a rich, highly diverse field of international adjudication."); Gleider I. Hernandez, *The Judicialization of International Law Reflections on the Empirical Turn*, 25 EUR. J. INT'L L. 919, 919 (2014) ("[t]he proliferation of international courts and tribunals in the last two decades has been an important new development in international law"); Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13, 13–14 (2017) ("[i]n recent years, there has been a proliferation in the number and type of international courts and tribunals.").

adjudication to the life of international lawyers.² An entire generation of international law scholars and practitioners—of which David D. Caron was a leading representative—has been shaped by this new landscape of international adjudication that has departed from familiar professional reference points. They have spent most of their careers grappling with and seeking conceptually to abstract it. After over three decades of burgeoning literature on this development, it appears timely to take stock of it from the perspective of a generation's shared professional experience navigating the "judicialization of international law."³

This Article focuses on international lawyers and how they represent and create the architecture of international adjudication during a period of great change. It is a reflexive analysis that begins with the internal perspective of international lawyers rather than with the more traditional formalist approach that sees international adjudication as an abstracted external given.⁴ After all international adjudication is shaped in material respects by what international lawyers actually think, feel, and do.⁵ Relying on a dyad of opposites, this Article investigates how a generation of international lawyers have reacted to the multiplication of international courts and tribunals and the professional disorientation it engenders with the familiar and contradictory human sentiments to great change: faith and nostalgia.⁶ The experiences of the past no longer provide sufficient guidance to the present, which gives rise to chronocentrism,⁷ an aggrandizement of the present (faith), or a longing for the past (nostalgia). These sentiments overlap and structure the literature as international lawyers draw continuities and discontinuities between the past and the present in order to

2. This Article uses the terms international courts and tribunals and international adjudication interchangeably.

3. See the theme of the 2014 European Society of International Law Annual Meeting and the resulting volume. See, e.g., ANDREAS FOLLESDAL & GEIR ULFSTEIN, *THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING?* (Oxford University Press 2018).

4. See generally INTERNATIONAL LAW AS A PROFESSION (Jean d'Aspremont eds., Cambridge University Press 2017) (analyzing international law as a professional activity) [hereinafter D'ASPREMONT]. See also on how this reflexivity can manifest itself in the writing of a treatise, Bruno Simma & Daniel Litwin, *International Law in a Transcivilizational World*, by Onuma Yasuaki, 61 JAPANESE Y.B. INT'L L. 351 (2018) (book review).

5. A re-articulation of Martti Koskenniemi's adage that international law is "what international lawyers do and how they think." See Martti Koskenniemi, *The Fate of Public International Law Between Technique and Politics*, 70 MODERN L. REV. 1, 8–9 (2007).

6. A dichotomy that is found or hinted at across the literature. It also has some echoes of the fragmentation debate where "international lawyers have described the development of specialized norms and/or institutions as trustworthy or as to be feared, depending on their perception of the international legal project as a whole." See Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L. 1, 2 (2009).

7. Also known as "the belief that one's own times are paramount, that other periods pale in comparison." Jib Fowles, *On chronocentrism*, 6 FUTURES 65, 65 (1974).

privilege perspectives of nostalgia or faith.⁸ The resulting literature reflects these layered temporalities⁹—the past and the present—each with its own expectations of future developments. Thus, investor-state arbitration must, for example, either be reformed along nostalgic lines of the past (e.g., replaced by a court) or faith should be placed in the hands of the present (e.g., left to its own devices to develop in “spontaneous order”¹⁰).

This Article looks behind the elaborate formal constructs about international adjudication developed over the past several decades to its subjective roots and conditions of production. It is an investigation into how international lawyers think about international adjudication—how familiar intellectual tropes are structured around opposite and overlapping sentiments about multiplication. Thus, the familiar and stale oppositions of “backlash” and “progress” or “critics” and “supporters” are reframed as expressions of faith in the present and nostalgia for the past. The claim is that an investigation into the structure of this literature from the perspective of international lawyers may provide an understanding of some of the underlying forces and assumptions that shape and delimit recent thinking about international adjudication.¹¹ In turn, this exercise may encourage dialogue and engagement between these opposite positions, pointing to their spaces of overlap, but also creating emancipatory room beyond their confines.

In Part I, this Article briefly discusses its approach to this perspective and the boundaries—periods, actors, and methods—that determine its analysis. It then continues with discussion of the opposition between faith and nostalgia. In Part II, faith in the present is observed through the building of discontinuities between the past and the present. In practice, this means that the literature is busy building new conceptual constructs (e.g., functions) and crafting a narrative of progress benchmarked to empirical developments so as to create distance with the past. In Part III, nostalgia for the past is observed through the elaboration of a continuity with the past and the search for familiar reference points. This also translates into a series of constructions that attempt to give a sense of order and coherence to multiplication, in the process grounding these new practices with the legitimacy and authority of the past.

8. An eminent commentator articulated this tension not as an exercise in self-reflection about the underlying structure of the literature, but as the actual embodiment of how this tension is used to explain the practices of international courts and tribunals. See James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISPUTE SETTLEMENT 3 (2010).

9. On the idea of multiple temporalities, see generally REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* (Keith Tribe trans., Columbia University Press 2004).

10. See Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System*, 29 ICSID REV. 372, 375 (2014) (trying to overcome a duality between top-down reform and status quo by introducing the notion of complex adaptive system).

11. See generally Martti Koskenniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT'L L. 727 (2016).

I. A BOUNDED ANALYSIS

To take the perspective of the international lawyer during this period is to attempt to ground in shared professional experience the disparate expressions and attitudes of international lawyers about international adjudication. In adopting this perspective, this Article avoids looking at the literature of the past three decades in the way that it usually presents itself, that is, as an assembly of discrete writings that may reflect the diverse personal and political contexts of international lawyers and the variety of specialized international courts and tribunals. Thus, its ambition is not to map exhaustively debates and schools of thought in order to render accurately the heterogeneity of this body of writing. Rather, this Article attempts to capture parts of the structure that underlies the positions taken by a generation of international lawyers in response to the multiplication of international courts and tribunals. These statements merit several additional clarifications, as they direct one to how the boundaries of this analysis—what is left in and what is left out—are constructed.

The first boundary is that of the community of international law professionals. The point of view that is examined in this Article is the socially constituted field of international lawyers with symbolic capital—authority, prestige, reputation—that have written about international courts and tribunals. This field is constituted of individuals who often interchangeably take on the different roles of professor, judge, counsel, and international civil servant. But they also are members of a professional group that shares a particular language, knowledge, experience, and history. Through a process of socialization,¹² of interacting with other members of this “community of practice,”¹³ they become acquainted with the dominant argumentative techniques and doctrines of law.¹⁴ This socialization occurs *inter alia* through education, which includes the reading of textbooks and scholarship, training, and academic or professional conferences. By virtue of this form of socialization, international lawyers develop a basic consciousness shared with those who have been trained in the same way.¹⁵ This conclusion is not meant to deny the plurality that exists within this community, its subdisciplines, and the way professional roles or geographical affiliations affect different understandings of international law. Nevertheless, a shared basic understanding allows international lawyers to understand and communicate with each other and participate in a common disciplinary venture. It is this shared basic consciousness about international

12. See Pierre Bourdieu, *The Force of Law Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 850 (1987).

13. See generally JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (Cambridge University Press 2010).

14. See D'ASPREMONT, *supra* note 4, at 33.

15. *Id.* at 34.

adjudication that is confronted by the multiplication of international courts and tribunals, that becomes insufficient to explain the new reality of multiplication, and that moves international lawyers towards a collective response of faith or nostalgia.¹⁶

In the process of engaging with this community of professionals in international law, reference must be made to the singular biographical experiences of David D. Caron. This turn to biography, to the practitioner-academic, already has been used productively in the literature to explain the practices and argumentative techniques of international lawyers more generally.¹⁷ The choice of David reflects his position as a leading representative of his generation who closely experienced the multiplication of international courts and tribunals. Throughout his career, David participated, in various capacities, in the operations of a range of international courts and tribunals, both those that were newly created, and those that experienced a resurgence.¹⁸ David began his professional career in 1983 as a law clerk at the Iran-United States Claims Tribunal, an institution that arguably formed part of the earliest iteration of this multiplication. He entered the academy as a faculty member of the Berkeley School of Law in 1989 and ended his career in institutions that embody continuity and discontinuity, as a Judge *ad hoc* of the International Court of Justice (ICJ)¹⁹ and as a titular member of the Iran-United States Claims Tribunal. David's lectures at the Hague Academy took stock of this experience, as he put forward a political theory to "make sense of the wide array of international courts and tribunals now populating the global scene."²⁰

The second boundary framing this analysis is a period: the focus of this Article is on a generation of international lawyers writing during a specific period. The framing of this period will be detailed in Part II. At present, however, suffice it to note that this period is meant to align with the multiplication of

16. Thomas Skouteris finds "coherence" across these texts in the idea that "the turn to adjudication constitutes a moment of disciplinary progress." See Thomas Skouteris, *The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication*, 17 FINNISH Y.B. INT'L L. 307, 308 (2006).

17. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (Cambridge University Press 2002).

18. As an arbitrator in proceedings administered by the Permanent Court of Arbitration, ICSID, and elsewhere, as well as a commissioner for the United Nations Compensation Commission, as counsel before the Eritrea-Ethiopia Claims Commission and the Marshall Islands Nuclear Claims Tribunal, and latterly as a judge of the Iran-United States Claims Tribunal and a judge *ad hoc* in two cases at the International Court of Justice.

19. David was a judge *ad hoc* in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia) and in *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America). See generally *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicar. v. Colom.), Dissenting, 2016 I.C.J. at 74 (Mar. 2016); *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. ¶ 4 (Feb. 2019).

20. DAVID D. CARON, *A POLITICAL THEORY OF INTERNATIONAL COURTS AND TRIBUNALS*, RECUEIL DES COURS (forthcoming).

international courts and tribunals, at least as it is commonly understood in the literature. This choice is dictated by the approach taken in this Article, which is to examine the reaction of international lawyers to multiplication. The precise moment when that began is itself a subject of some debate.²¹ As a result, any reference to multiplication in this Article is meant to cover the early period of multiplication in the 1980s, its burgeoning at the turn of the twentieth century, and its continued multiplication today.

As noted previously, the period in which multiplication occurred is loosely defined in the literature, but the way it confronts the profession's socialized shared consciousness, its dominant ideas about what is international adjudication, is undeniable. In that sense, the multiplication of international courts and tribunals can be described as international adjudication's own Kuhnian revolution,²² which makes it a particularly fertile area of analysis. Thomas Kuhn explained that scientific disciplines go through periods of normal science and scientific revolution. During normal science, a central set of ideas and beliefs (or paradigm) is used to explain a field—here, international adjudication. Periods of scientific revolution begin when this central set of ideas and beliefs becomes incapable of explaining certain situations, i.e., when anomalies in the paradigm occur. As a result, the dominant paradigm is questioned, and competing paradigms begin to appear, until one of them becomes the new dominant set of ideas and beliefs within the field, engendering a paradigm shift. With the multiplication of international courts and tribunals, the paradigm that previously dominated international adjudication is contested, as it is incapable of entirely explaining this new reality. Accordingly, the generation of international law scholars and practitioners that arose during the period of great multiplication were busy putting forward new competing paradigms, paradigms whose potency was due not only to their explanatory reach, but also to their ability to speak to the opposing temporalities (the past and the present) of international lawyers.

Finally, the third boundary is the focus on the structuring role of faith and nostalgia. This focus examines how a period or generation is encapsulated by its relationship to multiple temporalities—the past, present, and future. Different groups of international lawyers navigate different ideas of historical time even if they exist in the same geographic and chronologic space.²³ More broadly, this

21. Compare Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle* 31 NYU J. INT'L L. & POL. 709, 709 (1999), with Skouteris, *supra* note 16.

22. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (describing the idea of scientific revolutions as episodic rather than cumulative). See also as applied to international law more generally, Thomas Schultz, *Life Cycles of International Law as a Noetic Unity: The Various Times of Law-Thinking*, in *INTERNATIONAL LAW AND TIME: NARRATIVES AND TECHNIQUES* (2017).

23. See KOSELLECK, *supra* note 9, at 2.

approach also attempts to strike a balance between structure and agency. Thus, it can be associated loosely with structuralist analysis, which looks to the operation of hidden determinations for a better understanding of how the visible and familiar rules, policies, and intellectual tropes are produced.²⁴ But it also is aligned with the recent turn to sociology and its focus on “the production of meaning and the exercise of power by international lawyers themselves.”²⁵

These three boundaries set the stage for the analysis that follows in this Article. It is an analysis that (1) takes the view of the community of professionals in international law; (2) examines their reaction to the multiplication of international courts and tribunals within a given period; and (3) focuses on the resulting effects of their opposing reactions in the literature.

II. FAITH (DISCONTINUITY)

A. *Periodization and Progress*

Faith in the present as a reaction to the multiplication of international courts and tribunals is communicated through a progress narrative that the literature constructs in two steps.²⁶ First, it stresses discontinuity with the past alongside the period when multiplication occurred—a period often referred to as the “post-1980” era or the “post-Cold War” moment.²⁷ Second, it qualifies this discontinuity with a positive designator giving it its chronocentric character. Thus, the literature readily notes that developments in international adjudication over the past three decades are different and separate from what came before (delineating periods), indicative of a historical break that marks an important evolution in international law (attribution of a positive designator). These periodization decisions organize knowledge through the construction of a contrast between the past and the present, a contrast that serves to put forward a positive interpretation of multiplication and thus the present.²⁸

A result of this interpretation is the way the chosen periods reinforce an understanding of international adjudication along empirical lines—they are

24. See Koskenniemi, *supra* note 11, at 733.

25. Wouter Werner, *Concluding Remarks The Praxis of International Law*, in *INTERNATIONAL LAW AS A PROFESSION* 429 (Jean d’Aspremont eds., Cambridge University Press 2017).

26. See generally Skouteris, *supra* note 16 (providing a far more detailed exposition of these progress narratives).

27. See, e.g., Eric de Brabandere, *International Dispute Settlement—from Practice to Legal Discipline*, 31 *LEIDEN J. INT’L L.* 459, 460 (2018) (providing a recent example).

28. See generally Oliver Diggelmann, *The Periodization of the History of International Law*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* (Bardo Fassbender & Anne Peters eds., Oxford University Press 2012) (discussing the use of periodization in international law); see also Ignacio de la Rasilla, *The Problem of Periodization in the History of International Law* 37 *L. & HISTORY REV.* 275 (2019).

determined principally along a new empirical reality, i.e., the quantity of new international courts and tribunals and resurgent caseloads. This perspective supports research agendas on international courts and tribunals increasingly attuned to empirical frameworks.²⁹ Although these frameworks provide useful grids of analysis, they also tend to privilege general explanations over normative and institutional critiques. This might provide some explanation as to why multiplication has not led to a multitude of new theories of international adjudication³⁰—David D. Caron’s political theory being one of the few exceptions.³¹

Empiricism finds resonance in the oft-used designator for this period: proliferation,³² a term that directly refers to quantification. In practice, the term “proliferation” directs one to two empirical trends. First, it points to the quantifiable increase in the resort to international adjudication and in the creation of new international courts and tribunals.³³ Typically cited examples of this increase include the expanded caseload of the ICJ and the boom in investor-state arbitration with its resulting increase in the activity of the Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes.³⁴ Also cited are the creation of new international courts and tribunals such as the Iran-United States Claims Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Kosovo Specialist Chambers, and the International Criminal Court, as well as the adoption of treaties that provide for international dispute settlement such as the World Trade Organization, the North American Free Trade Agreement, the International Tribunal for the Law of the Sea, and the Energy Charter Treaty.³⁵ Second, proliferation may also refer to the diversification of the structural characteristics of international courts and tribunals. This includes diversification in scope, jurisdiction, and enforcement

29. See Hernandez, *supra* note 1.

30. See Martti Koskenniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, in TOPICALITY OF THE 1907 HAGUE CONFERENCE, THE SECOND PEACE CONFERENCE 127 (Yves Daudet ed., Brill Academic Publishers 2008) (“[t]he past years have seen an unprecedented increase in the number of international courts and tribunals . . . [b]ut no new theory has accompanied these”).

31. See David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401 (2006); see also CARON, *supra* note 20.

32. The term was principally used in the late 1990s and early 2000s. See, e.g., Romano, *supra* note 21, at 679; Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT’L L. 267, 267 (2001).

33. See, e.g. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 75 (2009).

34. See generally Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (James Crawford & Martti Koskenniemi eds., Cambridge University Press 2012) (providing a review of these developments).

35. *Id.*

mechanisms, which one commentator summarized as a “dizzying array of different forms.”³⁶ These developments lead to an equally exponential increase in the output of international courts and tribunals—decisions, judgments, and awards—that serves to reinforce the immediacy of the present and create more distance with the past.

These periods are also reflected in the discontinuity present in the literature. The literature is structured as a before and after. Whereas it was broadly generalist before multiplication, the literature has increasingly turned to narrow discussions of specialized regimes and subdisciplines.³⁷ The broad subject of “international courts and tribunals” is compartmentalized by specialization and institution and largely analyzed from these perspectives. Thus, there are now vast quantities of writings on the adjudication of international criminal law, investment law, World Trade Organization law, and human rights law, all of them notably self-referential.³⁸ Similarly, edited volumes that claim to discuss “international adjudication” or the “judicialization of international law” contain chapters that mostly deal with its subdisciplines.³⁹ Discontinuities are reinforced as international adjudication’s past has little relevance to international lawyers working in newly constituted and self-referential regimes—these lawyers are busily crafting new historical narratives and genealogy in order to assert the regimes’ newfound autonomy and authority.

The literature reinforces these periodization decisions and the underlying empirical developments to which they refer with a variety of rhetorical and analytical devices. It is replete with hyperbolic references to a “significant transformation,”⁴⁰ an “enormous expansion,”⁴¹ a “marked change,”⁴² a “brave new world,”⁴³ an “unprecedented prominence,”⁴⁴ and a “paradigm change.”⁴⁵ This hyperbole also is put forward in the form in which these developments are described, within “a single breathless paragraph,” to use the words of David D.

36. See Hernandez, *supra* note 1, at 931.

37. This arguably evokes a more general cultural trend towards specialization “where knowledge is conceived as an incremental process of acquisition of additional skills in a given domain.” See Andrea Bianchi, *On Asking Questions*, in *THEORY AND PHILOSOPHY OF INTERNATIONAL LAW* xiii (Edward Elgar, 2017).

38. Not all disciplines may be closed to outside views, however. See generally Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875 (2011) (discussing in context of international investment law).

39. See, e.g., FOLLESDAL, *supra* note 3.

40. See Shany, *supra* note 33, at 75.

41. See Romano, *supra* note 21.

42. See Born, *supra* note 1, at 782.

43. See generally Crawford, *supra* note 8.

44. See Posner, *supra* note 1, at 3.

45. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 3 (Princeton University Press 2014).

Caron.⁴⁶ The effect is to draw a separation between a static past and a present in movement, an impression that is reinforced by a focus on the novel aspects of the international courts and tribunals themselves. A typical example of such an approach is one commentator's identification of a series of "new-style" international courts as moving away from "old-style" courts.⁴⁷ The distinction between "new-style" and "old-style" courts is crafted using a list of criteria such as the existence of compulsory jurisdiction and access for non-State actors that pre-determine the outcome of this categorization exercise: the only possible resolution is a marked difference between new and old entities.⁴⁸ Another distinction emphasizes the depoliticized nature of new international courts and tribunals as compared to the politicized nature of those of the past.⁴⁹ In sum, these devices leave the reader with a sense of wonder at the sheer scope, novelty, and depth of these new developments. They put forward the present and accentuate the idea of discontinuity as a type of progress.

In the second step of the progress narrative, this constructed contrast between the past and the present is associated expressly with the development and maturation of international law.⁵⁰ Thus, references by the literature to an objective empirical reality are generally followed by statements that qualify these developments positively. In these accounts, proliferation is equated with "the advancement of international law into new and improved levels of effectiveness."⁵¹ It is also "a sign of maturity and [the] growing importance of the rule of law . . . [and] is characterized as a development that contradicts the claims of skeptics who argue that international adjudicator mechanisms, and international law more generally, are ineffectual and seldom used."⁵² This particular affection for international courts and tribunals has been summarized as an "[u]nwavering trust of international lawyers in the beneficial and civilizing

46. David D. Caron, *Framing Political Theory of International Courts and Tribunals Reflections at the Centennial*, 100 AM. SOC'Y INT'L L. 55, 29 (2006).

47. See ALTER, *supra* note 45, at 81–82.

48. *Id.*

49. See, e.g., Christoph H. Schreuer, *Investment Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., Oxford University Press, 2013).

50. See generally Thomas Skouteris, *The Idea of Progress*, in THE OXFORD HANDBOOK ON THE THEORY OF INTERNATIONAL LAW 949 (Anne Orford & Florian Hoffman eds., Oxford University Press 2016) ("[p]roliferation is typically seen as progress in two different ways. First, as a process of internal maturation, marking the completion of international law's institutional structure (the missing 'third pillar' of the international division of powers), thus leading to more cases resolved before the courts, more case law, more determinate rules, more certainty and predictability, more precedent, more thickening of the texture of the legal fabric. Second, as the hallmark of a new rule-oriented approach, widely regarded as an absolute and necessary condition for social progress.").

51. YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 5 (Oxford University Press 2003).

52. See Born, *supra* note 1, at 778.

power of international courts and tribunals in a world of otherwise untamed sovereigns.”⁵³ The resulting progress narratives tend to affirm (if not create) the idea, discussed next, that international courts and tribunals wield outsized influence and are “important tools of international governance.”⁵⁴ They effectively shelter these institutions from a more fundamental critique—there is hardly any inquiry as to whether there should be a resort at all to international courts and tribunals to resolve a given issue, but rather, which of the international courts and tribunals is most effective at resolving it.

B. Functions and Legitimacy

Faith in the present through the literature’s periodization decisions and progress narratives is asserted by reference not only to the increased number of international courts and tribunals, but also to what they do. Thus, together with the multiplication of international courts and tribunals arose a voluminous literature on the functions undertaken by these entities. In a poignant summary of the function-oriented mission of scholars during this period of multiplication, commentators noted that “the functions of international courts need to be reformulated in times of global governance and in light of the remarkable trajectory of international adjudication over the past two decades.”⁵⁵ International courts and tribunals traditionally were thought of as pursuing a single function: the peaceful settlement of international disputes.⁵⁶ This has changed over the course of the past decades, as the literature now expends great energy contrasting this single function with ever more complex lists of the diverse “functions” or “roles” undertaken by the growing number of international courts and tribunals.⁵⁷ An exhaustive appraisal of these lists is outside the scope

53. Jochen von Bernstorff, *Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW? A MIXED BLESSING?* 9 (Andreas Follesdal & Geir Ulfstein, eds., Oxford University Press 2018).

54. Cesare P.R. Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 15 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany, eds., Oxford University Press 2013).

55. Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts An Appraisal in Light of Their Burgeoning Public Authority*, 26 *LEIDEN J. INT’L L.* 49, 50 (2013).

56. As Armin von Bogdandy and Ingo Venzke note, “[t]his contribution presents international judicial institutions as multifunctional actors against the background of a traditional understanding, which sees just one function: settling disputes.” *See id.* at 49. The traditional position that can still be discerned from the pronouncements of the ICJ. *See, e.g.*, LaGrand (Germany v. U.S.), Request for the Indication of Provisional Measures, Order, 1999 I.C.J. Rep. 9, 15 ¶ 25 (Mar. 3) (“the function of this Court is to resolve international legal disputes between States . . . and not to act as a court of criminal appeal”).

57. *See, e.g.*, von Bogdandy, *supra* note 55; José E. Alvarez, *What are International Judges For? The Main Functions of International Adjudication*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 159 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany, eds., Oxford University Press 2013); Shany, *supra* note 40, at 75.

of this Article, but a sample of these approaches should give a sense of their multiplicity and heterogeneity. One commentator, for example, enumerates the functions undertaken by international courts and tribunals as dispute resolution, norm support, regime support, and legitimation.⁵⁸ Other commentators find that, beyond dispute settlement, the relevant functions also include stabilization and development of normative expectations and control of legitimate public authority.⁵⁹ Yet another commentator explains that States have delegated to courts the function not only of dispute settlement, but also compliance assessment, enforcement, and legal advice.⁶⁰ Finally, a recent volume on the judicialization of international law explains that courts focus on dispute resolution, rule development, and substantive justice.⁶¹

The effect of these “militant” accounts of functions is to craft a narrative (of progress) in which new and revitalized international courts and tribunals must be taking on more responsibility and playing a larger role in international law than in the past. These function-centric accounts are said to create a framework in which it is possible to “appreciate the many different contributions [International Courts] make to international politics.”⁶² Yet this diverse range of functions has led some commentators to lament the resulting “terminological confusion.”⁶³ David D. Caron described many of these functions as “indeterminate and therefore both contestable and subject to strategic exploitation.”⁶⁴ One example of such a risk of exploitation is that a novel empirical reality framed as a progress narrative creates the conditions for attributing ever more expansive functions to international courts and tribunals. In the process, the conception and identification of these discrete sets of functions reinforce the roles that international lawyers writing during this period imagine international courts and tribunals should be undertaking. In that sense, these functions are at risk of being grounded merely in idealist aspirations put forward under the cover of scientific empirical observation.

58. See YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 49 (Oxford University Press 2014).

59. Von Bogdandy, *supra* note 55, at 49–50.

60. See Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHICAGO J. INT'L L. 537, 539 (2009).

61. HARLAN GRANT COHEN ET AL., *Legitimacy and International Courts—A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS 15 (Nienke Grossman et. al. eds., Cambridge University Press 2018).

62. See ALTER, *supra* note 45, at 17.

63. Alvarez, *supra* note 57, at 160.

64. David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. 231, 235 (2017).

After having drawn up the lists of new functions undertaken by international courts and tribunals and describing these courts and tribunals in such lofty terms as “deciding disputes with implications for our planet and its people,”⁶⁵ commentators are faced with an accounting. They must explain and justify the great power that they have ascribed to these entities, a power that fuels particularly virulent backlash against new international courts and tribunals. Backlash is felt with acuity by the international criminal court⁶⁶ and investor-state arbitration,⁶⁷ entities that do not benefit from a large shadow of the past and are thus more fully exposed to nostalgia. As a result, a large portion of the literature is preoccupied with the idea of legitimacy and its association with international courts and tribunals.⁶⁸ Admittedly, the examination of the legitimacy of international courts and tribunals is not an unimportant pursuit. However, the claim being made here is that the investigation of legitimacy is rendered more urgent by the literature’s enthusiastic assignment of ever-increasing functions to international courts and tribunals.

The legitimacy of international courts and tribunals is studied from several different perspectives. For some, legitimacy is found in the hands of the international judiciary, since “international judges and arbitrators ought to be tasked with ensuring the legitimacy of the international judicial system.”⁶⁹ For others, legitimacy is rooted in democratic theory and the conceptualization of international adjudication as an exercise of public authority.⁷⁰ And yet others might explain legitimacy as being connected to a court’s or a tribunal’s effectiveness as measured by the extent to which it has achieved its aims or goals as described by its founders.⁷¹ This plurality of approaches to legitimacy is not surprising, as legitimacy has been recognized as a “notoriously slippery concept.”⁷² In some ways, it is fitting that a concept known for being indeterminate and malleable is used to rationalize the equally indeterminate and malleable functions said to be wielded by international courts and tribunals.

65. COHEN, *supra* note 61, at 1.

66. See, e.g., Darryl Robinson, *Inescapable Dyads Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT’L L. 323, 323 (2016).

67. See David D. Caron & Esme Shirlow, *Dissecting Backlash The Unarticulated Causes of Backlash and its Unintended Consequences*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW? A MIXED BLESSING?* (Oxford University Press 2018) (speaking about a range of differing motivations and concerns for backlash).

68. See generally COHEN, *supra* note 61.

69. See Boisson de Chazournes, *supra* note 1, at 14–15.

70. See Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 EUR. J. INT’L L. 7, 8 (2012).

71. Shany, *supra* note 51.

72. See generally COHEN, *supra* note 61, at 4.

III. NOSTALGIA (CONTINUITY)

A. *Order and Systematization*

Much of the literature has embraced the multiplication of international courts and tribunals as a novel and discontinuous development that holds promise for the advancement of international law (faith in the present). In the process, it has offered new explanatory paradigms for this multiplication. Simultaneously, however, the literature also has continued to impart a sense of continuity to this development in order to render it intelligible, offering new paradigms under the guise of continuing past practices and intermingling the past with the present (nostalgia for the past). Thus, a complex social reality is reduced to familiar and easily identifiable reference points. Here, continuity is experienced through the creation of order and systematization to assuage the disorientation occasioned by the chaotic, even anarchical, nature of multiplication.

Characterized in another way, the construction of proliferation as the novel and progressive development of international law collides with the international legal profession's persistent desire for order. This search for order reflects a need inherent in the internal logics of international law and the international legal profession. Since the nineteenth century, international lawyers have "sought to explain how an apparently 'anarchic' aggregate of self-regarding sovereigns could still be united as 'order' at some deeper level of existence."⁷³ To build order and organize the multiplication of international courts and tribunals, the literature has relied on system-building—the construction of broad frames of thinking that can be applied to a large number of new as well as resurgent international courts and tribunals. This type of systematization diminishes the impression that proliferation is unpredictable and chaotic; it attenuates the distinction between new and old international courts and tribunals.

The most overt of these attempts at systemic thinking are "mapping" exercises that aim to create a repertoire of international courts and tribunals on the basis of a determined set of categories. These categories, as much as they act to create differences (as discussed in Part II), simultaneously eliminate differences between courts and tribunals through the use of criteria that strive for broad commonalities. For example, the Project on International Courts and Tribunals has prepared a synoptic chart that lists all "international judicial

73. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 556 (2002).

bodies.”⁷⁴ Inclusion within this category is based on five criteria.⁷⁵ These criteria result in a chart that includes over forty-three entities classified as international judicial bodies. The chart thus draws continuities between past and present courts and tribunals—the International Court of Justice is included alongside the International Tribunal for the Law of the Sea.⁷⁶ With these entities all safely situated under the umbrella of “international judicial bodies,” the appearance of discontinuity and confusion dissipates.

Similarly, continuities are built into the structure of the literature. An increasing number of writings attempt to treat international courts and tribunals as a unitary object of study. They conflate entities of the past and the present and build heterogeneity, not along temporal lines (old and new entities), but rather by employing criteria such as how effective these entities are.⁷⁷ Predictably, however, these analyses come to normative conclusions that the growth in international courts and tribunals has mainly been a positive development,⁷⁸ falling back on implicit temporal divisions. David D. Caron’s framing political theory of international courts and tribunals evoked something of this unitary approach to international adjudication.⁷⁹ An approach also evidenced in a slew of new journals and edited volumes whose titles—*Journal of International Dispute Settlement* or *Legitimacy of International Courts*—suggests a coherent and unitary object of study.⁸⁰ As noted in the discussion about the response of faith, however, this façade of unity quickly devolves into compartmentalized discussions of subdisciplinary specializations.⁸¹

The literature relies on a number of additional approaches to craft a sense of order. Earlier in this Article mention was made of a tendency in the literature to denote a separation between the functions and roles undertaken by

74. See Cesare P.R. Romano, *The International Judiciary in Context*, THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS (2001), cesareromano.com/wp-content/uploads/2015/06/synop_c4.pdf.

75. These entities: “a) are permanent institutions; b) are composed of independent judges; c) adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization; d) work on the basis of predetermined rules of procedure; and e) render decisions that are binding.” *Id.*

76. *See id.*

77. *See, e.g.*, SHANY, *supra* note 58.

78. *See* Hernandez, *supra* note 1 at 919, 923.

79. *See generally* Caron, *supra* note 46.

80. *See, e.g.*, J. INT’L DISP. SETTLEMENT (a journal that addresses “fundamental and lasting issues of international dispute settlement”); CESARE P.R. ROMANO, KAREN J. ALTER, & YUVAL SHANY, EDs., OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (Oxford University Press 2013) (a handbook on international adjudicative bodies).

81. *See, e.g.*, ROMANO et al., *supra* note 80. Despite its title, numerous individual chapters deal with particular specializations. There is thus a chapter on international criminal courts (Chapter 10), international human rights courts (Chapter 11), investment tribunals (Chapter 15) and claims and compensation bodies (Chapter 13). *See id.*

international courts and tribunals past and present. To think of international courts and tribunals as multifunctional, however, and to move away from the singular function of settling disputes, is also an attempt to offer a comprehensive grid of analysis, a measure of structure and continuity, of what a new plurality of international courts and tribunals do. This functionalist approach thus is used to draw a distinction with the past—the old and new functions—while at the same time providing new stable reference points and structures to explain international courts and tribunals of the present. Other approaches oriented to the creation of order and structure include large framing projects such as the constitutionalist project⁸² or the project of Global Administrative Law.⁸³

David D. Caron spent a considerable part of his career attempting to order and make explicable the new landscape of international courts and tribunals. His own version of order was the search for a broad theoretical foundation to the operation of international courts and tribunals.⁸⁴ In an article published in 2006, David identified a “lack of an adequate framing theory for study of courts and tribunals”⁸⁵ and started laying the groundwork for his theory. As he noted, “a theory requires some agreement about what is being explained or understood by the theory.”⁸⁶ Thus, he first identified “a divide amongst courts and tribunals that flows not from formal criteria but rather from the identification of different driving forces . . . [in consequence of which] it would not make sense to compare the creation of courts and tribunals in the interstate model with those in the transnational model.”⁸⁷ Second, he concluded that

the identification of the transnational set of courts and tribunals as a distinct group opens another tradition of theorizing, in particular theories of courts within national systems . . . [which view] courts not only as providers of conflict resolution, but also as a means of social control and a source of law making—and that these multiple functions can be in conflict with one another—can be helpful to our exploration of courts and tribunals.⁸⁸

Third, and finally, David concluded:

[T]he assertion that the two models exist in a dynamic relationship . . . suggests that the perspective of these two models offered allows for a general revisiting of the history of courts and tribunals in the international arena . . .

82. See, e.g., Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL'Y 753 (1999); see also Shalev Roisman, *Constraining States: Constitutional Lessons for International Courts*, 55 VA. J. INT'L L. 729 (2015) (providing a more recent example).

83. See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

84. See generally Caron, *supra* note 31.

85. Caron, *supra* note 46.

86. *Id.*

87. *Id.* at 61–62.

88. *Id.* at 62.

. [T]he future of international courts and tribunals will be determined by changes in the surrounding political context and the major change in this regard will be the wider presence of the rule of law. It is the rule of law domestically that will allow for greater coordinated sovereignty.⁸⁹

In a later article, David D. Caron qualified his contribution as “crystalizing [his] thoughts as to a theory of international courts and tribunals.”⁹⁰ In that article he introduced “the bounded strategic space theory of international courts and tribunals,” namely

that the structure and operation of international courts and tribunals can be understood as the result of interactions of five or less groups of actors [“specifically, the parties, the adjudicators, the constitutive community, the secretariat and other interested parties”] *within* and *against* the bounded strategic space defined by the constitutive instrument establishing the international court or tribunal.⁹¹

David continued: “In this sense, the rules of procedure employed in the bounded strategic space may be viewed as the legal expression of the political efforts of these groups to control the influence of each other in the operation of the court or tribunal.”⁹² By 2009, David had refined, and apparently perfected, his theory, entitling his series of lectures at the Hague Academy of International Law, now simply and definitively, “A Political Theory of International Courts and Tribunals.”⁹³

B. Narratives of the Past

The literature also seeks to narrativize present developments within the familiar reference points of the past, thus drawing overt continuities. As David D. Caron explained in his study of the Hague Peace Conference of 1899, “[t]o go forward, it is often wise, and sometimes necessary, to go back.”⁹⁴ References in the literature to the past are not part of self-standing historical inquiries. Rather, they serve to insert the multiplication of international courts and tribunals within a larger tradition—an invented tradition—that is generally dated back to the eighteenth or nineteenth century.⁹⁵ A typical assertion of continuity refers to

89. *Id.* at 30.

90. Caron, *supra* note 31. Note his progress from “framing” his theory, then moving “towards” it, his thoughts “crystallizing” in the process, hence not yet fully formed. *Id.*

91. *Id.*

92. *Id.*

93. CARON, *supra* note 20.

94. See David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 5 (2000).

95. A form of invented tradition also found in international adjudication’s iconography. See Daniel Litwin, *Stained Glass Windows, the Great Hall of Justice of the Peace Palace*, in INTERNATIONAL LAW’S OBJECTS (Jessie Hohmann & Daniel Joyce eds., Oxford University Press 2019).

major historical signposts in the history of international courts and tribunals. Thus, the literature is replete with summary references to the Hague Peace Conferences of 1899 and 1907 and their resulting Conventions.⁹⁶ These references are typically found in the introductory sentences of articles or treatises.⁹⁷ Commentators may also choose to stress continuity with debates, ideas, or figures of the past through, for instance, regular references to the professions' heroic figures.⁹⁸

Thus, at the same time as the literature enthusiastically notes discontinuities with the past, it simultaneously refers to the past, pointing to continuities as a means to assuage unease and build legitimacy for the new landscape of international courts and tribunals. The past is thus used as a means "to go forward" by creating a sense of continuity in a present where the multiplicity of international courts and tribunals can appear disorienting.

David D. Caron gave expression to his interest in the past by writing biographies and examining historical signposts. As early as 1991, he wrote a lengthy introduction to the *Elements of International Law* that discussed the life of Henry Wheaton and his role in "extending a shared conception of international law around the globe."⁹⁹ At this early stage of his career (and of multiplication), he already was signalling that the past was sufficiently important and deserving of examination. David drew more overt continuities in the context of international courts and tribunals in his article on the legacy of the Hague Peace Conference of 1899.¹⁰⁰ Besides writing about this well-known historical signpost at a moment when scholars were publishing extensively on proliferation, David also expansively referred to and resuscitated an earlier literature on international courts and tribunals.¹⁰¹ As he explained, his goal was to "recapture that which drove our predecessors to desire . . . [international] courts and tribunals."¹⁰²

96. See, e.g., Crawford, *supra* note 8, at 9; Born, *supra* note 1, at 795; ARMIN VON BOGDANDY & INGO VENZKE, *IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 1* (Oxford University Press 2014); Posner, *supra* note 1, at 7.

97. See de Brabandere, *supra* note 27, at 460 (providing a recent example); see also VON BOGDANDY, *supra* note 96 (providing a book-length treatment that has an entire introductory chapter devoted to these historical signposts).

98. Sir Hersch Lauterpacht being a favorite here. See de Brabandere, *supra* note 27, at 463.

99. David D. Caron, *Introduction*, in *ELEMENTS OF INTERNATIONAL LAW 25* (Henry Wheaton ed., 1991).

100. Caron, *supra* note 94, at 5.

101. See *id.* at 6 n.12, 9 n.28–29 (referencing works such as William Ladd, *Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms* (1840); Jackson Ralston, *International Arbitration From Athens to Locarno* (1929); and Thomas Willing Balch, *The Alabama Arbitration* (1900)).

102. See David D. Caron, *International Court and Tribunals: Their Roles amidst a World of Courts*, 26 *FOREIGN INV. L.J.* 1, 3 (2011).

Continuity with the past also is expressed in the literature in terms of structural or judicial hierarchy. This form of continuity was on display by successive presidents of the ICJ, who asserted an image of international adjudication as a relatively formal and centralized activity.¹⁰³ In the context of what they perceived to be the risk of fragmentation arising from the growth of international courts and tribunals, this image was articulated, for instance, as the possibility of “enabling other international tribunals to request advisory opinions of the ICJ on issues of international law that arise in cases before those tribunals.”¹⁰⁴ This suggested a hierarchy of international courts and tribunals with the ICJ at its apex, drawing soothing parallels to the domestic context and to received ideas about the structure of the international judiciary from the past. One commentator described this, however, as an attempt “to re-establish the old order of things . . . [that] ignores the very reasons that have occasioned the new decentralisation.”¹⁰⁵

Discussions about the functions of international courts and tribunals also have an underlying sense of continuity to them. Despite bringing forward an array of different functions undertaken by these new institutions, the literature, with remarkable consistency, faithfully refers to the age-old function of settling international disputes. As one commentator observed, the “intertwined functions of settling disputes and maintaining peace, self-evident to those at the turn of the nineteenth century, continue to explain the function of today’s diverse courts and tribunals.”¹⁰⁶ David D. Caron evoked a similar continuity with the function of settling international disputes. In his writings, he advocated for a distinction between function and task:¹⁰⁷ the function of the international judge, his judicial task, is the resolution of disputes.¹⁰⁸ It is in performing this task that he indirectly would further other functions.¹⁰⁹

Continuity also is expressed, rather self-evidently, through the standard terms used to describe international courts and tribunals. Though the literature may enthusiastically describe the diversity in the structure and functions of new international courts and tribunals, it is incapable of relying solely on the conceptual products of this discontinuity—it refuses to abandon the well-trodden

103. See, e.g., Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L COMP. L.Q. 848, 862 (1995) (advocating for a more centralized form of international adjudication).

104. U.N. GAOR, 54th Sess., 39th plen. mtg. at 3, U.N. Doc. A/54/PV.39 (Oct. 26, 1999) (containing address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice).

105. See Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT’L & COMP. L. Q. 121, 122 (2001).

106. Alvarez, *supra* note 57, at 159.

107. See Caron, *supra* note 64, at 231.

108. See *id.* at 235.

109. See *id.*

concepts and categories of the past. Thus, international courts still are “courts,” even if they now exert public authority or allow non-State actors to bring cases. International arbitration is still “arbitration,” even when it is now considered part of a global constitutionalist structure. This language inevitably imparts continuity to the operations of the new landscape of international courts and tribunals (we are still dealing with “courts” and with “arbitration”), a continuity that obfuscates the way concepts such as court or arbitration take on different meanings across time.¹¹⁰ This strategic use of conceptual continuity to assuage anxiety can also be found in recent initiatives such as the European Commission’s proposal for a Multilateral Investment Court—a proposal that equally could be construed as a court taking the guise of arbitration (discontinuity) or as arbitration taking the guise of a court (continuity). In his discussion on the nature of the Iran-United States Claims Tribunal, David D. Caron elaborated on the dangers of using existing conceptual tools and categories. As he explained it, commentators had struggled over whether the Tribunal was an international tribunal in the historical or conventional sense, or something else entirely.¹¹¹ He encouraged scholars to abandon their struggle to categorize the Tribunal and instead to recognize the evolutionary process it signaled.¹¹² For David, “to squeeze innovative efforts into categories is to constrain society’s ability to adapt . . . [S]ubtle doctrinal predispositions will only frustrate objective interpretation and the experimentation necessary to the growth of the international system.”¹¹³ An international lawyer may thus be forgiven for thinking, even though she or he is told that international courts and tribunals now undertake a multiplicity of new functions and represent a form paradigm shift, that they are still “courts” and “arbitral tribunals” of old.

CONCLUSION

This Article has argued that the literature on international courts and tribunals in the past several decades has been structured by the opposing reactions of international lawyers to the multiplication of international courts and tribunals. Thus, behind the veneer of sophisticated frameworks and systems of knowledge, the literature has been shaped by the simultaneous responses of faith in the present and nostalgia for the past to the disorientation brought about by multiplication. Each of these responses is privileged by drawing continuities or discontinuities between the past and the present under the guise of familiar tropes

110. See generally REINHART KOSELLECK, *THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS* (Stanford University Press 2002).

111. See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure on International Dispute Resolution*, 84 AM. J. INT’L L. 104, 128 (1990).

112. See *id.*

113. See *id.*

such as functions or systematization. These contradictory sentiments often are held at the same time. Faith expressed through assertions of discontinuity is simultaneously met with assertions of continuity to alleviate nostalgia. The resulting layered temporalities have contributed to the specificity and complexity of the literature of this period.

Throughout this Article, David D. Caron's writings have acted as a guide to the contours of this body of writing: David embodied Virgil in a version of the *Divine Comedy* that took place in the world of international courts and tribunals that he so cherished. As a leading representative of this generation, he attempted to instill order into the world of international courts and tribunals by crafting a framing theory that nevertheless would leave room for experimentation and growth.

The next generation of international lawyers will have been born into a world of already multiplied international courts and tribunals. They may start to look at that established order as natural or necessary, a dominant paradigm with a single temporality, the present. They risk forgetting the personal struggles involved in creating it and making sense of it. In that way, the body of writing that has emerged in the past three decades, with its tensions, struggles, and temporal contradictions, serves as a reminder to the next generation of the possibilities of international adjudication, and that things do not have to be as they always have been.

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