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Dialogue, Integration and Convergence Between International Courts: The Case for Conceptual Clarification

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ABSTRACT

International Courts and Tribunals (ICTs) have proliferated in the last decades. Their expanding competences and increasing involvement in politically and socially sensitive issues have sparked both renewed concerns over the fragmentation of international law, and a broader discussion on the methods and scale of potential coordination of these courts. Despite the growing body of scholarship, significant challenges remain in developing a coherent conceptual toolbox capturing the dynamic legal and extra-legal interactions between ICTs and their judges (conceptual blurriness, shortcomings in operationalisation, oversight of ICTs idiosyncratic nature).

This paper argues that the lack of conceptual clarity has hindered progress in both theoretical and empirical research on these phenomena. It reviews how different disciplines (law, sociology of law, socio-legal studies, and law and politics) have characterised and conceptualised interactions between ICTs. The paper identifies points of tension, of contradictions and sometimes gaps in the current state of knowledge. Specifically, the ambiguities surrounding judicial fragmentation and integration, convergence and divergence of courts, and 'judicial dialogue' prevent scholars from assessing the scale and empirical reality of these issues. This fuzziness has also prevented the cross-disciplinary communication necessary to construct an effective socio-legal theoretical framework.

To address these challenges, the article proposes clear and operationalisable definitions for these key concepts and sketches out a tentative theoretical map linking them together, offering a foundational basis for both interdisciplinary discussions and future research. This conceptual clarification aims to facilitate a more nuanced understanding of the phenomena at hand, providing a clearer path for future scholarship and interdisciplinary dialogue.

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INTRODUCTION

This article argues that the often self-contradictory state of the literature on the nature, scale, and impact of interactions between International Courts and Tribunals (ICTs) is attributable to the multiplication of fuzzy and overlapping concepts by different disciplines and strands of ICT scholarship.[1] 'Dialogue', 'fragmentation', or 'integration' can all have different meanings depending on discipline, epistemology or even researcher. ICT scholars talk past, rather than to each other, due to a lack of established common language to describe the complex phenomenon they are approaching from different angles.

The consequence is an impossibility to develop either a theoretical or an empirical understanding of these varied inter-ICT interactions. How much dialogue is actually happening? How much convergence is there between case law? Are we witnessing the rise of an international judiciary, or do judges and arbitrators remain intellectually (and physically) within their jurisdictions?

This is not a niche, parochial debate about definitions. The current state of the literature *is* an issue from multiple related perspectives. Firstly, the fragmented state of the literature, and the inability for researchers to truly engage with each other's results means missed opportunities to build *on* each other's work. Instead of having incremental advancement of knowledge through the usual, indirect scholarly debates in academic journals, entire strands of the literature repeat and reiterate similar findings, therefore wasting (human, time, financial) resources in the process. While making a case for a new theoretical framework on the grounds of research funding imperatives is unusual, the current academic landscape for social sciences demands it. Repeated, siloed research is a sub-efficient use of funding that is already scarce.

Further, a more traditional reason to address this issue is that the fragmented conceptual landscape makes it impossible to evaluate with certainty the empirical reality and scale of the phenomena under scrutiny. The literature and debates on interactions between ICTs is a vibrant one: but how many interactions are we talking about? Is the phenomenon itself worth the effort and the resources researchers are investing in it? Is there a point in debating cross-borrowing between ICTs if, in the end, this happens only in a handful of high-profile cases and without any actual impact on the outcome of the case? How worried should we be of ICTs catalysing the fragmentation of international law?[2] Our inability to empirically evaluate the scope and scale of this phenomenon leaves ICTs open to the same criticism national courts receive when they engage in transnational dialogue, at a time where the rule- and law-based international order is heavily challenged by bad faith actors. If objections to practices such as cross-borrowing are valid, but there is no clear data on the extent to which a given court engages in this practice, bad faith criticism can play a disproportionately heavy role in delegitimising it as an institution. There is an overreliance on anecdotal evidence of the existence and impact of interactions between ICTs, risking conducting confirmatory empirical research rather than a comprehensive evaluation of said interactions.[3]

This leads to the last reason to engage in a more systematic theorisation of these interactions: they do raise important normative questions. What are the consequences of convergence or divergence between different independent ICTs for the 'users'[4] of international law? What of conflicting requirements, for states and for rights holders?[5] Who wins when overlapping courts set conflicting requirements? A liberal, cosmopolitan approach takes the view that integration

1 Earlier drafts of this paper were presented at the SLSA Annual Conference Legal Borderland Stream (March 2025) ESIL– Leuphana Early Career Workshop 'International Courts and Tribunals: Interactions and Challenges' (May 2025). Thank you to the participants to these forums, particularly James Deverey and Pedro Fortes for their feedback, as well as Mathilde Vargas for her editing assistance, and for the two insightful reviewers of the Tillburg Law Review.

2 Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for International Legal Order' (Speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000).

3 Friedrich Kratochwil, 'Law as an Argumentative Practice: On the Pitfalls of Confirmatory Research, False Necessities, and (Kantian) Stupidity – Comments on Knut Traisbach' (2021) 10 Global Constitutionalism 208.

4 Eva Brems and Saïla Ouald-Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users' Perspectives* (Edward Elgar Publishing 2018).

5 Janneke Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who Takes the Lead?' in Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer International Publishing 2020).

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(taken as convergence and coherence in international law) is necessarily good,[6] but is there a race to the top[7] or a watering down of the standards of international law? An international judge engaging in comparative legal analysis to reach the most appropriate solution is probably a good thing;[8] the rise of the 'international judiciary as transnational power elite',[9] perhaps not so much.

Faced with these difficulties, which current definitions and framework do not address, how can a new framework improve our shared understanding of ICT interactions and facilitate future research across disciplines?

This article offers an answer with a new conceptual framework to capture the interactions between ICTs, with a vocabulary sufficiently precise to ensure its socio-legal usefulness, yet flexible enough to capture different facets of the phenomenon instead of collapsing them together. This framework remains broadly sketched out, and open to more advanced detailing and nuancing in the future; the primary goal of this article is not to lay down a comprehensive analytical theory of dialogue just yet. Instead, this article focuses on the required preliminary step: to clearly identify the shortcomings of existing approaches, to lay down the foundations of an alternative one to adequately address these shortcomings.

This framework is organised around three axes: Convergence/Divergence, Integration/Disintegration, and Dialogue.

The first two are sets of conceptual opposites bounding two spectra, while the latter is defined in terms of intensity and formalisation. This framework is descriptive rather than prescriptive: it is agnostic as to the desirability of these interactions. It also does not pretend to answer whether we are in an era of fragmentation or whether there is, in the end, a judicial dialogue. Instead, it gives a grid of analysis that can be the starting point for both prescriptive and empirical research. It may be that the phenomenon of judicial divergence between ICTs, relative to all international case-law, is minimal to the point of being dismissible. But the only way to reach this conclusion is to conceptualise clearly what that judicial divergence *would* be. This article fills in the current gap in *conceptualisation* of ICT interactions.

To justify and explain this new framework, the paper first conducts a literature review of the different notions used by the literature to explore interactions between ICTs, across different disciplines: theoretical and empirical legal research, sociology of law, socio-legal studies, and political science. It then leverages this review to critically identify the existing tensions between and within these concepts, while also acknowledging that there is a need for a flexible framework that captures different dimensions of the interactions between ICTs. The second section adopts a quasi-inductive approach to detail each component of the new framework, based on these identified pitfalls and shortcomings of the literature on each concept. Selected illustrative instances of ICT interactions are drawn from a wide array of public and private international law sub-fields. The conclusion will tentatively tease out what the *combination* of these different components when analysing the interactions of two courts leads to.

BREADTH, DEPTH AND MAELSTROM OF THE LITERATURE ON INTERACTIONS BETWEEN ICTs

Conducting a literature review on the state of the interactions between ICTs is challenging because the literature itself is fragmented across disciplines that struggle to engage with each other. Instead of clustering existing knowledge by (often arbitrarily defined) fields, this section first identifies the concepts that constantly come up, and attempts to sketch out their current definition(s). The inherent limitations arising from this exercise lead to the second sub-section,

6 Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 Leiden Journal of International Law 1; Knut Traisbach, 'A Transnational Judicial Public Sphere as an Idea and Ideology: Critical Reflections on Judicial Dialogue and Its Legitimizing Potential' (2021) 10 Global Constitutionalism 186.

7 Eleonore Sharpston, 'Keeping Each Other on Our Toes – a Circle of Mutual Encouragement towards Setting High Standards for Fundamental Rights Protection' in Ineta Ziemele (ed), *The Role of Constitutional Courts In The Globalised World Of The 21st Century* (Constitutional Court of the Republic of Latvia, 2019).

8 Basil Markesinis and Jorg Fedtke, 'The Judge as Comparatist' (2005) 80 Tulane Law Review 11.

9 Mikael R Madsen, 'The International Judiciary as Transnational Power Elite' (2014) 8 International Political Sociology 332.

which teases out the contradictions within this literature, and leverages examples taken from the practice of ICTs to show the limits of these concepts, as they are currently defined.

UNTANGLING INTERACTIONS BETWEEN ICTs: A RACE TO CONCEPTUALISATION

Dialogue

'Judicial dialogue' is everywhere, but 'international judicial dialogue' is scarcer in the literature. Once one has excluded 'transnational dialogues' involving domestic courts (and sometimes ICTs),[10] and 'vertical dialogue',[11] what is left? Undoubtedly, 'there is no universal agreement on the meaning of judicial dialogue'.[12] Nevertheless, narrow definitions often frame it as a practice of importing and exporting precedents between different ICTs,[13] or as 'the spontaneous reference to the case law of other courts and tribunals by a particular judicial body, whether domestic or international'.[14] This has also been dubbed 'borrowing' between ICTs.[15]

A wider definition looks less restrictively at the presence or absence of *precedents from another court*, and more generally at the import and export of *legal solutions and ideas*. For MacGregor, Vice-President of the Inter-American Court of Human Rights (IACtHR), international judicial dialogue must be understood as 'the practice of domestic and international courts using the reasoning of other courts to construct a better interpretation of a legal norm contained in a constitution or treaty.'[16] This view is echoed by current and former judges sitting in ICTs, though these actors may understand dialogue to extend to domestic courts as well.[17]

Taking a step further, Stone Sweet conceptualised judicial dialogue as courts *addressing each other* through their decisions, rather than simply *citing* each other, adding a *purpose*. With case-law as the key mode of expression of a court, judges use this medium to communicate with each other, navigating overlapping spheres of law and authority in a context of decentralised sovereignty in the international legal order. While this argument was made in the context of a vertical dialogue between the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU) and domestic courts, it still captures an intuitive understanding that dialogue is an interaction *with* and *toward* an interlocutor, rather than a simple exchange of information.[18]

The last take on 'judicial dialogue' is a sociological one: a more literal 'dialogue', where judges of different courts (and their numerous personnel) form independent sociological networks.[19] While their analyses cover national and international courts alike, Tushnet and Law argue that this literal dialogue takes place in international and regional organisations or courts, elite higher education institutions and scholarly meetings, but that these networks are '*fragmented and cliquish rather than global and inclusive*.'[20] They also note that the motivation behind these

10 Olga Frishman, 'Transnational Judicial Dialogue as an Organisational Field' (2013) 19 European Law Journal 739; Eduardo Ferrer Mac-Gregor, 'What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights' (2017) 20 Harvard Human Rights Journal 89; Leila Sadat, 'Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity' (2009) 22 Leiden Journal of International Law 543.

11 Dana Baldinger, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Brill Nijhoff 2015).

12 Silviana Cocan, 'Judicial Dialogue between International Courts in the Interpretation of Customary International Human Rights Law' in Andreas Føllesdal and others (eds), *Customary International Law and Its Interpretation by International Courts: Theories, Methods and Interactions*, vol 3 (Cambridge University Press 2024) 212.

13 Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99.

14 Cocan (n 12) 212.

15 Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 The Journal of Legal Studies 547.

16 Mac-Gregor (n 10) 91.

17 Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench*' (2006) 55 International & Comparative Law Quarterly 791; Alan Rosas, 'Methods of Interpretation, Judicial Dialogue' in Carl Baudenbacher and Erhard Busek (eds), The role of international courts (German Law Publishers 2008).

18 Alec Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' (2012) 1 Global Constitutionalism 53.

19 Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100.

20 David S Law and Mark Tushnet, 'The Politics of Judicial Dialogue' *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023).

exchanges can be strategic for judges, or courts, engaging in 'prestige trafficking' and reputation building. On the other hand, ICTs themselves have used the term of 'dialogue' to designate these meetings, but framing them as learning and cooperation opportunities between courts. Many of them have started to use the term 'judicial dialogue' to refer to specific events and activities where personnel from courts (judges or otherwise) connect with each other. Stone Sweet and Sandholtz have identified this practice particularly between regional Human Rights Courts (IACtHR, ECtHR, ACtHPR), with informal exchange programmes of reciprocal visits between their lawyers, working visits focusing on their case-law and other bilateral meetings, but also the more official '*biannual* "Permanent Forum of Institutional Dialogue"'.[21] This very official process even resulted in the adoption of joint declaration by all three Courts in 2018 and 2023[22] The same notion of 'dialogue' also appears in the yearly '*African Union Judicial Dialogue*' initiated in 2013, and specifically the 'Tripartite Dialogue Between Continental and Regional Courts in Africa' which gathers the African Court on Human and People's Rights (ACtHPR), the Court of Justice of the Economic Community of West African States (ECOWAS Court), and the East African Court of Justice (EACJ), which started in 2022.

Fragmentation

Fragmentation is Schrödinger's cat of international law, both existential danger[23] and postmodern anxiety.[24] In a great paradox, the discourse around fragmentation is itself fragmented across multiple definitions (and factual assessment). There is, of course, a general understanding of what fragmentation is: the coexistence of multiple norms of international law, with multiple treaties and bodies interpreting them. But what *exactly* constitutes fragmentation? In a related 2006 report, Koskenniemi took a system-level approach, focusing on the jurisdictional/normative fragmentation of international law: the multiplication of specialised norms and rules. But another way is to focus on 'substantive' fragmentation, which takes place when the same rules are interpreted differently – e.g., if different ICTs interpret the same treaty differently. From this definition, fragmentation does not apply to diverging interpretations of different treaties by ICTs. Substantive fragmentation requires a sort of direct collision between decisions,[25] rather than an abstract shattering of the normative landscape. This bleeds into the neighbouring concept of 'norm conflicts', which can be understood narrowly (complying with one rule means breaching the other), or broadly (complying with one rule means limiting the rights or obligations deriving from another one); but harmonious interpretation can smooth out the conflict.[26]

In light of more recent geopolitical developments, International Relations scholars have revisited "fragmentation", recontextualised the phenomenon as that of 'norm contestation' and 'retrenchment'. If for international lawyers fragmentation meant that the international legal order was becoming polycentric, IR see it rather as the retreat of states away from multilateralism. Here, international law is not fragmented between international sub-regimes (environment, trade, human rights, security, energy…). Rather, it is almost dissolved, with a regression towards domestic regulation and domestic governance only.[27] In other words, the polycentrism which emerged is that of states supplanting the international legal order, rather than fragmenting this legal order. Not only is this a more complex conceptualisation of fragmentation, but it is one that highlights the agency that some actors, such as States, can have in the process of fragmentation, strategically hastening it. In this sense, their analysis

21 Alec Stone Sweet and Wayne Sandholtz, *The Law and Politics of International Human Rights Courts: The Dilemma of Effectiveness* (OUP 2024) 253.

22 See for example in 2023 : https://www.echr.coe.int/documents/d/echr/speech_20230525_oleary_seminar_challenges_eu_hr_protection_eng; and in 2018 before the adoption of the Declaration of San José: https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf.

23 Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 New York University Journal of International Law and Politics 791.

24 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553.

25 Eva Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface' (2015) 8 European Journal of Legal Studies 21.

26 Erika De Wet and Jure Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 Global Constitutionalism 196, 198.

27 Rebecca Cordell and Alex Dukalskis, 'Authoritarianism, Global Politics, and the Future of Human Rights' (2025) 79 International Organization S162; Bryce W Reeder, 'The Future of United Nations Peacekeeping in a Fragmenting World' (2025) 79 International Organization 148; Stephen Weymouth, 'Digital Disintegration: Techno-Blocs and Strategic Sovereignty in the AI Era' (2025) 79 International Organization 57.

joins that of Kreuzer, who argued that interface conflicts between regimes need to be activated 'via contestations in practice or speech acts'.[28]

Divergence/Convergence

While traditionally lacking a clear definition, 'divergence' implies a difference in interpretation of a rule by two different bodies, typically due to its imprecision.[29] However, not even Petersmann creates a binary with 'convergence', instead opposing 'divergence' with 'integration' – a notion further developed below. Abrusci also uses the concept of 'convergence', but to simply mean 'the absence of normative fragmentation': convergence does not explicitly require agreement, only the absence of disagreement.[30] Judicial convergence, specifically, includes both 'reasoning and outcome', where at minimum 'two cases [are] very similar, if not identical, both in the subject matter, the features of the applicants, and the underlying domestic legislation.'[31]

Integration

This concept entered the discourse on fragmentation through the VCLT's 'principle of systemic integration', whereby interpreters of an international treaty must account for other international obligations which bind the parties. This is sometimes presented as a way to avoid fragmentation.[32] However, the value of this principle was to ensure harmonisation and coherence between *lex generalis* and *lex specialis* in international law, which does not solve the question of interactions between ICTs that are equally specialised and still overlap.

Another take on 'integration' takes inspiration from 'judicial integration' in Europe. This refers to courts, independent from each other, building on a sufficiently harmonised understanding of the common good. Petermann argued that this common core of values allows them to use the '*Solange method*' to accommodate for some substantial diversity, while still protecting citizens to an adequate standard.[33]

Brems takes yet another approach, that of rights holders, seeing 'integration' as reflecting the reality of the lived experience of those at the end of the chain of international law, particularly international human rights law.[34] 'Integration' simply means understanding that any empirical work on the fragmented landscape of international law requires accepting that at the end of the line is a user receiving the totality of this landscape holistically.

TOO MANY COOKS? THE SCHOLARSHIP'S OWN 'BABEL OF VOICES'

There is clearly a rich, diverse literature with varying strands all grappling with a question broadly identified as 'What are the processes and outcomes of interactions between ICTs, and how do they impact the international legal order'?[35] But there are arguably three main issues with the state of the scholarship, as reviewed, which prevent us from reaching a coherent answer. All conceptual frameworks tell us something about ICTs, but none tell the whole story. To put forward a framework that can, this section first reviews what is currently amiss. The issues are clustered around three characteristics: conceptual blurriness, oversimplification of operationalisation, and overlook of the ICTs' idiosyncrasies.

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28 Christian Kreuder-Sonnen and Michael Zürn, 'After Fragmentation: Norm Collisions, Interface Conflicts, and Conflict Management' (2020) 9 Global Constitutionalism 241, 249.

29 Ernst-Ulrich Petersmann, 'De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement' (2008) 6 Loyola University Chicago International Law Review 209, 228.

30 Elena Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law: The Regional Systems and the United Nations Human Rights Committee* (Cambridge University Press 2023) 20.

31 ibid 28.

32 International Law Commission, 'Conclusions of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/61/10, para 85; Panos Merkouris, 'Principle of Systemic Integration' [2020] Max Planck Encyclopedias of International Law.

33 Petersmann (n 29) 222.

34 Eva Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) European Journal of Human Rights 447.

35 Higgins (n 17). Higgings' initially used 'Babel of voices' to describe her vision of international judicial dialogue, a notion that is now applicable to the literature commenting on this very dialogue.

Firstly, there is a blurriness characterising different concepts, often due to a lack of universally accepted definitions. We can further break down this limit as intrinsic conceptual blurriness, and cross-conceptual blurriness. The former refers to individual concepts not being well bounded, notably by having notions presented as both 'process and outcome'. For example, while dialogue is often accepted as a process, it is then operationalised and examined in terms of outcomes (the precedents and solutions drawn from another jurisdiction which are or are not used). Similarly, Peters notes that the term 'fragmentation [of international law] denotes both a process and its result, namely a (relatively) fragmented state of the law'.[36] Frishman, like Pérez et al., include in 'dialogue' both 'direct interaction between judges and citation of foreign opinions in [...] court decisions'.[37] Another manifestation of intra-conceptual blurriness is when the scale, or unit of analysis, is unclear: fragmentation, for example, can refer to the fragmentation of international law into international sub-regimes, or the fragmentation of each international sub-regime into national governance only.[38] Cross-conceptual blurriness is when this lack of boundary leads to slippage between concepts. For example, Kassoti defines 'substantive *fragmentation*' as 'possibilities of *divergent* interpretations by the plethora of international adjudicatory bodies interpreting and applying the same substantive law',[39] making divergence and fragmentation the same thing.

Conceptual pair-opposites are not always well identified, either: Peters opposes fragmentation to integration,[40] whereas Abrusci opposes judicial fragmentation to judicial convergence.[41] But how do these different understandings relate to the concept of 'disintegration', when Martineau argues 'fragmentation does not amount to legal revolution but to legal disintegration'?[42] And what of Petersmann's 'de-fragmentation' of international law?[43] What is required is a finite set of concepts with clear definitions and boundaries separating and differentiating them.

Secondly (and potentially flowing from the conceptual blurriness), there is a tendency to simplify the operationalisation of rich concepts, leading to conclusions that rely on assumptions more than empirical evidence. This is particularly glaring for 'judicial dialogue'. However, Almeida[44] finds that there is limited *reciprocity* between the International Court of Justice (ICJ) and the IACtHR with this dialogue: the IACtHR is more willing to rely on the ICJ's precedents (and genuinely engage in a reception exercise) than vice versa. Similarly, Charlotin[45] found that, while the WTO-AB has cited the ICJ 80 times, the ICJ itself has never cited the WTO-AB (at the time of their writing). In other words, researchers often interpret as 'dialogue' what may only be a monologue.

Consequently, many of these concepts tend to be reduced, empirically, to cross-referencing.[46] The presence of a reference to another court in a judicial decision can have multiple uses and meanings, and not all are equal or even comparable. For example, in *Ireland v. UK*, the ECtHR mentioned two decisions of the ICJ, but only in the context of re-stating the arguments put forward by the UK, as opposed to ICJ judges actually leveraging these decisions.[47] How can the mention of the ICJ in this context be considered equivalent to the many times the ECtHR has engaged in depth with the case law of the CJEU, of various UN Treaty Bodies, or of international

36 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 672; see also: Martineau (n 6).

37 Frishman (n 10) 141; Aníbal Pérez-Liñán and Angie K García Atehortúa, 'Oversight Hearings, Stakeholder Engagement, and Compliance in the Inter-American Court of Human Rights' (2024) 78 International Organization 293.

38 for example Reeder (n 27).

39 Kassoti (n 25) 29.

40 Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671.

41 Abrusci (n 30).

42 Martineau (n 6) 28.

43 Petersmann (n 29).

44 Paula Wojcikiewicz Almeida, 'The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empirical Analysis' (2020) 11 Journal of International Dispute Settlement 1.

45 Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 Journal of International Economic Law 279.

46 Almeida (n 44); Charlotin (n 45); Cocan (n 12); Michelle Q Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28 European Journal of International Law 273.

47 *Ireland v The United Kingdom* (1978) 2 EHRR 25 [152].

criminal tribunals? Attributing meaning to the simple presence or absence of cross-citation flattens the very important nuances that permeate the practice of citing external jurisdictions. References have been found to be sometimes purely strategic,[48] ornamental,[49] absent due to limited resources [50] or genuine comparative law.[51] On the other hand, as argued by Sandholtz, the hyperfocus on external references risks underestimating the reciprocal influences that ICTs can have on each other, which for a number of reasons are reflected in an actual citation of case-law.[52]

The new framework will therefore have to ensure that concepts can be operationalised without relying on cross-citations, and not over-estimate the actual role, impact, or significance of an external citation in a judicial decision.

Lastly, much of the literature overlooks specificities of ICTs as institutions and organisations, their information processing, and practical, political, and legal constraints, and does not account for personal/sociological aspects of their interactions either. On 'dialogue', for example, much is drawn from the literature on 'transnational judicial dialogue', which involves domestic courts.[53] The frameworks built around this domestic dimension often highlight questions of legal culture and identity that are particularly relevant to explain national perspectives colliding, or coming together.[54] But when the bench itself is multi-national, surely the dynamics of judicial dialogue change.

As an illustration, the role and use of cross-references are surely not the same for an ICT using precedent, case-law and solutions drawn from courts within its own constituency (which it often ends up being sought after 'compliance partners'),[55] and for an ICT considering relying on precedent from a fully separate ICT, which will have no role in enforcing the final decision. In other words, the socio-legal, political, and even strategic relationship existing between an ICT and national courts in its jurisdiction is not mirrored by the relationship it has with another ICT. An exploration of the dynamics at work between ICTs will have to account for their specific place within international, sometimes supranational, jurisdictions, with all the consequences this has on the composition of their bench, their resources, goals and constraints.

A NEW THEORETICAL FRAMEWORK

This section attempts to provide a comprehensive, analytical framework to identify the different facets that interactions between ICTs can take. The goal is to offer a descriptive tool, a mainframe to superimpose onto observable phenomena: the text of a case-law, a meeting between judges, the final outcome of a dispute brought before an ICT. To anchor the framework and show its flexibility, each concept is accompanied by illustrative examples, drawn from various sub-fields of international law featuring ICTs. This is to show where the most iconic examples of interactions between ICTs can be reframed and re-conceptualised using this framework, as well as to display the flexibility of this approach, able to cover all sub-fields of international law.

48 Erik Voeten, 'Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights' in Clara Giorgetti and Mark A Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts* (Cambridge University Press 2022).

49 Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 Maastricht Journal of European and Comparative Law 812.

50 David Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 Washington Law Review 523.

51 Markesinis and Fedtke (n 8); Evangelia Psychogiopoulou, 'Judicial Dialogue and Digitalization: CJEU Engagement with ECtHR Case Law and Fundamental Rights Standards in the EU' (2022) 13 JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law 145.

52 Wayne Sandholtz, 'The ECtHR, Transregional Dialogues and Global Constitutionalism' (2020) 9 Global Constitutionalism 543.

53 Giuseppe Martinico and Oreste Pollicino, *The Interaction Between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar Pub 2012); Antonio Moreira Maués and others, 'Judicial Dialogue Between National Courts and the Inter-American Court of Human Rights: A Comparative Study of Argentina, Brazil, Colombia and Mexico' (2021) 21 Human Rights Law Review 108; Slaughter (n 13).

54 Kassoti (n 25).

55 Karen J Alter, *The New Terrain of International Law – Courts, Politics, Rights* (Princeton University Press 2014).

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CONVERGENCE/DIVERGENCE

Convergence/divergence is about the actual *content* of the case law of ICTs. This is the legal-substantive component of their interactions. What is required is a *comparability* of the questions raised between two different courts, without requiring the exact same facts to be brought twice. This can mean two ICTs adopting identical standards or requirements,[56] using similar arguments or doctrines, or reaching the same conclusion. ICTs citing each other may not be required: there can be convergence between ICTs without them explicitly pointing out this convergence, and indeed, its identification does not imply an *intent* of members of the bench to converge.

Commensurability to even evaluate the degree of similarity between two decisions still is a fairly high threshold: some authors have argued that the ICJ (Bosnian Genocide case) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) (*Tadic* case) have divergent case-law regarding the standard used to determine genocidal intent.[57] However, under this framework (and in agreement with the ICJ itself),[58] both courts cannot be considered 'divergent', as one covered state responsibility and the other individual criminal responsibility.[59]

From a theoretical perspective, it must also be noted that 'convergence' does not have to be reciprocal. One ICT may converge with the other, while the other does not – either by lack of decision allowing it to do so, or simply because it does not alter its jurisprudence when given the opportunity to do so.

Example of convergence

The CJEU and the ECtHR have converged (and diverged) on different issues; a key example pertains to moral persons' rights to privacy. The CJEU initially held that companies, as moral persons, had no right to privacy.[60] But in 2002's *Colas Est*. case, the ECtHR explicitly overturned its standing precedent on the question, finding that legal persons did have a right to privacy to a degree sufficiently high to receive some legal protection against unlawful state interference.[61] The CJEU, very shortly after, aligned itself with the ECtHR.[62]

Other examples of convergences between ICTs include the ACtHPR rights in the 2022 *Ogiek* case,[63] on awards attributed following the violation of indigenous rights. The Court explicitly referred to two cases of the Inter American Court of Human Rights on the same question[64] to decide on an equity-based award for 'communal violation of rights'.[65]

Yet other examples would include that identified by Miles between the ICJ and other ICTs on the law of provisional measures, where the latter followed the former,[66] or the ECtHR following the IACtHR on state obligations to investigate disappearances which took place 'before the respondent state recognised the Court's jurisdiction.'[67]

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56 Nathan Miller, 'An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals' (2002) 15 Leiden Journal of International Law 483.

57 Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013); *Prosecutor v Tadić* (Appeals Chamber, Sentencing Judgement) ICTY IT-94-1-A (26 January 2000); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Judgment)* [2007] ICJ Rep 43.

58 *Bosnia v Yugoslavia* (n 57) para 405.

59 Thanks to James Devaney for pointing this out.

60 *Joined cases 46/87 and 227/88 Hoechst AG v Commission* [1989] ECR 2859.

61 *Colas Est and others v France* (2002) 39 EHRR 17.

62 Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] ECR I-9011; Peter J Oliver, *The Fundamental Rights of Companies: EU, US and International Law Compared* (Hart Publishing 2019).

63 *African Commission on Human and Peoples' Rights v Republic of Kenya* **[2022] AfCHPR 1**.

64 *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 172 (28 November 2007); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) IACtHR Series C No 245 (27 June 2012).

65 *African Commission on Human and Peoples' Rights v Republic of Kenya* (Reparations) Application No 006/2012 (AfCHPR, 23 June 2022) para 74.

66 Cameron A Miles, 'The Influence of the International Court of Justice on the Law of Provisional Measures' in Eirik Bjorge and Mads Andenas (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

67 *Varnava and Others v Turkey* (2010) 50 EHRR 21; *Case of Heliodoro Portugal v Panama* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 186 (12 August 2008); Gerald Neuman, 'The External Reception of Inter-American Human Rights Law' [2011] QJIL 99.

Examples of divergences

Famously, in the field of International Criminal Law, different international tribunals can adopt different standards when interpreting the same ICL rules. There are divergences on the notion of *control* between the ICJ and the ICTY, with the ICJ setting up a higher standard (effective control) than the ICTY (overall control).[68] Peters went as far as calling the latter '[t]he only known example of facially irreconcilable interpretations of a cross-cutting norm by different courts'.[69]

Another fairly well-known example is the contrasting approaches on Indigenous Rights taken by the IACtHR and ACtHPR on the one hand, and the ECtHR on the other.[70] The ECtHR notoriously offers less protection than the two other courts on these questions.[71] It is also significantly less protective of collective rights, social rights, and environmental rights at large than its two other sister courts. Such lower standards of protection illustrate individual divergences between these courts.

The IACtHR not adopting the 'inter-American consensus' doctrine, in the way the ECtHR adopted a 'European consensus' doctrine, also means a divergence in reasoning between courts.[72] Under this renewed understanding of 'divergence/convergence', there is partial divergence between both courts on this aspect, even if the solutions adopted are not contradictory.

In other fields: *SGS v Pakistan* (2003), *SGS v Philippines* (2004), *SGS v Paraguay* (2010), and *BIVAC BV v Paraguay* (2009) saw the International Centre for Settlement of International Disputes (ICSID) tribunal deliver different interpretations of umbrella clauses, which can raise the obligation of a state party to a BITS towards an investor to the level of international law obligations. These diverse interpretations happened despite the facts being 'almost identical' and despite 'the difference in language between the clauses in the two BITS in these cases [not being] the basis for the very different outcomes'.[73] Some authors found that, we have, however, seen this divergence resolve into a gradual consensus toward expensive interpretations of the clause,[74] proof that divergence and convergence between ICTs is not static, but always needs to be analysed with a temporal approach.

INTEGRATION/DISINTEGRATION

Integration/Disintegration captures the interactions between ICTs on a *systemic* level — that is, how ICTs position themselves and their entire legal order, vis-à-vis each other. This has sometimes been presented as 'regime interactions', located in 'interface conflicts', requiring 'conflict management'.[75] Rather than the content of the case law, this pertains to meta-rules that govern instances of (potential) friction, where legal orders and jurisdictions run into each other. Reducing friction, having clearly established and uncontested meta-rules[76] (understood as 'rules about rules', or in this case, rules on how different potentially clashing legal regimes can – *or cannot* – coexist) is a sign of *integration*. These meta-rules do not have to solve the

68 *Bosnia v Yugoslavia* (n 57); *Prosecutor v Tadić* (Appeals Chamber, Judgement) ICTY IT-94-1-A (26 January 2000).

69 Peters (n 40) 696.

70 Elena Abrusci, 'Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions' (2017) 21 The International Journal of Human Rights 550; Christopher Roberts, *Alternative Approaches to Human Rights: The Disparate Historical Paths of the European, Inter-American and African Regional Human Rights Systems* (Cambridge University Press 2022) accessed 27 September 2024; Laurence Burgorgue-Larsen, *The 3 Regional Human Rights Courts in Context: Justice That Cannot Be Taken for Granted* (Oxford University Press 2024).

71 Giovanna Gismondi, 'Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1' (2017) 18 Yale Human Rights and Development Law Journal 1.

72 Abrusci (n 30); Burgorgue-Larsen (n 70).

73 Katia Yannaca-Small, 'BIVAC BV v Paraguay1 versus SGS v Paraguay2' (2013) 28 ICSID Review: Foreign Investment Law Journal 307, 312.

74 Jude Antony, 'Umbrella Clauses Since SGS v. Pakistan and SGS v. Philippines – A Developing Consensus' (2013) 29 Arbitration International 607.

75 Kreuder-Sonnen and Zürn (n 28).

76 Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart Publishing 2018); Nico Krisch, Francesco Corradini and Lucy Lu Reimers, 'Order at the Margins: The Legal Construction of Interface Conflicts over Time' (2020) 9 Global Constitutionalism 343.

a-hierarchical nature of the international legal order. Instead, they shape the 'incomplete pyramids surrounded by strange loops'[77] characterising legal pluralism.

Of course, these rules could be set out in the treaties governing the role and powers of each international jurisdiction, or those that they are in charge of enforcing. Peters[78] identifies a few of these 'integration rules'; but they tend to be limited to a commitment to 'enhance institutional cooperation', to avoid 'any policy contradiction', 'desiring to coordinate the policies', or practicing 'cooperation and information exchange', mostly with international institutions beyond ICTs. This may be because of the *ad hoc* nature in which international judicial bodies were created, without consideration for each other's existence by the states creating them – or, in the case of regime shifting strategies,[79] with the specific intent to create competitive alternatives to a pre-existing ICT. As a result, ICTs are architects of their own collective system-level interactions, creating their own meta-rules when confronted with a case that requires one.

This is not a matter of procedure, *lis pendens, res judicata* or overlapping jurisdiction. Instead, this pertains to situations where ICTs have to contend with each other's authority indirectly: being asked to interpret a treaty provision already interpreted by another court in different cases (e.g.: both the ACtHPR and the ECOWAS Court have mandate to interpret and enforce the Banjul Charter);[80] being presented with a case where they are, *de facto* or *de jure*, asked to review the case-law of another ICT (for example with the ECtHR *de facto* being asked to review the standards set by the CJEU on asylum or *ne bis in idem*). The result, at the scale of the decision, may or may not be existing on the convergence/divergence spectrum; but how this potential conflict is handled, the potential reliance on a meta-norm to that end, is what leads to integration or disintegration.

Examples of integration

The *Bosphorus* solution, introduced by the ECtHR in the eponymous case, is a way for the Strasbourg court to navigate the overlap in jurisdiction with the CJEU (and the EU legal order).[81] The situation between the two courts was on the course for the 'regime collision',[82] as by the 2000s both courts had a jurisdiction over almost 20 states for matters of human rights. The *Bosphorus* case specifically addresses how ECtHR judges are to organise conflict interfaces of applicants claiming in Strasbourg that the enforcement of EU law by national authorities had violated their ECtHR-protected rights. This had the potential to start a turf war with the Luxembourg Court, which is also in charge of ensuring the protection of fundamental rights in the EU legal order. To avoid this, the Strasbourg court drew inspiration from the BVerG's *Solange*[83] approach: the EU legal order was to be granted a 'presumption of equivalent protection', shielding it from any review by the ECtHR. Peters interprets it as a type of 'constitutional tolerance', made possible through the existence of a sufficient set of shared minimum values.[84] Any type of *Solange*-based solution, such as the *Bosphorus* rule,[85] is arguably one leading to integration, especially for overlapping regimes, as a meta-rule that clarifies the articulation between two independent courts.

Other meta-rules do solve potential conflicts more radically, by establishing a hierarchy or priority, but they have traditionally been used to organise interactions between national and international courts. With the growing role and jurisdiction of international courts, multiplying

77 Mireille Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Naomi Norberg tr, Cambridge University Press 2002) 8.

78 Peters (n 40) 699.

79 Laurence Helfer, 'Regime Shifting in the International Intellectual Property System' (2009) 7 Perspectives on Politics 39.

80 Since the 2005 Supplementary Protocol to the 1991 ECOWAS Convention. See: Joel Adelusi Adeyeye, 'ECOWAS Court of Justice: Its Linkage with the African Charter on Human and People's Rights' (2023) 10 Groningen Journal of International Law 51.

81 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2006) 42 EHRR 1.

82 Kerstin Blome and others (eds), *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge University Press 2018).

83 *Re: Wünsche Handelsgesellschaft (Solange II)* [1987] 3 CMLR 225.

84 Peters (n 40) 687.

85 Nikolaos Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals' (2008) 30 Loyola of Los Angeles International and Comparative Law Review 275.

potential conflicts, these solutions could be used to also regulate inter-ICT relations. These include the margin of appreciation doctrine, developed by the ECtHR, particularly in cases of overlapping jurisdictions of ICTs.

Importantly, for both these examples, the existence of a meta-rule as a sign of an integrative process does not reflect a normative assessment of its potential consequences on the substantive aspect of international law. Both the *Bosphorus* doctrine and the principle of mutual trust have been heavily criticised when applied to matters of human rights in Europe. Their value lies in legal certainty, not as a safeguard against the lowering of human rights and due process standards. Integration, in this framework, is not inherently virtuous for the 'user'.

Examples of disintegration

Two examples of meta-rules with more disintegrative effects can be drawn from the CJEU's case-law: *Opinion 2/13*, and *Kadi*.[86] In both cases, the Luxembourg Court was asked to decide how the EU legal order was to be articulated with the international legal order (for *Kadi*, following sanctions adopted by the UN Security Council against a private person), and the ECHR/ECtHR (*Opinion 2/13*, on the second attempt to have the EU become party to the ECHR).

In *Opinion 2/13*, states had attempted to set out rules, in the draft agreement, to regulate the reciprocal place of the Strasbourg and the Luxembourg court, and that their legal orders were to be interwoven; this would have been a rare example of states pushing for such a framework. But the CJEU considered, famously, that this institutional set-up would disregard the autonomy and very nature of the EU's legal order. The problem is that the EU offered no alternative.[87] The need for an accession of the EU to the ECtHR was, at this point in time pressing, with questions such as human rights standards in EU criminal and immigration law becoming points of tensions between both courts. By refusing to clarify their systemic relations, the CJEU contributed to the disintegration of European human rights.

Similarly (although with less resounding consequences), in *Kadi*, the CJEU was given the possibility to adopt a *Solange*-like solution, offered by the Commission, the AG and the applicant.[88] However, the CJEU did not cover the articulation of the UN and CJEU regimes, focusing instead on the EC Treaty being 'an autonomous legal system which is not to be prejudiced by an international agreement.'[89] This is even more problematic in light of Article 103 of the UN Charter, which also states that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Absent and fuzzy meta rules

A lack of meta-rules (whether established by states themselves, or by courts through their own case law), reinforcing uncertainty in the reciprocal place of each court and their roles vis-à-vis each other, is a sign of disintegration. Having said that, practice-based solutions, such as judicial comity,[90] or very flexible meta-rules that are subject to diverse interpretation, can represent a middle-ground: while the actual content of these rules or practices is vague and therefore no guarantee of integration, they can provide judges with the leeway to navigate interactions between their regimes, and each other's role, authority and case-law, on ad hoc basis. Indeed, comity has even been presented before as a type of "meta-principle" in and of itself, for ICTs to manage regime conflicts.[91] On the other hand, the liminal nature of fuzzy meta-rules and open space for comity can go both ways, with ICTs potentially refusing to coordinate or defer to each other's regime. Whether or not judges are more likely to use this liminal space between

86 *Opinion 2/13 Accession to the ECHR* ECR I-000; *Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission, ECR I-6351*.

87 *Opinion 2/13* (n 86) para 184.

88 *Kadi and Al Barakaat International Foundation* (n 86) para 236.

89 ibid 316 see also 282.

90 Thomas Schultz and Niccolo Ridi, 'Comity and International Courts and Tribunals' (2017) 50 Cornell International Law Journal 577.

91 James Crawford and Penelope Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 243.

their regimes to acknowledge each other's role or not will require empirical exploration. But in any case, the more flexible and vaguer the meta-rule, the more important the presence (or absence) and nature of the judicial dialogue, as explained in the following section, to help judges decide whether and how to coordinate their legal orders.

DIALOGUE

Lastly, **dialogue** in this new framework is reserved for the *process* used to exchange information between ICTs. This is the sociological aspect of interactions, involving individual actors such as judges, registries, legal assistants, jurists, networks, sociological aspect.[92] Rather than focusing on an idealised view of a transnational public sphere,[93] it embraces ICTs as their own growing organisational fields.[94] The focus is on (facilitating) information sharing, the progressive institutionalisation of these processes, and the gradual development of a (sociological and legal) field.

This 'dialogue' can go from initiatives within each court to exchange relevant information with another (regular email communication, or participation in common third-party events or conferences),[95] to more institutionalised practices such as designated contact persons within ICTs, shared databases, and official meetings between members of different ICTs, all the way to the development of the international judiciary as a coherent sociological field.[96]

The lowest form of dialogue would here be a passive transfer of information, institutional culture and know-how, attached to one person moving from one ICT to the other. This person may switch benches, or have gained experience in one court as a legal practitioner or jurist before or in one ICT prior to becoming judge in another, or vice versa. The first instance would be illustrated by Judge Julia Sebutinde, sitting as a Judge of the Special Court of Sierra Leone before being now a Judge at the ICJ; or current ITLOS Judge Boualem Bougataia, also acting as member of the Hague Arbitral Tribunal; Dean Spielmann, moving from the Presidency of the ECtHR to the bench of the General Court of the CJEU, and as of October 2024, Advocate General in the same court. Judge Siofrà O'Leary, for her part, gained experience as a referendaire at the CJEU before becoming Judge, then President of the ECtHR; while former ECtHR Robert Spano joined legal firm Gibson Dunn & Crutcher and litigates cases before the CJEU. Similarly, Kurtz has identified adjudicators moving from the WTO Appellate Body to ICSID panels, bringing with them their WTO-based approaches to dispute resolution.[97]

This carry-over of knowledge and practices is not limited to judges; while they are the most high-profile examples, they may not necessarily be the most impactful ones. Firstly, some lawyers and practitioners actively litigate cases before multiple courts. The focus here is not on the legal firms themselves, but on the lawyers actively appearing and pleading cases, on which no work has been conducted, to my knowledge. Judge Spano's role as a Lead Counsel before the CJEU, but also as an Advisor on cases brought before domestic courts involving compliance with ECHR, is equally noteworthy. Similarly, some civil society organisations plead and/or submit observations to multiple courts on similar, sometimes very specific issues, such as the ILGA-Europe supporting litigants bringing preliminary questions to the CJEU,[98] submitting *amicus curiae* before the ECtHR,[99] and litigating before the European Committee of Social Rights.[100] More difficult to track are the many jurists, referendaires, lawyers, and assistants going through

92 Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.

93 Traisbach (n 6).

94 Frishman (n 10).

95 Claes and Visser (n 19); Frishman (n 10).

96 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 Hastings Law Journal 805; Mikael Rask Madsen, 'Who Rules the World: The Educational Capital of the International Judiciary' (2018) 3 UC Irvine Journal of International, Transnational, and Comparative Law 97.

97 Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016).

98 *Case C-394/23 Mousse v Commission nationale de l'informatique et des libertés (CNIL) and SNCF Connect* EU:C:2025:2; *Case C-4/23 Mirin [2024] ECLI:EU:C:2024:845*.

99 *Minasyan and Others v Armenia* Appl No 5918015 7 January 2025.

100 *Transgender Europe and ILGA-Europe v the Czech Republic* Complaint No 117/2015 (European Committee of Social Rights, 15 May 2018).

ICTs and building a career and expertise in this specific field. Yet, to the author's knowledge, no research was conducted, either through hard data collection, interviews or ethnography, to understand the potential scope of this phenomenon.

A further step would be a degree of reciprocity between actors anchored in different ICTs, an actor-to-actor, informal information sharing based on individual willingness and good faith. Anecdotal evidence collected during interviews conducted with personnel of the CJEU and the ECtHR for my own doctoral research suggests that this can happen, although this is a very profile-dependent phenomenon.[101] Such exchange of information could be either one-shot, or repeated. A one-shot version occurs when actors belonging to different ICTs (judges or other personnel) find themselves in the same (physical or virtual) room, engaging with each other: academic conferences, seminars, events, official visits. These interactions could also be repeated, but importantly, still not institutionalised: regular email exchanges to share information about recent decisions; annual or bi-annual meetings of the benches for formal events.

The next degree of formalised dialogue, providing even more potential for effective and in-depth information- and practice-sharing, would be official diplomatic visits organised by the courts, recurrent enough to become quasi-institutionalised. For example, the ECtHR's annual solemn hearing marking the opening of its judicial year has for long included the presence of a representative of the CJEU, a practice which has been highlighted by interviewees during my doctoral work. A similar degree of institutionalised 'dialogue' and regular meetings can be seen in the African context, with the aforementioned 'African Judicial Dialogue' where the regional supranational courts of the continent are increasingly involved, shifting away from the initial practice which focused on national courts and lawyers. Less intensive but leaning toward more institutionalisation is the dialogue between the three regional human rights courts: the ECtHR, the IACtHR and the ACtHPR have started to dub each other 'sister-courts', meeting officially and very publicly at least every two years. From these discussions came official joint declarations: San José 1 in 2018,[102] Kampala in 2019,[103] San José II in 2023.[104] They also held an 'online dialogue' in 2020 focusing on Covid-19 and Human Rights.[105] Importantly, this level of dialogue is not dependent on the sheer good will or open mindedness of relevant key players. Institutional practices have an inertia and become path-dependent, and there is an inherent expectation that these dialogues continue regardless of who is at the helm.

However, dialogue is not the same as agreement: while intuitively we can expect that the reciprocal exchange of information and practices fosters convergence between ICTs, these are two conceptually separate notions. As shown earlier, the long-established, and growing dialogue between the CJEU and the ECtHR, and between the ECtHR, the IACtHR and the ACtHPR, respectively, have not always led to convergence.

CONCLUSION: PUTTING IT ALL TOGETHER… ALMOST

Rather than restating succinctly the content and merits of the new framework compared to the existing (fragmented) attempts at understanding the complex, multifaceted, layered, and contextual interactions between ICTs, this conclusion takes a step back. It presents the new framework holistically and critically. In other words: how are the three types of interactions

101 Audrey Mathilde Plan, 'A Theory of International Strategic Judicial Dialogue: Convergence and Divergence between the Court of Justice of the European Union and the European Court of Human Rights' (PhD thesis, Trinity College Dublin 2024) <http://www.tara.tcd.ie/handle/2262/104842>.

102 Joint Declaration of the Presidents of the ACtHPR, ECtHR and IACtHR on the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights, 18 July 2018, available at <https://www.echr.coe.int/documents/d/echr/San_Jose_Declaration_2018_ENG>.

103 Kampala Declaration of the ACtHPR, ECtHR and IACtHR, 29 October 2019, available at <https://www.echr.coe.int/documents/d/echr/Kampala_Declaration_ENG>.

104 San José Declaration of the ACtHPR, ECtHR and IACtHR, 26 May 2023, available at < https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.echr.coe.int/documents/d/echr/san_jose_declaration_2023_eng%3Fdownload%3Dtrue&ved=2ahUKEwjZjqO_hJaWAxUSVkEAHRGtBVwQFnoECBgQAQ&usg=AOvVaw0u7-JhRBM_4xcnOEE-sEP_>.

105 Teteve Davi, 'Judicial Dialogue between the Three Human Rights Courts on the Impact of COVID-19 on Human Rights: Extracting the Essentials' (*Opinio Juris*, 25 September 2020) <https://opiniojuris.org/2020/09/25/judicial-dialogue-between-the-three-human-rights-courts-on-the-impact-of-covid-19-on-human-rights-extracting-the-essentials/> accessed 31 May 2025.

presented above inter-related, if at all? Is there a coherent link (causal or otherwise) to be made between these three levels of interactions: the legal-substantive, the legal-systemic, and the sociological?

Rather than offering a definitive causal map or predictive model, the framework aims to serve as an analytical lens through which to observe, describe, and interpret context-dependant and fluid interactions. While the three axes are conceptually distinct, they are not independent. Ontologically, they may be correlated; but epistemologically, there may be more advantages in keeping the framework fluid, and away from theorisation of causal links. Interactions between ICTs, as a sociological phenomenon, is marred with contingent factors and endogeneity. However, there are still tentative clusters between each layer, which may be 'moving together'. A high degree of institutionalised dialogue may foster integration, which in turn may lead to convergence in case law. Yet, convergence in the case-law may also be the starting point, easing judges into more dialogue and facilitating their willingness to adopt more integrative meta-rules when relevant. Grisel and Stone-Sweet have even theorised that 'convergence in norms and forms across organizational boundaries [facilitate] the emergence and institutionalization of new 'fields''[106] in international arbitration. Conversely, a breakdown in dialogue hinders coordination in the substantive aspect of case-law, therefore fostering divergence. In turn, this may decrease ICTs´ willingness to hold space for each other in the international legal order—leading to disintegrative meta-rules. Another pathway could see the lack of, or disintegrative meta-rules, as preventing the coordination and subsequent convergence of case-law, rendering any kind of effective, open dialogue, more challenging sociologically. In this vein, these relationships are not absolute or linear. Courts may even converge in their reasoning in the absence of any formal dialogue or systemic integration; disintegration does not always entail substantive divergence.

For example, while *Opinion 2/13*[107] (and, in a lesser measure, *Kadi)*[108] has been analysed as a sign of autarky from the CJEU vis-à-vis the ECtHR,[109] it does not prevent both courts from 'remaining good neighbours' in the *content* of their rulings.[110] Further, we can find disintegration due to a lack of integrative mechanisms between ICTs' legal orders, without necessarily having any divergence to observe... due to a lack of commensurable cases raising the same questions. Peters found that, for decades, different ICTs, such as ITLOS, and regional human rights courts, such as the IACtHR and the ECtHR, were developing a body of decisions on environmental law, with no meta-rule to coordinate their legal orders. Yet, he found no concern-worthy incompatibilities between their decisions. He attributes this both to a high degree of natural synergy between international environmental law and international human rights law, but also to 'the nature of the complaints that have been brought':[111] the cases were not commensurable enough to establish any divergence or convergence.

Ultimately, this new framework is not a positivist theory seeking universal laws but a socio-legal tool: an invitation to engage more rigorously and reflexively with the phenomena of ICT interaction. It provides a structured yet flexible vocabulary that can enhance both empirical inquiry and normative reflection. While its breadth prevents it from being immediately leveraged to assess cross-court interactions, it is designed to thoroughly address the limits that the current literature has reached and that prevent further understanding of international judicial dialogue in all its complexity. Crucially, it is also an agenda-setting device, opening the door to future research that can refine, challenge, or expand the framework through detailed case studies, comparative work, and interdisciplinary perspectives.

106 Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 222.

107 *Opinion 2/13* (n 86).

108 CJEU, Joined Cases *C-402 & 415/05 Kadi v Council and Commission* EU:C:2008:461.

109 Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 Fordham International Law Journal 955.

110 Dean Spielmann, 'The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or How to Remain Good Neighbours after the Opinion 2/13 Doctrine' (2017) 2017 Revista Romana de Drept European 11.

111 Tim Stephens, 'Multiple International Courts and the "Fragmentation" of International Environmental Law' (2006) 25 The Australian Yearbook of International Law Online 227.

COMPETING INTERESTS

The author has no competing interests to declare.

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