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Armin von Bogdandy · Ingo Venzke (eds.)

International Judicial Lawmaking

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International Judicial Lawmaking

On Public Authority and Democratic Legitimation in Global Governance

With a foreword by Bruno Simma

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Foreword

This book explores three interrelated propositions under one thematic project. First, it describes the phenomenon of judicial law-making arising from various forms of international adjudication and analogous mechanisms of international dispute settlement. Secondly, it endorses judicial law-making when conducted in a legitimate manner. As a third proposition, the book argues that the legitimacy of any form of judicial law-making should be measured according to the value of democracy. (This democracy-based test of legitimacy of the exercise of public authority appears to continue the Heidelberg Max Planck Institute's innovative undertaking which led in 2010 to the publication of *The Exercise of Public Authority by International Institutions: Advancing* International *Institutional Law*). The grand vision of the project is to reveal the discursive patterns presumably unique to, and inherent in, the role of judges, arbitrators, and other types of dispute-settlers in the international system, in order to reach a more scientific *précis* of international legal normativity as developed by this community of decision-makers. As an enterprise both bold and provocative in contemporary international legal scholarship, the present book is not – as shown in the individual articles comprising this volume – without attendant, but interesting, complexities.

Armin von Bogdandy and Ingo Venzke submit that judicial law-making comprises the "judicial development of the law", and as such "is an intrinsic element of adjudication and it is not as such ultra vires" (*On the Democratic Legitimation of International Judicial Lawmaking*, 12 German Law Journal 1341-1370 (2011), at 1345). They do not confine law-making to the "sources" of international law enumerated in Article 38 of the Statute of the International Court of Justice but rather hold law-making virtually synonymous with all forms of "legal normativity." (*Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 German Law Journal 979-1004 (2011), at 979). Clearly, the present

book purposely expands the notion of "law" into a broader "normative" concept. It does not intend to demonstrate that, and how, international judicial institutions "create" or "author" the pedestrian categories of "sources" of international law, such as treaties, custom, or general principles. Instead, the book maintains that these institutions conduct "law-making" when their international decisions wield a primarily contextual influence on the ultimate content of international legal principles. To this end, it becomes relevant for von Bogdandy, Venzke, and the subsequent contributors to the book to identify possible "shifts" in the "normative expectations" of international actors as well as the addressees of their acts (*ibid*.) Using this broader understanding of "law" as "norms", several contributions propose to map some new (and quite unorthodox) spheres of "judicial law-making" in the international system – apart from the expected influence of international decisions as precedents. These instances of "norm-setting", in the view of the authors of the volume, actually describe cases of judicial law-making. For them, "lawmaking is an inevitable aspect of judicial interpretation". (*On the Democratic Legitimation of International Judicial Lawmaking*, at p. 1344).

Positivist international lawyers may not readily accept this deliberate shift, from a determination of the positive content of international law through the sources listed in Article 38 of the ICJ Statute towards a broader (and possibly more unwieldy) process of locating international legal normativity based on trends in judicial reasoning. But it is nonetheless a significant scholarly position that can advance the understanding of progressive developments in international law. In my 1995 Hague Academy lectures, I made an attempt to demonstrate that the contemporary international legal order reflects a marked transition from interstate bilateralism to a legal order founded on broader community interests. In an EJIL article (*The 'International Community': Facing the Challenge of Globalization,* 9 Eur. J. Intl. L. (2) (1998) pp. 266-277), Andreas Paulus and I also contended that States now channel the pursuit of many individual interests through multilateral institutions with different functional mandates. If one accepts that multiple institutions, individuals, and authorities now assume roles in the postulation of international law, one can better appreciate the innovative approaches of this book, with a caveat that the leap from postulation to legality remains a fairly aspirational one for the present. For this reason, I have some lingering reservations about the book's eagerness to explore all potential sources of normativity, even if they might go too far beyond the canon of Article 38 sources (*On the Democratic Legitimation of In-*

ternational Judicial Lawmaking, p. 1350). It is not clear to me, for example, whether the authors' call to have international judges "make explicit the principles they pursue with a certain decision", or to be "more open about the policies they pursue and what kind of social effects they intend to promote with a judgment" *(ibid.,* p. 1349), would still remain within the realm of the Court's jurisdiction to resolve disputes framed strictly according to the submissions made by sovereign States as parties before the Court. To some, the authors' call for such 'policy' disclosures by international judges might be read as a rather dangerous license for judicial overreach.

Leaving that ambiguity aside, however, one can still take a moderate view of the equivalence between norms and law to appreciate and examine the authors' conception of judicial law-making premised on a specific (and fairly constitutionalist) separation of powers paradigm. Here von Bogdandy and Venzke find that it is a "core problem of international judicial lawmaking" that there is a "distance to parliamentary politics" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1350). In order to expose this gap, several contributions in the present book focus on the processes of judicial reasoning in relation to political claims, institutional realities, and normative developments. For example, Niels Petersen (*Lawmaking by the International Court of Justice – Factors of Success*, 12 German Law Journal 1295-1316 (2011)) proposes innovations derived from game theory (although using some rather indeterminate variables for empirical measurement, such as 'state perceptions'), in order to isolate "legal developments" that are generated by decisions of the World Court. On the other hand, Thomas Kleinlein (*Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 German Law Journal 1141-1174 (2011)) presents an intriguing proportionality-based framework to rein in potentially overlapping, if not conflicting, interpretations of similar norms across different international regimes. Somewhat controversially, however, Eyal Benvenisti and George W. Downs draw a rather grim picture of the 'control' allegedly exercised by a "handful of powerful states that have tended to dominate the institutional design process [of international tribunals]" (*Prospects for the Increased Independence of International Tribunals*, 12 German Law Journal 1057-1082 (2011), at 1058) and which, according to these authors, have led to the issuance of international decisions of questionable legitimacy in the eyes of less powerful, or ultimately powerless, developing States. Resonating extreme realist overtones, these latter characterizations warrant further analysis and verification, in my view, where they suggest or im-

ply that international adjudication is ultimately a fatal enterprise because it is simply subordinated to the demands of *Realpolitik* and utterly devoid of any rule of law.

It is quite understandable that the various contributors to this book did not all adopt the same methodologies for determining or identifying the constituent elements of "judicial rule-making". The range of methodologies thus used provides insight into how the authors regarded and evaluated various aspects of international adjudication and dispute settlement. Marc Jacob takes a didactic and comparative law approach in his article on the theory of (often implied) precedents in international law (*Precedents: Lawmaking Through International Adjudication*, 12 German Law Journal 1005-1032 (2011)), an approach similarly employed by Stephan W. Schill when he argues that system-building occurs through precedent in investment treaty arbitration and accordingly generates normative expectations carried over to investment lawmaking (*System-Building in Investment Treaty Arbitration and Lawmaking*, 12 German Law Journal 1083-1110 (2011)); and by Ingo Venzke when he scrutinizes the effect of precedents from the WTO Appellate Body on the content of domestic regulatory policies protected under the exceptions of GATT Article XX (*Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 German Law Journal 1111-1140 (2011)). Karin Oellers-Frahm undertakes a taxonomic listing of the use of the advisory jurisdiction in numerous international organizations and tribunals (*Lawmaking Through Advisory Opinions?*, 12 German Law Journal 1033-1056 (2011)) as well as a description of the substantive and procedural requirements for the issuance of provisional measures by different international tribunals (*Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function*, 12 German Law Journal 1279-1294 (2011)). This descriptive approach is also mirrored in Michael Ioannidis' contribution on participation rights within the framework of rules contained in the WTO Covered Agreements (*A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 German Law Journal 1175-1202 (2011)), as well as in Markus Fyrnys' treatment of the pilot judgment procedure in the European Court of Human Rights (*Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German Law Journal 1231-1260 (2011)). Christina Binder uses a functionalist lens to analyze the impact of internal structural arrangements within the Inter-American Court of Human Rights

on the kind of 'norm-control' manifested in the trend of the Court's amnesty jurisprudence (*The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 German Law Journal 1203-1230 (2011)); somewhat analytically similar to the tools of discourse theory and institutional analysis employed by Milan Kuhli and Klaus Günther to expose the deliberate 'norm justification' conducted by the International Criminal Tribunal for the former Yugoslavia in its judgments (*Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 German Law Journal 1261-1278 (2011)). Most of the articles portray international decisions as forming a coherent (albeit at times dissonant) architecture of legal reasoning and international policy – which might be challenged in some quarters to be a foregone result of the authors' *a priori* selection of methodological tools that might be supportive of their ultimate conclusions. Nevertheless, irrespective of the occasional methodological disparities, I find that the contributions in this book valuably elicit, and helpfully succeed in provoking, a profound discussion of the actual scope of the "larger discursive contexts" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1354) that underlie the making and enforcement of international decisions, including the potential effect of these discursive contexts upon similar disputes in the future.

Beyond describing judicial law-making, however, the present book moves to more provocative propositions. It endorses legitimate judicial law-making and tests for such legitimacy based on judicial law-making's conformity with democratic values. Von Bogdandy and Venzke are quite careful to state that their investigation into the democratic legitimation of judicial law-making does not aim "at bringing the noise of popular assemblies to the quiet halls of learnt justice… (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1343). Rather, on the premise that the "generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and as an exercise of public authority" (*Beyond Dispute: International Judicial Institutions as Lawmakers*, p. 980), they posit that judicial lawmaking can (or indeed should) "be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials." (*Ibid*.). Manifestations of these democratic values include, among others, the independence and impartiality of international judges and the processes for their appointment; the public or transparent nature of international judicial proceedings as well as the access of a wider set of interested parties and public stakeholders to the disputes pending before international tribunals. As described in the various contributions

of the book, there are 'democratic deficits' in these aspects of international adjudication, which, the authors argue, ultimately militate against fulfilling the international community's expectations of the legitimacy of international judgments.

With the value of 'democracy' as its primary yardstick and a Montesquieu-esque constitutional theory of separation of powers as its foremost analytical paradigm, the book succeeds in thus depicting several 'democratic deficits' in various international tribunals such as ICSID tribunals, the WTO, ITLOS, and the ICJ. These critiques of undemocratic procedures in international adjudication also call to mind Francesco Francioni's arguments on the notion of an international right to access to justice (*Access to Justice as a Human Right*, 2007), but more importantly, the book brings to the forefront the key issue of international legitimacy as a separate and valid question in international lawmaking. The book's reliance on democracy as a key value in international relations, in my view, cogently delivers interesting realities and aspirations towards the achievement of common values in the international system. I still maintain that a strongly constitutionalist approach for assessing progressive developments in international law could be somewhat misguided as it "forces thinking about these developments into dogmatic structures (and strictures) that are, with regard to many questions, alien to the field and do not contribute to their creative-constructive handling." (Bruno Simma, *Fragmentation in a Positive Light*, 25 Mich. J. Int'l L. 845 (2003-2004)). However, I do not find that to be the case in the present book, as its authors carefully advance their claims about the lack of democratization within the institutional structures, rules, and processes of various international courts and tribunals. My only reservation lies with the extent of the authors' conceptions of democratization as a legitimating value, which, in my view, should perhaps be carefully differentiated with contextual sensitivity towards the actual internal mandates of such courts and tribunals and their corollary influence on the eventual paths of the international adjudicative practices of judges, arbitrators, and other dispute-settlers. For example, the 'exercise of public authority' by ICSID arbitral tribunals and the alleged accretive effect of ICSID awards on the evolving contours of international investment law, will necessarily be of a much different complexion from that wielded by the International Court of Justice according to its Rules of Court, Practice Directions, institutional history dating back to its predecessor, the work of the Permanent Court of International Justice, and the ultimate authoritativeness of the Court's jurisprudence as international precedents especially on general international

law issues of State responsibility, treaty interpretation, or the formation of custom, among others. To this end, Niels Petersen's use of game theory and reputational proxies to determine what states perceive as a "good decision" of the World Court (*Lawmaking by the International Court of Justice*, p. 1300) should be construed as his arbitrary view of possible determinants for the acceptance of an international judgment, inasmuch as it is Stephan Schill's perception that the development of a *jurisprudence constante* strikes an appropriate balance between the interests of investors and States is a democratic operation of 'legal certainty and predictability' (*System-Building in Investment Treaty Arbitration and Lawmaking*, p. 1106). While von Bogdandy's and Venzke's initial and concluding articles tightly describe their conceptual understanding of the value of democracy from judicial reasoning and forms of argument to issues of systematic interpretation and procedural legitimacy through the independence and impartiality of judges and the openness of international judicial procedures, this understanding does not always permeate all of the contributions to the book in equal or comparable degrees. As I have previously discussed, various authors also highlight other manifestations of the value of democracy in a given form of international adjudication – a tendency which might, at times, fail to adequately capture the overall functional realities faced by, and the integral nature of the institutional operations of, an international court or tribunal.

Finally, I note that while the book views "fragmentation" as a problem for democracy, it is laudable that the authors do not paint all international courts and tribunals with the same brush. As I stressed several years ago, "various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other" (*Fragmentation in a Positive Light* at 846). The extent to which this holds true at present, given the undeniable "variation of themes" in international arbitral awards and court judgments, might be debatable, but the book in any case prudently refrains from viewing the problem of fragmentation according to the notion of a supposed overriding unity or extreme universality of treaty regimes. Rather, the book cautiously examines and explains internal fragmentation in the different fields of international adjudication as a symptom of the lack of political oversight within most functional treaty regimes. These concepts of political oversight and institutional accountability are, yet again, pillars of constitutionalist reasoning that were adapted to accomplish the purposes of this book.

I congratulate the Max Planck Institute on issuing this noteworthy analytical contribution to the growing number of critical works that seek to reframe and recharacterize the nature of progressive developments of modern international institutions, processes, and norms. The volume exemplifies a truly innovative perspective, with valuable insights into, and hypotheses on, the nature of international judicial reasoning, and their visibly larger consequences on the robust (if not, at times, controverted and controversial) trajectories of international law.

Bruno Simma, The Hague, June 2011

Preface by the Editors

The increase of international adjudication has been one of the most remarkable developments within the international legal order of the past two decades. New international courts and tribunals have entered the scene and existing institutions have started to play more significant roles. We identify and study one particular dimension of this development: international judicial lawmaking. We observe that in a number of fields of international law, judicial institutions have become weighty actors and shape the law in their practice. Their authority transcends particular disputes and bears on the law in general. The contributions in this volume set out to capture this phenomenon and ask: How does international judicial lawmaking score when it comes to democratic legitimation?

One of our principal propositions is that international judicial lawmaking can and should be understood as an exercise of public authority. We thereby connect to our previous work, see "The Exercise of Public Authority by International Organizations", Special Issue, 9 *German Law Journal* (2008); Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer 2010). We now develop the thought that international judicial institutions influence all participants of the legal system with their decisions and have become noteworthy lawmakers. Sure enough, judicial lawmaking is a common phenomenon of any legal order, but there are a number of reasons that make it especially intriguing at the international level and that exacerbate its normative challenges. The contributions unfold these thoughts in principle, in particular detail, and with regard to a number of specific institutions.

The present volume is the product of a long process of discussion and mutual learning in which the active engagement of all contributors has been key. Participants met together with other colleagues for a first

workshop in October 2009. They discussed drafts at a second workshop in April 2010 and presented their contributions at an international conference at the Institute in Heidelberg in June 2010. We are grateful to our commentators and critics inside and outside the Institute, especially to our colleagues who work on related themes under the rubric of Global Administrative Law. Isabel Feichtner has been of great help in organizing these steps.

Our gratitude further extends to the editors in chief of the German Law Journal, Professors Russell Miller (Washington and Lee University, School of Law) and Peer Zumbansen (Osgoode Hall Law School, York University, Toronto), who published the contributions in a special issue of the German Law Journal (vol. 5, 2011) and whose tireless dedication is truly admirable. We also thank their team of students who assisted in the publication process. Anna Lechermann, Hannes Fischer, Max Mayer, Lea Roth-Isigkeit and Matthias Schmidt were all of great help in finalizing the contributions at the Institute. Lewis Enim and Eric Pickett proofread the texts. Angelika Schmidt touched up the contributions for the present edited volume.

Finally, we wish to thank Bruno Simma for offering a profound foreword.

Heidelberg, August 2011

Armin von Bogdandy
Ingo Venzke

Table of Contents

I. Framing the Issue 1

Armin von Bogdandy & Ingo Venzke
Beyond Dispute: International Judicial Institutions as Lawmakers 3

Marc Jacob
Precedents: Lawmaking Through International Adjudication 35

Karin Oellers-Frahm
Lawmaking Through Advisory Opinions? 69

Eyal Benvenisti & George W. Downs
Prospects for the Increased Independence of International Tribunals 99

II. Judicial Lawmaking for Economic Governance: The ICSID and the WTO 131

Stephan W. Schill
System-Building in Investment Treaty Arbitration and Lawmaking 133

Ingo Venzke
Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy 179

Michael Ioannidis

A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law 215

Thomas Kleinlein

Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law 251

III. Judicial Lawmaking to Protect the Individual: The IACtHR, the ECtHR, and the ICTY 293

Christina Binder

The Prohibition of Amnesties by the Inter-American Court of Human Rights 295

Markus Fyrnys

Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights 329

Milan Kuhli & Klaus Günther

Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals 365

IV. Further Fields of Judicial Lawmaking: The ICJ and the CAS 387

Karin Oellers-Frahm

Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function 389

Niels Petersen

Lawmaking by the International Court of Justice – Factors of Success 411

Lorenzo Casini

The Making of a *Lex Sportiva* by the Court of Arbitration for Sport 439

V. Strategies in Response: Concluding Considerations and Outlook 471

Armin von Bogdandy & Ingo Venzke
On the Democratic Legitimation of International Judicial Lawmaking 473

I. Framing the Issue

Beyond Dispute: International Judicial Institutions as Lawmakers

*By Armin von Bogdandy & Ingo Venzke**

A. The Research Interest

The increasing number of international judicial institutions, producing an ever-growing stream of decisions, has been one of the dominant features of the international legal order of the past two decades. The shift in quantity has gone hand in hand with a transformation in quality. Today, it is no longer convincing to only think of international courts in their role of settling disputes.[1] While this function is as relevant as ever, many international judicial institutions have developed a further role in

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[1] Note that we follow a broad understanding of the term "court". It covers arbitral tribunals as well as other institutions fulfilling a court-like function such as the WTO panels and Appellate Body even if they change in composition and do not formally *decide* a case. *See also* Project on International Courts and Tribunals, available at: http://www.pict-pcti.org, (adopting an equally broad understanding of "court"); *cf*. Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,* 31 NYU JOURNAL OF INTERNATIONAL LAW & POLITICS 709 (1999).

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what is often called global governance. Their decisions have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures. The practice of international adjudication creates and shifts actors' normative expectations and as such develops legal normativity.[2] Many actors use international judicial decisions in similar ways as they do formal sources of international law.[3] To us, this role of international adjudication beyond the individual dispute is beyond dispute.

Although international courts have always been producing such normativity, not only the sheer volume, but also the systematic fashion in which some are developing a body of law of general relevance points to a change in kind.[4] At the same time, we find that neither theory nor doctrine has yet adequately captured this aspect of international judicial activity. Our collaborative research project suggests that the generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and as an exercise of public authority. Equipped with this understanding, we ultimately hope to draw attention to the legitimatory implications of international judicial lawmaking, placing the project in the context of broader investigations of legitimate governance beyond the nation state.[5] Above all, we explore how this judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials. In that vein, one could say that international judicial lawmaking is not only beyond dispute in the sense of being an undeniable facet of global

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[2] The creation and stabilization of normative expectations is considered by many, otherwise diverging, contemporary theories as the core function of law, *see* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 427 (1997); NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 151 (1995).

[3] Note that Art. 38 ICJ-Statute refers to judicial decisions as "subsidiary means for the determination of rules of law", we discuss this qualification *infra* section B.III, notes 62-64.

[4] Cf. Yuval Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 EJIL 73 (2009).

[5] It follows the study on "The Exercise of Public Authority by International Organizations", Special Issue, 9 German Law Journal (2008); The Exercise of Public Authority by International Institutions: Advancing International Institutional law (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds, 2010). *See further* Ingo Venzke, On Words and Deeds. How the Practice of Interpretation Develops International Norms (unpublished doctoral thesis, 2010).

governance, but also in terms of being removed from politico-legislative processes and from challenge in the court of public opinion.

Although the phenomenon of international judicial lawmaking is omnipresent, it is most visible in legal regimes in which courts have compulsory jurisdiction and decide with sufficient frequency to allow for a *jurisprudence constante* to develop. This special issue presents in detail the judicial creation of the system of investment law, the development of Art. XX GATT into incisive standards for domestic regulatory policy, the creation of procedural obligations in policy-making, the lawmaking potential of proportionality analysis, the prohibition of amnesties in human rights law, the criminalization of belligerent reprisals in international humanitarian law, the doctrine of *erga omnes* in general international law, and the self-empowerment of courts, be it through proportionality analysis, through provisional measures, or through the pilot judgment procedure of the European Court of Human Rights.[6] It also analyses the creation of a global *lex sportiva* through private arbitration, in order to allow for comparison.[7]

Perhaps the most noticeable legal and institutional development has occurred in international economic law. For example, international investment agreements usually contain standards that have only gained substance in the practice of adjudication. Fair and equitable treatment, one such standard, started as a vague concept that hardly stabilized normative expectations with regard to what would legally be required from host states. Today, there exists a rich body of investment law on

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[6] See respectively the contributions in this issue by Stephan Schill, System-Building in Investment Treaty Arbitration and Lawmaking; Ingo Venzke, Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy; Michael Ioannidis, A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law; Thomas Kleinlein, Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law; Christina Binder, The Prohibition of Amnesties by the Inter-American Court of Human Rights; Milan Kuhli & Klaus Günther, Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals; Karin Oellers-Frahm, Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function; Markus Fyrnys, Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights; Marc Jacob, Precedents: Lawmaking Through International Adjudication.

[7] Lorenzo Casini, The Making of a *Lex Sportiva* by the Court of Arbitration for Sport, in this issue.

the issue, which shapes and hardens the standard.[8] International arbitral tribunals have decisively regulated the relationship between investors and host states and they have developed and stabilized their reciprocal expectations.

Such judicial lawmaking is not just a collateral side effect of adjudicatory practice. Corroborating evidence for this effect comes from former General Counsel of the World Bank Aron Broches, who pushed for creating the International Centre for Settlement of Investment Disputes (ICSID) in the early 1960s against the backdrop of failed international negotiations regarding the applicable material law. He advanced the programmatic formula "procedure before substance" and argued that the substance, i.e. the law of investment protection, would follow in the practice of adjudication.[9] And it did, as judge-made law, deeply imbued with the functional logic that pervades the investment protection regime. In the wake of its economic crises, Argentina, for example, realized that the judicially built body of law left it little room to maneuver and maintain public order without running the risk of having to pay significant damages to foreign investors.[10]

Such judicial lawmaking is difficult to square with traditional understandings of international adjudication, which usually view the international judiciary as fixed on its dispute settlement function. Many textbooks of international law present international courts and tribunals, usually towards the end of the book in the same chapter with mediation and good offices, simply as mechanisms to settle disputes.[11] They focus only on part of the picture and shut their eyes to the rest. Even if international courts are admitted or expected to contribute to the development of the law, it remains either obscure what is meant by development or development is equated with clarifying what the law is. Our in-

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[8] Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 151 (Stephan Schill ed., 2010).

[9] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 18 (2008).

[10] Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective,* in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW, 323, 344 (Tomer Broude & Yuval Shany eds, 2008).

[11] *See*, e.g., Malcolm N. Shaw, International Law 1010 (2008); Patrick Daillier, Alain Pellet, Mathias Forteau & Nguyen Quoc Dinh, Droit international public 923 (2009).

terest in judicial lawmaking is specifically triggered by the observation that judicial practice is creative and that it may have considerable consequences for the regulatory autonomy of states, thus affecting the space for domestic democratic government. We wish to explore above all the democratic justification of international judicial lawmaking, stating clearly at the outset, however, that international law and adjudication may also serve as devices that can alleviate democratic deficits in the postnational constellation.[12] We are not out to categorically mark international judicial lawmaking as illegitimate, let alone as illegal.[13]

The aim of this project is three-fold. It first seeks to contribute to a better understanding of international judicial lawmaking and the challenges it raises for prevailing narratives of legitimation in international law. This mainly requires conceptual work and theoretical reflection. Second, it examines instances of lawmaking by particular institutions in closer detail. Such analyses will show that these institutions portray different dynamics and face different problems. Third, it proposes ideas about how to react to problems in the legitimation of judicial lawmaking and it makes suggestions as to how to develop the law accordingly. The task for the present contribution is to introduce the *problématique* and overall framework.

It should be noted from the beginning that addressing judicial activity as lawmaking does not, as such, entail a negative judgment. Also, quite obviously, insisting, in doctrinal terms, that judges should only *apply* and not *make* the law does not make the phenomenon go away. Judicial lawmaking is an integral element of almost any adjudicatory practice. At the same time, there are different degrees of judicial innovation. Without too much theoretical baggage, it is probably easy to see, and safe to say, that the International Court of Justice's lawmaking impetus

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[12] JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001); Stephan Leibfried & Michael Zürn, *Von der nationalen zur postnationalen Konstellation*, in: TRANSFORMATIONEN DES STAATES?, 19 (Stephan Leibfried & Michael Zürn eds, 2006); Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EJIL 885 (2004); VENZKE (note 5).

[13] For a fierce and unconvincing argument on the illegitimacy, or, at best, plain futility of international adjudication, *see* ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (2009); with regard to the ECJ, *see* Dietrich Murswiek, *Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung*, 28 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 481, 484 (2009).

differs widely between its *Kosovo* opinion and its *Wall* opinion.[14] We discuss degrees of judicial lawmaking and questions of legitimacy in our concluding contribution. At this stage it may already be noted that the absence of judicial innovation, as it characterizes the *Kosovo* opinion, might actually be just as problematic as more audacious instances of judicial lawmaking.

Our focus does not question the view that international courts are integral parts of strategies to pursue shared aims, to mend failures of collective action, and to overcome obstacles of cooperation. International courts frequently play a crucial role in meeting hopes for betterment and in fulfilling promises vested in international law. But it is a common feature that the successful establishment of any new institution gives rise to new concerns. As many courts and tribunals have become significant lawmakers, their actions require an elaborate justification that lives up to basic democratic premises and feeds into the development of doctrinal *acquis*.[15] Traditional approaches miss large chunks of reality and are no longer sufficient.

The first step of this introductory contribution aims at defining more closely the phenomenon we investigate, i.e. the generation of normativity by international adjudication. It presents the reasons why the cognitive paradigm for understanding judicial activity is inadequate (B.I.), specifies what we mean by judicial lawmaking (B.II.), and works out the understanding of judicial lawmaking as an exercise of public authority, indicating why it needs to live up to standards of democratic justification (B.III.). With this qualification of the phenomenon, the second step addresses the problems in the justification of international judicial lawmaking. Judicial lawmaking is a common feature of most legal orders, but in international law it is particular to the extent that it is not

[14] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, available at: http://www.icj-cij.org/docket/files/141/15987.pdf; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, available at: http://www.icj-cij.org/docket/files/131/1671.pdf. See Karin Oellers-Frahm, Lawmaking Through Advisory Opinions?, in this issue. For pointed commentary on the direction of impact of each opinion, see Robert Howse & Ruti Teitel, Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?, 11 German Law Journal 841 (2010); Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory, 99 AJIL 1 (2005).

[15] Armin von Bogdandy & Ingo Venzke, On the Democratic Legitimation of International Judicial Lawmaking, in this issue.

balanced with a functionally equivalent legislative process (C.I.) Further problems in the justification of international judicial lawmaking arise from its fragmentary nature (C.II.). We discuss strategies in response to these problems in our separate contribution that concludes this issue in view of the wealth of its different insights. The final step of this introduction sketches this special issue's structure and walks through its contents (D.).

B. The Phenomenon of Lawmaking by Adjudication

I. (Far) Beyond the Cognitive Paradigm of Adjudication

Any argument that investigates judicial lawmaking and its justification would either be nonsensical or plainly pointless if the nature of judgments was that of cognition. The scales handled by *Justitia* would then look like a purely technical instrument that yields right answers. Correct adjudication would have to discover the law that is already given and judicial reasoning in support of a decision would simply serve the purpose of showing the rightness of cognition. Sure enough, few would still advocate a traditional cognitivistic understanding of judicial interpretation as Montesquieu famously expressed it in his metaphoric depiction of a judge or a court as "*bouche de la loi.*"[16] And yet, there is still a strong view suggesting that the right interpretation may be derived from the whole of the legal material in view of the intrinsic logic of the individual case through the correct application of the rules of legal discourse, considering all pertinent provisions, the context of the respective treaty, its object and purpose, and the whole of the international legal order.[17]

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[16] *Cf.* Joachim Lege, *Was Juristen wirklich tun. Jurisprudential Realism,* in: RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT, 207, 216 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008); RALPH CHRISTENSEN & HANS KUDLICH, THEORIE RICHTERLICHEN BEGRÜNDENS 26 (2001).

[17] *See* International Law Commission, *Third Report on the Law of Treaties*, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 5, 53 (1964) (assembling testimony for such a view on interpretation). *Cf.* Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning,* in: MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY, 34 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds, 2010).

Moreover, there is a strong incentive for judges and courts to maintain such an image of their activity as it forms an intricate part of a prevailing and self-reinforcing judicial ethos. Judges apply the law, this is the source of their authority, and whenever the impression gains currency that this is not what they are actually doing, they are usually in trouble.[18] But the obvious gap between the outward show and the actual activity should be overcome by more appropriate theory and doctrine that gives a convincing account, both descriptive as well as normative, of international judicial activity in the 21st century, an account that can also be conveyed in a rather straightforward fashion.

The traditional understanding of international adjudication as a method of applying given abstract norms to concrete cases at hand has proved unsound for a long time. It is beyond dispute that cognitivistic understandings of judicial decisions do not stand up to closer scrutiny. From the time of *Kant's Critique* it may hardly be claimed that decisions in concrete situations can be deduced from abstract concepts.[19] One of the main issues of legal scholarship is determining how to best define this insight and how to translate it into doctrine. Hans Kelsen famously argued that it is impossible to maintain a categorical distinction between law-creation and law-application.[20] He mocked theories of interpretation that want to make believe that a legal norm, applied to the concrete case, always provides a right decision, as if interpretation was an act of clarification or understanding that only required intellect but not the will of the interpreter.[21]

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[18] Judith N. Shklar, Legalism 12-13 (1964). Consider the ICJ's emblematic pronouncements in *Fisheries Jurisdiction* (Great Britain and Northern Ireland v. Iceland), 25 July 1974, ICJ Reports 1974, 3, para. 53; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para. 18.

[19] Immanuel Kant, Critique of Pure Reason A131-148 (2008 [1781]). *Cf.* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoretical Inquiries in Law 9 (2007).

[20] Hans Kelsen, Law and Peace in International Relations 163 (1942); Hans Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik 82-83 (1934).

[21] *Id*., 74, 95; Hans Kelsen, Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze xii-xvi (1923). In closer detail, András Jakab, *Probleme der Stufenbaulehre*, 91 Archiv für Rechts- und Sozialphilosophie 333, 334 (2005).

More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.[22] Building on the dominant variant of semantic pragmatism and its principle contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or interpretation of a concept contributes to the making of its content. The discretionary and creative elements in the application of the law make the law.[23] He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[24] This might allow for a discursive embedding of adjudication, which can be an important element in the democratic legitimation of judicial lawmaking.[25]

This strand of thinking does not detract from the deductive model of legal reasoning. The deductive mode of reasoning, which is dear to many lawyers, does not presuppose the belief in the full determinacy of legal concepts. It is rather based on the principle that judicial decisions must be justified. The reasoning in support of a decision does not serve

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[22] *See* THE LINGUISTIC TURN. ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967) (giving the name to this shift in philosophy); Richard Rorty, *Wittgenstein, Heidegger, and the Reification of Language*, in: 2 ESSAYS ON HEIDEGGER AND OTHERS, 50 (1991) (offering an accessible overview on what it is about).

[23] Brandom argues that "there is nothing more to the concept of the legal concepts being applied that the content they acquire through a tradition of such decisions, that the principles that emerge from this process are appropriately thought of as 'judge-made law'". Robert B. Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 EUROPEAN JOURNAL OF PHILOSOPHY 164, 180 (1999). A similar argument has been developed before by Friedrich Müller, *Richterrecht – rechtstheoretisch formuliert*, in: RICHTERLICHE RECHTSFORTBILDUNG. ERSCHEINUNGSFORMEN, AUFTRAG UND GRENZEN, 65, 78 (Hochschullehrer der Juristischen Fakultät der Universität Heidelberg eds, 1986).

[24] Brandom (note 23), 181 ("[t]he current judge is held accountable to the tradition she inherits by the judges yet to come."). *Cf.* JASPER LIPTOW, REGEL UND INTERPRETATION. EINE UNTERSUCHUNG ZUR SOZIALEN STRUKTUR SPRACHLICHER PRAXIS 220-226 (2004).

[25] Von Bogdandy & Venzke (note 15).

to show a necessary result but it is burdened with justifying the decision. In this view, Hans-Joachim Koch and Helmut Rüßmann defend the deductive mode of arguing as the central place of judicial rationality. They do not extend their defense to the schema of *analytical* deduction.[26] The deductive mode of reasoning demands that whenever a norm is disputed, the decision in favor of one or the other interpretation must be justified – it needs to be made explicit, to recall the work of Brandom on this issue.[27] In sum, deductive reasoning turns out to be an instrument for controlling and legitimizing judicial power. It regards the modus of *justifying* decisions and not the process of *finding* them.[28]

II. Judicial Lawmaking

The creation and development of legal normativity in judicial practice takes place in the context of concrete cases. Judicial decisions settle the particular case between the parties. They apply pertinent norms in view of the facts and legal interpretations presented to them. Owing to the doctrine of *res judicata*, judgments are taken to prescribe definitely what is required in a concrete situation from the parties of the dispute. At the same time, this practice reaches beyond the case at hand.[29] A judgment, its decisions, as well as its justification can amount to signifi-

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[26] Hans-Joachim Koch & Helmut Rüßmann, Juristische Begründungslehre 5, 69 (1982). *See* specifically on the lawmaking dimension of judicial decisions *id.*, 248.

[27] This is also the central theme in Rorbert B. Brandom, Making it Explicit: Reasoning, Representing, and Discursive Commitment (1998). For a concise introduction into this theme, *see* Robert B. Brandom, *Objectivity and the Normative Fine Structure of Rationality*, in: Articulating Reasons: An Introduction to Inferentialism, 186 (2000).

[28] Ulfried Neumann, *Theorie der juristischen Argumentation,* in: Rechtsphilosophie im 21. Jahrhundert, 233, 241 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008). Many have argued that the concept of decision, *i.e.* a choice between at least two alternatives, defies the possibility that it can be *found*. This is quite a fitting thought, although not all consequences drawn from it are equally compelling. Jacques Derrida, *Force of Law. The Mystical Foundation of Authority*, 11 Cardozo Law Review 919 (1990); Luhmann (note 2), 308.

[29] William S. Dodge, *Res Judicata*, in: The Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., 2006), available at: http://www.mpepil.com.

cant legal arguments in later disputes about what the law means.[30] We concentrate precisely on this dimension of judicial lawmaking that we see in the creation and development of actors' general normative expectations – that is expectations sustained and stabilized by law about how actors should act and, more specifically, how they should interpret the law. Most international judgments reach beyond the dispute and the parties.

Courts, at least those that publish their decisions and reasoning, are participants in a general legal discourse with the very decision of the case, with the justification that carries the decision (*ratio decidendi*), and with everything said on the side (*obiter dictum*).[31] For good reasons, actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court to rule consistently if a similar case arises. Actors in Latin America will expect the Inter-American Court of Human Rights to declare amnesties for generals who ordered torture null and void;[32] a party requesting a provisional measure by the ICJ will expect the court to declare it as binding;[33] and foreign investors, as well as host states, will expect any investment tribunal to consider arbitrary and discriminatory processes, or a lack of due process, as breach of fair and equitable treatment.[34] Some domestic constitutional courts even require domestic institutions, in particular domestic courts, to heed the authority of international decisions as

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[30] Christian Kirchner, *Zur konsequentialistischen Interpretationsmethode,* in: INTERNATIONALISIERUNG DES RECHTS UND SEINE ÖKONOMISCHE ANALYSE, 37, 39 (Tomas Eger, Jochen Bigus, Claus Ott & Georg von Wangenheim eds, 2008).

[31] Mohamed Shahabuddeen, Precedent in the World Court 76, 209 (1996); Iain Scobbie, *Res Judicata, Precedent, and the International Court: A Preliminary Sketch*, 20 Australian Yearbook of International Law 299 (1999); Stephan W. Schill, The Multilateralization of International Investment Law 321 (2009); Armin Höland, *Wie wirkt Rechtsprechung?*, 30 Zeitschrift für Rechtssoziologie 23, 35 (2009). *Also see* Oellers-Frahm (note 14), 1046 (arguing that advisory opinions do not only clarify the law but also contribute to establishing basic doctrines of international law).

[32] Binder (note 6).

[33] Oellers-Frahm (note 6).

[34] Schill (note 6). *Cf*. Jacob (note 6) (showing how arguing with precedents is quite natural and appealing in judicial reasoning, not least because it has a legitimating effect).

precedent.[35] In addition, it seems that, as a matter of fact, many decisions not only aim at settling the case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon that also clearly transcends the limits of the particular dispute and impacts the general development of the legal order is of particular interest to us.

Judicial lawmaking is not a concept of positive law, but a scholarly concept; as such it is to be judged on its usefulness for legal scholarship. One contending conceptual proposal is judicial activism (or pro-active courts).[36] One of the main drawbacks of this concept is that it does not specify in what the activism lies. It also obscures the most important element of such "activism"; namely the generation of legal normativity for third parties not involved in the dispute. This also holds true for the concept of dynamic interpretation that tends to overdo what states would have had to know the moment they entered into legal obligations.[37] In the German-speaking world, the concept of *richterliche Rechtsfortbildung* is used often[38] and can be translated as the judicial development or evolution of the law, which are also terms of art in English. Its upside is that it clearly differentiates adjudication and legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both of these aspects are expressed in the concept of judicial lawmaking, which is, in addition, introduced in the Anglo-American legal terminology.[39]

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[35] Bundesverfassungsgericht (Federal Constitutional Court), 14 October 2004, 2 BvR1481/04, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307, for an English translation, *see* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html, margin number 68 (referring to a domestic court's duty to take a decision of the ECHR into account).

[36] *See* Binder (note 6).

[37] Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 13 July 2009, para. 64. Cf. Julian Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, 9 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 443 (2010).

[38] *See* RICHTERLICHE RECHTSFORTBILDUNG. ERSCHEINUNGSFORMEN, AUFTRAG UND GRENZEN (Hochschullehrer der Juristischen Fakultät der Universität Heidelberg eds, 1986).

[39] This distinction is held up in the use of different terms in German-speaking legal science whereas in the world of common law the innovative judge frequently simply figures as *lawmaker*. *South Pacific Co. v. Jensen*, 244

For these reasons we opt for lawmaking as our leading concept to mark our object of inquiry. It captures the generation of legal normativity by international courts that creates, develops, or changes normative expectations.

The term *judicial* lawmaking indicates that it is not the only form of lawmaking. In fact, much lawmaking occurs by using the formal sources of law. One reason for unease with the concept of judicial lawmaking might be due to the concern that it is oblivious to important differences between judicial lawmaking and lawmaking through formal sources.[40] We agree with this concern. Whoever develops theory and doctrine on judicial lawmaking needs to be cautious of differences with lawmaking through formal sources, paying particular attention to distinct legitimatory profiles and the divergent institutional requirements. Sweepingly equating judicial law *application* and *legislation* may not be convincing. Speaking of judicial lawmaking is much less precarious than also using the term legislation for the activity of courts.[41] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

III. International Judicial Lawmaking as an Exercise of Public Authority

International adjudication would not of its own require an elaborate justification under the principle of democracy if it did not amount to an exercise of public authority: The very term *kratos* implies that link.[42] In the domestic setting, the public authority of courts is an essential element: *Justitia* herself not only handles scales but also wields a sword. It is rather evident in democratic constitutional contexts marked by the rule of law that mechanisms are in place to effectively implement domestic court decisions. This is evidently not the same when it comes to decisions of international courts. According to Art. 94(2) UNC the Se-

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U.S. 205, 221 (1917) (Justice Holmes, dissenting); Lord Reid, *The Judge as Law Maker*, 12 JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 22 (1972).

[40] Oellers-Frahm (note 14), section D.III.

[41] Hersch Lauterpacht, The Development of International Law by the International Court 155-223 (1958) (speaking of "judicial legislation").

[42] *See* Werner Conze, *Demokratie*, in: 1 GESCHICHTLICHE GRUNDBEGRIFFE, 848 (Otto Brunner, Werner Conze & Reinhart Koselleck eds, 1972).

curity Council could take coercive measures if disregard for decisions of the ICJ threatened international peace and security.[43] In practice, however, noncompliance with judgments of the ICJ or most other courts rarely draws coercive measures of such kind in response.

The relative lack of strong enforcement mechanisms at international institutions, whether the institution is a bureaucracy or a court, certainly needs to be taken into account in addressing their democratic legitimation. But does this mean that our investigation into their democratic justification is skewed? This might indeed be the case if one followed a traditional conception of public authority that is limited to coercive power.[44] Then the activity of most international institutions, including judicial lawmaking, would not amount to public authority. Yet, such a traditional conception has become, if it has not always been, both inadequate and implausible. The concept of public authority should rather include other ways of exercising power that are no less decisive and incisive than coercive enforcement.[45] Today, it is an empirical fact that the impact of international institutions on social life can be similar in significance to that of domestic institutions.[46] In order to give effect to this observation and experience, we understand authority more broadly as the legal capacity to influence others in the exercise of their freedom, i.e. to shape their legal or factual situation.[47] Even if international judicial decisions are usually not backed by coercive mechanisms,

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43 *See* Hermann Mosler & Karin Oellers-Frahm, *Article 94,* in: THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, 1174, 1176 (Bruno Simma ed., 2002).

44 Robert A. Dahl, *The Concept of Power*, 2 Behavioral Science 201, 202 (1957); Ralf Dahrendorf, Über den Ursprung der Ungleichheit unter den Menschen 20 (1961).

45 *Cf*. Michael Barnett & Raymond Duvall, *Power in Global Governance*, in: POWER IN GLOBAL GOVERNANCE, 1 (Michael Barnett & Raymond Duvall eds, 2005) (offering a nuanced conception of power that suits present purposes).

46 See Ingo Venzke, International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law, 9 GERMAN LAW JOURNAL 1401 (2008).

47 Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 GERMAN LAW JOURNAL 1375, 1381 (2008).

they still condition parties to the dispute as well as other subjects of the legal order in the exercise of their freedom.[48]

That said, international courts *are* frequently embedded in contexts that may lever considerable enforcement mechanisms in support of their decisions, even if not to the same degree as in many domestic contexts of the rule of law. The Committee of Ministers of the Council of Europe oversees the implementation of decisions of the ECtHR;[49] member states of the ICC cooperate with the court in the execution of sentences and are obliged to implement its decisions;[50] in the framework of the WTO, members may resort to countermeasures once their claims have succeeded in adjudication;[51] and arbitration awards of ICSID-Panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[52] In sum, a more refined understanding of how authority is exercised and a cursory look at the enforcement mechanisms that do exist supports the contention that international courts do exercise public authority in deciding legal disputes.

But what about the lawmaking dimension of international decisions that reaches beyond the individual case? Judicial decisions impact the legal order differently than new legal provisions that pass by the way of the sources of law. Decisions figure as arguments and influence the law through their impact in the legal discourse. The lawmaking effect of judicial decisions, in particular in their general and abstract dimension that goes beyond the individual case, does not only depend on the *voluntas*, but also on its *ratio*. Legal scholarship, legal counsel, other courts and the same court at a later point in time must first be convinced of the quality of the decision. Whether a judicial interpretation turns out to make law depends on its reception by other actors involved. If this is so, does it then make sense to understand lawmaking in the practice of adjudication as an exercise of public authority?

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48 Reputational costs are relevant even for such weighty and mighty actors as the United States. In a *rational choice* perspective, *see* ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS 71 (2008).

49 Art. 46 (2) European Convention on Human Rights.

50 Art. 93 *et seq.* Rome Statute of the International Criminal Court.

51 Art. 22 Dispute Settlement Understanding.

52 Art. 54 ICSID-Convention.

International decisions enjoy an exceptional standing in semantic struggles about what the law means.[53] Judicial precedents redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape.[54] In many judgments, precedents act as arguments in support of decisions that in terms of authority are hardly inferior to provisions spelled out in an international treaty. Courts regularly use precedents in their legal reasoning and, at times, engage in detailed reasoning on how earlier decisions are relevant or not. Disputing parties are of course well aware of this and thus fight about the meaning of earlier judicial decisions as if they formed part of the sources of international law and as if they could themselves carry judgments of (il)legality. In practice the response to one party relying on an earlier judicial decision is not that there is no formal rule of precedent, but rather, the response is to counter that claim with other arguments, distinguishing the case referred to, or using it in a different way. Many contributions in this issue analyze this dynamic in closer detail.[55]

The Appellate Body of the WTO has for example relied on Art. 3(2) DSU (providing that "[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system") to argue that previous reports on a subject matter "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[56] Recently it raised its tone a notch and even suggested that a failure to do

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[53] On the akin concept of „semantic fights", *see* Ralph Christensen & Michael Sokolowski, *Recht als Einsatz im semantischen Kampf,* in: SEMANTISCHE KÄMPFE. MACHT UND SPRACHE IN DEN WISSENSCHAFTEN, 353 (Ekkehard Felder ed., 2006). For a yet more drastic understanding, *see* Robert M. Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601 (1986).

[54] ALAN E. BOYLE & CHRISTINE M. CHINKIN, THE MAKING OF INTERNATIONAL LAW 272-311 (2007). *Cf*. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS LAW JOURNAL 814, 838 (1987), ("The judgment represents the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone. These performative utterances … formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. They succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.")

[55] *See*, in particular, the contributions by Jacob (note 6); Schill (note 6); Venzke (note 6); Oellers-Frahm (note 14).

[56] Appellate Body Report, *Japan – Taxes on Alcoholic Beverage*s, WT/DS 8, 10 and 11/AB/R, 4 October 1996, 14-15.

so by a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.[57] Panel and Appellate Body reports plainly do create legitimate expectations that must be considered in subsequent adjudication.[58] This is usually seen clearly in legal scholarship and it is evident to anyone involved in the operation of the system. For example, in the discussions pertaining to the *US-Shrimp* report, the Brazilian representative in the WTO Dispute Settlement Body stated that "[a]lthough no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement."[59]

In sum, the disputes about precedents illustrate how judicial decisions impact the legal order and influence individual as well as collective spheres of freedom beyond the individual case. The adjudicatory practice of any court that has some reputation should accordingly be qualified as an exercise of public authority that demands justification.[60] This is in particular so when courts have compulsory jurisdiction and decide a stream of cases conducive to a *jurisprudence constante*. It may be worth adding that our relatively broad conception of authority also stems from a principled consideration: If public law is seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination, then any act with an effect on these normative vantage points should come into consideration the moment its effects are significant enough to give rise to reasonable doubts about its legitimacy. International courts and tribunals enjoy an outstanding position in international legal discourse and their interpretations palpably redistribute argumentative burdens. They develop the law through their practice in a way that conditions others in the exer-

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57 This is a reference to Art. 11 DSU. *See*, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para. 162 (stating that "We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system").

58 *See* Venzke (note 6).

59 Dispute Settlement Body, Minutes of the Meeting held on 6 November 1998, WT/DSB/M/50, 12.

60 On the concept of reputation, *see* GUZMAN (note 48), 71.

cise of their freedom as they find themselves in a legal situation shaped by the courts.

This effect of judicial precedents is concealed by the doctrinal ordering of things in light of Art. 38(1)(d) ICJ-Statute, classifying international judicial decisions as "subsidiary means for the determination of rules of law." Under the impact of the cognitivistic understanding of judicial interpretation, decisions are thought of as a source that helps one recognize the law but not as a source of law.[61] It is still a lasting task to formulate a convincing response to the dissonance between the ordering of sources doctrine and the actual working of precedents. This is a task that strikes above all at positivist thinking prevalent in continental Europe.[62] Conversely, scholars at home in the common law tradition tend to neglect prerequisite institutional contexts when they downplay the distinction between sources of law and sources for the determination of law; above all, they ignore the fact that in domestic contexts the common law idea of judicial lawmaking goes hand in hand with a notion of parliamentary legitimation that is unworkable at the international level.[63] The distinction retains importance in particular if one considers that the international institutional order is marked by an asymmetry between powers. This leads us to the central problem in the justification of international courts: In domestic contexts of functioning democracies, judicial lawmaking is embedded in a responsive political system – something that is lacking at the international level in similar quality.

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[61] Allain Pellet, *Article 38,* in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 677, paras 301-319; GODEFRIDUS J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 169 (1983).

[62] *See, e.g.,* Georges Abi-Saab, *Les sources du droit international: Essai de déconstruction,* in: 1 EL DERECHO INTERNACIONAL EN UN MUNDO EN TRANSFORMACIÓN, 29 (Manuel Rama-Montaldo ed., 1994); BOYLE & CHINKIN (note 54), 267.

[63] *Id.,* 266-272; more cautious and openly flagging his common law bias, Robert Howse, *Moving the WTO Forward – One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223 (2009).

C. On the Justification of International Judicial Lawmaking

I. The Decoupling of Law from Parliamentary Politics

The lawmaking effect of adjudication is a common feature of judicial activity in any legal order.[64] However, *international* judicial lawmaking displays specific features that make it structurally more problematic when compared to the domestic context. One of the quintessential lessons of modern constitutionalism, which is worth recalling, is that legislation and judicial adjudication are two phenomena that should be kept apart and at the same time be understood in their intricate interaction.[65] It is a related and similarly great achievement of constitutional theory that it has conceptually grasped both distinction and connection, while stabilizing their simultaneity in legal institutions. The prevailing approach comes under the heading of separation of powers (or checks and balances) and it situates the legitimation of every power in its interaction with other powers.[66] Years of quarrel and learning have also established that law means *positive law*, at least in modern constitutional states.[67] The hallmark of positivity is that the legislature is responsible for this law.[68] In democratic societies, the majority (usually understood

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[64] *See* already MANLEY O. HUDSON, PROGRESS IN INTERNATIONAL ORGANIZATION 80 (1981 [1932]); LAUTERPACHT (note 41), 155 ("judicial lawmaking is a permanent feature of administration of justice in every society").

[65] *See* Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in: RECHT, STAAT, FREIHEIT, 143 (1991); MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 138 (1992).

[66] John Locke, The Second Treatise of Government ch. XII (1690); Giuseppe de Vergottini, Diritto costituzionale comparato 346 *et seq.* (1999); for a detailed analysis, *see* Hansjörg Seiler, Gewaltenteilung: Allgemeine Grundlagen und schweizerische Ausgestaltung (1994); Christoph Möllers, Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich (2005).

[67] For an early use of such a conception of positivity, *see* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHIE DES RECHTS § 3 (1970).

[68] Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in: RECHT, STAAT, FREIHEIT, 289, 322 (1991). With regard to the situation in a common law context: PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 141 (1991).

as the elected government) can intervene in the legal order by way of legislative procedures and, thus, can change the law.[69]

This main avenue of democratic legitimation is strained when it comes to international law and adjudication in a static perspective that focuses on the role of the parliament in the making of international agreements.[70] But the phenomenon of international judicial lawmaking primarily directs attention to a *dynamic perspective*.[71] International courts do not operate as parts of polities that include functioning political legislatures. Once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. By agreeing to an international treaty, the parliamentary majority of the moment cements its position and puts it beyond the reach of any later majority.[72] This strategy is particularly incisive when it comes to regimes that are characterized by relatively strong mechanisms of adjudication because such regimes

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[69] Armin von Bogdandy, Gubernative Rechtsetzung 35 (2000). We do not think that international courts can draw sufficient legitimacy from the fact that they check the power exercised by other institutions. Such argument is made by Sabino Cassese, When Legal Orders Collide: The Role of Courts 122-124 (2010).

[70] Our argumentation only relates to countries with a democratic constitution. For citizens living under authoritarian rule, this problem has to be examined separately. On the role of parliaments, *see* Armin von Bogdandy, *Parlamentarismus in Europa: eine Verfalls- oder Erfolgsgeschichte?*, 130 Archiv des öffentlichen Rechts 445 (2005); Philipp Dann, Parlamente im Exekutivföderalismus 294 (2004); Meinhard Hilf & Matthias Reuß, *Verfassungsfragen lebensmittelrechtlicher Normierung im europäischen und internationalen Recht*, 24 Zeitschrift für das gesamte Lebensmittelrecht 289, 293 (1997); Rüdiger Wolfrum, *Die Kontrolle der auswärtigen Gewalt*, 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 38 (1997).

[71] Jan Klabbers, On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization, 74 Nordic Journal of International Law 405 (2005); Lorand Bartels, The Separation of Powers in the WTO: How to Avoid Judicial Activism? 53 International & Comparative Law Quarterly 861 (2004).

[72] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 International Organization 421, 429 (2000); Judith Goldstein, Miles Kahler, Robert Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 International Organization 385 (2000) (understanding this to be a general political strategy).

tend to portray a greater dynamic and non-compliance usually bears greater costs. A later majority may in principle be able to exit a regime. But this possibility speaks in favor of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of domestic public authority.[73] It can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option because it is legally impracticable (long sunset clauses on investment treaties, for example) or the costs of exit are prohibitively high.[74]

This dynamic perspective on the decoupling of law from politics is critical when it comes to areas of the law which are marked by international judicial institutions. As analyses of the American Convention on Human Rights, the European Convention on Human Rights, as well as international trade and investment law all show, international judicial institutions have had significant impact on the development of the law and on the shape of the respective legal regimes.[75] Their grasp on the making of the law has not been confined to substantive provisions but is maybe all the more creative with regard to developments in procedural law and their genuine competences.[76] The history of provisional measures tells the intriguing story of a vivid dynamic between international courts and tribunals, starting out with a claim by the Inter-American Court of Human Rights that its provisional measures are binding, passing via a number of other international judicial institu-

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[73] Art. 13(2) Universal Declaration of Human Rights, GAOR III Resolutions, UN-Doc. A/810, 71; Art. 12(2) International Covenant on Civil and Political Rights, UNTS, vol. 999, 171; Art. 2(2) Additional Protocol 4 to the European Convention on Human Rights, ETS No. 46.

[74] Note that, referring to the doubtful legitimation of arbitral jurisdiction, Bolivia declared on 1 May 2007, that it would exit the ICSID Convention, *see* Bolivia Foreign Ministry, Letter Concerning Denunciation of ICSID Convention, 1 May 2007, 46 INTERNATIONAL LEGAL MATERIALS 973 (2007). *Also see* Christian Tietje, Karsten Nowrot & Clemens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, in: 74 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (Christian Tietje, Gerhard Kraft & Rolf Sethe eds, 2008).

[75] *See* respectively the contributions by Binder (note 6), Venzke (note 6), Schill (note 6), Oellers-Frahm (note 14). Compare this with the ambivalent track record explained by Petersen (note 6).

[76] On developments in procedural law that form part of strategies responding to problems in the justification if international judicial lawmaking, *see* von Bogdandy & Venzke (note 15).

tions, including the International Court of Justice, and even leading arbitral tribunals and human rights bodies to make the same claim, although the wording and drafting history of the rules of procedure of the former suggested otherwise and the latter are not even empowered to deliver binding opinions.[77] The European Court of Human Rights has also contributed to a remarkable innovation in its procedures with the instigation of so-called *pilot judgments*.[78]

A number of qualifications would be in order and a more detailed picture may well offer instances in the institution's histories that seem ambivalent. Some institutions, and some judges in those institutions, are also more dynamic than others. This does not diminish the argument that the remarkable increase in number of international judicial institutions and quantity of international decisions has contributed to a greater detachment of the law from parliamentary politics. It is interesting to note in this regard that dispute among state parties about the law and about the proper course that a court should take may not only be understood as a factor that pushes a court to be more cautious in its interpretations but also as a context that may offer it more leeway because it faces less risk of being countered in form of interpretative declarations or treaty amendments. Eyal Benvenisti and George Downs argue that the absence of consent among subjects of the law may increase the chances of judicial lawmaking.[79]

II. Fragmentation as a Problem for Democracy

A further critical element in the justification of international courts' authority concerns the institutional differentiation of distinct issue areas. Such differentiation narrows down the perspectives that may be cast on a certain subject matter. Why is this relevant, let alone problematic, with regard to the quality of democratic legitimation? Because it negatively affects the requirement of generality. In its legitimatory aspect, the requirement of generality is related to the process of law-creation and demands that the democratic legislature is the central place of norm

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77 Oellers-Frahm (note 6).

78 Fyrnys (note 6).

79 Eyal Benvenisti & George Downs, Prospects for the Increased Independence of International Tribunals, in this issue.

production and legitimation.[80] More specifically, it demands that procedures in this place are thematically unsettled and are open to all kinds of competing perspectives. It must further be open-ended, in the sense of being without a predetermined solution. They must not prejudge or, in principle, preclude any relevant aspect in the decision-making process from the point of view of a particular functional perspective.[81] Subject matters should not be distorted from the outset by the order of things as defined by functional narratives. The starting point of this argument is the individual as a whole, multidimensional human being that cannot be split into functional logics but rather calls for a mechanism of representation in which competing perspectives can be negotiated.[82]

Due to the functional differentiation of distinct areas of politics on the international level, the chances of meeting this imperative of democratic generality are dim. In functionally tailored international regimes, it is next to impossible to arrive at a certain degree of generality because in every regime there already is a particular set of preferences and concerns that is prevalent.[83] This undermines the requirement of generality as a critical element of democratic legitimation.[84] A functionally fragmented international judiciary threatens to weaken democratic generality in the continued development of the legal order.

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80 Tobias Lieber, Diskursive Vernunft und formelle Gleichheit. Zu Demokratie, Gewaltenteilung und Rechtsanwendung in der Rechtstheorie von Jürgen Habermas 226-229 (2007).

81 We take this point from Jürgen Bast, *Das Demokratiedefizit fragmentierter Internationalisierung,* in: DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT – SONDERBAND 18, 177 (Hauke Brunkhorst ed., 2009). *Also see* MÖLLERS (note 66), 31, 223.

82 Andreas L. Paulus, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY, 193, 210 (Tomer Broude & Yuval Shany eds, 2008).

83 Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002); Tullio Treves, *Fragmentation of International Law, The Judicial Perspective*, 23 COMUNICAZIONE E STUDI 821 (2007).

84 To what extent the potential for legitimation, which arises from decision-making processes within the states, is affected by the fragmentation cannot be further examined at this place.

This is a problem that is part of, but distinct from, the decoupling of the law from parliamentary politics generally because it relates to deeper processes of sectoral differentiation. It suggests that increasing political oversight would be democratically meaningful to the extent that it heeds to the principle of generality. Oversight would have to transcend sectoral fragmentation, largely a question of personnel and of links to domestic levels of governance. The shift towards functional and institutional differentiation of international decision-making processes must not go hand in hand with a shift from democratic to technocratic rule.[85] Against this background we are also skeptical that seeing fragmented regimes in a system of checks and balances, where one rationale (and its institution) counters others, helps to ease concerns.

D. Structure of this Special Issue

The remainder of Part I offers additional conceptual groundwork that helps to understand the phenomenon of judicial lawmaking. Marc Jacob exposes in greater depth the issue of *Precedents: Lawmaking Through International Adjudication*. Transcending the partisan views on the issue that often stem from particular jurisdictions and legal traditions, he argues that the working of precedents is a rather natural by-product of legal reasoning and dispute settlement. Saying that precedents are not binding in international law has very little purchase, if any. As a matter of fact, precedents are key to shaping the law as it is. They both create and constrain future legal practice while exclusively focusing on lawmaking by way of formal sources turns a blind eye to the critical role of precedents. The real question, Jacob maintains, is not whether judicial precedents form part of lawmaking, that much is hard to deny, but what the limits might be to this activity. He thus takes a closer look at how precedents are utilized in making claims regarding a system of law and how they actually operate in practical legal reasoning, concluding that, irrespective of any officially afforded normativity, precedents are not inherently more determinative as statements of law than formal sources are. But from whatever angle one looks at them, they shift and stabilize normative expectations and, thus, play an integral part in the making of international law.

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[85] Paulus (note 82), 210.

The contribution by Karin Oellers-Frahm then asks about the *Lawmaking Through Advisory Opinions*. Showing their general impact on the international legal order is of particular importance for this research project because advisory opinions are not even considered binding on any parties. But as Oellers-Frahm illustrates, they evidently impose argumentative burdens and justify state action. Even if advisory opinions could never be successfully invoked as genuine sources of the law in front of any court, they cannot be ignored either as they channel discourses about what the law is. Her contribution pointedly presents the wealth of practice of different institutions on this matter, explaining that advisory opinions weigh heavily in legal argument as authoritative statements of the law. Oellers-Frahm draws particular attention to the role advisory opinions may play in processes of customary law formation, as statements about the law but also as initial reference points that may give rise to new customary rules. She concludes by re-emphasizing that these considerations should not be taken without question to tear town all distinctions between the practice of courts, on the one hand, and legislation through the formal channel of sources, on the other. Also upholding the difference between what happens as a matter of fact and as a matter of law, Oellers-Frahm argues, is critical in view of state consent being the legitimatory basis of international law.

Eyal Benvenisti and George Downs bring the issue's first part to a close with their contribution on *Prospects for the Increased Independence of International Tribunals*. They complement the view on international courts as autonomous actors with an understanding that pictures them as possible instruments in the hand of more powerful states. The authors focus on the impact of powerful, developed, states on international courts and look at the domestic institutional context to learn how independence may be increased in the international system. They draw attention to judicial independence as a necessary, albeit insufficient, condition for legitimate judicial lawmaking. Beyond the nomination and work of judges as a decisive factor for courts' freedom to interpret and develop the law in the way they deem appropriate, Benvenisti and Downs suggest examining more closely the broader political context in which courts operate. The authors point out how political divisions between constituent states (interstate competition) but also between branches of government (interbranch competition) impact the independence of international tribunals and their role in shaping the law, the contention being that more political competition translates into less constraints on their actions. The contribution concludes with an outlook on the respective merits of judicial lawmaking in comparison to

politico-legislative processes, suggesting at the end that international courts may actually turn out to take better account of different interests and to better counter the distorting impact of powerful executives or dominant sectoral interests on the development of the law.

These introductory and foundational considerations pave the way for this special issue to turn to judicial lawmaking in distinct fields of the international legal order. It proceeds in the order of what may appear to be most problematic in terms of democratic legitimation. Part II covers the field of international economic law, characterized by a large amount of judicial practice and avenues of compulsory jurisdiction. Stephan Schill starts out by addressing *System-Building in Investment Treaty Arbitration and Lawmaking*. He observes that the practice of adjudication has created a rather closely-knit system of investment law that is significantly removed from the reach of states. Adjudication has palpably developed the normative expectations of both investors and host states. Schill examines the institutional features of international investment arbitration that might stand in the way of this development even though they ultimately will not hamper its dynamic. He pays close attention to the working of precedents in the making of a system of investment law that overlays the roughly 2,600 Bilateral Investment Treaties and he points to the wide range of policies under its purview, ranging from water management to the protection of cultural property. Large areas of domestic administration may come under considerable pressure from international investment law. The contribution closes with possible reactions to the current problems regarding the justification of international investment tribunal's exercise of public authority and proposes that the lawmaking of international investment tribunals should be guided by comparative public law.

Ingo Venzke addresses the no less dynamic and no less penetrating practice of adjudication in international trade law in his contribution on *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*. Setting the scene with a discussion of the institutional developments and normative environments in this field, he illustrates how the adjudicators have shaped the law on general exceptions in trade law, creating demanding thresholds that domestic policies pursuing non-trade objectives have to surmount in order to be justifiable. Portraying the argumentative patterns in this practice, Venzke also draws particular attention to the spells of precedents that structure the space of interpretation and generate legal normativity, a dynamic that was reinforced with developments ever since the inception of the World Trade Organization

and the rise of the Appellate Body as the supreme authority on this issue. He examines how past arguments, even if part of reports that were not adopted by the political bodies, pervade legal practice and how the Appellate Body transformed them in its decisions. He closes with a discussion of the emergence of proportionality analysis as a new hallmark of the Appellate Body's reign over general exceptions and concludes with a discussion of international adjudication in the context of multilevel governance, suggesting that practice should be informed by an understanding for the respective spheres of authority in a normative pluriverse.

What are possible reactions in response to judicial lawmaking in this field and elsewhere? The following two contributions continue to canvass the phenomenon of judicial lawmaking, placing the emphasis on strategies that may help to alleviate concerns about its normative justification. Michael Ioannidis proposes *A Procedural Approach to the Legitimacy of International Adjudication*. Drawing inspiration from the practice and theory of domestic administrative law, he highlights international courts' potential contribution in increasing the democratic qualities of decision-making processes; in short, their process-perfecting task. Such a kind of judicial lawmaking might be an appropriate alternative to substantive lawmaking. The well-known decision of the Appellate Body in *US-Shrimp*, Ioannidis suggests, may be read precisely in this light, obliging domestic regulators to give those affected outside their polity a meaningful say in the process of decision-making. Instead of adding to the substance of international norms, adjudicators could develop standards ensuring that internationally important decisions are the outcome of transnational processes of a certain quality, conducted in the shadow of the court. Such a procedural approach merits renewed consideration and may inspire practice in other fields of the law.

Thomas Kleinlein concludes the second part of this special issue with his contribution on *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*. He responds to the gap in the International Law Commission's study on the topic of fragmentation and to the significant role international courts can play in shaping the borders between different legal regimes. Kleinlein's contribution analyzes the potential benefits and the limits of balancing and proportionality analysis as a response to fragmentation, suggesting that these techniques can be understood both as restraints, in the sense that they are used by international adjudicators to hold back and acknowledge the authority of other regimes, and as judicial lawmaking, in the

sense that with time this practice of governing the borders between legal regimes becomes structured and principled. He concludes that the potential of these techniques hinges on how well they stay attuned to different institutional sensitivities and to views on the proper allocation of authority, not only between regimes but also between the international and the domestic level.

The fields of human rights and humanitarian law treated in Part III know strong courts with compulsory adjudication just as well. But due to the nature of the matter, the terms of the debate are in part rather distinct. "Proactive" or "progressive" adjudication – lawmaking in our terms – for the protection of individuals against human rights violations and for safeguarding their privileges as civilians in combat situations may seem to many as intrinsically justified, yet problems in the democratic legitimation of judicial lawmaking persist also in this field. Christina Binder examines *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, drawing attention to how the court contributed to the growth of it competences throughout the years by broadly interpreting its mandate. The court quite successfully established that its judgments have direct effect and void contravening domestic laws. It also claimed that domestic courts within its reach are obliged to engage in a decentralized "conventionality control," testing domestic laws and acts when they come up against the American Convention on Human Rights. Binder points out how the court's jurisprudence has reshaped and confined the sphere of domestic policy-making. But she also notes that domestic courts, even in those states that were not part of respective disputes, have largely accepted this development. The convention's special rank in most domestic constitutional orders in Latin America helps to explain and justify this fact, just as well as the context of fragile democracies. In the long run, Binder argues, the court needs to continue striking a sensitive balance between developing international protection standards and accounting for spheres of domestic autonomy; its activity may cause a considerable stir beyond the issue of amnesties in which it has been most active so far.

Markus Fyrnys dwells on the matter of competences in his contribution *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*. He addresses the court's crisis due to the huge number of 139,650 pending cases, many arising out of a systemic malfunctioning at the domestic level. The court however only has the capacity to handle 800 per year at a maximum. After politico-legislative efforts to meet this challenge remained unsuccessful, the court itself developed the pilot judgment procedure in

its practice, identifying the systemic problem and telling the domestic legislature in surprising detail what steps they have to take. Fyrnys highlights how the court's new procedure affects the division and balance of competences in the system in both the horizontal dimension, above all in relation to the Committee of Ministers, and in the vertical dimension, in relation to domestic self-government. He concludes his contribution by drawing attention to the individual applicants whose claims would be stalled in the summary treatment of the problem on the basis of only one exemplary case.

The contribution on *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals* by Milan Kuhli and Klaus Günther studies international humanitarian law and the International Criminal Tribunal for the Former Yugoslavia, one of the most prolific international judicial institution to date. Drawing on the framework of discourse theory, the authors develop a distinction between discourses of norm justification, paradigmatically the business of legislatures, and norm identification, the business of judicial institutions. Kuhli and Günther focus on circumstances in which courts enter norm-justificatory discourses, a circumstance they illustrate with the tribunal's decision in *Kupreškić*. In said case the tribunal candidly makes moral arguments in support of its findings on the legality of belligerent reprisals. The authors contend in conclusion that such lawmaking activity on part of the tribunal does not give rise to legitimatory concerns to the extent that the tribunal's claims in norm-justificatory discourses remain subject to the acceptance by other participants in the discourse; after all, they conclude, the court's validity claims remain defeasible.

Part IV is dedicated to other aspects of the phenomenon that may so far have raised fewer concerns with respect to their democratic justification. In her contribution on *Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function*, Karin Oellers-Frahm shows the mutual influence between international judicial institutions in shaping the regime on provisional measures, in particular in regard to the question whether such measures are to be considered binding. While this was first either denied or seen as an open question, a dynamic triggered by the Inter-American Court of Human Rights more recently also lead international arbitral tribunals to make the claim that their provisional measures are indeed binding, in spite of the fact that the language and drafting histories of their rules of procedure might have suggested otherwise. It is interesting how courts draw upon each other here and transform their respective reasoning. Oellers-Frahm argues that the power to issue binding provisional

measures may be deemed an inherent power of international courts. But when an institution does not even have the capacity to render binding final decisions, she suggests, it expands its competence claiming that its provisional measures are binding nevertheless.

The contribution *Lawmaking by the International Court of Justice – Factors of Success* by Niels Petersen develops a complementary theoretical account to determine whether international courts have actually engaged in lawmaking. He contends that there needs to be a change in the law over time and this change needs to be traceable in the activity of the court. Petersen further sets out to theorize which factors are conducive to such judicial lawmaking and relates this question to the structure of interests among states. Taking two instances from the International Court of Justice – the *Barcelona Traction Case* and the *Fisheries Jurisdiction Cases* – he illustrates both failure and success of judicial lawmaking, depending on whether or not the Court was responsive to the structure of interests prevailing at the time. The author concludes that this is what is decisive, much more so than the argumentative persuasiveness of the judgment.

With his contribution *The Making of a* Lex Sportiva *by the Court of Arbitration for Sport*, Lorenzo Casini offers comparative insights from private law arbitration in the transnational space. Setting the stage with an institutional history of the court marked by competition with other bodies and its ultimate victory, Casini shows how the court was the driving force in developing a global law for sport competition, developing common legal principles, interpreting global norms, and in effect harmonizing the law. He examines the relationship between the Court of Arbitration and national public authorities, suggesting that the latter sometimes commit themselves to standards developed by the court or cannot escape having their actions reviewed by it. Casini concludes by placing the practice of the Court of Arbitration in the broader discussion of judicial lawmaking in global governance. His study offers support for the theory that the more complex private law regimes become, the more they resemble public law.

Part V concludes this special issue with a discussion of strategies in response to the phenomenon of international judicial lawmaking and its normative implications, building on the rich material unfolded in all contributions. In our closing article *On the Democratic Legitimation of International Judicial Lawmaking* we argue at the outset that it is not possible to do without considerations of democratic legitimation, showing the irreducible quality of the principle of democracy in context with other narratives of justification. This step mainly contrasts

functionalist accounts that cling to the importance of the goals to be pursued. We then turn to three aspects of international judicial practice that harbor legitimatory potential. We first consider the democratic dimensions of judicial reasoning, above all its argumentative standards that allow for critique, but also its relation to political documents not amounting to sources. In view of repercussions following from processes of fragmentation we ultimately ask whether systemic interpretation may amount to a democratic strategy in judicial reasoning. Second, we show how judicial independence and impartiality are very important under the principle of democracy, reconsider the processes of judicial appointments and draw attention to the competing democratic *fora*. Third, we examine the judicial procedure for its legitimatory potential and argue that trends towards greater publicness and participation testify to an increasing recognition of the role of international judicial institutions in developing legal normativity beyond concrete cases. We conclude that, despite all achievements and even if strategies in response to legitimatory problems proved successful, there remains the discomfort that international courts may not always satisfy well-founded expectations of legitimation. Domestic organs will therefore continue to play a critical role in relieving the international level from some of its burden. But they would need to offer good reasons if they chose to contest international legal normativity; that should be beyond dispute too.

Precedents: Lawmaking Through International Adjudication

*By Marc Jacob**

A. Introduction

This paper deals with the role of judicial decisions in international adjudication. It is impossible to fail to notice the abundance of prior cases invoked in decisions of international tribunals and that, in order to find out what the law actually is, reference to previous cases is all but inevitable in practice. In some areas of international law, judicial or arbitral decisions have even been said to be the centre of progressive development. Nevertheless, there is an undeniable and deeply-rooted professional trepidation in many parts of the world regarding this enduring phenomenon.[1] Even absent a fully articulated theory of adjudication or legal reasoning, the very idea of "judicial lawmaking" tends to arouse instinctive suspicion, especially when coupled with a denial of any restraining force of prior cases. Be that as it may, observations to the extent that judicial decisions are not veritable sources of international law or only binding between the parties in a particular dispute are only the

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[1] Arnold Duncan McNair, The International Court of Justice 9 (1949).

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236, DOI 10.1007/978-3-642-29587-4_2,

beginning, and far from the end, of the present inquiry.[2] Several interrelated and intricate questions need to be disentangled and dealt with in order to get a better grasp on what is commonly, and often rather unhelpfully, lumped together loosely under the vague label of "judicial precedent." The paper is hence partly descriptive and partly revisionary. I do not however intend to rehash general criticisms or defences of precedent. Instead, I aim to present precedent as a general and omnipresent jurisprudential concept that enables and constrains judicial decision-making even in seemingly ordinary cases and to then showcase the specificities of one particular legal system in this respect, namely public international law. Hopefully this provides some of the methodological groundwork for other questions central to the present project, not least concerning the legitimacy of judicial lawmaking.

B. What Are Precedents?

I. Perspectives on Precedents

Since any inquiry is inevitably hostage to perspective,[3] it is perhaps appropriate at the outset to draw attention to three broad ways of approaching precedent. Firstly, it is possible to speak of *rules of* precedent. Not only do these differ from the material content of precedents (i.e. the *norms in* precedents, which are often collectively referred to as case law), but they are also by themselves silent as to a larger *theory of* precedent. This triangle roughly corresponds to legal method, substantive law, and legal theory, respectively.

The so-called *rules of* precedent are those guidelines stipulating how precedent operates in practice in a given legal system. These are often methodological instructions that differ in nature and quality from actual law concerning precedents, which tends to be derived from (quasi-) constitutional considerations. Their misapplication, therefore, does not necessarily result in an incorrect judgment where no pertinent substan-

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[2] *See*, *e.g.*, Statute of the International Court of Justice (ICJ Statute), 26 June 1945, UNTS, vol. 33, 993, Arts 38(1)(d) & 59.

[3] *See* Friedrich Wilhelm Nietzsche, Zur Genealogie der Moral III 12 (1887).

tive norms are contravened.[4] These rules are occasionally also referred to as a particular doctrine of precedent, particularly in systems where such rules are fairly detailed, as in the phrase "[t]he peculiar feature of the English doctrine of precedent is its strongly coercive nature."[5] It is here that one encounters a first confusion that is still surprisingly common. Terminology aside, a rule of precedent can of course also be a negative stipulation, such as "tribunals in investment arbitration are not bound by previous decisions of other tribunals."[6] Yet this simple rule on the lack of knockout authority of judicial pronouncements is not infrequently treated as synonymous with a complete absence of rules of precedent rather than a pronouncement on a particular facet thereof, for instance when a tribunal claims that "[t]here is so far no rule of precedent in general international law; nor is there any within the specific ICSID system …"[7] Such shorthand can be misleading. All legal systems have rules of precedent, even if these are implicit, terse, or prohibitive. To hold otherwise is to confuse a rule with its contents. They merely come in various flavours and guises and can either be fairly elaborate, as is traditionally the case in common law jurisdictions, or in a more rudimentary stage of articulation, as in the case of public international law. Nor does recognition of precedential effect necessarily commit one to a specific theory of law. As will be developed further below, many rules of precedent are in fact postulates of language or logic.

A *theory of* precedent on the other hand generally makes no claim to accurately proscribe or even represent the precise workings of prior judicial decisions in the everyday legal practice of a specific legal system. Rather, it takes a step back and examines the very essence and potential of judicial pronouncements. Such a theory provides a framework for understanding precedent and is therefore among other things likely to inquire more deeply into whether and how precedents work in general, the concept of legal norms, different judicial ideologies regarding precedents, the proper role of the judge (usually folded into a discussion of the separation of powers), the various advantages and disadvantages of assorted precedent models, and possible approaches to the ex-

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4 It is however conceivable that underlying rules or principles could indirectly be violated, thereby triggering some form of legal consequence.

5 Rupert Cross & James W. Harris, Precedent in English Law 3 (1991).

6 Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 36 (2008).

7 *AES Corp. v. Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, para. 23.

trapolation, interpretation, and application of precedents. The two main points advanced in this respect here are that there is little point to strenuous refutations that judges make law and that, almost as a corollary of the first point, precedents have both a creative and a constricting function, simultaneously enabling and fettering judicial decision-making.

II. Nature of Precedents: Sources & Arguments

Precedents are situations – in a legal context, usually decided cases – in which an issue at hand has already been decided elsewhere. Since they provide patterns on which future conduct can be based, precedents have been likened to "the usable past."[8] In an important sense, therefore, a precedent is also a form of argument or justification employed in the context of decision-making.[9] Its logical structure is straightforward but belies the many layers of complexity bedeviling the subject: Every time situation A arises, the answer should be B *because* A was previously resolved in manner B. The italicised conjunction betrays the core of precedent: decisional consistency based on historical lineage. One cannot blow both hot and cold, the argument goes. Stripped down to this bare skeletal frame, it quickly becomes apparent that precedent is not exclusive to the legal domain, as any exasperated parent can testify when a child demands treatment akin to that previously afforded to an elder sibling.[10] If this is the case, it gives rise to the hypothesis that precedent plays a role in every legal system, albeit perhaps of varying significance.[11] Exactly what role it plays in international law is the topic of this paper.

It is a basic premise of all law that certain actions have to satisfy certain criteria; in other words, they must be justified. This also applies to international law, which after all claims to bind states. It is a normative endeavour, ultimately drawing on non-legal considerations. The law

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8 Neil Duxbury, The Nature and Authority of Precedent ch. 1 (2008).

9 *See* Frederick Schauer, *Precedent*, 39 STANFORD LAW REVIEW 571 (1987) (noting the logical semblance between argumentation and justification).

10 *Id.*, 572.

11 *Cf.* Neil MacCormick & Robert Summers, *Further General Reflections and Conclusions*, in: INTERPRETING PRECEDENTS, 531-532 (Neil MacCormick & Robert Summers eds, 1997).

does not however admit all possible justificatory arguments. A higher dice roll for instance is not considered acceptable. Since the delineation of these considerations is ultimately so theoretical and contested – in short, messy – a matter defying readily apprehensible usability, formal sources of law habitually serve as common points of reference or agencies to govern conduct.[12] These sources can be seen as translations of what is materially right, or they can be considered the unique origin of law themselves.[13] But whatever their exact jurisprudential breed may be, sources continue to exert a centripetal pull on the legal mind.

Accordingly, it might appear natural to ask whether precedents are legal sources in the sense that treaties or custom are in international law or parliamentary legislation is in domestic legal systems, i.e. formal sources of law. This is certainly an instinctive reaction amongst many lawyers, especially those of a more positivistic jurisprudential bent. The question inherently only allows for an affirmative or a negative answer. And, using the staple methodology of international law, even a cursory glance at Article 38 of the ICJ Statute will yield an undemanding "no." Decided cases, we are told, are at best a source of law (albeit a secondary one) only for the very parties to a particular case and evidence of the state of law elsewhere.[14] It is said the ICJ merely applies the law; it does not make it.[15] Unfortunately, however, this denial is as undemanding as it is limited in explanatory power. What follows is hence not necessarily a refutation of the internal logic of this orthodoxy, but rather of the significance of the perspective it adopts.

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[12] *See* Martti Koskenniemi, *Methodology of International Law*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, margin numbers 7, 24 (Rüdiger Wolfrum ed., 2007), available at: http://www.mpepil.com.

[13] *See* Georges Scelle, Précis de droit des gens: principes et systématique 6 (1932) (for the former view); Hans Kelsen, Reine Rechtslehre 64 (1934) (on the latter position).

[14] *See* Alfred Verdross & Bruno Simma, Universelles Völkerrecht: Theorie und Praxis para. 618 (1984). Although even this is strongly contested, *cf.* Allan Pellet, *Article 38*, in: The Statute of the International Court of Justice – A Commentary (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 784 (insisting, as the mainstream does, that the ICJ's jurisprudence is not a real source of law but merely a documentary "source" in the sense of a resource or investigatory tool).

[15] *See* Ian Brownlie, Principles of Public International Law 19-20 (2008).

III. A Tale of Two Theories

This presents a good opportunity to introduce two paradigms or archetypes (less kindly, one might say caricatures or stereotypes) frequently encountered in attempting to demarcate where adjudication ends and judicial legislation begins.

On the one hand, there is what might loosely be called the common law approach, which is well-known for unashamedly priding itself on its judicial creativity and hardnosed pragmatism. Addressing the Society of Public Law Teachers in Edinburgh in 1971, Lord Reid of Drem, at the time senior Lord of Appeal in Ordinary of the House of Lords, dryly noted that it was a "fairy tale" that the law was locked away conveniently in a mythical Aladdin's cave and that on a judge's appointment there descended on him knowledge of the magic words "Open Sesame!"[16] This frank confession is typical of a legal culture that is traditionally devoid of any reverence for the supremacy and conclusiveness of the *lex scripta* as an expression of a coherent legal regime. Solutions are traditionally tailor-made as and when the need arises, more or less haphazardly without any grand overarching plan or logic.[17] Slapdash though it may be, this mode of evolution is often hailed as a great virtue promoting efficiency, effectiveness, and contextual sensitivity.[18] Necessarily, a great deal of faith is placed in the legal elite. Not surprisingly, the declaratory theory, according to which courts more or less mechanically pronounce existing law, is nowadays rarely met with much enthusiasm in such traditions besides being used strategically to convey images of judicial passivity.[19] Yet despite the critical potential inherent in such outspoken acknowledgment, powerful challenges have been issued on the one hand by those suspicious of the semantic openness of cases and wary of placing too much power into the hands of the privi-

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[16] Subsequently published as Lord Reid, *The Judge as Law Maker*, 12 JOURNAL OF THE SOCIETY OF PUBLIC LAW TEACHERS 22 (1972).

[17] *See*, *e.g.*, ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW 98 (2005) ("messy, episodic, and self-correcting").

[18] *See* Robert Howse, *Moving the WTO Forward – One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223, 230 (2009) (albeit professing to "common law prejudice").

[19] *See*, *e.g.*, Edward W. Thomas, The Judicial Process 3 (2005).

leged few, and on the other hand by those rejecting a rose-tinted view of adjudication that is blind to the virtues of the democratic process.[20]

In any event, one might claim that such a bold account may be true for common law jurisdictions, but has little to no applicability to code-based systems, where the decisional brunt is said to be born by legislatures and judgments are not considered "proper" sources of law. Such is indeed the premise of the declaratory theory, which arguably predominates on the European continent. Its motto is Justinian's famous aphorism "*non exemplis sed legibus iudicandum est*" ("justice must be administered not on the basis of precedents but based on [statutory] law"); its credo is the divide between law (courts) and politics (legislatures); its patron saint is Charles-Louis de Secondat baron de la Brède et de Montesquieu; and its intent and effect is to play down the role of the judiciary. Woe betide who commits the heresy of judicial usurpation in the face of legislative or constitutional superiority! Traditional German doctrine, for instance, hence holds that judges do not make law unless exceptionally required to fill unintended gaps in the legal order.[21] Accordingly, it is possible to differentiate neatly between the judicial activities of interpretation, (legitimate) legal development beyond the meaning of statutory wording that is still compatible with its spirit or purpose, and (illegitimate) legal development that is compatible with neither wording nor purpose of a statute. Once again, pointed criticism is not in short supply.[22]

Whether the two positions sketched above are commendable in their aspirations or accurate descriptions is an issue on which nothing shall be said here. The former is best left to the deep waters of political philosophy. As to the latter, various commentators, in particular private lawyers and comparatists, have expressed serious doubts regarding such

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[20] Examples of the former include the Realists and the Critical Legal Studies movement. On resuscitating liberal democratic ideals, *see*, *e.g.*, JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2 (1999).

[21] *See*, *e.g.*, BERND RÜTHERS, RECHTSTHEORIE: BEGRIFF, GELTUNG UND ANWENDUNG DES RECHTS 160-162, 505-567 (2008) (with further references). The idea of gaps in the law is of course itself an enduring controversy.

[22] *See*, *e.g.*, Marion Eckertz-Höfer, "*Vom guten Richter*" – *Ethos, Unabhängigkeit, Professionalität*, 62 DIE ÖFFENTLICHE VERWALTUNG 729, 733 (2009) ("It is a platitude, that … even in their everydaily dealings … judges make law. Judicial decision-making is hardly ever simple cognition of the law, but also regularly law-production."); JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG 174-177 (1970).

simplified macroscopic schisms.[23] Nor shall an attempt be made to pigeonhole public international law into one of these positions. And almost to add insult to injury, the obsession with sources of law is in itself no stranger to stinging critique.[24] The point here is to draw attention to two narratives that – consciously or subconsciously – dominate much of the debate on precedent. This is unfortunate since they tend to obfuscate the phenomenon more than assist in elucidating it. While the narratives help to understand where particular contributions are coming from (literally), endless haggling over whether judges "make law" or judgments are sources properly so-called, whatever that may be, suffers in the context of precedents from twin defects: theoretical shortsightedness and long-sightedness.

IV. Theory Myopia: Failing to Account for the Richness of International Legal Argument

Attending to the first charge, waxing over classifications of decided cases as formal sources of law or not is to a large extent a red herring. Adopting such a perspective to the exclusion of all others (deliberately) fails to see the larger picture. At the risk of sounding trite, it is suggested here that no matter what their exact jurisprudential providence may be, prior cases are crucial to adjudication, including dispute settlement in public international law. While it may be true that this point is more easily made – perhaps even inevitable – if judicial decisions were considered formal sources of law, the opposite is neither mandated as a postulate of logic nor from practical observation. That is not to deny that it is possible to come up with a view of law in which precedent "plays no role beyond the practical," which is an implicit relegation of institutionalized dispute settlement processes and its considerable effects to a side show of "real law," whatever that might then be. Besides largely tilting at windmills, such a quest for methodological purity and its harsh separation between law and its cognition requires considerable

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[23] *See*, *e.g.*, Patrick S. Atiyah, Pragmatism and Theory in English Law 2-3 (1987).

[24] *See*, *e.g.*, *only* KELSEN (note 13), 78; Gerald Gray Fitzmaurice, *Some Problems Regarding the Formal Sources of Law*, in: SYMBOLAE VERZIJL: PRÉSENTÉES AU PROF. J. H. W. VERZIJL, Á L'OCCASION DE SON LXX-IÈME ANNIVERSAIRE, 174 (Frederik Mari van Asbeck ed., 1958).

argumentative support of its own and begs questions as to its utility, especially in the wider context of the present project.

To be sure, formal sources are undeniably an important aspect of law. And of course international *law* remains a normative affair; but it is not simply an affair of norms laid down in positive sources. Formal sources are not the only game in town when it comes to arguing and thus deciding cases; analogies, hypotheticals, consequentialist considerations, historical points, different kinds of logical or linguistic arguments, and the use of dictionaries, maps, graphs, or statistics, to name but a few, are all widespread modes of *legal* argument. Reasoning in law is a complex process consisting of many steps, usually ranging from the initial classification of matters to various stages of identification and interpretation to some form of syllogistic conclusion.[25] Precedent can play a part in nearly all of these. Even if it often appears in the guise of a previously expounded rule or principle, i.e. as a major (legal) premise, it is not limited to the extraction of norms. Each of these steps is argumentative and possibly subject to various unspoken meta-rules (e.g. that a speaker ought not to contradict herself and give reasons for a statement). Nor is purportedly self-sufficient deduction immune to the shortcomings of a purely logical method.[26] In summary, just as it is inaccurate to claim that the law admits any and all types of arguments, it would be an equally gross oversimplification to maintain that adjudication is exclusively concerned with shoehorning arguments into formal sources.

Quite to the contrary, in most sophisticated matters before higher courts, the formal sources of law regulating the disputed issue are themselves rarely as such focal. Instead, controversies arise over making correct use of these sources or reconciling apparently conflicting sources, given that there is no single universally accepted method of approaching these tasks. Law as an argumentative or justificatory practice is not purely (or even, mainly) concerned with the classification of sources of law. It is far richer than that. Formal sources are usually only the first step in a lengthy chain of reasoning.

The objection that without the "formal source" badge a prior case is only of diminished value because a litigant cannot base her claim

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[25] *See*, *e.g.*, Joxerramon Bengoetxea, Neil MacCormick & Leonor M. Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, in: THE EUROPEAN COURT OF JUSTICE (Gráinne De Búrca & Joseph H. H. Weiler eds, 2001).

[26] *Cf.* Aleksander Peczenik, *Jumps and Logic in the Law*, 4 ARTIFICIAL INTELLIGENCE AND LAW 297 (1996).

squarely and solely on it is unconvincing for at least two reasons. First, it ignores the semantic openness of all sources, which viewed in pre-interpretive isolation are often equally unhelpful.[27] If the other side is competent, it will in almost all reasonably involving disputes be possible to craft a similarly solid opposing legal position using the same sources. Second, it forgets that all cases relied on invariably refer to a multiplicity of other sources, hence at the very least serving as a form of shorthand or summary thereof. They are proxies, the reasoning of which a litigant can appropriate (and possibly spin) no matter what. It need hardly be mentioned here that saying an argument is permissible is of course not saying it is a good argument.

Doubting the exclusivity of formal sources in this context is by no means tantamount to abandoning the project of positive law. Nor does it entail an abrogation of the judicial obligation to resolve the dispute before the court. Quite to the contrary, it is submitted that this can better be accommodated if judicial decision-making does not shut its eyes to such valuable legal artefacts. Indeed, to an outsider it would seem quite baffling that a legal system that deigns two of the slipperiest hodgepodges ever to be called formal sources of law respectable bases for legal propositions (viz. custom and general principles) would turn up its nose at clearly enunciated statements relating to the law coming from its own court. Hardened by years of training and practice, the legal professional hastily dismisses such naivety without much effort as a misunderstanding of ascertainability and validity. Yet the impression remains that the more one lingers on such distinctions, the more one forgets the actual task at hand – resolving disputes, not "science for the sake of science"[28] – and submits to the socio-political Rorschach test that precedent so frequently is.[29]

After all, it is beyond doubt that previous cases can be illustrative of legal reasoning[30] or a material source of law by clarifying previously un-

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[27] Certainly the doyens of modern positivism conceded the existence of a form of judicial discretion either on account of the open linguistic texture of law or because of the flexibility of the posited legal standards and the rapidness of social change, *see* HERBERT L. A. HART, THE CONCEPT OF LAW 124-128 (1961) and KELSEN (note 13), 97-99.

[28] *Nationality Decrees Issued in Tunis and Morocco*, PCIJ 1923, Series C, No. 2, 58 (Prof. de Lapradelle's speech).

[29] More on this *infra* section E.

[30] *See* SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 1553 (2006) (recognizing the value of a precedent

certain legal questions and thus affecting the position and planning of potential litigants.[31] Moreover, as one very experienced judge observed, reference to prior cases is further attractive to courts for a host of practical or even downright banal reasons.[32] There are undeniable intangible advantages to not having to do something for the first time. For one, precedents can save time and work. Especially if a judge is working in a foreign language, as most judges in international courts are, a well-crafted phrase or expression can be a welcome building block for one's own judgment. Moreover, it is often easier to convince a colleague of one's position when a decided case is invoked. Furthermore, there is some psychological comfort in turning to past decisions, since it suggests that any blame one might attract ultimately ought to be laid at another doorstep. In particular these last two points hint at the seemingly inescapable undercurrent to any discussion of precedents, but with an interesting twist: Utilizing past cases gives the impression that the judge is applying rather than making law.[33]

Nothing in this paper seeks to detract from the fact that a degree of variance regarding the treatment of precedent remains on account of historical, constitutional, and philosophical reasons. Much of this plays out in how cases are appreciated and discussed in practice and in the concomitant precedent-handling techniques, i.e. the particular doctrines of precedent. In very general terms, formalist orthodoxy tends to start with those abstract pronouncements deigned formal sources but then inevitably draws on cases in order to specify and resolve matters, whereas the less formalistic approach is quite content to scour the larger repository of legal artefacts without attempting to minutely trace the legal spark from its democratic cradle to its courtroom grave in that

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without any need for "difficult theories of judicial legislation"); Stephen M. Schwebel, *The Contribution of the International Court of Justice to the Development of International Law*, in: INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY, 407 (Wybo P. Heere ed., 1999).

31 *See* VERDROSS & SIMMA (note 14), para. 619.

32 KONRAD SCHIEMANN, VOM RICHTER DES COMMON LAW ZUM RICHTER DES EUROPÄISCHEN RECHTS 8-9 (2005).

33 ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 10 (2004) ("precedent camouflages lawmaking, while enabling it").

direction only.[34] But in its argumentative propensity, precedent is a point of convergence.

Perhaps it bears repeating. It is of course possible to find ways to insist on an anemic distinction between precedents as "mere" illustrations and precedents as "proper" sources and to draw up demarcations between adjudication and legislation. This can be done either through simplistic description ("adjudication is what judges do, legislation is what parliaments do") or more or less complex normative theories of adjudication.[35] But for present intents and purposes, such attempts miss the point: Formalist accounts and their insistence on binary validity are poorly suited to an adequate exposition of the variable nature and effect of precedent.[36]

V. Theory Hyperopia: Failing to Account for the Pervasiveness of Precedential Effect

The second charge is that, even if one does not completely ignore the significance of judicial decisions, the fixation with formal sources focuses the debate unduly on one particularly majestic type of discussion, namely the perennial issue of the legitimacy of judicial creativity. This commonly pits judges boldly reshaping the legal landscape through intrepid pronouncements against democratic decision-making and thus involves large-scale socio-political theorizing and ambitious considerations and ideological battles pertaining to institutional balance.

Such concerns regarding judges crudely supplanting their own designs at the cost of others are certainly deserving of scholarly attention, but by no means do they exhaust the issue of precedent. Saying a court does not possess purely legislative competences is not the same as arguing its decisions lack novel aspects.[37] In rashly eliding the two, a removed per-

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[34] *Cf.* Reiner Schulze & Ulrike Seif, *Einführung*, in: RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT, 8-9 (Reiner Schulze & Ulrike Seif eds, 2003).

[35] *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 26, 37 (1997).

[36] *See* Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD JOURNAL OF LEGAL STUDIES 215, 243 (1987).

[37] *Cf.* Robert Y. Jennings, *The Role of the International Court of Justice*, 68 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 43 (1997).

spective tends not to focus on the legal development close at hand that is engendered by the everyday practice of the courts. As will be argued shortly, the other side of the coin is that precedents commit the future not only in spectacular big-bang pronouncements *de novo* arousing democratic ire and charges of "activism," but also through quiet, everyday judicial activity that is not suspected of outright "judicial legislation." This continuous and inevitable ossification of a legal system through sets of cases creating an ever-denser thicket of precedent furnishes a broad basis for determining later cases. While occasionally subtle or humdrum to the point of being imperceptible, this is the more common form of judicial legal development. On to the systemic function of precedent then.

C. System-Building Through Adjudication

I. Can Precedents Constrain?

One of the reasons why formalist theories so readily discount the system-building[38] quality of decided cases is because they categorically rule out any normative force, either expressly or implicitly, and thereby conclude precedents have no authority at all beyond the immediate disputes. This is what Article 59 of the ICJ Statute for instance ostensibly does by brusquely dealing with the matter in a negative fashion: Decisions of the ICJ are said to lack binding force at large. Inversely, only the parties to a case are bound by that particular decision.[39] Such clear

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[38] This is an admittedly minimalistic conception of a system focusing mainly on the fact of interdependence of individual decisions without necessarily imputing a deeper meaning or underlying logic to these connections. Legal system is further used interchangeably with legal order. *Cf. infra* sections C.III. and C.V.

[39] *See* Rudolf Bernhardt, *Article 59*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE - A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 1232, 1244. While Lauterpacht disagreed that Art. 59 deals with precedent in general, the preponderance of literature suggests this was indeed intended by the committee of jurists responsible for the ICJ Statute. *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 8 (1958). *Cf.* MAX SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL: ETUDE SUR LA JURISPRUDENCE DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE 161 (1946); MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL

denials of the constraining force of previous cases *extra partes* are rarely encountered elsewhere, but where they are not exclaimed as plainly as in Article 59 they are often implicit in statements to the extent that decided cases are not properly called law or read into other norms or principles such as judicial independence or fidelity to the entire legal system. As a consequence of such disavowals, it is then surmised that judicial decisions do not have "real" authority but, at best, only "practical" or "persuasive" authority in the sense of alluding to underlying justifications or providing good reasons for believing a decision to be correct in law.

It is submitted here that a simple binary "on-or-off" or "black-or-white" understanding of precedents' authority is not very helpful when considering the import of prior cases. Bindingness is not *sine qua non* for system-building. Precedents in international law constrain in much quieter fashion than the formalist insistence purports. This does not even require committing to theories of judicially evolved normativity. Nor need this inevitably offend democratic sensitivities. Between the fanciful extremes of completely bound and totally free judicial decision-making, there exists ample space for reason-based adjudication that does not violate basic tenets of legality.[40] Precedents, it is averred here, always have a latent potential to constrain later decision-makers and hence harbour a generative potential by channelling developments accordingly. They do so on account of imposing argumentative burdens and enabling communication between the different actors of the legal process, regardless of any statement to the contrary. At the same time as being a potential shackle, a precedent can also act as a springboard for a statement of law, given the familiar propensity of some courts to bury legal propositions to be used another day, for instance whenever an abstract principle is established but its application is denied or irrelevant – and hence remains unchallenged – in the former proceedings.[41] Precedents can thus lead to path-dependency by organising complex envi-

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JUSTICE 1920-1942 207 (1943); Maarten Bos, *The Interpretation of International Judicial Decisions*, 33 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 11, 46 (1981).

[40] *See*, *e.g.*, JERZY WRÓBLEWSKI, THE JUDICIAL APPLICATION OF LAW 270, 273 (1992); RAIMO SILTALA, A THEORY OF PRECEDENT: FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW 76-105 (2000).

[41] For a rather unabashed attempt, *see*, *e.g.*, *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Separate Opinion of Judge Cançado Trindade, 20 April 2010, paras 3-5.

ronments and creating argumentative frameworks, be it directly or more obliquely. This provides a measure of determinacy that can be drawn upon in the course of "judicial governance."[42] In an important sense, prior cases stabilise expectations regarding the law, but there is often more to them than meets the eye. As a consequence thereof, all courts – including the ICJ – are to an extent system-builders, be it purposely or accidentally. Several related points need to be addressed in what follows in order to make these assertions good.

To begin with, a crude binary understanding of a case's normativity ("binding or not") belies the complexity of the reasoning processes accompanying the practical application of precedents. The stereotypes such an account conjures up are not borne out in reality. That English judges constantly follow pertinent precedents slavishly is as inaccurate as the cliché that the German judge always makes up his mind afresh in every new case. Shades of grey also exist when it comes to systems espousing "binding" precedent; American judges for instance are said to be less strict than their English counterparts.[43] Leaving aside the issue of personal ideology, it is imperative to bear in mind that precedents are a malleable legal artefact, perhaps even more so than treaties or statutes, due to their loquacity, factual specificities, uncertain relevance, and the constant process of reformulating and remoulding them.[44] Moreover, a precedent-based rule can usually be outweighed or defeated, and the degree or weight of its authority depends on a plethora of factors, such as the hierarchical rank of the court, whether the prior decision was made by a full bench or not, the reputation of that court, the precedent's age, the soundness of the reasoning employed, the presence or absence of dissent, its reception by the larger epistemic community, changes in social and legal reality, and more.[45] It seems fair to say, and many very senior common law judges have indeed reinforced this view, that a multitude of legal positions can be wriggled out of precedents if only one is willing to argue accordingly, no matter whether *stare decisis* is officially endorsed or not. Recall the cautionary words of Llewellyn:

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[42] STONE SWEET (note 33), 4.

[43] See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982); PATRICK S. ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 116-117 (1987).

[44] *Cf.* JOSEPH RAZ, THE AUTHORITY OF LAW 195 (1979).

[45] *See* Aleksander Peczenik, *The Binding Force of Precedent*, in: INTERPRETING PRECEDENTS, 475-478 (Neil MacCormick & Robert Summers eds, 1997).

"I know of no phase of our law so misunderstood as our system of precedent."[46] In many respects, the so-called strict doctrine of precedent is perhaps more rhetoric than reality. That is of course not to deny that constraints are imposed by precedents, but simply that these constraints are subject to reasoning processes and can be used creatively.

On the other hand, portraying those systems with an outright or implicit disavowal of any binding force of precedents (e.g. public international law) as eternal adjudicatory blank slates is equally unconvincing. True, it is sometimes assumed that on account of statements such as Article 59 the very same issue could theoretically later be decided totally differently.[47] But there are so many caveats to this brazen statement that one should seriously consider whether this supposed Litmus test still in fact serves a useful purpose.

First, there is of course the Court's glaring practice of extensively quoting its own pronouncements and its marked hesitation to deviate from its own prior decisions.[48] Many of the reasons for this behavior have already been alluded to above.[49] But these practical observations, accurate though they may be, shall not be relied upon here in order avoid inferring an abstract proposition from a fact.

The second point relates directly to the attributes of the international system. For one, its complex organization, high degree of specialization and lack of effective all-purpose legislature serves to offset the paradigmatic primacy of state consent that potentially dampens judicial innovation in international law.[50] Furthermore, as will be elaborated upon in due course, precedent is a particular species of analogy. As such it is a rather modest argumentative device relying on fairly specific comparisons, building bridges and linking solutions one by one. It is thus ar-

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[46] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62 (1960). Note in this respect also Allen's important but often overlooked insistence that throughout history judges have frequently made it clear that there is no magic in the mere citation of precedents: CARLETON KEMP ALLEN, LAW IN THE MAKING 212-213 (1958).

[47] Bernhardt (note 39), 1244 (but immediately observing that reality differs from this rarefied suggestion).

[48] *See*, e.g., *id.*; MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 29-31 (1996).

[49] *See supra* section B.IV.

[50] *See* WOLFGANG GASTON FRIEDMANN, LAW IN A CHANGING SOCIETY 84-85 (1972).

guably better suited to international dispute settlement, which, per definition, comprises a wide range of worldviews and legal traditions, than totalising top-down modes of argumentation, such as an all-pervasive theory like law and economics or strict deductivism based on an all-encompassing code.[51]

Third, saying that a decision has no binding force beyond a dispute is not equal to saying judicial decisions cannot bear on a later case at all. As Judge Jessup once put it in the *Barcelona Traction* case when discussing Article 59, "the influence of the Court's decisions is wider than their binding force."[52] Indeed, even in legal systems dominated by a codification culture there are various reasons militating against a court reaching a different result on a similar matter. Among these are equality, fairness, unity, stability, continuity, legal certainty, and the protection of legitimate expectations. These might even find expression in various norms of a legal system. Whether or not this is the case for public international law is an interesting question in its own right, but beyond the scope and intent of this paper. Then there is also the matter of reputation. All self-respecting judges have an interest in eschewing seemingly erratic behaviour and avoiding the impression their respective legal systems violate the basic idea of treating like cases alike. It is thus suggested here that, regardless of normative statements to this effect, such second-order considerations provide good reasons (if not necessarily a legal entitlement) why, if question A was previously resolved in manner B, this should again be the case when A arises.[53] Nothing compels dismissing an argument merely because it is not "binding," especially where it includes judicial discussion on the values of law and the weighing and formulation of principles of law, all of which are elements of legal discourse. The flip side is that opposing B demands a justificatory effort. To be sure, once precedent fixes a construction, it is still open to discussion (perhaps on what is ultimately an appeal to rationality, flexibility, or justice); after all, this is not about *stare decisis et non quieta movere*. But answer B merits serious consideration and might be too convincing to be shaken.

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[51] That is of course not to say that precedent argumentation is normatively or ideologically abstemious. *See*, *in particular*, *infra* section D.IV.

[52] *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, Separate Opinion of Judge Jessup, ICJ Reports 1970, 163, para. 9.

[53] *See*, *e.g.*, MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 79 (2008).

II. The Return of the Formalist

Rejecting the view of precedents as burdens implicitly relies on what might be called a theory of illegitimate authority. Two variants are conceivable: one relating to formal sources (Article 38), the other to an express exclusion of bindingness (Article 59). It is argued here that neither can convincingly rule out precedential effect. The sources variant has already been dealt with above. I now turn to an assessment of the latter from an internal public international law perspective.

Does Article 59 of the Statue free future judges and litigants of all constraints of past decisions? The argument would go along the lines that not only does public international law lack a commitment to precedent, but it actually contains an explicit stipulation to the contrary.[54] How exactly is said provision to be understood?

Statements on the purpose of Article 59 tend to amount to what the ICJ's predecessor said in 1926 in *In re German Interest in Polish Upper Silesia (Merits)*: "The object of [Article 59 of the Statute] is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes."[55] Viewed in this minimalistic light, what the PCIJ said is that each particular case must be decided individually and that the reasoning and obligations of one case cannot be blindly transplanted to another situation without justification. More recently, the ICJ considered the core of Article 59 to be "the positive statement that the parties are bound by the decision of the Court in respect of a particular case," thereby situating Article 59 within the distinctive context of *res judicata*.[56] This is again perfectly compatible with the suggestion that prior decisions create argumentative (as opposed to formalistic legal) burdens in similar situations. Understanding precedents accordingly by no means amounts to an automatic abandonment of sovereignty or a circumvention of the consent principle, issues that are obviously close to the heart of the international legal system. Without wanting to labor the point, there is a fundamental

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[54] Provisions to similar effect might be said to be Art. 20(3) of the German Basic Law or Art. 5 of the French Civil Code. These of course have their own systemic implications.

[55] PCIJ 1926, Series A., No. 7, 19.

[56] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment of 26 February 2007, ICJ Reports 2007, 44, para. 115. On the relation between *res judicata* and precedent, *see infra* section C.IV.

difference between something being binding (assuming for a moment this is a helpful concept) and something imposing a burden; the latter makes no attempt to conclusively regulate a matter to the exclusion of all countervailing arguments. Moreover, Article 59 does not explain why the Court should in fact deviate from a previously espoused line of reasoning, all other things being equal. It would further be plainly mistaken to read this provision as an entitlement to decide cases wrongly, a suggestion that jars with the ICJ's function to decide submitted disputes "in accordance with international law" (Article 38). Finally, it would be practically impossible to come up with a workable rule to effectively keep precedents out of pleadings, given that the use of generalised hypotheticals in argumentation cannot be barred.

The remaining possibility is to interpret Article 59 as condoning the practice of ignoring arguments, even if they are on point. Again, this fails to convince. For one, this would turn a concise negative statement into a dissimilar positive entitlement. Deliberately shutting one's mind to a reasonable legal argument is once again difficult to reconcile with the discharge of the Court's function to decide in accordance with international law and the general idea of voluntary international adjudication. Moreover, although prior cases can impose significant constraints, the process of arguing by precedent is, as shall be shown below, elastic enough to accommodate various concerns. Nor should the Court feel compelled to maintain an air of infallibility. It is not the blunt correction of a mistake that harms the project of international law, but rather the embarrassment occasioned by shoddy and selective reasoning under the guise of a theory of illegitimate authority. In conclusion, deliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce.

One is thus left with the impression that Article 59 is, strictly speaking, a superfluous restatement of the obvious, designed to assuage those afraid of the spectre called *stare decisis.* Rather than regulating precedential effect, it is an expression of the latent distrust of international adjudication harboured by many states. As Waldock observed, there was an understandable trepidation to give "a wholly new and untried tribunal explicit authority to lay down binding law upon all States."[57]

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[57] Humphrey Meredith Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 91 (1962). The advisory committee was beset by some fairly quixotic views on precedent, with some drafts assuming the Court's decisions might have the authority of rules of international law, *see* SHAHABUDDEEN (note 48), 49-52.

But that anxiety is to a large degree based on an extreme form of precedent that is practically nonexistent.

III. Instances of System-Building

One of the suggestions incidentally advanced in this paper is that even more so than to the talismanic landmark judgments of international adjudicatory bodies (the so-called "leading cases"), the shaping of international law is owed to the cumulative effect of the often unnoticed tweaking and tinkering constantly carried out regarding issues that do not usually arouse the hotter convictions of men and women. This is not only a matter of the stakes in a particular case or the degree to which a court or tribunal is exposed to the larger public, but rather a more or less unconscious reshaping in the course of the judicial routine of resolving disputes rather than making grand legal pronouncements *in abstracto*. At the most basic level, the fodder for argumentation obviously increases with the number and length of decided cases, given that this presents ever more lattices for future litigants to latch on to. Social scientists tell us that international adjudication thereby creates an empirically measurable web of case law.[58] Reference to prior cases has in some legal environments indeed become the most common argumentative device of international judicial institutions and a veritable mainstay of "judicial discourse," the ECJ being an example. It is in this respect worth bearing in mind that even the ostensibly minor and obscure cases and the semi-automatic process of adjudication in itself can often result in evolutionary developments, even where this was not intended or appreciated. The mechanics of this case law method will be discussed in more detail shortly; only a few preliminary points will be addressed here.

For one, it is not unheard of for an international judicial institution to adjust its legal assessment of an issue over time. The ICJ for instance revisited the question of the Federal Republic of Yugoslavia's (FRY, later Serbia and Montenegro) access to the Court for the period

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[58] *See*, *e.g.*, Margaret McCown, *Precedent and Judicial Decision Making: The Judge Made Law of the European Court of Justice*, American Political Science Association Annual Conference, 29 August – 1 September 2001, Panel 27-3: Law, Politics, and Power: Contrasting Comparative Perspectives (quantifying *inter alia* the proportion of cases citing precedent, precedent life-span, date, cluster density, as well as form and legal domain of cases).

between 1992 and 2000, a question among other things depending on the FRY being party to the ICJ Statute and hence hinging on its status as a member of the UN. In the course of the *Genocide* litigation, the Court opined that the *sui generis* FRY could appear before the ICJ during the period in question.[59] Shortly thereafter, however, the Court changed its view in the *Legality of Use of Force* cases and held that the FRY was not at the relevant time a member of the UN and that consequently the Court was not open to it.[60] Yet when the merits stage of the *Genocide* saga subsequently came for consideration, the ICJ once again reverted to its earlier position that the FRY (now Serbia and Montenegro) had the capacity to appear before the Court and affirmed its jurisdiction under the mantle of *res judicata*.[61]

Regardless of what the correct answer may be on the substance of this matter, such a sequence of decisions illustrates that adjudication is often a continuous process of rethinking and remoulding a legal system step by step.[62] Importantly, the apparent absence of consistency or overarching rationality does not compel the conclusion that judicial decisions lack intra-systemic impact. Not only do these cases show that the ICJ and especially individual dissenting judges certainly do engage the Court's jurisprudence (be it convincingly or not), but to treat a *volte-face* as proof for the lack of systemic development rides roughshod over the rationale of individual decisions while at the same time imposing a rather ambitious definition of what constitutes a

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[59] *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment of 3 February 2003, ICJ Reports 2003, 30, paras 69-71. The Court had previously skirted the issue: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, 14, paras 17-18.

[60] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004, ICJ Reports 2004, 279, para. 91 (the main argument being that the 2000 admission of the FRY to the UN revealed retroactively that it had not been a member).

[61] *Case concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, 51, para. 135.

[62] *Cf.* HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 161-163 (1997).

"proper" legal system that focuses on logical coherence to the detriment of actual interrelation.[63]

A perhaps more subtle but equally characteristic example of a court's creative activity is when it quietly recolours, adds, or omits a particular word or expression. Lauterpacht draws our attention to such a situation.[64] In *Electricity Company of Sofia and Bulgaria (Interim Measures of Protection)*, the PCIJ silently dropped the reference to the irreparability of possible damage as a criterion for the indication of interim measures.[65] This had been a feature of the PCIJ's jurisprudence on interim measures to date, which were arguably limited to cases where an infraction could not be made good simply by payment of an indemnity or by compensation or restitution.[66] Instead of contrasting these cases and stating the obvious ("there is no binding doctrine of precedent in international law"), it is once again suggested that the more perceptive analysis is that case sequences are a constant process of redirection and recalibration of the law, even in apparently standard cases that do not seem to present knotty legal conundrums.

In a similar vein, it bears noting that precedent is a Janus-faced concept. As the "usable past," it is backward-looking. This is perhaps the more traditional way of looking at the concept. But, paraphrasing Schauer, today is not only yesterday's tomorrow, it is also tomorrow's yesterday. If precedents have the potential to constrain, as claimed in this paper, present decisions will be the precedents of the future. Judges aware of this will craft their judgments accordingly by using more guarded language or couching their judgments in explicit reservations so to not open the floodgates of any unwanted future developments. At other times, they might sow seeds to bloom later. Assuming that is true and perplexing though it may at first seem, this means that precedent constrains even where there is no prior decision. Whether or not this results in sub-optimal decisions is a question that cannot be fully pursued here, but this feature additionally helps to explain the reluctance of many systems to acknowledge the existence of precedent.

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[63] This may certainly be a tendency within the so-called Continental, and in particular German, legal tradition. *Cf. supra* section B.III.

[64] LAUTERPACHT (note 39), 252-253.

[65] PCIJ 1939, Series A/B, No. 79, 199 (focusing solely on the prevention of acts likely to prejudice rights resulting from the impending judgment).

[66] *Denunciation of the Treaty of 1865 between Belgium and China*, PCIJ 1927, Series A, No. 8, 7.

IV. Related Systemic Tools: Analogy, Experience & Res Judicata

There are various ways to prejudice subsequent judicial decision-making. For one, precedent bears a close relation to analogy. Both are forms of argumentation typically revolving around the idea of treating like alike and producing systemic consistency. Analogical reasoning is the imputation of one characteristic in a situation where another characteristic is shared for the purpose of informing judgment.[67] Just like precedent, it is frequently employed outside the law.[68] But the notion of precedent is narrower. Whereas both analogy and precedent require the compared cases to be relevantly similar, precedent tends to demand a more exacting degree of fidelity. A situation might thus be analogous without being a precedent, but not vice versa, such as when there is no appeal to replicability or whenever the facts are similar but the operation of an opposed rationale precludes precedential effect. Precedents on the other hand are paradigm examples of analogous reasoning.[69] This potentially translates into an analogy being less compelling than a precedent. The upshot is that analogical argumentation is by and large more readily accepted even in those legal systems ostensibly disavowing any operation of precedent.[70]

Although similar to the extent that both draw on previous occurrences, precedent must also be differentiated from reasoning by experience. Experience is observational knowledge about the world.[71] As such, it revolves around being conscious of things. Should the apple one day travel skywards after leaving my hand, my experience of gravity has proven inadequate and will be revised. Precedent, to the contrary, does not make any directly extrapolative claims, but rather it appeals to consistency. It is not primarily concerned with the validity of its

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[67] *See* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 29 (2005).

[68] *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARVARD LAW REVIEW 741, 743 (1993).

[69] *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARVARD LAW REVIEW 923, 934 (1996).

[70] Although its application is then often tempered by the demand for the existence of an unintended regulatory gap, itself a perennial debate beyond the remit of this paper.

[71] *Cf.* ALVIN I. GOLDMAN, EPISTEMOLOGY AND COGNITION 301 (1986).

supporting reasons. Hence, a "bad precedent" is typically still considered a precedent.

Furthermore, precedent ought not to be confused with the concept of *res judicata*, a more circumscribed device whereby the final judgment of a competent court may not be disputed in later legal proceedings. This only applies to the disputed decision and the involved parties, including any successors following lapse of an appeal period. While it can also be broadly said to deal with legal stability, *res judicata* is specifically concerned with the closure of concrete legal quarrels and with assuring a litigant the benefit of an obtained judgment.[72]

V. Interim Conclusion

Let us take stock for a moment. Precedents in international law are best thought of not as normative obligations but as argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision. Arguments from precedent are independent from the status of precedent as a formal source of law or any express denial of bindingness.

If a comparable prior case exists and is referred to, a later decision-maker has less argumentative flexibility. One cannot, for instance, claim the previous solution impossible or so outlandish that no one would ever think of it. Indeed, as we know from Bracton's practice book, "I have never heard of such a thing!" was part of the judicial dialectic in England as early as 1237, centuries before the strict doctrine of binding precedent developed there.[73] The use of precedent as an argument is not tied to a particular set of rules of precedent. Rather, it provides a good reason or justification why the subsequent decision should be as argued, all other things being equal. It can certainly be defeated by various means. But it is a real constraint all the same, in that it clutters previously unencumbered argumentative freedom. Cases unavoidably

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[72] *See Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, 44, para. 116.

[73] This in fact did not reach its final definitive form until the beginning of the 19th century, with the *locus classicus* usually claimed to be Baron Parke's exposition in *Mirehouse v. Rennell*, 1 Cl & F 527, 546. On this and Bracton, *see* ALLEN (note 46), 184-186, 227-228.

add layer upon layer of judicial gloss to the understanding of law, which eventually becomes thick and encrusted and thus increasingly hard to break out of. Of course it is not outright impossible to resist such argumentative burdens, but it at least demands some effort. Such a fluid understanding unavoidably destabilises the distinction between utilisation and production of norms, traditionally assumed impenetrable but never fully convincing in international law, and enhances the dynamic nature and multiplicity of actors relevant to the legal process.[74]

The argumentative burden is similar, but not identical to a presumption. The latter can apply without the aid of proof and introduces a default position that trumps automatically in the absence of a rebuttal. An argumentative burden is less ambitious. Unlike a presumption, it does not claim decisional exclusivity on an isolated issue. Metaphorically speaking, it adds one further weight in an attempt to tip the scales, whereas the presumption is the string tying one side of the scales down and demanding to be cut loose by whoever wants to resist it.

A parting thought on precedents and the coherence and integrity of the international legal system: A precedent is only one small stone in a larger mosaic, which in the end does not necessarily have to amount to a coherent picture, let alone one that is pleasing to behold. An acknowledgement of precedents as constraining and thereby system-building devices does not commit one to a particular view of the legal system as a whole.

D. The Operation of Precedent

I. Establishing Precedential Effect

Having claimed that precedents create argumentative burdens and hence can constrain decision-making, it is time to look at how exactly this operates in practice. The thrust of the argument that will be presented in what follows is that classificatory exercises and rules of language and logic can both constrain and empower decision-makers and thus affect the legal order just like substantive rules might.

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[74] *Cf.* Karl-Heinz Ladeur & Ino Augsberg, *Auslegungsparadoxien: Zur Theorie und Praxis Juristischer Interpretation*, 36 RECHTSTHEORIE 143, 164 (2005).

The starting point is that there is in law no other way to argue and justify than through words. The more fully a point is argued, the more likely it will be successful.[75] In the words of Schwarzenberger, "[i]t is probably not accidental that the least convincing statements on international law made by the International Court of Justice excel by a remarkable economy of argument."[76] The ECJ in particular is accused of similar sins on account of its French-inspired magisterial and bureaucratic style and its traditionally terse syllogistic reasoning, which makes leaps in logic and hidden premises all the more likely and can shield a court from critique. Since there is rarely an express formulation to rely on, a precedent provides ample interpretive leeway. Precedents are hence constantly subject to dynamic re-formulation and re-characterization. They are never set in stone. Indeed, one cannot overstate the role of the subsequent court or other interpreters looking at a prior decision.

The various tools and techniques available that will be described below clearly evince the argumentative nature of law. The consequent ambiguity and cacophony rules out any "dictation by precedent,"[77] as feared by the drafters of Article 59. Such a thing is impossible without fundamentally upsetting the present system. But the channelling force of precedent in the hands of a skilled judge, advocate or commentator is very real.

II. Relevant Similarity

The lynchpin of precedent is relevant similarity. While of course no two situations will ever be identical, what matters is that they are the same *as far as relevant*.[78] Since this involves comparison, a quest for a

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[75] Naturally there comes a point where nothing useful can be added. Moreover, this does not doubt the general wisdom that succinctness rather than prolixity is the key to good legal drafting and pleading.

[76] GEORG SCHWARZENBERGER, 1 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS § I 32 (1957).

[77] LLEWELLYN (note 46), 76.

[78] Some commentators like to point to "sameness", others to "similarity" as the linking factors between two cases. The position adopted here is that the situations need to be the same only as concerns the relevant matters, which is casually expressed by saying the cases are similar or comparable.

generalisable abstraction or overarching category follows after the first intuition or mere perception of relevant likeness.[79] This search for an organizing theory is inevitably an inroad for all sorts of ("non-legal") considerations.

Be that as it may, identifying the relevant part of a precedent which serves as a basis for the abstract argument is an elusive endeavour.[80] There is no set formula for doing so. If one were to ask ten lawyers what is precisely mandated by a ("strictly binding") case, one might very well receive ten different answers. Many approaches are on offer, varying in degree of formality from the utterly mechanistic[81] via the moderately principled[82] to the completely discretionary.[83] Public international law theory, being largely in denial as it is, provides no assistance on the matter. Nor do common law systems offer an agreed upon method. In line with the general claim that precedents are best understood as arguments and only inadequately captured by rigid theories of validity, it is suggested that this uncertainty is however far from fatal; rather, it is itself part of the wider argumentative context of precedential and legal reasoning. Nothing ought to be dismissed outright on account of an artificial test soaked with various unspoken normative premises. In this spirit of eclectic methodological pluralism, one might turn to expressions used in prior cases, specific facts, teleological aspects, underlying principles, tendencies and developments reacted to over a series of cases, and so on; the point of all of which is to find an abstraction that explains the first case and convincingly covers the present case. This involves creating and testing principles of low to medium abstraction, with one foot planted in the concrete context. In actual practice, this tends to be an "incompletely theorised" exercise, i.e. the actual basis for one's reasoning is unknown or not laid open

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[79] These expressions are preferable to the term *ratio decidendi*, which invokes many uncalled for assumptions.

[80] *See* Geoffrey Marshall, *What is Binding in a Precedent*, in: INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, 503 (Neil MacCormick & Robert Summers eds, 1997).

[81] *See*, *e.g.*, EUGENE WAMBAUGH, THE STUDY OF CASES 8 (1894); Arthur Goodheart, *Determining the Ratio Decidendi of a Case*, in: ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, 4-25 (Arthur Goodheart ed., 1931).

[82] *See*, *e.g.*, KATJA LANGENBUCHER, DIE ENTWICKLUNG UND AUSLEGUNG VON RICHTERRECHT 77-93 (1996).

[83] *See*, *e.g.*, Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MODERN LAW REVIEW 5, 20 (1937).

clearly.[84] In any event, perhaps concerns are overblown, given that common law systems appear to have managed fine as is. But it is already here that exacting methodology gives way to a more mercurial notion of convincingness, highlighting the importance of *arguing* a point and thus enhancing the role of the international judiciary. The optimist might call this the dialectic of precedent; for the cynic, this is the precedent game.

III. Rules of Precedent as Rules of Language

It is in this context that language plays a particularly interesting role, which at times appears underappreciated.[85] Since the particular wording used in a previous case is one of the most promising origins of a generalisable abstraction, the looser the language used in the prior case is, the more situations will fall under the umbrella of an accordingly constructed category. Obvious though it may sound, whether or not future scenarios can be said to come under the precedent is not exclusively a matter over which the legal system wields control, but to a great extent also up to the relevant rules of language, given that they largely determine the ambit of the categories. While language is notoriously hazy,[86] semantic constraints can at times be close to inevitable. Attempting without more to argue Alsatians are not affected by rules relating to "dogs" is certainly an uphill battle. Arguably one should not only focus on the craft of the judge, but also on what the person interpreting the precedent brings to the table. But the basic point seems sound: The size of the overarching categories is legally relevant, yet primarily a matter of language. Indeed, this close connection between law and language explains the conventional reticence of many judges to say more than what is necessary. If this is correct, three points are worthy of note.

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[84] Sunstein (note 68), 745-746. Llewellyn's golf metaphor pertains: "Onto the green, with luck, your science takes you. But when it comes to putting you will work by art and hunch." *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH 42-43 (1930).

[85] But *see* Schauer (note 9), 587, 579.

[86] *See*, *e.g.*, Martin Morlok, *Neue Erkenntnisse und Entwicklungen aus Sprach- und Rechtswissenschaftlicher Sicht*, in: PRÄJUDIZ UND SPRACHE, 33-34 (Bernhard Ehrenzeller, Peter Gomez, Markus Kotzur, Daniel Thürer & Klaus A. Vallender eds, 2008).

Firstly, the precedential effect of cases is wider than commonly assumed, lying silently in forgotten cases only waiting to be tapped into by inventive litigants. Public international law is thus not only shaped by the will of the states, but can also be manipulated decisively by creative use of the French and English language. Secondly, the size of the extracted categories influences the degree of constraint, i.e. the strength of a precedent. The bigger it is, the harder it becomes to avoid its burden. This is yet another string to the bow of those arguing that normative talk about the "weight" of a precedent or its "bindingness" as if this were some kind of metaphysical measurement largely misses the point. A prior case is not a precedent at all if it is dissimilar in relevant matters. Specific objections can thus be phrased as a lack of similarity. Concerns that through a recognition of precedent the ICJ could, for instance, not champion diplomatic immunity in a case where an embassy was stormed without granting an official who was suspected of gross human rights violations unwarranted privileges in another situation are unfounded if this can be denied on the basis of a relevant dissimilarity. Thirdly, if language can impose its own constraints, then multilingualism and looser social and cultural ties weaken these constraints on account of diluting linguistic precision and reducing the common conceptual repository. This perhaps offers an explanation why precedent thrives in the fertile soil of highly homogenous legal systems (e.g. Victorian England) and habitually has a looser hold on heterogeneous orders (e.g. public international law).

IV. Resisting Precedential Effect

Assuming two cases are relevantly similar, what then? Having repeatedly dismissed the notion of strict bindingness and argued for a conception of precedents as important arguments, it should not be a revelation that once a case has been identified as a precedent, the particular stage of legal reasoning is far from over. Different techniques can then be employed to absorb an argumentative burden. After all, precedent not only entails constraint but also creativity and potential for legalisation. These techniques tend to be more rigidly defined and applied in systems that purport to give special authority to precedents and possess a hierarchical judicial branch. Consequently, they are not very developed in public international law, but, nevertheless, they are still influential in the international realm.

1. Distinguishing

Perhaps the most obvious attempt to resist the argumentative burden is to claim it does not actually bear on the present situation. This has already been alluded to above. Distinguishing is a dual process of reverse analogy whereby the precedent is not impugned as such but rather declared to be inapplicable. By pointing out relevant differences, the reach of the precedent is retrospectively shaped. Examples of the ICJ and the PCIJ employing this technique are legion and include the *Lotus*, *Mosul* and *Barcelona Traction* cases.[87] More recently, the ICJ in a maritime dispute between Nicaragua and Honduras considered that special factors mandated the construction of a bisector line instead of the traditionally preferred equidistance line, while at the same time explicitly reaffirming its prior jurisprudence on Article 15 of UNCLOS.[88]

The first point to be aware of here is that the very fact that the Court and its predecessor bother to distinguish cases underlines the notion of precedents imposing an argumentative burden. Why else would they care to do so in a system where cases are not "binding"? This fits well with Allen's observation that "the fascinating game of distinguishing" was popular in English courtrooms long before any acceptance of *stare decisis* or any suggestion that cases are formally considered law.[89]

Secondly, just as in the quest for relevant similarity, dissimilarity must be germane. Any case can in the end be distinguished on account of minor factual specificities. But that is not the point. Again, there is no magic formula for eliminating the accidental and non-representative.[90]

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[87] *Lotus*, Judgment of 7 September 1927, PCIJ 1927, Series A, No. 10, 26 (distinguishing the *Costa Rica Packet* arbitration); Preliminary Objections, Judgment of 24 July 1964, ICJ Reports 1964, 28-30 (distinguishing *Aerial Incident of 27 July 1955*). *See also* William Eric Beckett, *Les Questions d'Intérêt Général au Point de Vue Juridique dans la Jurisprudence de la Cour Permanente de Justice internationale*, 39 RECUEIL DES COURS 135, 138 (1932); SHAHABUDDEEN (note 48), 111 (referring in particular to the many instances in which *Monetary Gold* was distinguished).

[88] *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, 740-746, paras 268-287.

[89] ALLEN (note 46), 187.

[90] *See* CHAIM PERELMAN, LOGIQUE JURIDIQUE, NOUVELLE RHÉTORIQUE 129 (1976).

The process of distinguishing thereby also contributes indirectly to judicial system-building. If a dissimilarity is not considered significant enough despite existing, the reach of the prior decision is implicitly extended to the degree of its application in the present case.

Thirdly, there are on closer inspection two principal ways in which a precedent can be distinguished: Either the previous case does not truly stand for what is contended, or the present situation differs in significant factual or legal respects. The former focuses on the prior case and restricts its rationale, which might prompt one to call this process retrospective *obitering*. An example hereof is the *Namibia* opinion, in which the ICJ narrowed the reasoning of the *Status of Eastern Carelia* opinion to turning on membership of the League of Nations and appearance before the PCIJ.[91] The latter is perhaps the more typical method of distinguishing. It centres on the present situation and points to different circumstances warranting a lessening of the argumentative burden, which again is an act of fleshing out the bare bones of the international legal system.[92]

2. Departing

But even when a prior case is relevantly similar (i.e. applicable), there is ample opportunity to avoid its gravitational effect. A more direct technique of challenging the argumentative burden is to decline to accept its intrinsic logic. This process of invalidation is commonly called overruling, especially in hierarchical judicial systems with more elaborate precedent rules, or departing.[93] There are various reasons for refusing to pay heed to the force of a precedential argument. The most obvious – namely the existence of provisions giving effect to a grander political commitment to individual justice, flanked by the jurisprudential faith in a logically coherent and complete system of law

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[91] *See* Advisory Opinion of 21 June 1971, ICJ Reports 1971, 23, paras 30-31 and Advisory Opinion of 23 July 1923, PCIJ 1923, Series B, No. 5, 27.

[92] *See*, *e.g.*, *Lotus* (note 87), 26 and *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, 89, para. 88 (expressing puzzlement at the Court's reliance on *Factory at Chorzów*).

[93] Although distinguishing could also be seen as a form of departure. Perhaps it is hence best to adopt Llewellyn's more prosaic phrase of "killing the precedent".

as expressed by the *lex scripta* – has already been referred to above. But beyond this all-or-nothing argument, a precedent might be considered flawed from the start or outdated.

Turning to the ICJ, although it is often said it has the power to do so, the Court is loath to expressly depart from cases.[94] It usually "explains away" changes in the law via distinctions, which accords with its dislike for generalisations. The rift between the *Legality of Use of Force* and *Genocide* jurisprudence might serve as a recent example hereof.[95] To a certain degree, this works. The same result can usually be achieved either through an exception (i.e. disapplication) or through an argument applying but being outweighed. But there is nevertheless a qualitative difference: Only in the first situation is the argument left largely intact. Defeating it through logical or other arguments on the other hand modifies its material content more fundamentally, quite possibly to the point of completely eradicating what worth it may have had. This is of course in itself a process of reshaping the international legal system through adjudication.

In any event, this apparent lack of disharmony should not fool anyone into believing international law was free of contradictory positions or devoid of any evolutionary momentum. While there is perhaps no clear example of the Court expressly disapproving one of its prior decisions, both ICJ and PCIJ have arguably departed from precedents *sub silentio* at times.[96] The lack of situations in which the ICJ openly invalidates its precedents is probably also largely due to the fact that there are simply not that many decisions by the Court. Indeed, the paucity of decided cases partly explains why international courts tend to have a rather carefree approach as to how to handle precedential arguments.[97]

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[94] *See*, *e.g.*, *Namibia*, ICJ Reports 1971, 18, para. 9.

[95] Admission of the FRY to the UN was used as a device to avoid a universal position on its "access" to the ICJ.

[96] *See*, *e.g.*, the *Electricity Company of Sofia and Bulgaria* Case, the jurisprudence on recourse to the *travaux préparatoires* (shifting from impermissible if a treaty is clear to an apparently freely available aid to interpretation), and the role of equity in the law of maritime delineation in *Tunisia/Libya*. On the latter, *see* PROSPER WEIL, THE LAW OF MARITIME DELIMITATION: REFLECTIONS 172-173 (trans. By Maureen MacGlashan, 1989).

[97] But note that the obverse is not true, as evinced by the ECJ and European Court of Human Rights.

Briefly sketching some methodological preliminaries in this respect, departing is a two-stage process. First, arguing for the invalidation of such an argumentative burden essentially involves a claim that it is mistaken, for example because it does not fit with the broader picture (i.e. jars with other rules or principles) or because the conflict at hand is of a fundamentally different nature. In short, there is a sounder argument as to what international law requires. But even if that can be accomplished, the precedential effect is not yet absorbed. Even in legal systems in which it is permissible to make light of the first step, there are then second-order considerations that have to be dealt with. The second stage is thus ascertaining whether there are any other reasons why the argument should nevertheless hold sway, for instance, where there is detrimental reliance deserving of protection or another exceptional reason why consistency should be preferred in this instance.

E. Epilogue: Of Mystics and Ostriches

Owing to training, tradition, temperament, experience, and jurisprudential and political outlook, two habitually recurring general takes on precedent as a whole – one might say, states of mind – can be identified.

First, there are the mystics, who grandiloquently peddle maudlin views of the authority, unity, and purity of judge-made law and extol the virtues of the "piety of precedent."[98] They dream of a space free of the unavoidably ruinous vicissitudes of politics and regale in Lord Mansfield's theme of the law "working itself pure."[99] Such is the reverence for the judiciary and the impeccability and consistency of their methods and motivations that precedents are frequently applied blindly without critical reflection. The playfulness and flexibility of language is substituted with an unquestionable deference to judicial pronouncements, which are elevated to articles of faith. For the mystics, international adjudication is salvation.

Then there are those who stick their head in the sand and pretend judicial decisions play no role beyond mere education, as if anyone could

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[98] Chided, *e.g.*, by THOMAS (note 19), 139-153 (referring to an aphorism by R. W. Emerson: "A foolish consistency is the hobgoblin of little minds").

[99] *See* ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72-73, 108-109 (1996) (stating that one of the "dirty little secrets" of jurisprudence is its discomfort with democracy and fear of popular action).

get by perfectly without them if only he or she had a proper technical grasp of the "real" legal sources. Dismissing cases as crutches and precedent as an illness befalling only common lawyers and their jerry-built legal systems or hopeless utopians, these ostriches stubbornly refuse to take the power and precariousness of language to its logical conclusion and all too readily dismiss the notion of law as an argumentative practice. They deliberately shut their intellectual toolboxes, be it because of a frustration born out of the self-inflicted difficulty to account for these phenomena or due to a principled revulsion at the thought of social science material intruding the wholesomeness of law as a self-sufficient discipline.

Hopefully this paper has at least averted to some of the pitfalls of both romantic mysticism and the blithely ignorant approach to precedents. International judges are of course neither philosopher kings nor simply *bouche de la loi*. The real question is not so much whether or not they make law, but to what extent there are limits to this activity. I have attempted to sharpen a perception of precedent as a very real phenomenon that plays out even in the absence of grand legal and socio-political theorising, as an argument that simultaneously constrains and allows for creativity, and as a device for shaping a legal system. As concerns the prospects of an entirely rational system of precedents in international law, muted expectations appear warranted. But if nothing else, the critical potential of this acknowledgement merits the effort; only by seeing the precedential web can one even attempt to deal with it.

Lawmaking Through Advisory Opinions?

*By Karin Oellers-Frahm**

A. Preliminary Remarks

International courts and tribunals are firstly and particularly conceived to settle legal disputes between States and/or other organs or individuals admitted as parties according to the statute of the respective court by means of a binding decision. An advisory function is not inherent in the function of a judicial body, but has to be transferred expressly upon a court or tribunal in the constituent instrument. For non-standing judicial bodies, i.e., arbitral tribunals, an advisory function is rather unusual, but not altogether ruled out: The parties to a *compromis* may empower the tribunal to give an advisory opinion.[1]

As settlement of disputes (and the clarification of legal questions generally) are functions that preferably should be exercised by courts or tribunals, the question of transferring advisory power to international judicial organs became relevant in the context of the creation of the first international standing court, the Permanent Court of International Justice (PCIJ).[2] There was, however, a fundamental debate about whether

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1 *Cf.* Hugh Thirlway, *Advisory Opinions*, in: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL), margin number 4 (Rüdiger Wolfrum ed., 2006); *cf. infra* section C.III.

2 There had been other bodies with advisory functions, such as the International Bureau of the U.P.U., Art. 15 of the 1874 Convention; the International South American Postal Bureau, Art. 2 of the 1911 Montevideo Convention; the International Commission for Air Navigation, Art. 34 of the 1919 Aerial Navi-

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international courts should at all exercise non-judicial functions, in particular with regard to potential parties, namely states, of contentious cases, because states could be inclined to favor advice instead of submitting to binding contentious jurisdiction.[3] This concern explains why advisory power has been conceived for the PCIJ – followed by the majority of other courts entitled to give advisory opinions – in order to avoid as far as possible conflicts with the contentious power of the court. Thus, the power to request advisory opinions lies with organs that cannot be parties in contentious cases[4] because the advisory function should not substitute the contentious jurisdiction.

In order to appreciate the impact of non-binding advisory opinions for the development or "making" of international law and the "power" of the court or tribunal flowing from that function, it seems appropriate to give an initial but brief overview of the judicial organs empowered to issue advisory opinions and the extent of such power (B). Secondly, some examples of advisory opinions that have clearly contributed to the development of international law will be given (C); the central issue concerning the legal effect of advisory opinions will be examined in part (D), which will then be followed by some concluding remarks (E).

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gation Convention. These and other bodies were bodies concerned with rather technical questions and will not be treated in the present context. *But cf.* Jochen A. Frowein & Karin Oellers-Frahm, *Art. 65*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A COMMENTARY, 1403, margin number 1 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), which is limited to international courts or tribunals.

[3] *Cf. Informal Inter-Allied Committee on the Future of the PCIJ*, 39 AJIL 1-42, para. 65 (1945) (Supplement); *see also* the critics of Judge John Bassett Moore, in: Publications of the PCIJ, Series D, No. 2, Annex 58A, 383, who stated that "to impose upon a court of justice the duty of giving advice, which those requesting it were wholly at liberty to reject, would reduce the court to a position inferior to that of a tribunal of conciliation".

[4] *Cf. infra* section B; an exception is constituted by the IACtHR, *infra* section B.III.

B. Judicial Bodies Entitled to Deliver Advisory Opinions

I. Permanent Court of International Justice/International Court of Justice

The power to deliver advisory opinions was first laid down in Art. 14(3) of the Covenant of the League of Nations with regard to the PCIJ. The explicit idea underlying Art. 14(3) of the Covenant was the creation of an additional means for peaceful dispute settlement – besides judicial settlement – focusing primarily on interstate controversies and only in a subsidiary way on abstract legal questions ("any dispute or question," not even "legal" question, Art. 14 (3)).[5] According to the idea that an advisory function should be complementary to the contentious power without substituting it, the power to request advisory opinions was only given to organs that could not be a party in a contentious case. This principle has been followed for most of the judicial bodies entitled to give advisory opinions. In the case of the PCIJ, the organs empowered to request an opinion were the Council and the Assembly.

The drafters of the ICJ Statute maintained the advisory function of the PCIJ, albeit in a more restrictive measure insofar as Art. 96 (1) of the UN Charter only provides for advisory opinions to be given "on any legal question," thus omitting the reference to "disputes" as included in Art. 14(3) of the Covenant. This does not exclude opinions on "disputes" between states, but the Court decided that the advisory function may not be used to circumvent the lack of acceptance of the Court's jurisdiction by states, the main danger related to the advisory function.[6]

Under the UN Charter the number of bodies entitled to request an advisory opinion has been increased. However, the General Assembly and the Security Council remain the sole bodies capable of requesting an opinion "on any legal question," while the specialized organizations of the UN, which may be authorized by the General Assembly to request

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[5] Hermann Mosler & Karin Oellers-Frahm, *Art. 96*, in: THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 1181, margin number 3 (Bruno Simma ed., 2002); Manley O. Hudson, *Les Avis Consultatifs de la Cour Permanente de Justice Internationale*, 8 RECUEIL DES COURS 207 (1925/II).

[6] *Applicability of Article IV, Section 22, of the Convention on the Privileges and Immunities of the United Nations,* Advisory Opinion, ICJ Reports 1989, 177, 189, referring to earlier dicta.

advisory opinions according to Art. 96(2) UN Charter, can do so only with regard to "legal questions arising within the scope of their activities."

Art. 65 of the Statute provides the Court with discretionary power to give or to decline to give an opinion. However, the Court has limited its discretional power to instances of "compelling reasons," because it has to be mindful of its responsibilities as the principal judicial organ of the United Nations. No request for an advisory opinion has ever been refused for discretionary reasons.[7]

The advisory activity of the PCIJ was rather significant; it delivered twenty-seven advisory opinions between 1922 and 1940. Concerning the ICJ, a clear decrease of its advisory function has occurred; between 1945 and 2010 only twenty-six advisory opinions were issued – two of which took place during the last ten years. However, it is not the number, but rather the type of opinions requested which is important here. While all advisory requests brought to the PCIJ were initiated by the Council of the League of Nations and focused on "disputes,"[8] the majority of advisory requests to the ICJ came from the General Assembly and only rarely concerned "interstate disputes," but rather current legal questions that were at stake also in contentious disputes or Security Council Resolutions.[9]

II. European Court on Human Rights

The European Court of Human Rights was not initially empowered to deliver advisory opinions because the Convention did not contain a provision to that effect. Such an entitlement was only introduced in

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[7] The only request dismissed was the one of the WHO concerning the legality of the use by a state of nuclear weapons; the dismissal was based on the lack of jurisdiction, ICJ Reports 1996-I, 66, 73 (para.14).

[8] Michla Pomerance, *The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future*, in: THE INTERNATIONAL COURT OF JUSTICE – ITS FUTURE ROLE AFTER FIFTY YEARS, 271, 291 (Alexander Sam Muller, David Raic & Johanna M. Thuranszky eds, 1997).

[9] Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 415, 421 (2006).

1970 by Protocol No. 2 to the Convention, by which the Committee of Ministers of the Council of Europe was empowered to request advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols. As, however, advisory opinions "shall not deal with any question relating to the content or scope of the rights and freedoms defined in Section I of the Convention and the Protocols thereto," the scope of the advisory function is extremely limited. Therefore, it is not surprising that only three opinions have been requested to date; the first one, dating from 2 June 2004, concerned the question whether the Human Rights Commission (established in 1995 by the Commonwealth of Independent States following the break-up of the Soviet Union) could be regarded as "another procedure of international investigation or settlement" within the meaning of Art. 35(2b) of the Convention. This request was dismissed because it would have only been relevant in a particular case concerning the question whether the *same* matter had already been submitted to another procedure of international investigation or settlement; it thus did not fall under the advisory competence of the Court.[10] The second advisory opinion concerned the election of judges to the ECHR and led to a unanimous decision finding that a list of candidates not including the underrepresented gender, i.e., women, was not compatible with Art. 22 of the Convention. Also, the third advisory opinion concerned questions regarding the election of judges; it was delivered on 22 January 2010.[11]

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[10] *Cf.* HUMAN RIGHTS LAW JOURNAL 326 (2004); *see also*, EUROPÄISCHE MENSCHENRECHTSKONVENTION, EMRK-KOMMENTAR 612 (Jochen A. Frowein & Wolfgang Peukert eds, 2009).

[11] Advisory Opinion on certain legal questions concerning the list of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008 and Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 22 January 2010.

III. Inter-American Court of Human Rights

The situation in the Inter-American Court of Human Rights[12] differs considerably from that of its European counterpart. According to Art. 64 of the Convention, any member state of the Organization of American States (OAS) may consult the Court not only regarding the interpretation of the Convention, but also with respect to the interpretation of other treaties concerning the protection of human rights in the American States and regarding the compatibility of domestic law with the aforesaid international instruments. Furthermore, the organs of the OAS may request advisory opinions "within their respective spheres of competence." States initiating an advisory procedure need not even be parties to the ACHR or have accepted the contentious jurisdiction of the Court. This very broad competence implies the possibility of overlap between a contentious and an advisory procedure. However, the Court has the discretion whether or not to give an opinion that will lead it (and has in fact led it) to decline a request that interferes with a contentious case. Although the advisory competence is thus greater than in other judicial bodies, the number of advisory opinions is rather limited as compared to contentious cases: Until 2010 the Court had issued twenty-one opinions and about 210 judgments (March 2010).[13]

IV. The African Court on Human and Peoples' Rights

The power of the African Court (established in 2004) to give advisory opinions principally follows that of the IACtHR: It may give an opinion at the request of "a member state of the OAU, the OAU, its organs, or any African organization recognized by the OAU upon any legal

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[12] Gerald L. Neuman, *Inter-American Court of Human Rights (IACtHR)*, in: MPEPIL, *passim* (Rüdiger Wolfrum ed., 2007); *see also* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 99-122 (1997); Juliane Kokott, *Das Interamerikanische System zum Schutze der Menschenrechte*, in: 92 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 166 (Armin von Bogdandy & Rüdiger Wolfrum eds, 1986); Karin Oellers-Frahm, *Der Interamerikanische Gerichtshof für Menschenrechte*, in: MENSCHENRECHTE, BILANZ UND PERSPEKTIVEN, 385-430 (Jana Hasse, Erwin Müller & Patricia Schneider eds, 2002).

[13] *Cf*. homepage of the Court: http://www.corteidh.or.cr/casos.cfm.

matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."[14] This provision is similar to that of the IACtHR in that is gives the Court an advisory power comprising the entire set of human rights instruments in order to concentrate implementation and control of human rights issues in the Court. Until today (March 2011), the African Court has only decided one contentious case, but has not yet received a request for an advisory opinion; however, the African Commission of Human Rights, which was created by the African Charter on Human and Peoples' Rights of 27 January 1981, was and remains entitled to "interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organization recognized by the OAU" (Art. 45, para. 3 of the Charter). The only request for interpretation referred to Art. 45, para. 1 and para. 3; it concerned the compatibility of the UN Declaration on the Rights of Indigenous People with the African Convention. The opinion was delivered in 2007.[15]

V. The Law of the Sea Tribunal

The Law of the Sea Tribunal has only contentious jurisdiction, while the Sea-Bed Dispute Chamber also has the power to give advisory opinions on a request by the Assembly or the Council on legal questions arising within the scope of their activities (Art. 191 of the Convention). This power is comparable to the advisory function of the ICJ according to Art. 96(2) of the Charter with regard to opinions concerning questions arising within the scope of the activities of specialized organizations of the UN. The first request for an advisory opinion was brought before the Sea-Bed Chamber on 14 May 2010 and delivered on

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[14] Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 9 June 1988; Anne Pieter van der Mei, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights*, 5 AFRICAN HUMAN RIGHTS LAW JOURNAL 27 (2005).

[15] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous People, available at: http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

1 February 2011. It concerned the question of the Council on the legal responsibilities and obligations of states with respect to the sponsorship of activities in the area.

VI. The European Court of Justice

The Court of Justice of the European Union is not generally empowered to give advisory opinions. It may only give advisory opinions in the context of concluding treaties with one or more non-member states or with an international organization. According to Art. 218, para. 11, of the Treaty on the Functioning of the European Union (formerly Art. 300, para. 6, of the EC Treaty) the European Parliament, the Council, the Commission, or any member state may request an opinion on the compatibility of such an agreement (proposed to be entered into by the Union) with the Treaty. This competence, which has been used several times,[16] is rather comparable to the involvement of national constitutional courts with regard to the conclusion of international treaties aimed at preventing the declaration of unconstitutionality of a treaty after its coming into force. It is thus not of relevance to the present study.

VII. The Court of Justice of the Economic Community of West African States

The Economic Community of West African States, which was created in 1975, established a Community Court of Justice.[17] Art. 10 of the Protocol provides that "the Court may, at the request of the Authority, the Council, one or more member states or the Executive Secretary, and any other institution of the Community, express, in an advisory capac-

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[16] *Cf.* Christian Tomuschat, *Art. 300*, in: KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, 1602, margin number 89 *et seq.* (Hans von der Groeben & Jürgen Schwarze eds, 2004).

[17] Protocol on the Community Court of Justice of 6 July 1991, text in: KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 1 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1020 *et seq.* (2001).

ity, a legal opinion on questions of the treaty." There is no information on any advisory opinion delivered by the Court.

VIII. Common Market for Eastern and Southern Africa (COMESA)

The Treaty instituting COMESA (5 November 1993)[18] provides, in Art. 32 concerning the competences of the Court, that "the Authority, the Council or a member state may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market, and the member states shall in the case of every such request have the right to be represented and take part in the proceedings." There is no information on cases having been brought to the Court.

IX. The Judicial Board of the Arab Organization for the Petroleum Exporting Countries

The Arab Organization for the Petroleum Exporting Countries (OAPEC), created in 1968, provides in a Special Protocol of 9 May 1978 for a Judicial Board for the settlement of disputes.[19] According to Art. 25, the Board may give an advisory opinion on a legal question referred to it with the approval of the Council of Ministers. There is no information on any opinion having been given.

X. The Arbitration Commission on the Former Yugoslavia

The Arbitration Commission under the UN/EC Geneva Conference of 27 January–26 April 1993 (created in the context of the dissolution of the Former Yugoslavia) is comparable to an arbitral tribunal; it is not a standing court like the other organs considered above. The Commis-

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18 Text in: OELLERS-FRAHM & ZIMMERMANN (note 17), 1042 *et seq*.

19 Text in: KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 2 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1469 *et seq*. (2001).

sion was empowered to settle disputes and give legal advice on any legal question submitted to it by the Co-Chairmen of the Steering Committee of the Conference.[20] In fact, only requests for advisory opinions (as opposed to contentious cases) were brought before the Commission (fifteen in total), which concerned questions arising from the dissolution of the Former Yugoslavia. The opinions delivered by the Commission did, in fact, govern the legal consequences connected with the dissolution of the Former Yugoslavia.

XI. Summary Conclusion

From the survey given above, it becomes clear as a first result that the advisory function is only given to a handful of judicial bodies,[21] few of which have had the possibility to exercise such a function. In fact, advisory opinions have until now only been requested from the PCIJ and the ICJ, the ECHR, the IACtHR, the Sea-Bed Dispute Chamber, the ECJ and the "Badinter" Commission (which is not a standing court). Secondly, it should be noted that the extent of such a function differs largely: Some judicial organs are only empowered to give advice to particular organs of the relevant organization on questions concerning their activities, as is the case with the ICJ regarding requests under Art. 96(2) of the Charter and the Sea-Bed Chamber under the Law of the Sea Convention. In addition, the advisory function of the ECJ is rather limited in nature, as it only concerns issues relating to the compatibility of agreements or treaties to be concluded with the EC Treaty. Such an advisory function is not of primary relevance in the present context because the issue of "lawmaking" through advisory opinions rather arises if advisory opinions are requested on legal questions of a general character, such as the existence or the precise meaning of legal rules.

With respect to these preconditions, there are only three organs relevant for the present study, that is the PCIJ/ICJ, the IACtHR, and the "Badinter" Commission, which raises the question whether general

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[20] Text in: OELLERS-FRAHM & ZIMMERMANN (note 19), 1779 *et seq*.

[21] There are more than 150 judicial bodies (*cf.* OELLERS-FRAHM & ZIMMERMANN, *supra* note 17) and only those presented above have advisory jurisdiction. It should, however, be added that some judicial organs concerning very special technical matters have not been listed above.

conclusions can and should at all be drawn from the sole practice of three bodies, one of which is not even a standing international judicial organ. This concern can, however, easily be set aside because these organs are the most important international judicial institutions: The PCIJ/ICJ, the "World Court," is the only "universal" international court with a more than 80-year-old practice, and it is the only one empowered to give advisory opinions on "any legal question." The IACtHR, although "only" a regional court with subject-matter-restricted competence, is the most active human rights court besides the ECtHR, which does not only contribute to the implementation of human rights obligations through its contentious jurisdiction, but also through its advisory function. As to the Badinter Commission, its role in this context is somehow special. However, it gave advice in an intricate legal and political situation which served as the guideline in the process of the dissolution of the Former Yugoslavia and will certainly be of relevance in future comparable situations. Thus, the impact of the advisory opinions of these bodies on international law is highly relevant in the context of "lawmaking" by international judicial organs.

C. Contribution of Advisory Opinions to the Development of International Law

The fact that advisory opinions shall and in fact do contribute to the development of international law has never been contested.[22] As *Lauterpacht* rightly stated already in 1934, "judicial law-making is a permanent feature of administration of justice in every society,"[23] a statement that is particularly true for the advisory function of a court. Such a con-

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[22] Hersch Lauterpacht, The Development of International Law by the International Court (1958); Frowein & Oellers-Frahm (note 2), margin number 45; Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Mankind*, in: International Organization and International Dispute Settlement: Trends and Prospects, 105 (Laurence Boisson de Chazournes, Cesare P. R. Romano & Ruth Mackenzie eds, 2002); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Enforcement of a New International Judiciary*, 20 EJIL 73, 77 (2009).

[23] Hersch Lauterpacht, The development of International Law by the Permanent Court of International Justice 45 (1934).

tribution to this development may occur when the court finds that a particular rule is part of customary international law or when it identifies the meaning of a treaty provision. This aspect of "development" or "making" of law becomes particularly evident in cases of "dynamic" treaty interpretation, i.e., cases where "the parties' intent upon conclusion of the treaty was, or *may be presumed to have been* (emphasis added), to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed one and for all, so as to make allowance for, among other things, developments in international law."[24]

A view on the advisory practice and its follow-up in international law can only confirm this statement. It is neither possible nor necessary in this context to give a comprehensive overview of the advisory practice and its part in the development of international law; however, reference should at least be made to some of the most important advisory opinions in order to give an impression of the subject matters at stake. Such a selective proceeding seems justified by the fact that, in the present context, the contribution of advisory opinions to the development of international law as such is not controversial; what is controversial is simply the issue whether this "contribution" should be qualified as "lawmaking," a question that under legal aspects requires a uniform answer independent of the particular case.

I. The International Court of Justice

With regard to the ICJ – for reasons of space and in order to concentrate on tribunals in function today, the PCIJ advisory jurisprudence will be left aside[25] – the *Genocide* opinion of 1951,[26] in which the Court

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[24] *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, para. 64 and *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20 April 2010, para. 203 *et seq*.

[25] For information on the advisory activity of the PCIJ, *see* MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS (1973); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 235 *et seq*. (1972); *see also* LAUTERPACHT (note 22), particularly Chapter III on the advisory practice of the PCIJ, 155 *et seq*.

[26] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15; *cf.* Eckart Klein, *Reparation for Inju-*

had to answer questions concerning the admissibility and effect of reservations to multilateral treaties in case of objection or lack of objection to such reservations by other state parties to the treaty, must first be broached. At that time, this question was not settled by a binding international rule of law. The Court therefore attempted to develop a new legal regime concerning reservations.[27] As the law of treaties was, at that time, under the consideration of the ILC, the guidelines elaborated by the Court had far reaching effects and were adopted by the ILC in Arts. 19 *et seq*. of the Convention. In the *Reparation for Injuries* opinion,[28] the Court ruled in favor of the capacity of an international organization to bring a claim against a state, a decision that was standard-setting on the issue of the international personality of an international organization; on the basis of this opinion the United Nations' claim for recovery of pecuniary reparation from Israel was successful. In the *Certain Expenses* opinion,[29] the Court had to decide on the budgetary powers of the General Assembly; it found that expenses authorized by the General Assembly in relation to two peacekeeping forces were expenses in the meaning of Art. 17(2) UNC and thus had to be borne by the member states. The significance of the three advisory opinions delivered in the context of the *South Africa* cases, in particular the *Namibia* opinion,[30] concerning the international responsibility of a state resulting from physical control, not from sovereignty, over a particular territory, is undisputed. In particular, the findings concerning the consequences for UN member states as well as non-member states flowing from the illegal presence of South Africa in Namibia had far reaching repercussions, although the South Africa Government maintained its original position and did not cooperate with the General Assembly in its efforts

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ries Suffered in the Service of the UN (Advisory Opinion), in: 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 174 (Rudolf Bernhardt ed., 2000).

[27] For more details, *see* LAUTERPACHT (note 22), 186 *et seq*.

[28] *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174; Klein (note 26), 174.

[29] ICJ Reports 1962, 151; Michael Bothe, *Certain Expenses of the United Nations (Advisory Opinion)*, in: 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 557 (Rudolf Bernhardt ed., 1981).

[30] ICJ Reports 1971, 16; Eckart Klein, *Namibia*, in: 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 485, 488 (Rudolf Bernhardt ed., 1997).

to "implement" the opinion. In the *Wall* opinion,[31] as in the *Namibia* opinion, the Court gave detailed explanations of the legal consequences for all states flowing from the illegal construction of the wall in the occupied Palestinian territory. Furthermore, the Court used the occasion to make its voice heard in the debate concerning the meaning of the term "armed attack," in Art. 51 of the Charter, taking a stance opposite to that of the Security Council. In contrast to the Council, the ICJ persisted in understanding armed attack as only referring to attacks committed by *states*, not including those of non-state actors. In difference to the lack of national reaction to the *Namibia* opinion, in the *Wall* opinion there was at least a decision of the Supreme Court of Israel following the findings of the Court.[32] Finally, the opinion on the *Use of Nuclear Weapons*[33] should also be mentioned, in which the law-developing approach played a particular role in order to prevent a *non liquet;* ultimately, however, the *non liquet* was favored by the majority. It is the only opinion delivered so far where the Court found that international law (as it then existed) was not able to provide an answer to the question,[34] a statement that underlines the difficulties a question can raise to a court when any decision on the substance would be seen as plain lawmaking on a very contentious issue.

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[31] ICJ Reports 2004, 3; Frowein & Oellers-Frahm (note 2), margin number 49 *et seq*.

[32] *Cf.* Israeli Supreme Court, decision of 15 September 2005 in the case *Mara'abe v.The Prime Minister of Israel,* HCJ 7957104, available at: http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

[33] ICJ Reports 1996, 226; Bharat H. Desai, *Non Liquet and the ICJ Advisory Opinion on the Legality of the Threat or Uses of Nuclear Weapons; Some Reflections*, 37 INDIAN JOURNAL OF INTERNATIONAL LAW 201 (1997).

[34] *Infra* section D.I., text to note 71.

II. The Inter-American Court on Human Rights

With regard to the IACtHR,[35] the opinions by which the Court defined the extent of its own competences laid down in Art. 64 of the Convention should first be mentioned. In the opinion on the interpretation of the term "other treaties" concerning the protection of human rights in the American States in Art. 64 of the Convention,[36] the Court arrived at a broad understanding of these terms. Although the term "other treaties" could have been understood as meaning only human rights instruments, the Court held that it included

> any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-member states of the inter-American system are or have the right to become parties thereto.[37]

This decision was confirmed in the *Consular Relations* opinion,[38] where the IACtHR held that Art. 36(1) of the Convention on Consular Relations conferred rights on the individual that qualified as human rights.[39] This opinion applied the general findings of the first advisory opinion concerning the term "other treaties" to a particular situation, namely

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35 For a summary overview over the advisory opinions, *see* Gerald L. Neumann, *Inter-American Court of Human Rights (IACtHR)*, in: MPEPIL, margin number 31-35 (Rüdiger Wolfrum ed., 2007); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, in: LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: ESTUDIOS Y DOCUMENTOS, 15 (Daniel Zovatto ed., 1999); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STANFORD JOURNAL OF INTERNATIONAL LAW 241 (2001).

36 *"Other Treaties" Subject to the Advisory Jurisdiction of the Court,* Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1.

37 *Id*., para. 52 of the Opinion.

38 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law,* Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16.

39 It is, however, interesting to note in this context that the ICJ in the *LaGrand* Case declined to take position on the character of Art. 36(1)(b) as a human right, ICJ Reports 2001, 494, para. 78.

the Convention on Consular Relations, which is neither a human rights treaty nor a regional treaty "concerning the protection of human rights in the American States"; however, the Court reiterated that it had jurisdiction to review any treaty provision concerning the protection of human rights in the American States because the relevant terms in Art. 64(1) of the Convention could not be deemed to impose geographic or regional limits.[40] As these opinions did not require any implementation on behalf of the states, they constitute an authoritative interpretation of the Convention and accordingly the guideline for the extent of the Court's advisory powers. This is of the utmost importance because it empowers the Court to control the implementation of any human rights provision by the parties to the American Convention on Human Rights. What was of general relevance at a substantial level were, in particular, the opinions on *Habeas Corpus in Emergency Situations*[41] and *Judicial Guarantees in States of Emergency*,[42] by which the Court stated which rights could not be derogated even in emergency situations. The opinion concerning the *Judicial Status and Human Rights of the Child*[43] has also to be mentioned, which together with several contentious cases on the right of the child, was of significant relevance in defining the rights of the child in a surrounding where such rights urgently needed definition and implementation. Finally, reference should be made with respect to the most recent and very far reaching opinion on the *Juridical Condition and Rights of the Undocumented Migrants,*[44] where the Court found that any migrant worker was entitled to non-discrimination and equality before the law, independently of his migratory status, because non-discrimination had to be qualified as a *jus cogens* norm.[45] As a consequence of this opinion, the U.S. Aliens Torts Claims Act (which provides standing to aliens that are victims of torts in violation of the law of nations) would be applicable to undocumented workers.

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[40] In this sense *cf*. already Opinion *"Other Treaties"* (note 36), para. 25.

[41] Advisory Opinion OC-8/87 of 30 January 1987, Series A, No. 8.

[42] Advisory Opinion OC-9/87 of 6 October 1987, Series A, No. 9.

[43] Advisory Opinion OC-17/2002 of 28 August 2002, Series A, No. 17.

[44] Advisory Opinion OC-18/03 of 18 September 2003, Series A, No. 18.

[45] *Cf*. for the significance of such finding Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Worker's Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 547, 565 (2004).

This result was not in line with U.S. politics and led the U.S. Supreme Court to indicate that it would narrowly define the term "laws of nations."[46] This statement in fact implies that the United States admitted that the opinion would be of some effect for it although the United States has not ratified the Convention.

III. The Badinter Commission

Coming finally to the opinions of the Badinter Commission, it can be said that the whole issue concerning the consequences of the dissolution of a state and the conditions for the recognition of new states was not settled in international law and thus lent itself to contributing to the legal issues concerning the dissolution of states and relating to statehood and succession.[47] Regarding the particular situation at hand, namely the one in the Former Yugoslavia, the opinions on the legality of secession[48] and the issue of consent of the former sovereign,[49] as well as those opinions on issues of self-determination,[50] recognition of new states[51] and questions of minority rights and human rights in case of secession,[52] offered some guidance to solve these issues with regard to the particular situation in the Former Yugoslavia; however, they undoubt-

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46 Schmid (note 9), 415, 450.

47 Malgosia Fitzmaurice, *Badinter Commission (for the Former Yugoslavia)*, in: MPEPIL, margin number 38 (Rüdiger Wolfrum ed., 2005).

48 Opinion No. 1 of 29 November 1991, 31 INTERNATIONAL LEGAL MATERIALS (ILM) 1494. (1992) and Opinions No. 4, 5, 6 and 7, all of 11 January 1992, 31 ILM 1501 (1992); *cf.* for more details to: Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BALTIC YEARBOOK OF INTERNATIONAL LAW 323 (1996); Stefan Oeter, *Yugoslavia, Dissolution*, in: 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1563, 1568 (Rudolf Bernhardt ed., 2000); Malgosia Fitzmaurice, *Badinter Commission (for the Former Yugoslavia)*, in: MPEPIL (Rüdiger Wolfrum ed., 2005); ANDREAS ZIMMERMANN, STAATENNACHFOLGE IN VÖLKERRECHTLICHE VERTRÄGE 303 *et seq.* (2000).

49 Opinion No. 8 of 4 July 1992, 31 ILM 1522 (1992).

50 Opinion No. 2 of 11 January 1992, 31 ILM 1497 (1992).

51 Opinion No. 10 of 4 July 1992, 31 ILM 1525 (1992).

52 Opinion No. 2 (note 50).

edly also constitute a contribution to the development of the respective questions of international law which will be of relevance in future cases; they already played a role in the advisory opinion of the ICJ concerning *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. Several of the issues considered by the Badinter Commission were of particular relevance in that procedure and have been cited as precedents by numerous of the "participants" in the procedure.

This admittedly incomplete and abridged overview of the advisory practice of the relevant judicial bodies not only gives an impression of the international law issues at stake but also of their significance for the development of international law. However, the statement that advisory opinions "contribute to the development of international law," which is generally employed in the context of describing the impact of advisory opinions on international law,[53] does not answer the question what exactly is (legally speaking) the particular impact of advisory opinions and the quality of such contributions respectively. This question will be addressed in the following section.

D. The Legal Impact of Advisory Opinions

As the term *advisory opinion* implies, it only constitutes advice on a legal question[54] concerning either the existence of a legal rule or the exact meaning of such a rule. Consequently, the advisory function of a court or tribunal is used with regard to controversial, often evolving issues of international law: Where the meaning of a treaty provision or the state of international law is uncontroversial, no advisory opinion would be requested. Thus, advisory proceedings, far more than contentious cases, are aimed at clarifying or establishing basic doctrines of international law and they do indeed constitute contributions to the conceptual evo-

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53 *Cf*. in this sense already Edvard Hambro, *The Authority of the Advisory Opinions of the International Court of Justice*, 3 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 87 (1954).

54 Manley O. Hudson, *The Effect of Advisory Opinions of the World Court*, 42 AJIL 630 (1948).

lution of international law.[55] However, the clarification or identification of legal rules is situated at the boundary between simply stating the existing law, law-development, and law-making, which are not separated by a precise definition. Although the opinions are merely advisory, they are judicial pronouncement and not only legal advice in the ordinary sense.[56] The substance of the opinions is of the same high judicial quality as that of judgments,[57] underpinned by the fact that the advisory procedure is "guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."[58] Furthermore, advisory opinions do at least constitute a "subsidiary source of law" according to Art. 38, para. 1(d) of the ICJ Statute. Nevertheless, "the character and binding force of these opinions have puzzled jurists since the very beginning of the existence of the Court"[59] because the legal meaning of that "binding force" remains unclear, although the contribution of advisory opinions to the development of international law was never contested. The different circumscriptions concerning the effect of advisory opinions, such as *contribution to the development* of international law, *law-making*, *statement of law erga omnes*,[60] and *judicial legislation*,[61] are not doctrinally determined legal terms, but rather terms in legal theory or political science;[62] they do not contain a clear qualification of what exactly constitutes the legal impact on the development of international law of advisory opinions.

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55 Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 11 (2010).

56 PRATAP (note 25), 230.

57 PRATAP (note 25), 227.

58 Art. 68 ICJ Statute; Art. 63 Rules of Court of the IACtHR; for details concerning the procedure *cf.* Hambro (note 53), 8.

59 Hambro (note 53), 8.

60 SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 1699 (2006).

61 LAUTERPACHT (note 23), ch. III entitled "Judicial Legislation", 45.

62 LAUTERPACHT (note 22), 155.

I. Lack of Binding Force

It is a basic truth that advisory opinions have no binding force, as there is no provision in the relevant treaties comparable to that concerning the binding effect of judgments. They do not create an obligation for the body requesting the opinion to give them effect,[63] and lesser still are the states likely to be legally bound by them. Even if the opinions are accepted by the requesting body – as generally is the case[64] – the states are not bound individually. Thus, for example, if the General Assembly requests an opinion from the ICJ, it usually adopts a resolution by which it accepts the advice given by the Court, but the positive vote expressed by the states supporting the resolution does not imply any obligation on these states individually. Advisory opinions are not even binding "in the negative sense": Action contrary to the law found to exist in an opinion does not constitute a violation of international law, although in fact there are nearly no cases in which states or organizations have acted contrary to the law laid down in an opinion; infamous exceptions being of course South Africa with regard to the *Namibia* opinion and Israel with regard to the *Wall* opinion.[65] On the other hand, action in conformity with the legal situation found to exist in an advisory opinion would have a justifying effect for state action in accordance with the opinions.[66]

Also, the formal position constantly taken by the courts themselves clearly denies not only any binding effect of the advisory opinions, but also any legislative impact.[67] The PCIJ/ICJ as well as the IACtHR constantly underline the non-binding and non-legislative character of their opinions. On this matter the ICJ has said the following: "The Court's

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[63] For an overview over the reception of advisory opinions, *see* PRATAP (note 25), 234 *et seq*.; Frowein & Oellers-Frahm (note 2), margin number 43 *et seq*.

[64] *Cf*. Frowein & Oellers-Frahm (note 2), margin number 44, with examples of resolutions adopted by the General Assembly concerning advisory opinions given on the request of the General Assembly; ROSENNE (note 60), 1755.

[65] PRATAP (note 25), 228.

[66] Frowein & Oellers-Frahm (note 2), 1417, margin number 53.

[67] This conclusion was drawn very early: LAUTERPACHT (note 23), 45 and confirmed with a view to the practice of the ICJ, in LAUTERPACHT (note 22), 156.

reply is only of an advisory character; as such it has no binding force."[68] This position was confirmed in the advisory opinions regarding the ILO Administrative Tribunal, the Statute of which provides for the binding character of certain opinions. In this context, the Court made it clear that "such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion."[69] In its advisory opinion concerning the powers of the Council of the League of Nations under the mandates system, the Court even stated that "… the opinion would not have binding force, and that the Mandatory could continue to turn a deaf ear to the Council's admonitions."[70] A particularly telling example where the ICJ explicitly reiterated that it did not consider itself as empowered to "make" law is the advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.[71] This opinion was largely criticized as constituting a *non liquet* in the decisive part 2E of the dispositive,[72] where the Court's findings were as follows:

> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstances of self-defense, in which the very survival of a state would be at stake.

In fact this case would have been an occasion for the Court to "make" law, and the separate opinions reflect the discussion that took place within the Court on this issue. In particular, the question was raised whether a finding of *non liquet* was forbidden as a rule of international law, which is, in fact, controversial; but if that were the case, the question would have arisen whether such rule would also apply to advisory opinions, a question that would have to be answered in the negative: Advisory opinions are requested in order to hear the court's advice upon the existing state of law; when the court finds a gap in the law, it is

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[68] *Peace Treaties*, Advisory Opinion, ICJ Reports 1950, 71; also *Privileges and Immunities Convention*, Advisory Opinion 1989, ICJ Reports 1989, 189, para. 31.

[69] *ILOAT (UNESCO)*, Advisory Opinion, ICJ Reports 1956, 84.

[70] *South West Africa Cases*, Preliminary Objections, ICJ Reports 1962, 337.

[71] ICJ Reports 1996, 226.

[72] *See* Dissenting Opinion of Judge Schwebel, ICJ Reports 1996, 322 and Judge Higgins, *Id.*, 590.

not its task to fill the gap, as it only has the function of stating the law in existence at that moment in time.[73] In the last paragraph of his separate opinion, Judge Guillaume took a clear position on the role of the Court when he said: "I should like solemnly to reaffirm that it is not the role of the judge to take the place of the legislator. … The Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign states."[74] Similar statements have been made by the IACtHR which qualified its advisory function as being designed "to enable OAS member states and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States."[75] Furthermore, the Court stated in its first advisory opinion that in interpreting the Convention, it "will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Art. 31 and 32 of the Vienna Convention on the Law of Treaties,"[76] thus indicating its intention to merely interpret and not to "make" law.

All these statements underline the fact that the advisory function is conceived, or at least presented, by the courts themselves as a means of merely giving guidance to the requesting organ in the particular circumstance on the basis of the *existing* law, and that the impact of the opinions depends on the reception and acceptance by the international community. Furthermore, it should be mentioned that there exists no obligation to answer a request brought before a court; it is within the court's discretion to give the requested opinion or not,[77] a fact that, on the one hand, reflects the difference between contentious jurisdiction

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[73] Robert Y. Jennings, *Advisory Opinions of the International Court of Justice*, in: 1 BOUTROS BOUTROS-GHALI AMICORUM DISCIPULORUMQUE LIBER, 531, 534 (1998); ROSENNE (note 60), 1753.

[74] ICJ Reports 1996, 293, para. 14.

[75] *Restriction to the Death Penalty /Arts 4.2 and 4.4 American Convention on Human Rights*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, para. 22.

[76] *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the Convention)*, Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1, para. 33.

[77] This discretion is expressed in terms that the Court "may" give an advisory opinion, Art. 65 ICJ Statute and Art. 64 (2) American Convention on Human Rights.

and, on the other hand, the possibility that requests for advisory opinions may have significant political implications which may make it preferable not to answer the question. It should, however, be noted that neither the PCIJ/ICJ nor the IACtHR has ever dismissed a request for reasons of propriety,[78] because, except in very particular situations, declining a request for an advisory opinion would not be in line with the function of a judicial body and the task of merely clarifying legal questions.[79] The "sensibilities" of the states are thus very present in the courts' action that finds particular expression in the exhaustive reasoning of the opinion, because the absence of full reasons could raise the impression of law-making or even of arbitrariness.[80] In this context, the procedure is of utmost importance, because it is characterized by what may be called *amicus curiae input*. In advisory proceedings before the ICJ and the IACtHR, not only are all parties to the instrument informed of the request, but also organs and international organizations that may furnish information on the question at stake by written statements and/or oral argument (Art. 66 ICJ Statute and Art. 62 Rules of Procedure of the IACtHR). States and organizations, in particular NGOs, make great use of this possibility.[81] This input enables the

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[78] *See* in particular, the *Kosovo* Opinion of 2010, the *Wall* Opinion, ICJ Reports 2004, 3, 144 *et seq*. and the *Nuclear Weapons* Opinion, ICJ Reports 1996, 66, requested by the WHO which was dismissed for other reasons than those of propriety. The IACtHR only once refused to give an advisory opinion, however for the reason that the question presented "could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings", *Compatibility of Draft Legislation with Art. 8.2. of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991, Series A, No. 12; *see also* Frowein & Oellers-Frahm (note 2), margin number 37 *et seq*.; Pasqualucci (note 35), 274; Franklin Berman, *The Uses and Abuses of Advisory Opinions*, in: 2 LIBER AMICORUM JUDGE SHIGERU ODA (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds, 2002).

[79] Frowein & Oellers-Frahm (note 2), margin number 39.

[80] LAUTERPACHT (note 22), 39.

[81] In the ICJ *Wall* Opinion more than 40 statements by states and organizations were furnished; in the still pending opinion concerning the *Unilateral Declaration of Independence by Kosovo* the situation was similar; for more details, *cf.* the information on the homepage of the ICJ; *see also* Andreas Paulus, *Art. 66*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A

Court to decide the question on the basis of the information of all interested parties, which may be considered to be a means of legitimating the decision. This possibility of receiving broad information exists thus in a significantly larger measure in advisory opinions than in contentious cases where, on the one hand, the question at stake is defined by the application and the claims of the parties, and, on the other hand, the information brought before the Court only comes from the parties and is thus rather one-sided and partial but does, however, determine the Court's findings in so far as the Court cannot decide *ultra petita*. In this context, it should also be kept in mind that the advisory function of international courts depends on a request by an authorized organ so that the way the courts treat such requests will be reflected in the readiness of the organs to bring requests to the court. In this sense, the acceptability of an advisory opinion which results, on the one hand, from the reasoning of the decision and, on the other hand, from the support given to the decision by a convincing majority of the court,[82] is of utmost importance for the reception of the opinion and thus its impact on international law.

II. Authoritative Character

The fact that advisory opinions are not binding and lack the res judicata effect is, however, "not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences."[83] Advisory opinions have been characterized as "a quasi-judicial appraisal" and "some kind of judgment,"[84] and their "persuasive character and substantive authority"[85] as pronouncements of the most prominent inter-

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COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[82] Hambro (note 53), 20; LAUTERPACHT (note 22), 40, 41.

[83] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Separate Opinion of Judge Azevedo, ICJ Reports 1950, 80.

[84] *Certain Expenses of the United Nations*, Advisory Opinion, Dissenting Opinion of Judge Koretsky, ICJ Reports 1962, 254.

[85] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 29 BALTIC YEARBOOK OF INTERNATIONAL LAW 55 (1952).

national court have constantly been emphasized. Due to the "authoritative character" of advisory opinions, they have been considered as comparable to declaratory judgments,[86] and declaratory judgments have even been considered to be an indirect method of obtaining advisory opinions by states.[87] This idea is particularly attractive in cases where the interpretation of treaties is at stake, the only subject matter of the advisory function of the IACtHR, but also often the subject matter of advisory opinions of the ICJ. In fact, whether treaty interpretation is the subject matter in a contentious or advisory procedure will not make a great difference in practical terms: The interpretation given by the court will govern the future application of the treaty and, *de facto*, this will not be limited to the parties to the case.[88] This is the reason why, in contentious cases, each state party to a treaty, the construction of which is at stake, has a *right* to intervene,[89] and, in advisory opinions, it has the right to give comments.[90] In this sense treaty interpretation in contentious or advisory proceedings is nothing more than a statement of the law *erga omnes*, a finding that is also applicable to advisory opinions on legal questions not concerning treaty interpretation, since, in this case, the court also states what is – in its view – the law at large, namely the law *erga omnes*.[91] Although this conclusion does not answer the question to what "extent an advisory opinion enters into the general corpus of international law,"[92] it is of great importance because it produces a justifying effect in the sense that no state can be considered to act illegally if complying with the law found to exist in an advisory opinion.[93]

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86 Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AJIL 156 (1938).

87 LAUTERPACHT (note 22), 250.

88 In this sense reference can be made to the ICJ which explicitly stated in the case *Avena and other Mexican Nationals (*Mexico v. United States*),* ICJ Reports 2004, 12, that its findings in the present case on the obligations of the United States under Art. 36 Vienna Convention on Consular Relations would also apply to other foreign nationals in similar situations, 151, paras 69-70.

89 Art. 63 ICJ Statute.

90 Art. 66 ICJ Statute, Art. 62 Rules of Procedure of the IACtHR.

91 ROSENNE (note 60), 1699.

92 *Id.*

93 Frowein & Oellers-Frahm (note 2), margin number 53.

Rather, the contrary is true: A state would have to justify its actions if acting contrary to an advisory opinion.

A further effect of advisory opinions concerning the court's rather than the international community's reaction lies in the fact that the court will rely on its findings in an advisory opinion as well as in contentious cases if the same legal issue is at stake in subsequent proceedings, be they advisory or contentious. Only in the presence of compelling reasons would the court depart from its earlier ruling, because advisory opinions, as judgments, are authoritative statements of law in equal degree.[94] From this perspective, advisory opinions constitute precedents:[95] They do not legally bind the court, however, for the sake of consistency and predictability of jurisprudence, the law stated to exist in an advisory opinion will be upheld unless compelling reasons require the court to decide otherwise.

III. The Law-Making Element

Having found that advisory opinions contribute to the development of international law, that they do have authoritative, even *erga omnes* character, and that they have generally been accepted by the requesting body, the question that still remains concerns their *law-making* character. This question calls for an initial definition of what the term *law-making* means.[96] If law-making is understood in the traditional sense, namely as a formal procedure of legislation or codification resulting in the definition of rights and obligations binding upon all legal subjects, the answer is a clear "no," because there is neither a legislative procedure nor any legal obligation flowing from the opinion, neither for the

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[94] LAUTERPACHT (note 22), 22; *see also* Art. 38(1)(d) ICJ Statute on decisions as a source of law where no distinction is made between judgments and advisory opinions.

[95] For the "lawmaking" effect of precedents, *see* Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue; *see also* LAUTERPACHT (note 22), 18 *et seq*.; Shyam K. Kapoor, *Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice*, in: INTERNATIONAL COURT IN TRANSITION 301, 312 (Raama P. Dhokalia & B.C. Nirmal eds, 1995).

[96] Von Bogdandy & Venzke (note 55), 12.

body requesting the opinion nor for the states. In that sense, any law-making effect would rather derive from the reception of the opinion by the international community by a voluntary act that ultimately would only depend upon the intrinsic merit and general acceptability of the opinion. As Lauterpacht put it:

> [H]owever competent, however august, however final, and however authoritative a tribunal may be, it cannot, in the conditions in which its jurisdiction is in law, and in compliance with its decisions is in fact, essentially of a voluntary character, dispense with that powerful appeal to opinion which stems from the reasoned content of its pronouncements. [97]

This statement, which is still true today, means that advisory opinions are not a formal source of law, but that their persuasive authority can and does induce states or other organs to act in accordance with advisory opinions, thus contributing to the creation of customary law or – and that is a strong argument against the law-making effect comparable to a formal source – in the case that they do not accept the opinion, to act contrary to it thereby preventing the creation of customary law. Consequently, advisory opinions can, but do not necessarily, have a lawmaking effect in that they state what the court considers to be the law; this needs, however, confirmation by state practice. In this sense the law-making, or in the terms of Lauterpacht, the "judicial legislation" by court decisions including advisory opinions, is not – and ought not to be – comparable with legislative codification by statute;[98] it only is an "indirect, although significant contribution towards the development of the law of nations."[99] This finding is in line with the traditional concept that international lawmaking lies with states by concluding treaties or creating customary law – the decisive element for the creation of law being at the very end the consent of states "to be bound *as a matter of law.*"[100] In formal terms, this is confirmed by the fact that an advisory opinion could never successfully be invoked as a source of law before a court or tribunal or give rise to reprisals in a technical sense in

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[97] LAUTERPACHT (note 22), 41.

[98] LAUTERPACHT (note 22), 189.

[99] *Id*., 400.

[100] Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65, 94 (1980).

case of non-implementation; only its development into customary law makes it generally applicable, and until then it is not more than a precedent and a subsidiary source of law in the sense of Art. 38(1)(d) of the ICJ Statute.

There is, however, an alternative concept of the term *lawmaking* that focuses more on the procedural aspect of creating law or changing the existing law rather than the outcome of such process, namely the creation of a legal rule. As advisory opinions contain an *erga omnes* judicial statement of what is – in the view of the court – the law at large, they have a direct impact on international law in so far as they cannot be ignored. If the existence of the relevant rule of law is controversial, the opinion of the court will in any case initiate a process of creating or confirming customary law according to the opinion by justifying any action in accordance with the opinion. In case of a general disregard of the rule found to exist in an advisory opinion, the developing law would deviate from the opinion. In this sense *law-making* could be understood as a process extending from the non-binding definition of a legal issue, which could be characterized as the authoritative statement of the *opinio juris,* to the final acceptation of the *opinio* by state practice. In this sense an advisory opinion would also be part of the *lawmaking* process. However, such an understanding is in fact not controversial and finds expression in the term *contribution to the development of international law*; judicial law-making in this sense is a permanent feature of the administration of justice in every society, but at the same time it is accepted that a system of law expressly sanctioning judicial legislation would be a contradiction in terms.[101]

In the context of the conceptual apparatus of this research project, advisory opinions are of particular relevance because their contribution to generating new normative expectations is not controversial. Under the modern definition of law-making, not to be understood as formal legislation, advisory opinions play a more significant role than judgments for the reason that they construe the meaning of a treaty provision or state the existence or contents of a rule of customary law at large, e.g., *erga omnes.*

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[101] LAUTERPACHT (note 22), 155.

E. Concluding Remarks

At a time when international courts and tribunals have gained increasing importance and are seized with current controversial issues of international law, the question whether their contribution to clarifying and developing the status of international law has already entered the domain of legislation is of general interest. As law-making in international law is a time-consuming affair, the involvement of courts and tribunals could in fact be helpful. However, international law, more than national law, depends on the consent of the subjects of the legal order, namely states which today still fulfill the role of legislator in international law and thus constitute the democratic and legitimizing basis of international law. Even if court decisions – and here the difference between advisory opinions and judgments in contentious cases is *de facto* rather irrelevant – may be progressive in defining the state of law or the concrete meaning of a treaty provision, these statements as such are not legislation; they need confirmation and acceptance by the international community in order to evolve into formal law if they do more than merely reflect the already existing legal situation; until then they only serve as precedents, as guidelines, or as authoritative pronouncements of considerable weight, but not more.

This conclusion, which may seem extremely positivistic and formalistic is, however, reassuring insofar as it reiterates that formal legislation simply does not belong to the power of courts or tribunals, neither in national nor in international law because legislation is a power which cannot be exercised by only some persons, however qualified and morally high-standing they may be; particularly in international law where means for coercive implementation of legal obligations are wanting, a democratic, i.e., large and consensual, basis is the primary guarantee for law-abiding conduct of states. In this sense, especially with a view to the limited means of coercive implementation, it may in the final analysis not even be decisive whether an advisory opinion or other court decision has created *formal* law: It is the authority and acceptability flowing from the significance of the organ and the reasonableness and persuasiveness of the decision which will govern the conduct of the states, irrespective of the formal character of the *law*.[102]

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[102] Bothe (note 100), 65.

In this perspective any attempt to clearly distinguish between the enunciation of a new rule and the identification or interpretation of an existing legal rule by a court may be a fiction because there is no organ in international law other than a court capable of finding out whether a certain rule of international law does or does not exist, or what the exact meaning of a certain treaty provision is, or whether a court decision, contentious or advisory, has "created" law; this issue cannot be answered authentically. This finding leads to the conclusion that *de jure* advisory opinions are not acts of legislation, although *de facto* a clear distinction between law-making and law-identification cannot be drawn. In the present context, it may therefore be stated that advisory opinions of international courts or tribunals can at least be considered as formulating shared or community expectations – what is in the interest of the court itself as well as in the interest of the judicial function a contribution to the development and certainty of international law – and that they do in fact govern the further behavior of those they address, irrespective of their binding or non-binding effect or their legal impact on international law.

Prospects for the Increased Independence of International Tribunals

By Eyal Benvenisti & George W. Downs***

A. Introduction

There appears to be a widespread perception, particularly among developing states, that international institutions continue to be disproportionately influenced by a small group of powerful states that played a dominant role in their creation and design. In recent years this has led to a growing acceptance among international legal scholars that the future legitimacy and credibility of international tribunals will be critically tied to the extent to which they are viewed as independent.[1]

To date, most of the literature on the independence of international tribunals, like most of the literature dealing with judicial independence at the domestic level, has focused on the rules connected with the ways

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[1] On the link between judicial independence and legitimacy, *see*, *e.g.*, Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification* (2010), available at: http://ssrn.com/abstract=1593543; Ruth MacKenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARVARD INTERNATIONAL LAW JOURNAL 271 (2003).

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_4,

that judges are nominated, selected, and tenured.[2] While it is true that these formal structural features have an important role to play in determining judicial independence, they are not sufficient in and of themselves. The effectiveness of international tribunals and their freedom to interpret and develop the law in the way that they deem appropriate is also a function of attributes of the broader political context in which they are embedded.

In this essay we draw upon the theoretical and empirical literatures on the evolution of court independence within modern democratic states to identify aspects of their political environments that have fostered judicial independence at the domestic level. We then extend that analysis to examine the role that these or similar factors are likely to play in facilitating the independence and legitimacy of international tribunals at the global level. We focus on two such broad aspects of the global environment not normally associated with the independence of international tribunals: the extent of political division between states that are parties to an international tribunal (interstate competition), and the extent of political division within states between state executives and national courts (inter-branch competition). We suggest further that the conditions that facilitate independence have increased in recent years and are likely to continue to do so.

The proliferation of international tribunals in recent years has focused scholarly attention on the extent and legitimacy of their lawmaking functions. Although never explicit, an integral part of the judicial process is the making of new norms by way of interpreting relevant texts and applying them to novel situations. To understand the extent of judicial lawmaking at the international level and to be able to assess its political legitimacy it is necessary to explore the background conditions that have led to the emergence and growth of international tribunals. Below we argue that the most important determinant of political legitimacy at the international level is roughly the same as Ely and others

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[2] Supra, note 1. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo* 93 CAL. L. REV. 1, 44-57 (2005) discusses the political and structural factors that motivate states to create and constrain the independence of international tribunals. *See also* Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 460-62 (2000) (referring also to the level of legal discretion that judges may exercise when interpreting a treaty, and the degree of control that governments exert over a tribunal's material and human resources, as also playing a role in determining overall tribunal independence).

have long argued that it is within the domestic sphere; i.e., the extent to which a given court is perceived to be sufficiently independent of the powerful actors that dominate the political sphere to take less powerful and minority interests into consideration.[3] There are, of course, any number of other factors involved in shaping the outcome of the litigation at the level of the international tribunal, such as the relative clarity of the relevant legal texts and the room for discretion they leave for the judges, the analytic qualities of the judges, and their moral convictions. In addition, there are a number of factors that enhance or detract from the perceived legitimacy of the law made by the international tribunal, such as the process of the litigation itself, the content of the new law, and the ways it affects diverse stakeholders. However, we argue below that the perceived independence of a given international tribunal from the handful of powerful states that have tended to dominate the institutional design process continues to be the most significant factor in shaping the extent to which judge-made law is regarded as legitimate in the eyes of less powerful states. Such political independence on the part of the international tribunals continues to be a necessary, if not sufficient, condition for the perceived legitimacy of their lawmaking.

While normative assessments of judicial lawmaking usually assume that courts are independent, this is not always the case. In many parts of the world, courts regularly make laws that disproportionately promote the interests of a small group of powerful political actors at the expense of the majority of citizens and often function as their surrogate legislatures. The situation is similarly mixed at the international level. Lawmaking by international tribunals has always been and continues to be both the product of international tribunals that are effectively dependent agents of powerful states who employ them as delegated legislatures ("surrogate lawmaking") as well as comparatively independent tribunals that have managed to employ their discretion to make law that may not be in line with the wishes of the dominant actors that created the international tribunal ("independent lawmaking"). Obviously, only the second type of lawmaking reflects what most commentators would regard as compatible with democratic principles. It is doubtful that surrogate lawmaking can ever be wholly democratically legitimated. A given decision may happen to be good law (e.g., ending impunity to war criminals, improved protection of global commons, etc.), but judicial independence is a necessary condition for legitimacy and surrogate

[3] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

lawmaking fails this test by definition. Moreover, it is doubtful whether opening up the international tribunal for public participation and reason-giving could remedy the inherent deficiencies of a dependent tribunal.

To facilitate the normative discussion about the legitimacy of lawmaking by international tribunals, this essay explores the geopolitical conditions in which lawmaking by "surrogate" and "independent" tribunals arise. Drawing on theoretical work on judicial independence conducted by political economists, we argue that judicial independence depends on the degree of political competition among the major political actors and the extent of policy differences among them. In general, the greater the competition and policy differences, the more "political space" is available for courts to operate within, and the broader their independence and discretion is in setting and implementing policies. The absence of these conditions facilitates what we term "surrogate" courts or lawmaking in which courts have little or no independence. While the conditions that facilitate the emergence of "surrogate" lawmaking are relatively simple to describe, the conditions under which powerful states might voluntarily agree to accept to surrender a substantial degree of control over international tribunals – and by so doing tolerate the prospect of growing constraints on their own discretion – has received relatively little attention.

While obviously international tribunals can possess varying degrees of independence and any given court can possess different amounts of discretion in different issue areas under their jurisdiction, it is useful to begin by contrasting two different ideal types of international tribunals: dependent international tribunals and independent ones. Part B below provides a brief description of lawmaking by dependent international tribunals. Part C describes the conditions that allow international tribunals sufficient political space to make law relatively independently. Part D concludes.

B. Surrogate Lawmaking

In many cases, the composition and mandates of international tribunals is overseen by a small group of powerful states that enjoys a relatively high level of consensus with respect to the way they perceive the role of the international tribunals. The five permanent members of the UN Security Council are united in their desire for ineffective review of Secu-

rity Council Resolutions by the International Court of Justice (ICJ), and limited review of internal administrative matters.[4] The founders of these international tribunals possess the capacity and incentive to directly monitor the members of the tribunals. They dominate the process of nomination, define the criteria for renewing the appointments, and approve the court's budget.[5] They can also limit the court's independence by disregarding its judgments, by threatening to abandon it for a different venue,[6] by institutionalizing ways to overcome its interpretations,[7] or by simply renegotiating treaty obligations.[8] To the extent that this group of states can remain united they can employ these instruments of control to both limit the discretion of international tribunals and pressure them into adopting a jurisprudence that will be more conservative in terms of the existing status quo than that of their national court counterparts and the international tribunals that they monitor less closely.

In general, the more influential a given court is and the more significant the consequences of its decisions are for the interests of the dominant

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4 This can be inferred from the decisions of the ICJ in cases like those mentioned in notes 36-38 *infra*.

5 For an analysis of the methods for controlling international tribunals, *see* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 412 (2008); Tom Ginsburg, *International Judicial Lawmaking* (2005), available at: http://ssrn.com/abstract=693861.

6 On the effects of the ability of states to pick and choose among international tribunals, *see* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD LAW REVIEW 595, 628 (2007).

7 Such as the NAFTA Free Trade Commission composed of representatives of the three member states that has the authority to overrule interpretations of the NAFTA by arbitrators. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en. Similarly, "[t]he [ECJ's] discretion to interpret secondary legislation was curtailed by the move from unanimity to [Qualified Majority Voting] in the [European] Council" (George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INTERNATIONAL ORGANIZATION 357, 359 (2001)).

8 On the widespread renegotiating of investment treaties, *see* UNCTAD World Investment Report 2010, 86, available at: http://www.unctad.org/Templates/Page.asp?intItemID=1465.

states, the more likely it is that these tools will be employed. This perspective suggests that the ICJ's "infuriatingly transactional" jurisprudence, "sparse reasoning," beating around the bush with respect to applications of *jus cogens*, and lack of progressivity compared to other international tribunals[9] are more attributable to the powerful state scrutiny that the court labors under than to the judicial philosophies of its judges.

In addition to settling interstate disputes in ways that broadly reflect the interests of the system's principal designers, international tribunals provide them with several other important services.

I. Internal Monitoring of the Bureaucracies of International Organizations

Designers of any large-scale organization or system have reason to worry that the bureaucratic agents to whom they delegate day-to-day operational authority will exploit their informational advantage and undermine their interests, and international organizations are no exception. Assigning international tribunals detailed internal oversight functions and vesting them with broad disciplinary power provides the system's designers with a relatively low cost way to discipline bureaucracies of international organizations for failing to implement their preferred policies or complying with what they believe to be the norms of good governance. The reputation for impartiality and independence that international tribunals often enjoy enables them to oversee and, if necessary, rule against bureaucrats, regardless of nationality, and reduces the political costs of direct control that system designers would otherwise have had to assume. Lawmaking in this context is likely to focus on good governance requirements, and/or on transparency and broad participatory rights that would privilege representatives of constituencies of the powerful states. Pertinent examples include administrative tribunals that oversee employment conditions[10] and the inde-

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[9] Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EJIL 265, 288 (2008).

[10] *See, e.g.*, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166 (ICJ reviews legality of judgment of United Nations Administrative Tribunal).

pendence of office-holders,[11] as well as treaty bodies that review the implementation of policies by the management of the international body, such as the World Bank Inspection Panel.[12]

II. Imposing Treaty-Based Obligations on Weaker Member States

Since the primary function of international tribunals is to ensure the compliance of parties to an international organization with its rules and obligations, such as the compliance of members of the WTO with WTO norms, lawmaking in this context generally means expanding the obligations that member states have beyond what they envisioned at the time of concluding the treaty. International tribunals tend to interpret widely the powers of international organizations under the "implied powers" doctrine and hence their authority vis-à-vis member states.[13] International tribunals have also interpreted widely their own authority to obtain information related to the litigation directly from constituencies not represented by governments,[14] an interpretation that was vehemently opposed by developing countries.[15] In disputes concerning foreign investments, international tribunals have developed rules con-

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[11] Administrative Tribunal of the International Labour Organization, *Bustani v. Organisation for the Prohibition of Chemical Weapons*, Judgment No. 2232 of 16 July 2003, available at: http://www.ilo.org/public/english/tribunal/fulltext/2232.htm) (The Tribunal reaffirms that the independence of international civil servants is an essential guarantee for the proper functioning of international organizations).

[12] For WBIP cases, *see* http://www.inspectionpanel.org/.

[13] *See*, *e.g.*, Reparations for Injuries Suffered in the service of the United nations, ICJ Reports 1949, 178, 182; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter),* Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151, 172; José E. Alvarez, International Organizations as Law-makers 92-95 (2005); Jan Klabbers, An Introduction to International Institutional Law 70-71 (2002).

[14] The WTO Appellate Body decision in *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, 18 September 2000 and WT/DS135/AB/R, 12 March 2001.

[15] On the negative reactions of developing countries, *see* Petros C. Mavroidis, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, available at: http://centers.law.nyu.edu/jeanmonnet/papers/01/010201.html.

cerning the amount of damages and other reparations that host states – predominantly developed ones – owe under international law, absent specific treaty provisions on this matter.[16] The law on internal armed conflict was developed by international tribunals, thereby overcoming the need to have developing countries (the main target of this law) agree to them.[17]

For the most part, powerful states are advantaged by a fragmented system of treaty regimes because such a regime makes it difficult for weaker parties, who are more likely than powerful states to possess disparate preferences, to increase their bargaining power by creating cross-issue coalitions so that they can act collectively.[18] On the surface, it might appear to be the case that such international tribunal-created linkages (e.g., between environmental protection or human rights and state obligations under WTO law) might perform a similar function of facilitating the creation of weaker state coalitions and eroding the dominance of powerful states. In practice, however, this is rarely the case for two reasons. First, for the most part these international tribunal-created linkages have rarely been substantively significant. Even when tribunals have shown sensitivity to related considerations, for example to environmental protection in trade or investments disputes, their ultimate focus was on the technical question whether those related

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16 *E.g.,* Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages and Valuation*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 1049 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2008).

17 On the lawmaking by international criminal tribunals, *see* Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, in this issue; Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation'*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 459 (2010); Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT LAW REVIEW 1 (2006). Cogan cites statements by the representatives of Argentine and Venezuela during the Security Council debates on the establishment of the ICTY and the ICTR to the effect that these international tribunals would not have powers to modify international law, Cogan (note 5), 438.

18 Benvenisti & Downs (note 6). On the difficulties of developing countries to create coalitions at the WTO, *see* Sonia E. Roland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARVARD INTERNATIONAL LAW JOURNAL 483 (2007).

considerations had actually been used as pretext to evade treaty-based obligations.[19] Second, and more importantly, the judge-made linkages do not offer the same "space" for weaker countries to congregate and develop their own common agenda as extended treaty negotiations would. Judge-made linkages are equivalent to giving fish to developing countries rather than fishing rods.

The regime that powerful states have promoted to protect their foreign investments extends the design principle of fragmentation to the resolution of investment disputes. The bilateral investment treaties and other investment-related agreements enable the powerful states not only to tune the capital importing states' obligations in ways beneficial to capital exporting states, but also to resort to a diffuse system of ad hoc arbitration panels composed of private professionals. Several scholars have decried the outcome of the jurisprudence emerging from those arbitration awards as grossly unfair for capital importing countries,[20] some even calling them capitulation agreements.[21] Others have blamed the expansion of doctrines protecting investors and limiting the regulatory authority of host states on the dependence of arbitrators in ad hoc investment dispute panels "on two powerful actors in the system: executive officials (that are designated as appointing authorities under investment treaties) and prospective claimants."[22]

The latter explanation is not fully convincing, because arbitrators who seek to expand the chances of reappointment should act impartially.

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[19] This was ultimately the concern of the Appellate Body in the *Shrimp/Turtle Case*. *See* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491 (2002).

[20] DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007). *See also* a public statement by scholars, available at: http://www.osgoode.yorku.ca/public_statement/.

[21] David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization,* 35 TEXAS INTERNATIONAL LAW JOURNAL 387 (2000). For support of the system, referring to it as an "Athenian" type of empire emerging out of the myriad of investment treaty regimes, *see* José E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALABAMA LAW REVIEW 943 (2009).

[22] VAN HARTEN (note 20), 169.

The defending states appoint as many arbitrators as the claimants do, and both arbitrators and executive officials share an interest in maintaining their personal reputation and that of the system as impartial.[23] More importantly, self-motivated arbitrators who are keen to expand their reappointment opportunities would seek collectively to reduce barriers to litigation (recognizing lower standing requirements, disregarding procedural limitations, etc.), thereby potentially increasing the number of litigations, rather than err on the side of the investors. In fact, an empirical study by Susan Franck demonstrates just that: While investors were largely successful at the jurisdictional phase, governments were more successful on the merits, and overall, governments won almost 58% of the cases.[24]

There may be several reasons for this failure to counterbalance powerful state interests apart from the arbitrators' lack of independence. Susan Franck, for example, has suggested that because the arbitrators are disproportionately drawn from Western countries,[25] they may tend to have predispositions about the sincerity of regulatory decisions in developing countries. We doubt these explanations. We suspect that the lack of balance springs from three more systemic reasons. First, arbitrators in investment disputes are called upon to interpret and apply discrete treaties where the pro-investor bias is firmly embedded. The arbitrators simply cannot level the playing field and counterbalance the treaty provisions as other tribunals sometime do. Second, the arbitrators may realize that such interpretative effort would be futile given the ease by which powerful states can renegotiate treaties or otherwise modify the outcomes of awards.[26] The third systemic reason is the diversity of the ad hoc panels that increase the coordination costs of all arbitrators to come up with consistent positions. These three systemic factors reduce the independent authority of arbitrators to modify the law (which is distinct from their independence in ruling for or against the state party). All too frequently arbitrators have neither the power to

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[23] On the importance for arbitrators of their reputation, *see* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM LAW REVIEW 1521, 1596 (2005).

[24] Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 NORTH CAROLINA LAW REVIEW 1, 50 (2007).

[25] *Id.*, 78.

[26] *See* the ruling of the NAFTA FTC (note 7).

impose their will on strong states, nor the sense of responsibility for doing so.

III. Shaping the Default Rules of International Law

In the two above-mentioned contexts, international tribunals function as mechanisms by which powerful states can exercise indirect control over international organizations and their bureaucracies or modify the parties' specific treaty-based commitments. But international tribunals can also serve as vehicles for implementing legal changes in a broader context by altering existing norms or creating new ones in a context that would traditionally have required the consent of all state parties. Lawmaking by international tribunals is a way for system designers to set the default rules of the international legal system, namely the rules that would apply unless they are changed by interstate agreements. By laying the ground rules of international law, international tribunals increase the costs for those states that seek different norms and which would need to obtain state consent to different treaty obligations.

The main vehicle for such lawmaking is the use of customary international law as a source of legal obligation. International tribunals exercise considerable discretion in both "finding" state practice and in determining whether such practice reflects states' acknowledgement of its binding quality.[27] Courts rarely engage in systematic review of state practice and instead use proxies such as adopted treaties or decisions of other international institutions as reflecting state practice.[28] The recourse to customary international law was instrumental for imposing general obligations to cooperate in the area of global commons, where the ICJ adopted the concept of international watercourses as "shared" property.[29] While the ICJ might appear to be primary locus for the

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[27] As Lauterpacht observed already in 1958, "In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of customary international law." HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 368 (1958).

[28] Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AJIL 817, 819 (2005); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 758-759 (2001).

[29] *See* the International Court of Justice judgments in *Case concerning the Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997, 7;

creation of new law that conforms to P5 interests, it is certainly not the only such institution. Ad hoc international criminal tribunals, set up by the UN Security Council, are good examples of lawmakers in the laws of war area that transformed the law on the regulation of internal armed conflict, thereby overcoming persistent opposition of developing countries to accept limits on their internal use of force.[30]

Sometimes the primary purpose of litigation lies less with the specific case at hand than with the intention to influence the evolution of general international law. One clear example is the ELSI case, brought by the US against Italy before the ICJ in 1987. The suit centered on Italy's alleged responsibility for taking over a failing factory in Sicily owned by US companies. The sole reason for the suit was the precedent it set for *other potential* disputes concerning foreign investments. As explained by Terry Gill, the ICJ judgment in the ELSI case was

> an important decision in what [wa]s ostensibly a relatively unimportant case. The interests of a financially shaky Italian subsidiary of a U.S. corporation and damages totaling a mere $12,679,000, plus interest, do not appear at first sight to be of major significance. However, there was considerably more at stake than might appear from a cursory examination of the Judgment. The United States maintains a substantial network of bilateral relations based on FCN [Friendship, Commerce and Navigation] and investment protection treaties with similar or identical provisions to those in the FCN Treaty with Italy. The U.S. interest in the provisions of this Treaty that protect U.S. shareholders that own and control foreign subsidiaries in host countries extends considerably beyond the fate of ELSI.[31]

At times, the desired default rules of customary international law would have the character of open-ended standards that provide powerful states with sufficiently wide discretion and bargaining space. Although the choice of vague standards can make eminent sense at times, they can have distributional effects. Vague standards might work better for powerful states than clear rules that either immunize weaker countries' jurisdiction and resources from external interference or improve their bargaining position either in bilateral or multilateral settings. Therefore when interpreting treaties or "finding" customary interna-

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Case Concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010.

[30] On the lawmaking by international criminal tribunals, *see*, *supra*, note 17.

[31] Terry D. Gill, *International Decisions (on ELSI)*, 84 AJIL 248, 257 (1990).

tional law in matters which could restrict the powerful states' bargaining position, the preference of the stronger states would be for less rather than more clarity in the law. For example, in the Fisheries Jurisdiction case, the ICJ rejected Iceland's attempt to assert its exclusive authority under customary international law over a fishery zone in the North Sea, despite various precedents and a clear economic rationale supporting such a declaration. The ICJ effectively sent Iceland and the other coastal states to the multilateral bargaining at the UN Conference on the Law of the Sea, stating that the court should not "anticipate the law before the legislator has laid it down."[32]

IV. Overcoming Domestic Political and Judicial Resistance

Because the interpretation of treaties and the finding of customary international law by international tribunals do not need to be endorsed by state parties, they enable powerful states to preempt potential resistance on the part of both weaker state parties and also of domestic actors in all states. Similarly, the rulings of the international tribunal do not need to be endorsed by the domestic ratification processes of the state parties, and they make it more difficult for domestic courts to reach a different conclusion as to the content of the international norms. As much as powerful governments can use lawmaking by international tribunals to preempt weaker state resistance, they may benefit from it also by overcoming lawmaking by domestic actors in strong

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[32] *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, ICJ Reports 1974, 3; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, Judgment, ICJ Reports 1974, 175, paras 45, 53 respectively: "The Court is aware that a number of States has asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law […]The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down."

states. The ICJ was instrumental in curbing the efforts of the Belgian legislature to prosecute incumbent foreign agents,[33] and currently the same court is seized with an application by Germany against the Italian courts' rejection of Germany's immunity for damages claims for crimes committed during WWII.[34]

V. General Observations Concerning Surrogate Lawmaking by International Tribunals

Obviously, dependent international tribunals may be motivated by more than one of the above-mentioned goals. It is also possible that states have established international tribunals without these goals in mind but have come to pursue them through the courts in hindsight. It is also true that international tribunals are rarely in an either/or situation, and much depends on more specific constraints under which they operate. Some of the international tribunals have multiple roles: They may have jurisdiction to develop norms of internal governance, interpret the specific treaty regimes of international organizations, and make statements about general international law. However, there is any number of other explanations for the differing appetites of international tribunals for lawmaking across different issues. International tribunals – like states themselves – might simply place a higher priority on some issues than on others, or they might possess scarce resources in terms of time and cases, which forces them to focus their attention on a limited set of issues. This is especially likely to be true in the early stages of the international tribunals' efforts to increase their reputation, discretion, and/or independence.

One reliable indicator of dependency of an international tribunal is the relative ease by which its lawmaking functions can be preempted by the state parties. As we saw earlier,[35] while investment tribunals may be

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[33] International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment of 14 February, available at: http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

[34] International Court of Justice, *Case Concerning Jurisdictional Immunities* (Federal Republic of Germany v. Italy), Application of the Federal Republic of Germany, 23 December 2008, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=gi&p3=0.

[35] *Supra*, notes 20-26 and accompanying text.

quite independent in applying the law of the treaty to a case at hand, they are quite ineffective in modifying the law against the wishes of the state party that can easily renegotiate the text of the relevant treaty. Two additional, relatively reliable if not necessarily conclusive, indicators of dependency include the congruence of international tribunal and powerful state preferences over time and the frequency with which a change in the jurisprudence of the international tribunal appears to follow on heels of a recent change in the expressed preferences of one or more powerful states. These indicators become apparent especially in situations where the international tribunal is led to adopt mutually contradictory positions. One case in point is the seemingly conflicting approaches adopted by the ICJ concerning its own authority. The ICJ found implicit authority based on scant language in the UN Charter for the UN General Assembly to set up an international tribunal to adjudicate internal employment matters (the UN Administrative Tribunal),[36] but refused to find a similar authority to have "the ultimate authority to interpret the Charter"[37] and review the compatibility of Security Council resolutions with the Charter.[38] In general, the ICJ consistently avoided challenges to the fundamental interests of the P5, as for example in its treatment of the request for an advisory opinion on the legal-

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[36] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954)*, Advisory Opinion of 13 July 1954, ICJ Reports 1954, 47. Also, despite grave concerns the ICTY found implicit authority for the Security Council to set up criminal courts for enforcing the laws of war, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995.

[37] "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted." *Certain Expenses* (note 13), 168.

[38] Undoubtedly, it asserted, "the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 16, para. 89. The ICJ did not accept the invitation to review the legality of the Security Council's Resolution to impose sanctions on Libya *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 3.

ity of nuclear weapons,[39] or its effort not to rule on the legality of nuclear tests in the atmosphere,[40] and likewise sought to evade issues over which the P5 were split. For example, its treatment of the various legal issues arising out of the conflict in former Yugoslavia, including the recent skirting of the question of legality of the Kosovo declaration of independence,[41] attest to its unwillingness to assert claims that would favor one P5 member over others or might be disregarded.

Having said this, it has to be acknowledged that the ICJ has, on several occasions, departed from its pattern of supporting the position of the P5 and ruled against the United States, criticizing directly its military actions against Nicaragua[42] and Iran,[43] against its breaches of the Vienna Convention on Consular Relations,[44] or indirectly rejecting the US interpretation of treaty obligations (e.g., the *Wall* opinion on the applicability of human rights law in occupied territories).[45] While the complicated relationship between ICJ and the United States is beyond the scope of this paper, one might speculate that these relatively isolated events arose from the uniqueness of the U.S. position, which ensured that few other powerful states would be affected by the adverse rulings, either because they did not have similar problems (e.g., semi-independent sub-national units that defy the international obligations such as the consular rights treaty) or because they were not bound by bilateral treaties to litigate before the ICJ. In other words, while the ICJ may be dependent on the P5 with respect to matters of *common* interest of all the P5 members, it can act quite independently when it can single

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[39] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226.

[40] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports 1974, 253; *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports 1974, 457.

[41] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010.

[42] International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14.

[43] *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003, 16.

[44] *See Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, ICJ Reports 2004, 12; *LaGrand* (Germany v. United States of America), Judgment, ICJ Reports 2001, 466.

[45] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.

out one of the P5 members for more rigorous treatment. In such a case, non-compliance with ICJ rulings does not reflect on the ICJ but only on the losing party. As we will see below, one source of independence of international tribunals is what we term "interstate competition."[46] Such interstate division is not impossible even within the group of the P5.

C. Independent Lawmaking

Thus far we have dealt with what we have labeled "surrogate lawmaking," a situation in which international tribunals are effectively "captured" by virtue of their dependence on powerful states and then operate as their agents. Since the rulings of prominent international tribunals are likely to be the most politically and economically salient, monitoring their decisions and influencing the appointment of their judges provide powerful states with an efficient way to "manage" an increasingly extensive and fragmented system of international tribunals. There are, however, a growing number of occasions when international tribunals have acted in what appears to be an independent fashion and created what clearly conflicts with the expressed interests of one or more powerful states. We argue below that such increased independence is attributable to conditions that are similar to those that political economists have long argued foster court independence domestically within democratic settings. After presenting those factors, we focus on two potential sources for independence of international tribunals, namely political division between states that are parties to an international tribunal (interstate competition) and divisions within states, especially between state executives and national courts (inter-branch competition). We suggest further that the number of occasions where the conditions for independence have manifested themselves has increased and is likely to continue to do so.

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[46] *Infra*, notes 53-54 and accompanying text.

I. The Impact of Political Division Between and Within States on the Independence of International Tribunals

One of the earliest and most prominent explanations for the evolution of judicial independence and the expansion of court lawmaking power in the domestic setting is the theory of judicial independence by McNollgast.[47] These authors argue that court independence is inversely related to the likelihood that its decisions will be ignored or overridden by the political branches. As a result, judicial independence waxes and wanes with the pattern of partisan control that exists in the political branches of government and institutional rules. In the United States, for example, the likelihood of the Supreme Court being overridden tends to be least and its political independence the greatest during periods when the government is under divided partisan control. In such an environment the chances are good that one of the legislative chambers or the executive branch will prevent the court's decision from being overturned by vetoing any attempt to do so. An independent judiciary can also emerge and be sustained when two political parties enjoy an alternating or cyclical majority and anticipate that this situation is likely to continue into the future.

Stephenson (2003) develops a related theory of judicial independence.[48] In his model, the independence of the court is driven by the referee-like role that it plays in providing a public signal to the competing governmental and opposition parties regarding the constitutionality of a given law. This signal indicates whether the party in power complied with its constitutional obligations. Because this signal provides these parties with more reliable information than they themselves possess, it enables them to exercise mutual restraint, despite their lack of the necessary means for monitoring and enforcement of this restraint, to preserve a politically moderate cooperative equilibrium that they both value.[49]

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[47] McNollgast, *Conditions for Judicial Independence*, Research Paper No. 07-43, April 2006, available at: http://ssrn.com/abstract=895723; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 SOUTHERN CALIFORNIAN LAW REVIEW 1631 (1995). (McNollgast is a collective pen name that is employed by three longtime collaborators: Matthew McCubbins, Roger Noll, and Barry Weingast.)

[48] Matthew C. Stephenson, *"When the Devil Turns... ": The Political Foundations of Independent Judicial Review*, 32 JOURNAL OF LEGAL STUDIES 59 (2003).

[49] *Id.*, 84.

According to Stephenson, in order for the independence of court to be sustained a number of conditions must be met that are similar to those described by McNollgast. Political competition needs to be at some intermediate level, judicial doctrine needs to moderate in the sense that the judiciary cannot lean too far in favor of either of the contending parties or else at least one of them will abandon its preference for judicial independence and both parties must be risk averse and place a relatively high value on the future. If the expected level of political competition diminishes such that one party becomes overwhelmingly dominant, that party will abandon its support of the existing cooperative equilibrium and judicial independence will perish with it.[50]

The McNollgast and Stephenson models are not, of course, directly applicable to the international system, which is made up of different kinds of actors and possesses weaker and more unstable rules and institutions. However, the models' central result, that political competition plays a key role in determining judicial independence, possesses a cross-contextual descriptive robustness. Hegemonic power and severe inequality are rarely if ever compatible with the emergence or sustainability of institutional independence in any political system. Historically, institutional checks and balances such as an independent judiciary have often emerged as the result of a political compromise between two relatively equally powerful actors (e.g. political parties, coalitions of states, interest groups) who believed that such a body would effectively monitor and assist in enforcing one or more agreements between them.

Stephenson (2004) explores a different model in which (1) court independence is contingent on the support of the government (i.e., a combined legislative-executive branch), (2) there is asymmetric information between voters and the government, and (3) the government is politically accountable.[51] He shows that the voters' decision as to whether

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[50] *Id*., 73. On the link between political competition and independent courts, *see also* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21–33 (2003); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 JOURNAL OF LEGAL STUDIES 721 (1994); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 JOURNAL OF LAW AND ECONOMICS 875 (1975).

[51] Matthew C. Stephenson, *Court of Public Opinion: Government accountability and Judicial Independence*, 20 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 379 (2004). On judicial review as a way to overcome the asymmetric information problem that is inherent in representative democracy, *see*

the government should cede some of its legislative power to courts depends on the relative reliability of the information that the branches provide voters, where reliability reflects the degree to which the voter can rely on a given branch's support of or opposition to a proposed piece of legislation as evidence that the proposal is in the voter's interest. For example, if judicial support is more reliable than government opposition and judicial opposition is more reliable than government support, voters will force government to cede some policy control to the courts and vice versa.

Given the opaque and uncertain character of political accountability in the international system, the potential contribution of such a public opinion model for understanding the emergence of independence of international tribunals is difficult to assess. Just as there are no well-defined parties, legislature, or executive branch at the international level, there is no well-defined court of public opinion. Nonetheless, it seems reasonable to assume that the prospects for judicial independence will be increased if that portion of the transnational "public" composed of weaker states and NGOs believes that international tribunals will provide them with significantly more reliable information about the consequences and legality of policies of international organizations than they would otherwise have. Once in hand, such information could function to create valuable focal points for weaker state/NGO coordination and reduce the risks associated with collective action. What is less clear is whether judgments of international tribunals about policies of international organizations and the grounds on which they are based will be able to reliably reach this public, and the extent to which international tribunals can help ensure that this occurs.

The models of judicial independence described above emphasize the role of political competition and the ways that courts are able to expand their lawmaking ability during periods of division or disunity that unpredictably arise among the political branches of government. However, there is reason to believe the role of courts is sometimes less passive than most theories suggest. As will be further elaborated below (see section III), once political division has emerged, courts often have the ability to strategically sustain it to bolster their independence and increase their discretion by supporting the relatively weaker branch of government when the other stronger branch threatens to regain dominance. For example, by insisting on parliamentary pre-approval of ex-

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also David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEORGETOWN LAW JOURNAL 723 (2009).

ecutive action, courts have been able to ensure the input of legislatures that had been short-circuited by the executive. By lowering threshold requirements for initiating proceedings against executives and by allowing civil society to provide information to the court through amicus briefs, courts have enhanced their own opportunities to call the executive to give account for its policies. Moreover, faced with global coordination by executive branches that circumvented and weakened the role of national legislatures, national courts have turned to inter-judicial cooperation that has strengthened both their legislatures and, indirectly, themselves.[52]

II. How Political Divisions Influence the Independence of International Tribunals

It might be useful to identify different types of political competition or political division at the global level that facilitate the independence of international tribunals. We can distinguish between two types. The first and the more common type is interstate competition between state parties that precludes them from disciplining an international tribunal that has made a ruling that they believe is inappropriate. The second type of political division, which has only recently shown signs of emerging, results from inter-branch division within states and occurs when executives of state parties are dependent on the support of the domestic legislature or judiciary for the ratification of their preferred policies that have been adopted at the global level.

1. Interstate Competition

Interstate competition occurs at the level of an international organization where state parties compete for power and are divided on policies. These states, although they may be displeased with a ruling by an international tribunal, prefer to remain bound by the agreement that grants authority to the international tribunal. State parties may prefer to be bound by such agreement and concede to adverse ruling by an international tribunal when the benefits of participation outweigh the costs. The more costly the exit from the international tribunal's jurisdiction,

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[52] Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

the greater would be the independence of the tribunal. The relative independent lawmaking functions of the WTO Appellate Body (AB) vis-à-vis the United States and the EU can be explained by the fact that neither of them is seriously considering ignoring the AB's opinions. Therefore, internal division between state parties together with high exit costs for either state are likely to grant the relevant tribunal a relatively high measure of independence from the member states.

Regional human rights courts are another example of relatively independent tribunals. Their independence is derived from a division between a majority of states that would welcome the international tribunal's new law and a minority that would not. In such a case (take for example cases where the European Court of Human Rights (ECtHR) criticizes Russia for abusing convention rights), the reputational effects of ignoring rulings of human rights courts weigh heavier on the responding state than on the court. Those who would not comply with the law made by the international tribunal would suffer the reputational consequences of being noncompliant with an evolving human rights standard that others accept. Because petitions are usually brought consecutively against specific states rather than simultaneously against several states, the human rights international tribunal has an opportunity to single out the responding state as violator. In contrast, when a petition raises a matter of concern to most or many member states and the international tribunal cannot single out a sole violator – for example when suits were brought to the ECtHR against all NATO members[53] or members of KFOR[54] – the international tribunal may find it more difficult to limit the member states.

The most important interstate competition seems likely to be that created by growing economic power and political prominence of the developing countries. While different from each other in any number of ways, these states possess similar preferences on a wide range of issues such as climate change and trade that are likely to continue to dominate the international policy agenda in the coming years. In addition, they possess policy priorities that often differ considerably from those of the post-war coalition of powerful states that has dominated the governance of the international system up until this point. This creates the prospect that in the near future, the coalition of powerful states that

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[53] European Court of Human Rights, *Bankovic and others v. Belgium and 16 other Contracting States*, 19 December 2001.

[54] European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007.

will be governing the international system will be markedly less united and more politically competitive and divisive – a situation that as we have seen has historically given rise to greater court independence and expanded court lawmaking power. The increased competition between developed and developing nations and possibly growing divisions among the developed nations seems likely to result in greater independence for international tribunals and lawmaking discretion.

2. Domestic Inter-Branch Division

Inter-branch division – internal competition between the branches of government in state parties – can also facilitate the independence and influence of international tribunals. Such inter-branch division has increased substantially with the expansion of the international regulatory system. This has afforded the executives of powerful states and the domestic interest groups that support them with the opportunity to formulate policies that have important domestic repercussions in often opaque and fragmented decision-making apparatuses of international organizations without the institutional scrutiny that would normally take place at the domestic level, and the protection that this scrutiny offers to politically weaker domestic stakeholders.[55] As a result, the adoption of policies by state executives at the global interagency level is often viewed by national legislatures and courts as a strategy that executives use to evade domestic law. Increasingly wary of this problem, national legislators and courts have begun to monitor the implementation of, and on occasion to offer resistance to, international agreements[56] and decisions of international organizations,[57] particularly those obtained via inter-executive bargaining that appear to threaten or erode the au-

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[55] *See* Eyal Benvenisti & George W. Downs, *Will National Court Cooperation Promote Global Accountability? Prospects for the Judicial Review of International Organizations* (draft paper).

[56] *See* the Lisbon Treaty Judgment of the German Constitutional Court, 30 June 2009, available at: www.bverfg.de/entscheidungen/es20090630_2bve000208en.html; *Brunner v. The European Union Treaty*, 1993 German Constitutional Court (trans. in [1994] COMMON MARKET LAW REPORTS 57); Czech Republic Constitutional Court, *Treaty of Lisbon II*, 3 November 2009, available at http://www.usoud.cz/view/pl-29-09.

[57] ECJ Grand Chamber, Joint Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi v. Council of the European Union*, Judgment of 3 September 2008.

thority of legislatures and courts, or those that challenge the constitutional limitations on state power.

This inter-branch tension at the national level can be exploited by international tribunals to increase their own power and influence. Limitations imposed on a member state's executive by its own national courts diminish significantly the member state's ability to ignore the ruling by the international tribunal. As we mention below,[58] the European Court of Justice (ECJ) has exploited not only the horizontal division that was created by the requirement of consensus for changing the EC law, but also, and perhaps more importantly (although little noticed), it benefited from the inter-branch division that existed in three smaller members. The inter-branch division in the three Benelux countries resulted from domestic constitutional doctrines that ensured the supremacy of the ECJ law (as interpreted by the ECJ) over regular domestic legislation.[59] As a consequence, the ECJ has been able to rely on the compliance of at least these three member states with its rulings. The important role that domestic support plays in fostering lawmaking by international tribunals is demonstrated by what occurs when the basis of such support is absent. For example, in their study of the Andean Tribunal of Justice (ATJ), an international tribunal modeled on the ECJ, Karen Alter and Laurence Helfer attribute its modest lawmaking (compared to the extensive lawmaking by the ECJ) to the ATJ's inability to expect that the national courts of the member states and the other domestic interlocutors would support its rulings.[60]

The European Court of Human Rights is also sensitive to the inter-branch division and actively seeks to establish a professional rapport

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[58] *Infra* note 64 and accompanying text.

[59] The Dutch Constitution of 1953 provided for the supremacy of international treaties over domestic statutes. The Luxemburg Court of Cassation (in 1950) and its Conseil d'Etat (in 1951) acknowledged the supremacy of treaty obligations over local laws. In its 1971 *Le Ski* decision, the Belgian Court of Cassation, unable to rely on express provision in the Belgian Constitution, invoked the monist theory of the primacy of international law over national legislation, in determining that treaties supersede subsequently incompatible national laws. *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EJIL 159, 163 (1993).

[60] Laurence R. Helfer & Karen J. Alter, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INTERNATIONAL ORGANIZATION 563 (2010).

with the national courts of the member states. As Yonathan Lupo and Eric Voeten demonstrate in a recent paper,[61] one way of doing this is by increasing the citation of precedents where this might resonate well with domestic legal professionals and courts. The authors find that the ECtHR makes more reference to its precedents when it deals with politically sensitive cases (where the national court might face resistance from the executive) and when the international tribunal decides cases from common law countries whose legal systems rely more on precedents.

Of course, it is important to note that while inter-branch divisions can enhance the independence of international tribunals vis-à-vis the states' executives, the international tribunals will remain quite dependent on the preferences of potential domestic "allies" – the national courts and the legislatures. This is due to the fact that the international tribunals depend on those domestic allies to implement their judge-made law. Because these domestic allies are ultimately accountable to their domestic constituencies, they can be expected to usually give only limited and intermittent support to the international tribunal. There is, after all, no reason to believe that national courts and national legislatures will generally share the same preferences as the international tribunal. Moreover, the impact of inter-branch division tends to be limited because it is almost always confined to one state or a small group of states (e.g., between the executives and the national courts of a handful of powerful democracies) whereas interstate divisions are far more likely to be global in character. As a result, instances of independence of international tribunals stemming from inter-branch division can usually be expected to be more modest, localized, and transient relative to independence that is driven by interstate competition (e.g., by North-South differences).

Inter-branch division promises to bolster the independence of international tribunals vis-à-vis state executives due to the relatively greater independence and domestic legitimacy of national courts (as opposed to those of the international tribunals). The process by which judges are elected or appointed and their independence, once tenured, results in national court judges who are more insulated from executive influence than judges of international tribunals (some of whom can be re-

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[61] Yonathan Lupo & Eric Voeten, *Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights* (2010), available at: http://ssrn.com/abstract=1643839.

appointed).[62] National courts in most democracies also enjoy greater domestic legitimacy than do international tribunals. The basis of their authority – the national constitutions – is usually more immune to intra-governmental interference or manipulation. Nor is the legal system they control one that the executive can easily exit from. As a result, national courts are almost invariably more independent than international tribunals, whose compositions and budgets are controlled by governments, and who are sometimes viewed as expendable by the most powerful states.

As the ECJ example suggests, national courts, for their part, can also benefit from cooperation with international tribunals. International tribunals can facilitate coordination between national courts by endorsing, or at least by not opposing, their shared interpretation of the law. Therefore, while serious areas of potential disagreement exist between national courts and international tribunals and are likely to persist, it is difficult to escape the conclusion that at this particular stage in their respective developments, international tribunals and national courts, like the couple in the familiar battle of the sexes game, will both be better off if they coordinate their actions than if they act independently.

3. Independence of International Tribunals Shaped by Both Interstate Competition and Inter-Branch Division

It follows that the relative dependency of any given international tribunal is shaped both by interstate competition and inter-branch division. An international tribunal can be both interstate- and intrastate-dependent, be relatively independent on both axes, or enjoy only partial (either interstate or inter-branch) independence. For example, the ICJ is arguably interstate-dependent by virtue of the fact that the P5 control the process of judicial appointments and can veto requests to the Secu-

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[62] This is especially the case with the ICJ where elections are dominated by the P5. *See* Mackenzie & Sands (note 1); Edward McWhinney, *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, 13 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 1 (1986). But this is also the case with time-limited appointments: The Commission on Democracy through Law of the Council of Europe (the "Venice Commission") has determined that "time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges." (CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution, para. 57).

rity Council to give effect to its judgments. It is also inter-branch-dependent because the implementation of many of its judgments (e.g., those regarding the responsibility for armed conflicts, the delimitation of boundaries, and the use of transboundary resources) depend solely on state executives.[63] In contrast, the ECJ has been both interstate- and inter-branch- independent. The interstate competition resulted from the different appetites for open markets between the larger and smaller states that composed the initial six member states. The inter-branch division was driven by the national courts of the Benelux states which demonstrated relatively more willingness than the national courts of the larger member states to refer questions of interpretation to the ECJ[64] and to implement its rulings despite executive resistance. The courts of the big three – France, Germany and Italy – regarded the ECJ with suspicion. They – the French courts in particular – were significantly less enthusiastic about making references to the ECJ, and made clear that they would not automatically embrace the ECJ rulings.[65]

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[63] This may also be the case of the Andean Tribunal of Justice. Helfer & Alter (note 60) emphasize the ADJ's interbranch-dependency, but they also mention that member states have exited from the Andean Community and this would imply that the AGJ was also interstate-dependent.

[64] The greater appetite for open markets and more judicial receptivity to satisfy this appetite is reflected in the rate of judicial referrals to the ECJ. The courts of the smaller states referred questions to the ECJ significantly more (relatively to the size of their population) than those of the courts of the bigger states. Belgium and the Netherlands brought much more references per-person than the rest of the member states. Between 1970-79, (after the expansion from 6 to 12 member states) the courts of Belgium and the Netherlands referred 4 cases per 500,000 persons per year (CPPY), while German courts brought 2.2 CPPY and France, Italy, UK and Denmark less than 1. Between 1980-89 (after another expansion) the courts of Belgium and the Netherlands brought 7.1 CPPY each, while Germany 2.8, France 2.6, Italy 1 and UK less than 1. Between 1990-98 (yet another expansion) Belgian and Dutch courts brought 6 CPPY (Germany 3 CPPY, France 2, Italy 3, UK 1). While in the total account, the courts of the larger countries contributed the larger number of references, but even the absolute numbers are telling, with German courts referring 246 cases during 1980-89 while Dutch courts referring 224 cases during the same period. This information is taken from Figure 2.1 in KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW 35 (2003).

[65] The French and the German courts presented the strongest resistance to the ECJ supremacy, *see* ALTER (note 64), ch. 3 (on German courts reaction to the ECJ rulings) and ch. 4 (on the reactions of the French courts).

By capitalizing on a unique confluence of critical circumstances involving interstate and inter-branch division, the requirement of consensus for overcoming ECJ judgments, the unlikelihood of exit, and a steady flow of cases from member-states' national courts, the ECJ offers the most prominent example of an international tribunal that succeeded in making significant modifications to its legal system, by benefiting from both interstate competition and inter-branch divisions. To the extent that a transformation of the European order was achieved through law, it was the product of collaboration between the ECJ and the courts of the smaller member states rather than a collective effort on the part of European judges acting as a class.

III. Strategies to Enhance the Independence of International Tribunals

As mentioned above, there is reason to believe that the role of courts is sometimes less passive than what most theories, which emphasize the role of the political branches in creating or hindering judicial independence, suggest. While interstate and inter-branch division is usually a given from the perspective of the international tribunals, they have at times the opportunity to strategically sustain it for their own purposes by supporting the relatively weaker state or domestic actors in states that compete with the executive.

Independent international tribunals have been able to further increase interstate competition by weighing in on behalf of weaker state interests rather than operating as the agents of powerful states as they would have been forced to do under conditions of dependency. For example, we have documented the countervailing efforts by international tribunals supported by relatively weak states to confront the adverse consequences (for them) of fragmentation by developing a jurisprudence that was based on a view of international law as a system from which exit is conceptually impossible.[66] Inter-branch division can be enhanced by

[66] *See* Benvenisti & Downs (note 6), 621. On the lack of exit, *see Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para. 176 ("States cannot contract out from the *pacta sunt servanda* principle – unless the speciality of the regime is thought to lie in that

strengthening traditional checks on executive authority and unilateralism, namely national courts and civil society. This can be achieved primarily by relaxing standing requirements of individuals to initiate suits against governments on the international plane, or by increasing opportunities for public participation in judicial proceedings. In general, information that international tribunals generate could be instrumental domestically vis-à-vis the domestic political branches. The reasoning of the judgment of the international tribunal can in itself provide important information to the general public and thereby increase awareness to and criticisms of policies of powerful actors. As Lupo and Voeten show,[67] the reasoning of the case can also be a way of subtly communicating with national courts to persuade or motivate them to withstand domestic pressures. Finally, the international tribunal can empower national courts to act as its surrogates. As Christina Binder shows in this volume,[68] the Inter-American Court of Human Rights (IACHR) interpreted the American Convention on Human Rights (ACHR) as obliging national courts not to apply national norms, which were in violation of the ACHR. No doubt, when announcing this doctrine, the IACHR could anticipate the positive response of the relevant national courts, given the widespread domestic opposition to amnesty laws.

D. Conclusion

We have drawn on the domestic literature on judicial independence for guidance on the assumption that the independence of the judiciary and the perceived legitimacy of judicial lawmaking are closely connected. We suggested that the independence of international tribunals, which is a precondition for the perceived legitimacy of their lawmaking, depends on the background political conditions that shape decisions of international tribunals, especially the extent to which lawmaking by international tribunals is believed not to have been unduly influenced by the policy priorities of the great powers. Meeting this test is, of course, only one of many factors that determine the broader legitimacy of

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it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie).")

[67] *Supra*, note 61.

[68] Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in this issue.

lawmaking by international tribunals, but there are reasons to believe that it is an important one.

Lawmaking by International tribunal raises several concerns, particularly on the part of weaker stakeholders such as smaller or less developed states and the diffuse domestic constituencies within developed states whose interests receive little attention by dominant state executives and the international institutions they tend to control. However, if we are correct in believing that the growing political competition between the post-war coalition of powerful developed states and the one composed of developing powers will foster a more independent international court system, the discretion and independence of these tribunals will lead to their making rulings that less closely reflect the preferences of powerful states. As a result, such international tribunals should achieve greater legitimacy among developing country politicians and the general public than is currently the case. This greater legitimacy, in turn, should enable these bodies to contain better the level of political conflict in the system so that it does not jeopardize the effectiveness of the international institutions in dealing with the growing number of problems that confront them.

Having said that, it will not be easy for international tribunals to gain the trust of states that have good historical reason for believing that these tribunals continue to be effectively captured by the United States and its European and Asian allies. Such states will need to be presented with at least two types of evidence, neither of which is sufficient by itself. The first type of evidence will be derived from the presence or absence of the host of badly needed personnel, procedural, and structural reforms that are so well characterized by von Bogdandy and Venzke.[69] The second type of evidence is likely to be outcome-based in terms of the fairness and democratizing effects of the law produced by the international tribunals.

Another concern with lawmaking by international tribunals is the ancient worry about *gouvernement des juges*. The main difficulty with independent tribunals from the democratic perspective is, of course, the preemption of the political process when rulings by the tribunals limit the discretion of democratic legislatures. We therefore need to explain why we think that independence of international tribunals is not incompatible with the idea of democracy. This is a serious cause for worry, to which we can offer here only initial thoughts about two ways

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[69] *Supra*, note 1.

for providing an answer. First, in fragmented global lawmaking processes, characterized by numerous, weakly-related, and independent treaty-regimes, powerful state executives can diffuse the potential opposition of developing countries and also evade domestic democratic limitations on their powers, thereby disenfranchising both types of stakeholders. In contrast, competitive conditions at the political level (either between or within state parties) empower judges of international tribunals to promote their vested interest in rationalizing their environments, and this works inherently as a defragmentation tool. By creating generalizable principles and by privileging consistency and precedent, these judges not only reduce their own decision costs and increase their efficiency; they can also reduce the coordination costs of weaker states and also representatives of politically subordinate constituencies even within stronger states, by reducing the level of fragmentation. It is therefore our contention that lawmaking by *independent* international tribunals is no less representative of relevant stakeholders on the global and local level than lawmaking by state executives, particularly if these are executives of a small subset of powerful states. Second, to the extent to which independence of international tribunals is based on inter-branch division, the international tribunals depend on their domestic "allies" – the national courts, the legislatures, and the civil societies that can control the implementation of the law made by the international tribunals. Hence, lawmaking by independent international tribunals is potentially *more* democratic than international law made by the executives of powerful states.

II. Judicial Lawmaking for Economic Governance:

The ICSID and the WTO

System-Building in Investment Treaty Arbitration and Lawmaking

*Stephan W. Schill**

A. Introduction

Since the late 1990s investment treaty arbitration has developed into one of the most vibrant fields of international dispute settlement with now almost 400 known cases.[1] It involves claims by foreign investors against host States for breach of obligations assumed under one of the more than 2,700 bilateral investment treaties (BITs), under the numerous investment chapters in bilateral or regional free trade agreements,[2]

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1 *See* United Nations Conference on Trade and Development (UNCTAD), *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1, 1–2 (2011), available at: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf (recording an aggregate of 390 treaty-based investment disputes by the end of 2010).

2 *See UNCTAD, Recent Developments in International World Investment Agreements (2008 - June 2009), IIA Monitor No 3 (2009Report 2010 – Investing in a Low-Carbon Economy, 81 (2010), available at: http://www.unctad.org/en/docs/wir2010_en.pdf (recording an aggregate of 2,676750 BITs by the end of 2008, id., 2,2009 as well as 273295 investment agreements other than BITs, id., 8).* On the development of international investment law, *see* Kenneth J. Vande-

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236, DOI 10.1007/978-3-642-29587-4_5,

including the North American Free Trade Agreement,[3] or under sectoral treaties such as the Energy Charter Treaty.[4] All of these instruments offer comprehensive protection to foreign investors by setting down principles of substantive investment protection, including national and most-favored-nation treatment, fair and equitable treatment, full protection and security, protection against expropriation without compensation, and free capital transfer.[5] They also allow investors to enforce these standards in arbitral proceedings directly against the host State, most commonly under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[6] Investment treaty arbitration thereby not only empowers foreign investors under international law,[7] but also introduces

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velde, *A Brief History of International Investment Agreements*, 12 UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 157 (2005).

3 North-American Free Trade Agreement (NAFTA), signed 17 December 1992, entered into force 1 January 1994, 32 INTERNATIONAL LEGAL MATERIALS (ILM) 289, 605 (1993).

4 Energy Charter Treaty (ECT), Annex I to the Final Act of the European Energy Charter Conference, 17 December 1994, 34 ILM 373 (1995).

5 For the content of investment treaties, *see*, *e.g.*, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES (2007); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES – STANDARDS OF TREATMENT (2009).

6 *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, UNTS, vol. 575, 159. Investment treaty arbitration, however, may also take place under other procedural rules, such as the ICSID Additional Facility Rules, the United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the Arbitration Rules of the International Chamber of Commerce, the Arbitration Rules of the London Court of International Arbitration, and *ad hoc* arbitration. *See* DOLZER & SCHREUER (note 5), 222-229.

7 It is controversial, however, whether an investor by having recourse to investor-State arbitration enforces individual rights granted to him or her under international law or whether the rights and obligations in investment treaties remain inter-State obligations. *See* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitrations*, 74 BRITISH YEARBOOK OF INTERNATIONAL LAW 151 (2003).

investment treaty tribunals as novel actors into the arena of international investment law. Although arbitration has been a classic form of dispute settlement on the State-to-State level, including for the settlement of investment-related disputes,[8] modern investment treaty tribunals have wider jurisdiction and are more removed from State control than any of their predecessors.[9]

Functionally, investment treaty tribunals often replace dispute settlement between foreign investors and the host State in the host State's domestic courts. The reason for this is that foreign investors, in particular in developing and transitioning economies, often have reservations about the neutrality, impartiality, and independence of the host State's courts to settle disputes with the government.[10] In view of this function, investment treaty tribunals, like courts, engage in the finding of facts and in the application of the governing law to those facts. Most importantly, arbitrators in investment treaty disputes are required to reach their decisions based on their impartial and independent judgment. Investment treaty arbitration therefore has little in common with commercial arbitration, where the parties under the principle of party autonomy have full liberty to determine not only which law to apply, but also whether to render a decision based in law or *ex aequo et bono*. Investment treaty arbitration, thus, is an adjudicatory process involving independent fact-finding and legal analysis according to rules of national and international law by neutral, independent, and impartial decision-makers.[11]

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[8] *See* Charles H. Brower, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 259, 265 (2008); Christine Grey & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 BRITISH YEARBOOK OF INTERNATIONAL LAW 97 (1992).

[9] *See* discussion *infra*, section B. I.-IV.

[10] For a functional explanation of the rationale for investment treaty arbitration, *see* Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in: THE BACKLASH AGAINST INVESTMENT ARBITRATION, 29 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds, 2010).

[11] *See* Susan D. Franck, *International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?: The Role of International Arbitrators*, 12 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 499, 503 (2006); Jan

Despite important differences from proper courts, most importantly the fact that arbitral tribunals are appointed by the parties for the resolution of a specific dispute only, investment treaty tribunals, in settling investor-State disputes act similarly to domestic administrative or constitutional courts when engaging in judicial or constitutional review of government conduct or to international courts, such as the European Court of Justice or the European Court of Human Rights when determining the conformity of a State's measure with the governing international instrument.[12]

In exercising their dispute settlement function, investment treaty tribunals exercise authority in several respects. First and foremost, investment treaty tribunals exercise authority over the parties to the proceedings. They determine in a binding decision with *res judicata* effect the lawfulness or unlawfulness of the respondent State's conduct under the applicable investment treaty and, in case of breach, grant remedies, most commonly damages or compensation.[13] The tribunals' authority

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Paulsson, *International Arbitration Is Not Arbitration*, 2 STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 1 (2008).

[12] *See International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL (NAFTA), Arbitral Award of 26 January 2006, Separate Opinion of Thomas Wälde, para. 13 (all arbitral awards are available, unless otherwise stated, on the Investment Treaty Arbitration website at http://ita.law.uvic.ca or the Investment Claims website at http://www.investmentclaims.com); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EJIL 121, 145 (2006); Thomas W. Wälde, *The Specific Nature of Investment Arbitration*, in: LES ASPECTS NOUVEAUX DU DROIT DES INVESTISSEMENTS INTERNATIONAUX / NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW, 43, 112 (Philippe Kahn & Thomas W. Wälde eds, 2007); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 58 *et seq.* (2007); Stephan W. Schill, *International Investment Law and Comparative Public Law – An Introduction*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 3, 12 (Stephan W. Schill ed., 2010).

[13] Foreign investors generally request damages for breaches of investment treaty obligations. Other remedies, including restitution of property and the cessation of unlawful conduct, in principle, are also available. *See* Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARBITRATION INTERNATIONAL 325 (2004). *See also* Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 721 (Stephan W. Schill ed., 2010).

also covers determining how the arbitral proceedings are conducted. Although generally seeking the parties' consent, tribunals have wide-ranging powers to structure the proceedings, to order the taking of evidence, and to sanction non-compliance with tribunal orders in making their decision on the merits or on costs.[14] In addition, arbitral tribunals can regulate the behavior of counsel concerning the proceedings, impose sanctions for misbehavior, and even exclude counsel from appearing.[15]

Second, decisions of arbitral tribunals also impact domestic administrative, legislative and judicial decision- and policy-making. While tribunals cannot compel States to bring their domestic legal order into line with investment treaty obligations or quash domestic acts with direct effect, the monetary sanctions they can impose exert considerable pressure on States to bring their domestic legal orders into conformity with their investment treaty obligations.

Furthermore, because foreign investors engage in virtually all industries, and because many State measures have effects on investment, a wide range of measures can come under the scrutiny of investment treaty tribunals. Disputes span the whole range of administrative, legislative and judicial decision- and policy-making, such as the cancellation or non-extension of operating licenses for waste disposals,[16] the scope of the legislator's emergency powers in economic emergencies,[17] the

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[14] *See*, *e.g.*, Art. 43 of the ICSID Convention ("Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate."). *See also* ICSID Arbitration Rules 35-37 (concerning the taking of evidence).

[15] *Cf.* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals*, in: MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY – ESSAYS IN HONOUR OF DETLEV VAGTS, 488 (Pieter Bekker, Rudolf Dolzer & Michael Waibel eds, 2010).

[16] *See Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award of 30 August 2000.

[17] *See*, *e.g.*, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No.

regulatory oversight over public utility companies,[18] the control and ban of harmful substances,[19] the protection of cultural property,[20] or the implementation of non-discrimination[21] and anti-tobacco policies.[22] Investment treaty disputes therefore involve core issues of public law in any area touching upon economic policy-making. Accordingly, the impact of international investment law on domestic public law is considerable.[23] It is this dimension of the exercise of public authority by investment treaty tribunals that explains why investment treaty arbitration is facing demands for more transparency, more accountability, more legitimacy and for ensuring that the interpretation of investment

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ARB/02/1, Decision on Liability of 3 October 2006; *BG Group Plc v. Argentina*, UNCITRAL, Award of 24 December 2007; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award of 3 November 2008.

[18] *See*, *e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2004; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 21 October 2005; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/03/19 and *AWG Group v. Argentine Republic*, Decision on Liability, 30 July 2010 (all cases concerning the water sector).

[19] *See*, e.g., *Methanex Corporation v. United States,* UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005; *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL (NAFTA), Award of 2 August 2010.

[20] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits of 20 May 1992; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award of 8 June 2009.

[21] *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award of 4 August 2010.

[22] *FTR Holding S.A., Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, registered on 26 March 2010 (pending).

[23] *Cf.* Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 953 (2006).

treaties leaves sufficient policy space for States.[24] In that respect, however, investment treaty arbitration differs little from other areas of international economic governance, such as WTO law.

Finally, while dispute settlement between foreign investors and host States is the primary function of investment treaty tribunals, it is not their only function. Instead, investment treaty tribunals, as will be argued in this chapter, not only mechanically apply investment treaties to specific disputes. Rather, their impact is creative, forging international investment law with effects beyond the individual dispute at issue. Most importantly, investment treaty tribunals increasingly function as a mechanism of global governance, affecting not only the parties to the proceedings, but also foreign investors, host States, and civil society, more generally.[25] Although arbitral tribunals only resolve a specific dispute and vanish thereafter, the awards they render increasingly form a body of jurisprudence that affects the legal framework governing investor-State relations at a multilateral level, that is, rather independently of specific bilateral investment treaty relations. The reason for this is that investment treaty tribunals heavily rely on precedents set by earlier in-

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[24] These demands have been so strong that the reticence to meet them has been linked to an emerging "legitimacy crisis" in international investment law and arbitration. *See* Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in: APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, 39-45 (Karl Sauvant ed., 2008); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM LAW REVIEW 1521, 1523 (2005); Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 51 (2004); Charles N. Brower, Charles H. Brower & Jeremy Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARBITRATION INTERNATIONAL 415 (2003); Charles N. Brower, *A Crisis of Legitimacy*, NATIONAL LAW JOURNAL 7 October 2002, B9. *See also* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW 471 (2009).

[25] *See* Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, IILJ WORKING PAPER 2009/6 (Global Administrative Law Series), available at: http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf.

vestment treaty tribunals, and increasingly are expected to fall into line with earlier arbitral jurisprudence.

In other words, in deciding cases investment treaty tribunals contribute to a growing body of case law that concretizes the principles of investment protection contained in investment treaties and further develops them. This facet of their exercise of public authority can be viewed as an instance of law-making by investment treaty tribunals. Arbitral tribunals thus are in a position to craft and develop treaty-overarching standards for investor-State relations that are hardly pre-determined by the texts of the specific investment treaty at issue. Instead, these standards increasingly are being applied in a uniform manner across bilateral treaties. Investment treaty tribunals, therefore, multilateralize international investment law, even though it is enshrined in specific bilateral treaties and implemented by one-off arbitral tribunals. Tribunals thus generate and implement a multilateral structure for international investment relations in the absence of a multilateral investment treaty and without a permanent dispute settlement body.

Instead of focusing on the content of the often far-reaching restrictions on government conduct that investment treaty tribunals have developed in their interpretations of the rather vague principles of international investment law, the present contribution focuses on the aspect of system-building as a form of exercising public authority that is rather specific to investment treaty tribunals. With system-building, I refer to the phenomenon that investment treaty tribunals generate coherence rather than divergence in arbitral jurisprudence, and forge one treaty-overarching body of international investment law that affects the behavior of States and investors and restricts States in their decision- and policy-making, even though the law governing investor-State disputes is enshrined in specific bilateral treaties and despite the tribunals only have the mandate to settle an individual dispute.[26]

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[26] System-building in the present context is therefore understood as a process that takes place within international investment law, that is, a process by which international investment law is established as a uniform body of law. System-building as understood in this context is not about whether and how arbitral tribunals operate as part of the overarching system of international law or how international investment law relates to general international law or other bodies of international law. These questions can meaningfully only be discussed once international investment law and arbitration are understood as *one* system or regime. Otherwise, any inquiry into the relationship between international

In order to show how investment treaty tribunals engage in this form of system-building, Part B describes the institutional infrastructure of investment treaty arbitration as the foundation of the tribunals' power over the parties and as law-makers in international investment law. It also addresses the limits imposed on investment treaty tribunals by different aspects of bilateralism. Part C then shows how arbitral tribunals overcome the limitations of bilateralism they face and succeed in crafting treaty-overarching standards of investment protection that effectively multilateralize international investment law through interpretation. Part D concludes by pointing to strategies to legitimize system-building by investment treaty tribunals.

B. Empowerment and Constraints of Investment Treaty Tribunals

Investment treaty tribunals operate in an institutional framework that confers significant powers on them. These powers chiefly serve the tribunals' primary function of settling specific investor-State disputes effectively; they shield tribunals against State interferences with the arbitral process. They also, however, lay the foundations for investment treaty tribunals to act as law-makers in international investment law, in particular by concretizing and further developing uniform standards of treatment of foreign investors based on the principles of international investment law laid down in investment treaties. The empowerment of investment treaty tribunals results not only in a transfer of dispute settlement powers from domestic courts, who otherwise would be competent to resolve disputes between foreign investors and host States, but also in a delegation of certain law-making powers in international investment law from States to arbitral tribunals.

Five components are critical for understanding the empowerment of arbitral tribunals: (I) the right of foreign investors to initiate arbitration directly against host States and to seek damages for breach of investment treaty obligations; (II) the limited influence of States on the arbitral process; (III) the limited review of arbitral awards; (IV) the rules on

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investment law and other areas of international law would be an inquiry into the relationship between one bilateral treaty and other international law obligations of the two States in question.

the recognition and enforcement of investment treaty awards; and (V) the vagueness of investor rights. All of these elements, however, have to be seen against the significant institutional and structural constraints that arbitral tribunals face and that should significantly limit the impact of their decision-making beyond the specific dispute (see VI). It is against this background that investment treaty tribunals engage in building a treaty-overarching system of international investment law, i.e., exercise public authority through system-building.

I. The Investor's Right to Initiate Arbitration and Seek Damages

Foreign investors under modern investment treaties are no longer mediated through an inter-State prism as they are under the customary international law system of diplomatic protection. Under that system, it is up to an investor's home State to espouse the claim of its national and to assert it, after exhaustion of local remedies, at the inter-State level against the host State, in particular through inter-State arbitration or by recourse to the International Court of Justice.[27] Under modern invest-

[27] The classic expression of the system of investment protection under customary international law through the exercise of diplomatic protection can be found in *The Mavrommatis Palestine Concessions* (Greece v. Britain), Judgment of 30 August 1924, PCIJ 1924, Series A, No. 2, 12 ("In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State – *i.e.* between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States … It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law"). Similarly, *The Factory at Chorzów (Claim for Indemnity)* (Germany v. Poland), Merits, Judgment of 13 September 1928, PCIJ 1928, Series A, No. 17, 28; *Payment of Various Serbian Loans Issued in France* (France v. Kingdom of the Serbs, Croats and Slovenes), Judgment of 12 July 1929, PCIJ 1929, Series A, No. 20/21, 17; *The Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), Judgment of 28 February 1939, PCIJ 1939, Series A/B, No. 76, 16; *Nottebohm* (Liechtenstein v. Guatemala), Judgment of 6 April 1955, ICJ Re-

ment treaties, by contrast, foreign investors have an independent right to initiate investor-State arbitration directly against a host State, regularly without the need to exhaust local remedies. Thus, they can seek redress in their own name, generally in the form of damages,[28] for the host State's breach of its investment treaty obligations. The introduction of this private right of action has a number of consequences:

First, it transforms the way investment disputes are settled from a dyadic negotiation-based process between States, in which the relative power between them is crucial, into a triadic dispute settlement process.[29] Introducing an independent third party, i.e., the arbitral tribunal, enables the settlement of investment disputes according to pre-established legal rules.[30] This entails a move from politics to law and enables the juridification of investor-State dispute settlement.

Second, investor-State arbitration disassociates the investor from potentially conflicting interests of its home State.[31] The decision whether to proceed with an investor-State claim no longer depends on aspects that are external to the relationship between investor and host State, such as the broader geo-political interests of the investor's home State. Whereas otherwise States controlled access to, and initiation of, investment-related dispute settlement under international law, investment treaty ar-

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ports 1955, 24; *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, 45-46, para. 85. On diplomatic protection generally, *see* CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION (2008).

[28] *See* text and literature cited *supra*, note 13.

[29] On the governance structure that emerges from triadic compared to dyadic dispute settlement, *see* Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMPARATIVE POLITICAL STUDIES 147 (1999).

[30] The *travaux préparatoires* of the ICSID Convention mention at various instances that the Convention was designed in order to remove the settlement of investment disputes from the realm of politics and diplomacy into the realm of law; *see* Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 27*, in: THE ICSID CONVENTION – A COMMENTARY (2009), para. 14.

[31] *Cf.* Ibrahim F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA,* 1 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 1 (1986).

bitration transfers control over the initiation of disputes to private investors.[32]

Third, the control of States concerning their submission to investor-State dispute settlement is reduced to the one-time act of giving general and advance consent to arbitration in an investment treaty, thus allowing investment treaty tribunals to exercise jurisdiction over a theoretically infinite number of future investment-related disputes.[33] This entails a loss of control of States concerning the jurisdictional scope of investment treaty arbitration. Instead, the States' general and advance consent effectively creates a form of compulsory jurisdiction of investment treaty tribunals in investment-related disputes.

Fourth, modern investment treaties generally dispense with the requirement to exhaust local remedies.[34] Investment treaty arbitration therefore regularly bypasses the domestic courts of the host State, who otherwise would be competent to entertain investor-State disputes. This not only removes the opportunity of domestic courts to remedy unlawful government conduct,[35] but makes the international law under which

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[32] An investor claiming violations of an investment treaty can simply invoke the host State's consent to investor-State arbitration given in the applicable investment treaty. No contractual privity between investor and State is necessary. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 232 (1995); Bernardo Cremades, *Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties*, in: LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY, 149 (Robert Briner, L. Yves Fortier, Klaus Peter Berger & Jens Bredow eds, 2001); Andrea K. Bjorklund, *Contract Without Privity: Sovereign Offer and Investor Acceptance*, 2 CHICAGO JOURNAL OF INTERNATIONAL LAW 183 (2001).

[33] Modern investment treaty tribunals have more extensive jurisdiction than tribunals established in post-conflict situations whose mandates were limited to a certain time-period, such as the Iran-United States Claims Tribunal, the Ethiopia-Eritrea Claims Commission, or the claims commissions, during the pre-World War II era. On the specifics of State consent in modern investment treaties compared to more classical investment dispute settlement mechanisms, *see* Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA*, 43 HARVARD INTERNATIONAL LAW JOURNAL 531 (2002).

[34] *See* AMERASINGHE (note 27), 334-341.

[35] On this function of the exhaustion of local remedies rule, *see* CHITTHARANJAN F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 59 *et seq.* (2004); ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE APPLICATION OF

investment treaty tribunals operate directly applicable to investor-State relations.

Finally, the award of damages allows the investor to be indemnified for the financial harm resulting from the host State's violation of an investment treaty;[36] this requires the host State to internalize the costs of a breach of its investment treaty obligations. Investment treaty arbitration thereby induces governments to breach investment treaties only in cases where the advantage they derive from breach outweighs the full costs to affected investors.[37] It empowers investment treaty tribunals because States, in order to avoid potential liability, have an interest in aligning their conduct with how tribunals are expected to apply investment treaty obligations. The effectiveness of the remedy combined with direct access to investment treaty arbitration therefore allow for the judicialization of investor-State dispute settlement.

In short, the right of foreign investors under investment treaties to initiate arbitration directly against host States and to seek damages for breach of a treaty fundamentally changes the dispute settlement structure in foreign investment disputes. It subjects investor-State relations directly to international law and removes State control over the use of dispute settlement procedures. The investor's right to arbitration, therefore, is at the basis of the juridification and the judicialization of investment relations under international investment law.

THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW 11 (1983).

36 This conforms to the principle of State responsibility, according to which an injured State is entitled to obtain reparation for the internationally wrongful act of another State. *See* Art. 34 of the ILC Articles on State Responsibility. *See also The Factory at Chorzów (Claim for Indemnity)* (Germany v. Poland), Merits, Judgment of 13 September 1928, PCIJ 1928, Series A, No. 17, 47 (stating that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

37 *See* on the theory of "efficient breach" Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS LAW REVIEW 273, 284 (1970); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle*, 77 COLUMBIA LAW REVIEW 554 (1977).

II. The Limited Influence of States on the Arbitral Process

The influence of States, however, is not only reduced in respect of the control of access to investor-State dispute settlement under international law. The power of States is also significantly reduced in relation to the dispute settlement process itself. In this respect States can exercise no more power than the private investor. Instead, following the model of international commercial arbitration, the host State and the investor are, in principle, treated as parties on equal footing.[38] This can been seen above all in their shared powers to appoint arbitrators.[39]

The limited influence of States on the arbitral process is also evidenced in relation to the written and oral submissions of the respondent State on matters of interpretation of investment treaties. Thus, arbitral tribunals accord no more weight to the written and oral submissions of the host State than to that of the investor,[40] even though the host State shares, together with the investor's home State, the role as authoritative treaty interpreter.[41] Finally, the ICSID Convention prevents the collective power of the investor's home State and the host State from influ-

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[38] Despite the principle of equality of the parties in arbitration States retain certain procedural privileges, such as the right to invoke national security interests against producing evidence. *See*, *e.g.*, Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INTERNATIONAL COMPARATIVE LAW QUARTERLY 345, 363 (2001). *See also* Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State*, 26 ARBITRATION INTERNATIONAL 3 (2010).

[39] Arbitral panels most often consist of three arbitrators, with both parties being entitled to appoint one arbitrator each; the two party-appointed arbitrators then regularly agree on the tribunal's president. The investor's home State has no say in the appointment of the arbitrators. *See*, *e.g.*, Art. 37 of the ICSID Convention; Art. 7 of the UNCITRAL Arbitration Rules.

[40] *See Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction of 11 May 2005, para. 146 (noting that "[c]ounsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State").

[41] For a comprehensive account of the dual role of States as parties to investment treaty arbitrations and as masters of the applicable treaty, *see* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010).

encing arbitral proceedings or settling pending investment treaty arbitrations.[42] In view of the host State's advance consent to arbitration, this *de facto* also excludes a settlement of foreign investment disputes at the inter-State level, since the investor can initiate arbitration unilaterally.

III. Finality of Arbitral Awards

The authority of arbitral tribunals is further strengthened by the finality of investment treaty awards. Unlike in the WTO dispute settlement system where the Dispute Settlement Body can reject adoption of a Panel or Appellate Body report by consensus,[43] investment treaty awards become final and binding for the parties to the arbitration even if both States parties to the investment treaty in question disagree with the outcome or reasoning of an arbitral tribunal. States are not empowered to overrule the outcome of an investment treaty arbitration, for example, because of the breadth of an interpretation adopted by an arbitral tribunal of certain standards of investment protection.

Furthermore, investment treaty awards are shielded effectively from review by domestic courts both in the host State as well as any third State. Under the ICSID Convention, the exclusive remedy against an ICSID award is a request for annulment under Article 52 of the ICSID Convention based on strictly limited, primarily procedural grounds; it is decided by an *ad hoc* Annulment Committee with members appointed by

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[42] Although home State and host State are empowered under general international law to dispose of a claim raised by one of the home State's nationals, the ICSID Convention arguably restricts this right to the period prior to the commencement of arbitration. This flows from the object and purpose of Arts 25-27 of the ICSID Convention that establish investment arbitration as a self-contained regime to the exclusion of other remedies under international law once an investor-State dispute has begun. *See* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 253 (2009); Christoph Schreuer, *Investment Protection and International Relations*, in: THE LAW OF INTERNATIONAL RELATIONS, 345, 349 (August Reinisch & Ursula Kriebaum eds, 2007).

[43] For this so-called "principle of reverse-consensus", *see* Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Arts 16(4) & 17(14), UNTS, vol. 1869, 401.

the Chairman of the ICSID Administrative Council.[44] Non-ICSID awards, while possibly subject to set-aside procedures in the domestic courts at the place of arbitration,[45] are also significantly shielded from review by State courts. This is particularly the case as arbitral tribunals themselves can choose the place of arbitration freely, unless the parties to the proceedings agree otherwise.[46] This allows arbitral tribunals effectively to evade *ex post*-control by State courts of the interpretations they make of international investment law. States thereby are effectively prevented from intervening and correcting decisions of an investment treaty tribunal, for example because a tribunal gave an extensive reading to obligations contained in an investment treaty.

IV. Recognition and Enforcement of Arbitral Awards

The authority of investment treaty tribunals is further buttressed by the widespread enforceability of their awards. ICSID awards, for example,

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[44] On annulment proceedings, *see* Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 52*, in: THE ICSID CONVENTION – A COMMENTARY (2009). *See further* Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 321 (1991); Georges R. Delaume, *ICSID-Arbitration and the Courts*, 77 AJIL 784 (1983); Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 4 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 85 (1987). Grounds for annulment are limited to improper constitution of the tribunal, corruption by one of the tribunal's members, the tribunal's manifest excess of power, its serious departure from a fundamental rule of procedure, or its failure to state the reasons for the award. *See* Art. 52(1) of the ICSID Convention.

[45] In non-ICSID arbitration the domestic courts at the place of arbitration have the jurisdiction to set aside, *i.e.* quash, an arbitral award. The grounds for set-aside vary depending on the jurisdiction in question; this could theoretically include set aside for misapplication of the governing law. Under rare circumstances, domestic courts already have set aside investment treaty awards. *See*, *e.g.*, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 644. *See further* Walid Ben Hamida, *Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Wälde's Legacy*, in: A LIBER AMICORUM: THOMAS WÄLDE – LAW BEYOND CONVENTIONAL THOUGHT, 69, 80 (Jacques Werner & Arif Hyder Ali eds, 2009).

[46] *See*, *e.g.*, Art. 16(1) of the UNCITRAL Arbitration Rules.

have to be recognized and enforced by all Contracting Parties to the ICSID Convention in relation to pecuniary obligations like a final judgment of the enforcement State's own courts.[47] This allows enforcement of an ICSID award across several jurisdictions without the distorting effects of post-breach bargaining between the respondent State and the enforcement State. In particular, the enforcement State cannot invoke its public policy against an ICSID award, challenge the tribunal's competence or arbitrability of the claim, or refuse enforcement because of the way the tribunal resolved a legal question.[48] The only exception to enforcement is State immunity.[49]

For non-ICSID awards, possibilities to resist enforcement are slightly broader. Notably, the New York Convention allows the enforcement State to invoke its public policy against enforcement and recognition of arbitral awards.[50] That notwithstanding, the rules on recognition and enforcement for investment treaty awards give States a particularly strong incentive not only to comply with awards already rendered against them, but also to change their behavior prospectively so as to avoid any potential liability for damages for breach of investment treaty obligations as interpreted by investment treaty tribunals. The widespread recognition and enforcement of awards therefore allows investment treaty jurisprudence "to penetrate the surface of the [host] state"[51] and affect State behavior considerably.

V. The Vagueness of Substantive Investor Rights

The institutional structure of investment treaty arbitration significantly reduces the power of States: it bestows arbitral tribunals with effective

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47 Art. 54(1) of the ICSID Convention.

48 Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 54*, in: THE ICSID CONVENTION – A COMMENTARY (2009), para. 74.

49 *See* Art. 55 of the ICSID Convention.

50 *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 10 June 1958, Art. V(2)(b), UNTS, vol. 330, 38.

51 Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE LAW JOURNAL 273, 288 (1997).

means to settle investor-State disputes and provides foreign investors with the means to initiate arbitration and to enforce investment treaty awards. With their dispute settlement function arbitral tribunals assume an important position in protecting the rights of foreign investors and in constraining host States in their treatment of foreign investors. They help to ensure that States treat foreign investors according to standards laid down in international investment treaties.

However, arbitral tribunals also exercise significant law-making powers in international investment law. The reason for this is the vagueness of the principles of investment protection contained in international investment treaties. The wording of standard guarantees of international investment law, such as the prohibition of indirect expropriations without compensation and the requirement to accord foreign investors fair and equitable treatment and full protection and security, are so vague that they lack well-defined and easily ascertainable normative content. Fair and equitable treatment, for example, does not have a clearly ascertainable conventional core meaning, nor does an accepted definition exist that could be developed from State practice. Legal concepts such as fair and equitable treatment, in other words, are difficult to narrow down by traditional means of interpretation, i.e., focusing on wording, context, and object and purpose.[52] Similar observations hold true for almost all other investor rights, including the concept of indirect expropriation and the obligation to provide full protection and security.[53]

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[52] In interpreting fair and equitable treatment provisions, an interpretation of the ordinary meaning may replace the terms "fair and equitable" with similarly vague and empty phrases such as "just," "even-handed," "unbiased," or "legitimate." This, however, does not elucidate the normative content of the standard or clarify what is required of a State in specific circumstances. *See MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 113; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 297. Similarly, the object and purpose of investment treaties to promote and to protect foreign investment is equally vague and hardly able to narrow down the meaning of substantive standards such as fair and equitable treatment.

[53] *See only* Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 107, 108 (Stephan W. Schill ed., 2010) (stating that "even the most basic criteria for determining whether a measure constitutes an indirect expropriation and hence requires compensation have remained in the dark").

The core legal concepts of international investment law, in other words, only assume a more concretized meaning over time because of the interpretations investment treaty tribunals give to them in their decisions.

The vagueness of the substantive standards that are applied as a yardstick for the international responsibility of host States are the root cause for the significant law-making activities arbitral tribunals engage in. This law-making activity is a consequence of the position that was envisaged for them by States: on the one hand, investment treaty tribunals not only have the authority but also the duty to apply the principles contained in international investment treaties by having recourse to accepted methods of treaty interpretation;[54] yet, on the other hand, the tribunals have been given little guidance by the States parties to the treaties in question as to the precise meaning of the principles in question. As a consequence, investment treaty tribunals inevitably are faced with filling the significant gaps left by the ambiguity of the standard investor rights. This vagueness, in turn, leaves arbitral tribunals with ample interpretative choices about how to concretize the content of investment treaty obligations and what concrete obligations to derive from – or to read into – them.

VI. Constraints on Multilateral Law-Making

While arbitral tribunals have significant powers to settle disputes between the parties effectively and concretize the substantive rules on a case-by-case basis, they face significant limitations that would appear to exclude any systemic implications of the activity of individual tribunals for international investment law more generally. These limitations are the fragmentation of substantive investment law largely into bilateral treaties, the one-off nature of arbitration, and the absence of a rule of *stare decisis* in investment treaty arbitration.

First, the bilateral form of international investment treaties suggests divergence rather than convergence in the applicable standards of protection of foreign investors depending on the applicable investment treaty. After all, the flexibility to agree on tailor-made solutions, including in

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[54] Art. 42(2) of the ICSID Convention explicitly provides: "The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law."

relation to the applicable substantive protection standards, would seem to be one reason for States to prefer bilateral over multilateral treaty-making.[55] This fragmentation of sources also would militate against the impact of arbitral decisions on third-party investment treaties.

Second, compared to a standing court that can easily develop a uniform jurisprudence, the institutional set-up of investment treaty tribunals as one-off dispute settlement bodies, which are created for the resolution of an individual dispute and vanish thereafter, limits the law-making power of individual tribunals and their impact beyond a specific dispute. One-off tribunals coexist without hierarchy and without supervisory mechanisms that could ensure coherence in arbitral jurisprudence. This militates against the possibility of arbitral tribunals to engage in system-building in international investment law.

Third, investment treaty tribunals are formally independent in their assessment of law and facts. In particular, there is no principle of *stare decisis*, or binding precedent, that could serve as a cross-award mechanism for producing consistent jurisprudence. Some investment treaties, as well as the ICSID Convention, even explicitly provide for the *inter-partes* effect of awards.[56] Similarly, arbitral tribunals stress that decisions made by earlier investment treaty tribunals are not binding on them as a matter of law. The Tribunal in *AES Corporation v. Argentina*, for example, stressed that "[e]ach tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for re-

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[55] *Cf.* more generally on the variables that explain the institutional choice between bilateralism and multilateralism Thomas Rixen & Ingo Rohlfing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INTERNATIONAL NEGOTIATION 389 (2007).

[56] Art. 1136(1) of the NAFTA, *e.g.*, provides: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." Similarly, Art. 53(1) of the ICSID Convention provides: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." *See also* Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 53*, in: THE ICSID CONVENTION - A COMMENTARY (2009), paras 16-17 (noting that in the preparatory works for the ICSID Convention nothing implies the applicability of a *stare decisis* rule).

solving the same problem."[57] In fact, directly conflicting decisions of different investment treaty tribunals on comparable or even identical facts, under comparable or even the same investment treaty obligation, are a recurring phenomenon.[58]

The combined effect of the above mentioned factors should give rise to the expectation that arbitral tribunals play but a minor role in the development of a system of international investment law and jurisprudence. The embryonic infrastructure and the limited mandate of investment treaty tribunals to settle a singular dispute rather suggest that arbitral tribunals are not able to exercise public authority in making law beyond an individual dispute in a significant manner. It is against the background of these institutional obstacles that the development of a large degree of treaty-overarching uniformity in the jurisprudence of arbitral tribunals, in particular concerning the principles of investment protection, has to be appraised.

C. System-Building Through Precedent in Investment Treaty Arbitration

The fact that international investment law is enshrined in bilateral treaties and implemented by one-off arbitral tribunals suggests a chaotic and unsystematic aggregate of law governing international investment relations. Rather than constituting a consistent and coherent system of law, one would expect extreme divergence and fragmentation in this field. This is all the more so as projects for truly multilateral investment treaties have failed on various occasions, most recently the OECD's Multilateral Agreement on Investment and negotiations on investment during the Doha Round of the WTO.[59] The fragmentation into bilateral

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[57] *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para. 30. This conclusion is shared widely by investment treaty tribunals more generally. For further arbitral jurisprudence on point, *see* SCHILL (note 42), 292, note 45. For a recent expression of the same view, *see Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para. 163.

[58] *See* SCHILL (note 42), 284, 339; Franck (note 24).

[59] *See* SCHILL (note 42), 23-64.

treaties would make it impossible to understand this area of law as a proper system of law in itself that provides a structure for international investment relations. Differentiated, preferential, and discriminatory standards, instead of uniform principles of investment protection, should be the expected result of bilateral treaty-making.

However, what one can observe is convergence, rather than divergence, in the structure, scope, and content of international investment treaties as well as in the jurisprudence of investment treaty tribunals. Unlike genuine bilateral arrangements, investment treaties are not isolated instruments governing the relation between two States only; rather, they develop multiple overlaps and structural interconnections that create a relatively uniform, treaty-overarching regime for international investment relations.

Certainly, this multilateralization of international investment law builds on a number of factors embedded in the substance and structure of investment treaty-making, most importantly the close textual resemblance of different BITs, the negotiation of these treaties based on model treaties of capital-exporting countries, and the entrenchment of bilateral treaty-making in multilateral processes, in particular the coordination of foreign investment policies by the most important capital-exporting countries within the OECD and elsewhere.[60] Furthermore, most-favored-nation clauses, which are regularly included in international investment treaties, have a significant effect in leveling differences in investment treaty protection.[61] Finally, broad notions of "investor" and "investment" in many investment treaties permit investors to shop for the most favorable investment treaty by making use of multi-jurisdictional structuring, i.e., channelling investment flows through corporate vehicles in third countries; this has an effect that is comparable to the functioning of most-favored-nation clause in raising the scope of investment protection in a given host State to a uniform level.[62] Substantive investment law and the institutional framework in which investment treaties are negotiated therefore already contain nuclei of a multilateral order for international investment relations, even though truly multilateral investment treaties that grant the same level of in-

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[60] *See* on the standardization of treaty texts and the entrenchment of bilateral treaty-making in multilateral processes *id.*, 65-120.

[61] *See id.*, 121-196.

[62] *See id.*, 197-240.

vestment protection have not been accepted by the majority of States, both capital-importing and capital-exporting.

An even more important factor for the multilateralization of international investment treaties, however, is the activity of investment treaty tribunals. They generate, with some exceptions, largely coherent decisions even across different investment treaties, above all as regards the interpretation of the substantive principles of investment protection. This generally coherent body of jurisprudence is not a product of mere coincidence, but is fostered by the wide-spread practice in investment treaty arbitration of citing and following earlier arbitral awards. References to earlier investment treaty awards and decisions can be found in virtually any of the more recent awards. In fact, as quantitative citation analyses of investment treaty awards show, "citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate."[63] Unlike in commercial arbitrations between private parties that are held behind closed doors, this development is possible because awards in investment treaty arbitrations are regularly published on the Internet and in print journals and are discussed extensively in the investment law community and general media.[64] Furthermore, conver-

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[63] Jeffrey Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, 24 JOURNAL OF INTERNATIONAL ARBITRATION 129, 148 (2007). The study illustrates a number of interesting trends. It shows, *e.g.*, a "marked increase of citation to ICSID decisions by ICSID tribunals" with citations increasing from an average of approx. two decisions between 1990 and 2001 to an average of more than seven between 2002 and 2006. ICSID decisions on jurisdiction even cited an average of nine earlier ICSID decisions or awards (*id.*, 148-150 [Tables 3, 4 and 5] – quotation at 149). Similar trends can also be observed with regard to decisions under the ICSID Additional Facility and non-ICSID investment treaty awards (*id.*, 150-151 [Tables 6 and 7]). At the same time, the study suggests that references to other sources, such as non-investment treaty awards, the writings of publicists, general principles of law and international custom may be declining (*id.*, 151-153). *See also* Ole K. Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EJIL 301 (2008).

[64] Investment treaty awards become public either because the parties agree to that effect; because ICSID publishes excerpts of the reasoning of the award (*see* Rule 48(4) of the ICSID Arbitration Rules, stating that "[t]he Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal."); because non-ICSID awards become public when a party to the arbitration requests to set them aside or opposes enforcement; or because awards

gence in the jurisprudence of investment treaty tribunals is fostered because a relatively small pool of arbitrators is appointed in the most prominent and influential cases.[65] Frequent reappointments of the same individuals, in turn, ensures a certain continuity in arbitral jurisprudence, even though the number of arbitrators is much higher than the number of judges in a standing international court or tribunal.

How arbitral tribunals translate the patchwork of international investment treaties into a genuine (sub-)system of international law becomes most obvious in regard of the use of precedent. Thus, arbitral tribunals establish a system of precedent not only with respect to the interpretation of the same investment treaty, but across various treaties. Certainly, the ways in which investment treaty tribunals make use of precedent, and the legal impact associated with such use, differ. Yet, they all illustrate how investment treaty jurisprudence converges and forms part of a uniform treaty-overarching regime for international investment relations and how investment treaty tribunals actively engage in system-building in international investment law. In ascending order of normative impact on tribunal decision-making, the use of precedent includes the following: (I) precedent as a source of cautious analogizing with earlier decisions; (II) precedent as a means of clarifying treaty provisions; (III) precedent as an abbreviation of reasoning; (IV) precedent as a standard-setting device; and finally (V) precedent as an instrument of system-wide law-making.[66] Most interestingly, however, precedent is even at play in cases of conflicting decision-making in investment treaty arbitration (VI). Precedent, in consequence, becomes the basis for those affected by international investment treaties and investment treaty arbitrations to develop normative expectations about the existence of a system of international investment law and its functioning (VII).

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are simply made public by one of the parties. Awards in commercial arbitration, by contrast, generally remain confidential, although the reasoning of some international awards is also published in commercial arbitration reporters. However, such publications are much less systematic than in investment treaty arbitration; after all commercial arbitrations by default remain confidential as regards both the existence of proceedings and the availability of arbitral decisions.

[65] *See* Commission (note 63), 137-141.

[66] *See* in depth Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue.

I. Analogizing with Earlier Decisions

Analogizing with earlier decisions is one way in which arbitral tribunals make use of precedent. This approach was taken, for example, by the Tribunal in *AES Corporation v. Argentina* in a case that concerned the effects of Argentina's emergency legislation in 2001-2002. The Tribunal stressed that it was not bound by precedent,[67] but considered that it was allowed to use earlier arbitral decisions as a source of "comparison and ... of inspiration."[68] In the Tribunal's view, this applied both to the interpretation of law and of facts. It observed:

> One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.
>
> The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant.[69]

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[67] *See AES Corporation v. Argentina* (note 57), paras 23 & 30.

[68] *Id.*, para. 31. *See also id.*, para. 30 (stating that "but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors"). A similar approach may be found in *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 July 2005, para. 36.

[69] *AES Corporation v. Argentina* (note 57), paras 31-32. Similarly, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, para. 170 (stating that "[a]rbitral awards remain mere sources of inspiration, comfort or reference to arbitrators"); *Chevron v. Ecuador* (note 57), para. 164 (considering that "Tribunals can consider precedent to the extent that it may find that they shed any useful light on the issues that arise for decision in th[e] case").

The approach chosen by the Tribunal in *AES Corporation* has a particular appeal for making reference to awards that are based on investment treaties other than the one applicable in the *cas d'espèce*, because it stresses that the legal basis of the earlier decision was different. It nevertheless enables a tribunal to integrate the reasoning and the result of an earlier decision into its own decision and built up consistency in arbitral decision-making across different cases and treaties. Reasoning by analogy, therefore, reconciles the principle of non-binding precedent with the persuasive influence of prior investment awards, in particular in relation to awards rendered on the basis of different investment treaties.

II. Precedent as a Means of Clarification of Investment Treaty Provisions

Other investment treaty tribunals have used precedent as a means of clarifying the meaning of provisions in the governing investment treaty. This reflects the function attributed to judicial decisions in Article 38(1)(d) ICJ Statute "as subsidiary means for the determination of rules of law." Accordingly, decisions by international courts and tribunals can be employed as evidence of the existence of a specific rule or principle of international law, or as evidence of a certain interpretation or application of a rule or principle.[70] Similarly, precedent can be used to ascertain the ordinary meaning of specific treaty provisions. As put by the Tribunal in *Azurix v. Argentina*: "The Tribunal is required to consider the ordinary meaning of the terms used in the BIT under Article 31 of the Vienna Convention. The findings of other tribunals, and in particular of the ICJ, should be helpful to the Tribunal in its interpretative task."[71]

Likewise, arbitral precedent can be used to determine, by taking into account how other tribunals interpreted similar provisions in different BITs, the function of a specific treaty provision. The Tribunal in *Eureko*

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[70] *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 47 (1996).

[71] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 391 (concerning the interpretation of "arbitrariness" in the BIT between Argentina and the United States).

v. Poland, for example, had recourse to arbitral precedent regarding the interpretation of umbrella clauses under the Switzerland-Pakistan and the Switzerland-Philippines BITs in order to elucidate the function and meaning of a comparable clause in the Netherlands-Poland BIT.[72] The Tribunal's majority not only relied on the plain meaning of the clause in question and the principle of effective interpretation,[73] but also invoked other investment awards,[74] stating that it "finds the foregoing analysis of the Tribunal in *SGS v. The Republic of the Philippines* … cogent and convincing."[75] Yet, even though the Tribunal put significant emphasis on the interpretation of the umbrella clause by the tribunal in *SGS v. Philippines*, it did not adopt that decision as a binding precedent, but rather engaged in its own interpretation of the Dutch-Polish BIT. Thus, it used arbitral precedent as an additional means of interpretation, that is, as an interpretative aid without authoritative or binding effect. Still, such use of precedent allows tribunals to develop convergence at a level that overarches individual treaties.

III. Abbreviation of Reasoning

Similarly cautious approaches to the use of precedent, however, are not followed by all investment treaty tribunals. Instead, one can regularly observe that investment treaty awards accord prior decisions much more immediate impact on their decision-making. Thus, the reference to precedent often is less embedded in a problem-oriented interpretation of the governing investment treaty that deals with earlier decisions as arguments, but attributes a more imminent function to precedent. This enhanced degree of influence of prior investment treaty awards can be illustrated, for example, in the Decision on Jurisdiction in *Enron*

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[72] *Eureko B. V. v. Republic of Poland*, UNCITRAL, Partial Award of 19 August 2005. Similarly cautious in its use of precedent also *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paras 73 & 89.

[73] *Eureko v. Poland* (note 72), paras 246-249.

[74] *Id.*, paras 252-258.

[75] *Id.*, para. 257.

v. Argentina, a case also relating to Argentina's 2001-2002 economic emergency legislation.[76]

Unlike the *Eureko* tribunal, the Tribunal in *Enron* did not refer to earlier awards merely to support its own reasoning. Instead, it incorporated by reference the reasoning of earlier awards into its own decision. The Tribunal in that case used precedent, stemming from other arbitrations involving the lawfulness of the impact of Argentina's economic emergency legislation on the claimant at stake, which it designated as "ICSID's case law concerning the Argentine Republic,"[77] as a shorthand argument to reject Argentina's objections to jurisdiction. Thus, instead of rejecting those objections based on independent reasoning, and based on an independent interpretation of the governing law, it stated that "the Tribunal does not intend to discuss again questions that have been amply considered in recent decisions and which have been also extensively argued by the parties in this case."[78] Instead, it stated that it would only focus on the specific issues of the case that were different in law or in fact from similar cases already decided against Argentina by other investment treaty tribunals.[79]

While the Tribunal in *Enron* also stressed that it was not bound by precedent and stated that it used references to earlier decisions because it "believe[d] that in essence the conclusions and reasons of those decisions are correct,"[80] the use of precedent in order to abbreviate a tribunal's reasoning illustrates a qualitative step towards an increasing self-referentialty of the system of investment arbitration and a more direct influence of earlier awards on the decision-making process of arbitral tribunals. It shows that the focus in investment treaty arbitration is moving in some cases from an independent case-by-case and tribunal-by-tribunal analysis of the legal and factual issues at stake towards an analysis that assesses whether earlier interpretations of the same or a different treaty were convincing and should be followed. This focus goes along with an increased normative value of precedent.

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[76] *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004.

[77] *Id.*, before para. 24.

[78] *Id.*, para. 38.

[79] *Id.*, para. 41.

[80] *Id.*, para. 40.

IV. Precedent and Standardization of Interpretation: Towards a *Jurisprudence Constante*

Several arbitral awards go even further and view precedent as constituting a standard that they will only depart from upon the presentation of new facts, new legal aspects, or upon the showing that the Contracting Parties' intentions departed from the common framing of investment treaties on the specific issue at stake. The Tribunal in *Camuzzi v. Argentina*, for example, likewise faced with a case relating to Argentina's economic emergency legislation, in essence required the party that was arguing for a departure from earlier investment treaty jurisprudence to provide the Tribunal with reasons for doing so. It maintained that "the Tribunal has no reason not to concur with [an earlier] conclusion, even though some of the elements of fact in each dispute may differ in some respects."[81] The perception of precedent in this case thus moves extremely close to the common law system of *stare decisis*. The Tribunal no longer seems to interpret the governing law, but confines itself to referring to prior ICSID practice as an authoritative source of law.

Such reasoning implies that a change in jurisprudence requires the parties to provide reasons for such a change; this accordingly shifts the burden of argumentation and persuasion to the party wishing to change existing jurisprudence, even if this jurisprudence has developed based on unrelated investment treaties between different States.[82] In this context, precedent standardizes the interpretation of investment treaties to a point where few differences exist between persuasive and binding precedent and, above all, where differences in the governing bilateral treaties become less and less relevant.

Building on this consideration, a convergence of investment treaty jurisprudence towards a *jurisprudence constante* increasingly has the effect that investment treaty tribunals perceive themselves as agents of a treaty-overarching regime for the protection of foreign investment,

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[81] *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction of 11 May 2005, para. 82; *Sempra Energy v. Argentina* (note 40), para. 94.

[82] *Cf.* also *Gas Natural v. Argentina* (note 68), para. 49 (observing that "unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement").

which they feel bound to apply. The statement of the Tribunal in *Saipem v. Bangladesh* may be taken as a representative expression of a position that is increasingly taking hold among arbitrators in investment cases:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[83]

While precedent, in this view, does not bind later investment treaty tribunals, it shifts the burden of argumentation by demanding a reasoned justification for departing from precedent. The more established precedent becomes, and the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes to meet that burden and to convince tribunals to adopt solutions that

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[83] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Provisional Measures of 21 March 2007, para. 67. Virtually identical statements are expressed in almost all cases in which Gabrielle Kaufmann-Kohler participated as an arbitrator. *See*, *e.g.*, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. The Argentine Republic*, UNCITRAL (joint cases), Decision on Liability of 30 July 2010, para. 189; *Noble Energy, Inc. and Machalapower CIA. LTDA v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction of 5 March 2008, para. 50. *See also* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARBITRATION INTERNATIONAL 357 (2007). Kaufmann-Kohler's views, however, are not unique in the world of investment treaty arbitration, but shared by several of the most frequently appointed arbitrators. *See*, *e.g.*, Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) TRANSNATIONAL DISPUTE MANAGEMENT; *see also Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award of 9 October 2009, Separate Opinion of Charles N. Brower, para. 1.

deviate from prior practice.[84] This phenomenon is a core element for system-building in investment treaty arbitration.

V. Delegation of Law-Making Functions from States to Tribunals

While most of the decisions discussed above concerned the use of precedent in proceedings involving similar factual circumstances, relating above all to the evaluation of Argentina's economic emergency legislation, the use of precedent also plays an important role for the clarification and further development of standard investor rights, such as the prohibition of indirect expropriation without compensation, fair and equitable treatment, national treatment, or full protection and security. In fact, the interpretation and application of these standards of treatment is driven more by arbitral precedent than by the texts of the applicable treaty or State practice.[85] The primary reason for this is the terminological vagueness of these rights.[86] Since the methods of treaty interpretation endorsed by the Vienna Convention on the Law of Treaties provide little guidance, investment treaty tribunals are often forced to resort exclusively to assessing the practice of earlier investment treaty tribunals in order to determine, respectively develop, the normative standard to apply.

How influential precedent in the interpretation and application of investor rights has become can be illustrated in respect of fair and equitable treatment, the normative content of which has been structured pri-

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[84] *International Thunderbird Gaming v. Mexico*, Separate Opinion of Thomas Wälde (note 12), para. 16 ("A deviation from well and firmly established jurisprudence requires an extensively reasoned justification").

[85] An exception, however, is the recent award in *Glamis Gold v. United States* (note 20), paras 598–616, which insisted on the difference between an autonomous interpretation of fair and equitable treatment and the customary international law minimum standard and deduced from that difference that the customary basis of fair and equitable treatment in Art. 1105(1) of the NAFTA required the claimant to show State practice supported by *opinio juris* in order to impose restrictions on certain State conduct that would go beyond what the standard required in the 1920s. For a critique of that approach, *see* Stephan W. Schill, *Case Note – Glamis Gold, Ltd. and United States of America*, 104 AJIL 253, 258 (2010).

[86] *See*, *supra*, section B.V.

marily through the jurisprudence of arbitral tribunals.[87] The NAFTA award in *Waste Management v. Mexico* is representative of arbitral practice in that respect. In this case, the Tribunal extensively described prior investment awards applying the fair and equitable treatment standard in order to extrapolate a workable definition of that standard. After discussing earlier precedent at length, the Tribunal concluded:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[88]

What is noteworthy is that the Tribunal did not interpret fair and equitable treatment independently by using the methods of treaty interpretation under the Vienna Convention. Rather, it couched the meaning of the standard in terms of the holdings of arbitral precedent.

While the cases taken into account in *Waste Management* were all NAFTA arbitrations, most investment treaty tribunals deduce the meaning of fair and equitable treatment from the case law more generally without paying much attention to the investment treaty that was at issue in those cases. Thus, for purposes of interpreting fair and equitable treatment, the definition by the Tribunal in *Tecmed v. Mexico* of that standard in an arbitration under the Spain-Mexico BIT[89] has already become the standard definition; other tribunals have adopted and refined this definition in BITs between Chile and Malaysia,[90] Ecuador

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[87] The same dynamic, however, equally holds true with respect to all other standards of investment protection, including full protection and security, the prohibition of direct and indirect expropriation without compensation, or national treatment. For the jurisprudence on these standards, *see* the references cited *supra*, note 6.

[88] *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award of 30 April 2004, para. 98.

[89] *Tecmed v. Mexico* (note 16), para. 154.

[90] *MTD v. Chile* (note 52), paras 113 *et seq.*

and the United States,[91] or Germany and Argentina.[92] What is crucial in order to understand arbitral decision-making as an exercise of public authority is that subsequent tribunals increasingly do not critically examine earlier jurisprudence and its premises, but apply it as if it were binding. In other words, arbitral tribunals simply posit the normative content of the principles of international investment law without engaging in a normative deduction that explains the tribunals' premises and that grounds these premises and the conclusions derived from them in accepted international legal instruments and methods of interpretation.

Essentially, the vague language of fair and equitable treatment and other investor rights, buttressed by the institutional structure provided above all by the ICSID Convention, makes these rights functionally comparable to "general clauses" in civil codes, such as good faith or *bonos mores*, that allow the decision-maker to ascertain and craft, with a certain degree of independence, the normative content and the precise standard applicable to certain social situations and conduct.[93] The vagueness of the principles of investment protection, such as fair and equitable treatment and other standards of treatment, are quite similar to such general clauses in that they involve a substantial delegation of lawmaking powers from States to tribunals in the international investment context. Accordingly, it is much more arbitral jurisprudence concretizing the meaning of fair and equitable treatment and of other standards of investment protection that determines the application and interpretation of international investment treaties, rather than any guidance provided by the Contracting States in the investment treaties or in other instruments, for example subsequent agreements.

VI. System-Building and Conflicting Decisions

Quite notably, system-building by investment treaty tribunals cannot only be observed with respect to the use of precedent resulting in con-

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[91] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award of 1 June 2004, para. 185.

[92] *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Award of 6 February 2007, paras 298-299.

[93] *See* on the function of general clauses GUNTHER TEUBNER, STANDARDS UND DIREKTIVEN IN GENERALKLAUSELN 60 *et seq.* (1971).

sistent arbitral case law. Rather, the idea of the existence of a system of international investment law and arbitration regularly can also be traced in decisions that deliberately deviate from, and therefore conflict with, earlier arbitral jurisprudence. Yet, instead of serving as a counter-argument for the thesis that one can see the emergence of a system of international investment law, the way tribunals deal with precedent in such instances itself shows the deeply rooted perception among arbitrators that investment treaty tribunals operate within the confines of a uniform system of international investment protection.

First, arbitral tribunals generally try to avoid openly conflicting decisions about the proper interpretation of standard concepts of international investment law. Instead of openly disagreeing with the reasoning or the holding of an earlier decision, they often seek, similar to the common law system of precedent, to substitute divergence with alternative interpretative strategies that uphold the consistency of international investment law, while allowing divergence in respect of the specific dispute the tribunal has to resolve. One method consists of distinguishing the case submitted to them from earlier investor-State disputes by stressing differences in the facts of the cases, in the procedural posture, or in the applicable investment treaty. Another method is to reconcile seemingly irreconcilable decisions on the basis of meta-rules. In other words, even in cases where investment treaty tribunals deviate from earlier arbitral jurisprudence, they often extensively deal with conflicting earlier awards and distinguish their case on the basis of the facts, or redefine an earlier holding on a point of law from a precise rule to a broader principle that allows for exceptions, or from a rule to an exception.[94] Similarly, some tribunals occasionally also conceal jurisprudential conflicts in ways that suggest that they intended to uphold the perception that they did not in fact deviate from earlier investment treaty jurisprudence.[95]

Second, even in cases of open conflict, investment treaty tribunals use argumentative strategies that presuppose the existence of a treaty-overarching framework of international investment law. Thus, investment treaty tribunals rarely argue that their deviating from earlier case

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[94] *See* SCHILL (note 42), 347-352. Arguing that these strategies explain how much of the conflict in arbitral jurisprudence regarding the interpretation of most-favored-nation clauses was dealt with by subsequent tribunals when confronted with precedent that would have suggested reaching a contrary result.

[95] *Id.*, 352-355.

law is precipitated by the bilateral nature of investment treaties or because their function was restricted to resolving a specific dispute;[96] instead, they regularly deviate from earlier jurisprudence because they consider an earlier interpretation as unpersuasive from a principled perspective.[97] Accordingly, investment treaty tribunals regularly frame their disagreement with earlier jurisprudence in systemic terms and thereby aspire to influence, in the long term, the development of a treaty-overarching investment jurisprudence. Open conflicts, in other words, are deliberately accepted in order to arrive at sustainable and systemic solutions as investment treaty jurisprudence develops.

Systemic aspirations in cases of open conflict can be seen, for instance, in the way investment treaty tribunals deal with the notorious issue of interpreting umbrella clauses, that is, clauses requiring a State to observe specific undertakings made *vis-à-vis* foreign investors, for example, in an investor-State contract.[98] A case in point is how the Tribunal in *SGS v. Philippines* dealt with the precedent set by the award in *SGS v. Pakistan*. The *SGS v. Philippines* Tribunal strongly disagreed with the *SGS v. Pakistan* Tribunal. Despite the fact that the *SGS v. Philippines* Tribunal had to interpret an umbrella clause in the Switzerland-Philippines BIT, whereas the *SGS v. Pakistan* Tribunal was dealing with the interpretation of an umbrella clause in the Switzerland-Pakistan

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[96] Differently in this respect *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction of October 2007, para. 137 (observing in a case of open dissent with regard to the interpretation of most-favored-nation (MFN) clauses: "After having examined them [*i.e.*, arbitral precedents], the Tribunal feels there is no need to enter into a detailed discussion of these decisions. The Tribunal agrees with the Parties that different conclusions can indeed be drawn from them depending on how one evaluates their various wordings both of the arbitration clause and the MFN-clauses and their similarities in allowing generalisations. However, since it is the primary function of this Tribunal to decide the case before it rather than developing further the general discussion on the applicability of MFN clauses to dispute-settlement-provisions, the Tribunal notes that the combined wording in [the MFN clause] and [the arbitration clause] of the [applicable] BIT is not identical to that in any of such other treaties considered in these other decisions").

[97] SCHILL (note 42), 341-347.

[98] *See* comprehensively on umbrella clauses Stephan W. Schill, *Enabling Private Ordering – Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINNESOTA JOURNAL OF INTERNATIONAL LAW 1 (2009) (with further references to arbitral jurisprudence and scholarship).

BIT, the Tribunal in *SGS v. Philippines* did not simply ignore the precedent because it concerned a different BIT. Rather than trying to avoid conflict, the Tribunal in *SGS v. Philippines* noted that its interpretation was "contradicted by the decision of the Tribunal in *SGS v. Pakistan*."[99] While explicitly criticizing the earlier decision in *SGS v. Pakistan* as "failing to give any clear meaning to the 'umbrella clause',"[100] the Tribunal in *SGS v. Philippines* nonetheless considered whether it should "defer to the answers given by the *SGS v. Pakistan* Tribunal" for the sake of consistency.[101] It observed, however:

> [A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.[102]

The Tribunal in *SGS v. Philippines* therefore clearly recognized that coherence in investment treaty jurisprudence was desirable, but pointed out that the mechanism for achieving such coherence could not lie in requiring subsequent tribunals to follow earlier decisions they considered as unpersuasive or even incorrect. Instead, the Tribunal considered that the method to arrive at system-wide coherence should be a matter of evolution in investment treaty jurisprudence. The decision in *SGS v. Philippines*, thus, expressly recognized the existence of a treaty-overarching system of investment protection and stressed the importance of

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[99] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, para. 119.

[100] *Id.*, para. 125.

[101] *Id.*, para. 97.

[102] *Id.*

generating unity and consistency within this system even though it rendered a decision that was inconsistent with the reasoning of an earlier decision by another arbitral tribunal. In other words, the Tribunal's divergence from the earlier decision in *SGS v. Pakistan* cannot be seen as indicating the lack of a system of international investment law, but rather reflects divergence about how certain principles should be properly applied within that system.[103]

Although contradicting interpretations of core investor rights are undesirable for legal certainty and the predictability of international investment law, jurisprudential conflict is also one of the driving forces behind the development of a system of precedent because it enables tribunals to engage in a critical discourse about the proper interpretation of investor rights in view of different perspectives. Divergence in investment arbitration therefore does not need to be seen as defying the concept of a uniform system of international investment protection and investor-state arbitration, but may well be part of the evolution in international investment law towards a *jurisprudence constante*. Conflicting precedent, in that sense, is part of the system-building exercise investment treaty tribunals engage in; it illustrates the divergent views about which direction investment treaty jurisprudence should take, rather than defiance of the existence of a system of international investment law. In fact, conflicting arbitral precedent can be seen as a form of checks and balances that arbitral tribunals implement themselves given that responses by States through treaty-making or subsequent agreement that correct interpretations by arbitral tribunals of investment treaties are often difficult to achieve in view of the need of consensus among States. Conflicting decision thus are only a natural reaction to the multilateralization of international investment law which arbitral tribunals are engage in.

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[103] Similar systemic considerations also reappear in later decisions on umbrella clauses, some of which supported *SGS v. Pakistan*, some of which supported *SGS v. Philippines*. *See* Schill (note 98). It is worth noting, however, that these later tribunals likewise did not frame their decisions in bilateral terms, *i.e.*, by stressing the bilateral nature of investment treaties or the limited role of investment treaty tribunals. Rather, they considered the issues to be a matter of principle, thus aspiring their solution and reasoning to apply to the whole of international investment law.

VII. Precedent and the Generation of Normative Expectations

References by investment treaty tribunals to prior arbitral decisions, in particular to cases that concern the interpretation of wholly unrelated investment treaties, highlight that investment treaty arbitration is in a state of self-institutionalization as a system of investment protection in which the resolution of individual disputes is interconnected and embedded in a treaty-overarching framework. This self-institutionalization through communication enshrined in arbitral case law is particularly striking with respect to the concretization of vague substantive standards of treatment, such as fair and equitable treatment. While most substantive investor rights were initially not well-defined by either the texts of investment treaties or State practice, investment treaty tribunals at first merely posited the normative content of such rights; later on, by contrast, the tribunals turned to arbitral precedent as the preeminent source for getting direction concerning the interpretation and application of investor rights. Through this process, the normative content of investor rights is quintessentially coined by investment treaty jurisprudence, with every decision containing concretizations not only of the specific investment treaty in question, but of the treaty-overarching principles of international investment law. Investment jurisprudence thus assumes and fulfills a law-making function in concretizing the normative content of the core investor rights for the entire system of investment protection and functions as a mechanism of global governance influencing investor-State relations worldwide even though they only resolve one specific dispute at a time.

At first glance, understanding investment treaty arbitration as a mechanism of global governance appears surprising, as unaffected third investors and States should not be interested in – let alone concerned about – arbitral proceedings between wholly unrelated parties. In fact, substantive and procedural investment law are drafted to avoid effects on non-parties: not only is international investment law governed by bilateral treaties, but various treaties also adamantly deny any importance of arbitral awards as precedent in future arbitrations.[104] The reality, however, is different and displays numerous ways in which investors and States are affected by arbitrations between wholly unrelated parties. Above all arbitral precedent has become a focal point, giving rise to normative expectations: investors, States, and those acting as counsel and arbitrators

[104] *See*, *supra*, note 56.

expect arbitral tribunals to decide future cases consistently with earlier cases. In other words, those affected by investment treaty arbitration form expectations about how investment treaties will be and should be applied and interpreted in the future based on how investment treaties have been applied and interpreted in the past.

Investors and States introduce these expectations into arbitral proceedings by actively and comprehensively citing previous arbitral decisions.[105] Parties to investment arbitrations therefore expect that tribunals will decide cases not by abstractly interpreting the governing investment treaty, but by embedding their interpretation in the discursive framework created by earlier investment treaty awards. Similarly, users of investment treaty arbitration increasingly expect that investment treaty tribunals render consistent decisions, although the governing law is contained in bilateral treaties. Tribunals, in turn, react to such expectations by striving to render consistent decisions and to develop a *jurisprudence constante*, which, while permitting divergence, imposes an argumentative burden on those arbitral tribunals that want to diverge from precedent.

Arbitral tribunals, finally, react to those expectations and integrate them into their decision-making. The Tribunal in *El Paso v. Argentina*, for example, termed it "a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals."[106] Simi-

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[105] *See*, *e.g.*, *AES Corporation v. Argentina* (note 57), para. 18 (observing that the investor relied on earlier investment awards "more or less as if they were precedent [tending] to say that Argentina's objections to the jurisdiction of this Tribunal are moot if not even useless since these tribunals have already determined the answer to be given to identical or similar objections to jurisdiction").

[106] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 27 April 2006, para. 39 (stating that the Tribunal would "follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent"). Similarly, *AES Corporation v. Argentina* (note 57), paras 27-28 (pointing out that it "nevertheless reject[s] the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases. In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present a high level of similarity or, even more,

larly, the Tribunal in *ADC v. Hungary* considered that "cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States."[107]

This process of generating normative expectations interestingly takes place rather independently of whether a certain award concerned the same or a different investment treaty. That it takes place, and that arbitral precedent has an effect on the behavior of third parties can also been seen from reactions of some States to investment treaty awards rendered under treaties they were not parties to. Thus, there are instances where States who disagree with certain lines of arbitral jurisprudence adversely react to an investment treaty tribunal's decision by recalibrating their own investment treaties, although the decision in question was rendered under a different investment treaty.[108] The interpretation of most-favored-nation clauses by the Tribunal in *Maffezini v. Spain*,[109] for example, has had the effect that wholly unrelated States included "anti-Maffezini"-clauses in their investment treaties.[110] Similarly, broad interpretations of fair and equitable treatment, or of the

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an identity with those met in the present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals").

[107] *See ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16, Award of the Tribunal of 2 October 2006, para. 293.

[108] On the interaction between investment treaty arbitration and investment treaty-making, *see also* UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007), available at: http://unctad.org/en/docs/iteiia20073_en.pdf.

[109] *See Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, paras 38-64.

[110] *See* Art. 10.4(2) footnote 1 Draft of the Central America – United States Free Trade Agreement, dated 28 January 2004, available at: http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf. Likewise, Panama and Argentina exchanged diplomatic notes after *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, in order to clarify that the MFN clause in their BIT did not extend to issues of dispute settlement, *see National Grid Plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction of 20 June 2006, para. 85.

concept of indirect expropriation, have led several States to introduce more restrictive wording of the respective provisions in their more recent BITs.[111] This illustrates the systemic effect States attribute to decisions of investment treaty tribunals.

As a result, investment treaty tribunals actively engage in building a system of treaty-overarching precedent, partly reacting to the parties' expectations, partly motivated by their own need for direction as regards the interpretation of investment treaties, and partly driven by the understanding that past experience and practice legitimizes future decision-making. This has the effect that arbitral decisions increasingly craft treaty-overarching rules of international investment law and thereby function as a mechanism of global governance.[112] This is significantly different from commercial arbitration, where the focal point in arbitral decision-making around which normative expectations coalesce usually is not the jurisprudence of other arbitral tribunals, but the domestic law of a State as interpreted by its domestic courts.[113] In investment treaty arbitrations, by contrast, normative expectations are generated based on the jurisprudence of investment treaty tribunals themselves. Arbitral precedent, in other words, is the catalyst and cause of those expectations.

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[111] Art. 10.5(2)(a) of the Dominican Republic-Central America-United States Free Trade Agreement, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta, for instance, stipulates – in departing from the broader treaty language in earlier U.S. treaties – that "fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." Alternatively, States may also issue binding interpretative statements in order to channel and to correct arbitral jurisprudence. *See*, *e.g.*, NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en.

[112] *See* Kingsbury & Schill (note 25).

[113] *Lex mercatoria* as a body of non-national law for international commercial transactions, of course, is an exception in this respect. Here, just as in investment treaty arbitration, normative expectations develop based on decisions of arbitral tribunals without any grounding in national law. *See* Thomas E. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, in: Lex Mercatoria and Arbitration, 11 (Thomas E. Carbonneau ed., 1998).

These expectations, however, have limits. While they cannot encompass the expectation that investment treaty tribunals will always decide consistently or may not deviate from earlier jurisprudence – an expectation that would result in arbitral precedent being binding – they encompass the expectations that investment treaty tribunals operate as part of a treaty-overarching framework of international investment law and provide good reasons for their decisions, including a justification for any deviation from the decision of other investment treaty tribunals. The expectations *vis-à-vis* investment treaty tribunals, in other words, are similar to those *vis-à-vis* domestic or international courts more generally: these institutions are expected to exercise their judicial function and, above all, satisfy accepted standards of judicial reasoning. This means that a departure from earlier case law requires reasons, not least because like cases should be treated alike.[114]

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[114] *Suez* and *AWG v. Argentina* (note 83), para. 189 (stating that "considerations of basic justice would lead tribunals to be guided by the basic judicial principle that 'like cases should be decided alike,' unless a strong reason exists to distinguish the current case from previous ones"). The protection of expectations regarding the conduct of investment treaty tribunals is therefore lower than the protection of legitimate expectations that arise out of the conduct of a State's administration or the domestic legislature. Such conduct can become a source of legitimate expectations for foreign investors, frustration of which can breach the fair and equitable treatment standard. *See* Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle,* 21 ICSID Review – Foreign Investment Law Journal 1 (2006); Hector Mairal, *Legitimate Expectations and Informal Administrative Representations*, in: International Investment Law and Comparative Public Law, 413 (Stephan W. Schill ed., 2010); Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in: International Investment Law and Comparative Public Law, 151, 163 (Stephan W. Schill ed., 2010). Similarly, under general international law, State conduct can become a source of legitimate expectations protected under international law. *See* comprehensively Jörg P. Müller, Vertrauensschutz im Völkerrecht (1971). On the emergence of expectations in the reference to, application of, and justified departure from, precedent, *see also* Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS75/DS84/AB/R, 4 October 1996, 14 (observing that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dis-

D. Conclusion

We live in an increasingly global economy. Yet there is no global, multilateral treaty governing investor-State relations and dispute settlement. Instead, international investment law is governed by a myriad of bilateral investment treaties, investment chapters in free trade agreements, as well as a few sectoral and regional treaties. This suggests chaos and fragmentation in international investment relations. Surprisingly, however, one can observe convergence in the international law governing the protection of foreign investments. While bilateral investment treaties contain various elements allowing for a multilateralization of these treaties, in particular the effect of most-favored-nation clauses, as well as broad notions of "investor" and "investment," which permit investors to use multi-jurisdictional structuring in order to shop for the most favorable investment protection, the principal actors crafting uniformity in international investment law are investment treaty tribunals.

Above all, investment treaty tribunals create a system of persuasive and non-binding precedent that States and investors generally focus on in developing normative expectations both about how investment treaties should be interpreted by arbitral tribunals and about how States should conduct themselves in order to conform to their investment treaty obligations. In doing so, arbitral tribunals craft, despite the structural limitations they face, treaty-overarching standards of investment protection and effectively multilateralize international investment law through interpretation. Arbitral tribunals are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument and are establishing overarching linkages between seemingly unconnected treaty relationships. They thereby assume the function multilateral treaty-making normally would have in creating

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pute."). *See also International Thunderbird Gaming v. Mexico*, Separate Opinion by Thomas Wälde (note 12), para. 16 (stating that "[w]hile individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected. A deviation from well and firmly established jurisprudence requires an extensively reasoned justification.") and *id.*, paras 129-130. *See generally* on the function of law to stabilize expectations NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 124-143 (1993).

uniform rules for investment protection and for investment-related aspects of the emerging global economy. This function of system-building in international investment law constitutes a specific exercise of public authority and a form of law-making by investment treaty tribunals.

Such an exercise of public authority, however, is not without problems, in particular as the law-making function that is connected with the creation of a system of international investment law can have significantly constraining effects on the possibility of States to regulate in the public interest. At the same time, system-building increases legal certainty and the predictability of international investment law as a whole. System-building, therefore, also has positive effects in countering the fragmentation of international investment law. Furthermore, it is a precondition for developing systemic solutions to systemic problems arising in investment treaty arbitration in respect of the relationship between States and investment treaty tribunals.

The challenge in international investment law will therefore be twofold: to maintain a reasonable level of uniformity and predictability of decisions by investment treaty tribunals so that States and investors can adapt their behavior and plan accordingly; and to ensure that arbitral jurisprudence develops balanced solutions that sufficiently protect foreign investors against the abuse of governmental powers, while leaving sufficient policy space for States to regulate in the public interest. This challenge, some argue, should be met by reforming the system of investor-State arbitration institutionally, for example by introducing an appeals facility for investor-State awards,[115] or by establishing a permanent international investment court.[116] This could ensure the development of a *jurisprudence constante* that strikes an appropriate balance between the interests of investors and States. Yet, as long as States do not bring about such institutional reforms, it will be for investment treaty tribunals, domestic courts, annulment committees, and arbitral institutions to meet concerns as regards the legitimacy of investment treaty

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[115] *See* David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes*, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 39 (2006); Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Mechanism*, 57 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2006), available at: http://www.telc.uni-halle.de/Heft57.pdf.

[116] *See*, *e.g.*, VAN HARTEN (note 12), 180-184.

arbitration in general and the system-building exercise arbitral tribunals engage in in particular.

Strategies for investment treaty tribunals to meet such concerns could involve various elements:[117] developing the substantive law contained in international investment treaties in ways that are accepted by States, investors, and civil society; ensuring the openness of international investment law *vis-à-vis* general international law and other specific international legal regimes, such as human rights, international environmental law, the protection of cultural property, international labor law, etc.; developing appropriate standards of review for acts of host States; increasing the transparency of investor-State arbitration so that outsiders can assess its benefits, but also address criticism; developing further mechanisms for non-parties affected by the outcome of arbitrations to participate in the proceedings and voice their position, for example through *amicus curiae*-interventions; reconsidering the procedural maxims governing investor-State arbitrations to meet the requirements of a global governance system; and strengthening the independence and impartiality of arbitrators by excluding undue influence on their decision-making due to conflicts of interests and conflicts of roles. Overall, these strategies will involve strengthening public law approaches to conceptualize the public authority investment treaty tribunals exercise and to develop solutions in line with the general principles governing the exercise of such authority.[118]

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[117] *See* in depth the contributions in STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010).

[118] *See* Schill (note 12), 3; *see further* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in: THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, 3, 21 (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds, 2010).

Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy

*By Ingo Venzke**

A. Introduction

Judicial lawmaking in the GATT/WTO context has for some time drawn considerable attention. Some are inclined to show a sense of existentialist anxiety in view of the fact that legal practice does not neatly live up to the orthodox doctrinal order of things. Others see judicial lawmaking as (theoretically or practically) inevitable and tend to readily embrace it as a way of overcoming defunct political processes.[1] What-

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[1] Good contributions on this issue are usually more nuanced, but still come with diverging emphases along these lines. *See*, *e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333 (1999) (portraying judicial lawmaking as a matter of fact); Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609 (2001) (canvassing different understandings and looking above all at attempts for dealing with legitimatory implications); Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism?*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 861 (2004); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004); Robert Howse, *Moving the WTO Forward – One Case at a*

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_6,

ever its normative appraisal, as a matter of fact adjudicatory practice has developed some of trade law's cardinal norms. The rise and increasing sophistication of adjudication in the GATT/WTO context has also gone hand in hand with a surge of authority on the part of adjudicators and a larger overall detachment of the law from politico-legislative politics.

The GATT/WTO context may thus be one of the principal sites for studying in closer detail how international courts and tribunals exercise international public authority by way of lawmaking.[2] There are numerous examples of how adjudicatory practice changes international trade law and contributes to the creation of legal normativity. One might, for instance, think of Art. XXIII GATT stipulating that a member may file a complaint if it "consider[s] that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired." Jurisprudence initially held that any harm in trade that "could not reasonably have been anticipated" at the time when concessions were negotiated would qualify; a breach of obligation was neither necessary nor sufficient.[3] Ever since the 1960s, however, a GATT violation would *ipso facto* be considered a "prima facie nullification or impairment" in the sense of Art. XXIII.[4] John Jackson summarized that the meaning of

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Time, 42 CORNELL INTERNATIONAL LAW JOURNAL 223 (2009) (pointing to a number of instances where adjudicators advanced the law in view of political deadlock).

[2] Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue. The project follows a broad understanding of "court" that includes judicial institutions in the GATT/WTO. There are formal differences such as that they only make *recommendations* and do not *decide* cases. But by now and in view of the real-life practices of these institutions there should be little squabble with this denomination. *Cf.* Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 605 (2002).

[3] The test was one akin to something like "legitimate expectations", known from contract law. *See* Working Party Report, *The Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, 3 April 1950, BISD II/188; GATT Panel Report, *Treatment by Germany of Imports of Sardines,* G/26, 31 October 1952, BISD 1S/53.

[4] GATT Panel Report, *Uruguayan Recourse to Article XXIII, L/1923*, 16 November 1962, BISD 11S/95. *Cf.* with illuminating detail Arwel Davies, *The DSU Article 3.8 Presumption That an Infringement Constitutes a Prima Facie*

Art. XXIII was "brought almost full circle by the evolutionary case-by-case process" of adjudication.[5] And on a more general note he pertinently observed that:

> There are some important lessons in the GATT/WTO story. … Perhaps the most significant lesson is that human institutions inevitably evolve and change, and concepts which ignore that, such as concepts which try to cling to "original intent of draftspersons," or some inclination to disparage or deny the validity of some of these evolutions and changes, could be damaging to the broader purposes of the institutions.[6]

The phenomenon and its normative implications demand closer analysis.

The present contribution examines how adjudicators in the GATT/WTO context have contributed to shifts in the meaning of the general exceptions spelled out in the black letters of Art. XX GATT and how their interpretative acts have come to represent reference points in discursive practices. It draws attention to the spell of precedents in legal discourse and highlights strategies on the part of adjudicators.[7] Against the expectations of governments and in spite of repeated fixations in norm texts that adjudicators "cannot add to or diminish the rights and obligations provided in the covered agreements" (Arts 3(2) and 19(2) DSU), adjudicatory practice has shifted normative expectations among participants with regard to general exceptions in trade law. The Appellate Body has in effect come to reign supreme over Art. XX and over the junctures between trade objectives and other public policy concerns. The following analysis of changes in Art. XX illustrates how the Appellate Body has built up strategic space by way of general pronouncements that were not strictly necessary for deciding the case and that would in later proceedings be used to carry judgments of (il)legality. Along the way, this contribution also endeavors to highlight

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Case of Nullification or Impairment: When Does it Operate and Why?, 13 JOURNAL OF INTERNATIONAL ECONOMIC LAW 181 (2010).

[5] JOHN H. JACKSON, SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 143 (2006). *See* GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, 17 June 1987, BISD 34S/136.

[6] JACKSON (note 5), 82.

[7] With a fresh look on the working of precedents, *see* Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue.

the impact that changes in the institutional context and culture have had on interpretations of the law.

The argument falls into four parts. The first part sets the scene by introducing initial institutional developments, the normative environment, and the social contexts for legal argumentation focused on Art. XX GATT (B.). The second part shows how GATT panels responded to mounting conflict between trade and non-trade objectives (C.). Institutional changes and the possibility of appellate review then considerably strengthened the working of precedents, increased the authority of adjudicators, and portrayed rather immediate repercussions on substantive law. With recent developments in the law on general exceptions, legal discourse has palpably transformed into a controversy surrounding the legitimacy of adjudication in a scheme of multilevel governance (D.). The last part recalls the force of precedents in the transformation of Art. XX and dwells on the idea that legal interpretation has turned into a debate about legitimacy (E.).

B. Institutional Developments, Normative Environment, and Social Contexts

Adjudication portrays a number of particular features in the context of the GATT/WTO. First of all, its institutional development offers a superb illustration of institutional growth (or mission creep) that has been told many times: At the dusk of the Second World War, the GATT of 1947 was meant to form part of an International Trade Organization (ITO), only that the ITO never came into existence.[8] The GATT contained very vague procedures on how to deal with "disputes," a word that does not appear anywhere in the GATT. It framed processes of consultation and hinged on negotiation – a long way from anything that resembles judicial proceedings. In Robert Hudec's fitting words, "[i]t was a diplomat's legal order. At least, that is the way it started out."[9]

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[8] ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW. THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 4-5 (1993). It should be noted, however, that the GATT of 1947 was modified with the Final Act of the Uruguay Round in 1994.

[9] Robert Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 JOURNAL OF WORLD TRADE 615 (1970).

Over the years, the GATT developed features that made it look and work very much like any other international organization in spite of its defects at birth. At its inception, the GATT was run and characterized by the same diplomats who had negotiated it. They represented the parties and also staffed the small secretariat. On their own initiative, they developed the panel procedure for dealing with disputes and thereby created a mechanism that has since advanced to be one of trade law's flagships. Legal disputes would be referred to panels of three or five independent panelists and their reports needed to be adopted by the Council made up of all contracting parties. Consensus decisions were necessary at decisive points in the process – a requirement that gradually eroded in practice.[10]

The process used to be dominated by GATT diplomats and trade experts but came under the increasing influence of trained lawyers and the characteristic form of reasoning moved towards a judicial technique.[11] The creation of a legal division within the GATT secretariat in the early 1980s is of enormous importance in this regard. The secretariat has regularly drafted panel reports, worked towards consistency and contributed to a legal mode of dispute settlement.[12] Most decisive changes have, of course, come with the 1994 Marrakesh Agreement setting up the WTO. I will deal with this transformation at a later state. For now it remains helpful to briefly flesh out the normative environment in which legal practice centered on Art. XX GATT takes place.

The basics are that Art. XX comes into play in practice as a justification of trade restrictions that would otherwise amount to a violation of the GATT. Measures that come under Art. XX normally aim at non-trade objectives and need justification because they conflict with the general prohibition of quantitative restrictions (Art. XI), with the prohibition of discrimination between like products whose imports are still restricted in quantitative terms (Art. XIII), or with the obligation to pro-

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[10] WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT 232-236 (1990); HUDEC (note 8), 9.

[11] Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191 (2001); Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

[12] Martin Nettesheim, *Von der Verhandlungsdiplomatie zur internationalen Wirtschaftsordnung: Zur Entwicklung des internationalen Wirtschaftsrechts*, 19 JAHRBUCH FÜR NEUE POLITISCHE ÖKONOMIE 48, 54 (2000).

vide national treatment with regard to internal taxation and regulation (Art. III).[13] For Art. XX to become relevant there needs to be an inconsistency in the first place. While there is room for considering a policy's aim already at this stage of the legal analysis (with the possible effect of finding that there is no violation),[14] trade restrictive measures that aim at other public policy considerations are typically found to be in prima facie violation of the GATT and are accordingly addressed under Art. XX.

Art. XX GATT reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health; …
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; … .

For some time, potential conflicts between trade and other policy considerations used to slumber underneath an agreed upon borderline separating normal trade policies from policies that struck everyone as unjustified and abnormal. John Ruggie famously termed this shared understanding "embedded liberalism," meaning that trade liberalization was embedded in the usual working of the interventionist welfare state

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[13] On the last point, *see* Joseph H. H. Weiler, *Law, Culture, and Values in the WTO – Gazing into the Crystal Ball*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, 749, 758 (Daniel L. Bethlehem, Donald RcRae, Rodney Neufeld & Isabelle Van Damme eds, 2009) (noting that "the material and conceptual contours of the discipline of national treatment not only remain contested but are, *par excellence*, the creature of legal discourse").

[14] I have deliberately left aside the considerable jurisprudence and commentary on the well-known intricacies in determining "likeness". On the stages of legal analysis at which a policy's aim may come into consideration, *see* JAN WOUTERS & BART DE MEESTER, THE WORLD TRADE ORGANIZATION 52-54 (2007); Weiler (note 13).

– at the end of the day, the argument went, everybody would be better off.[15] This context provided the preconditions for GATT experts to follow a narrow focus on trade. Within their community, shared understandings of an embedded liberalism were transformed into economic ideas about free trade that became increasingly detached from the real life preconditions under which their arguments did actually work.[16] While disputes mounted, the old ethos of GATT trade experts and a *corps d'esprit* retained its grasp on the interpretation of the law. GATT panels would tread beaten paths and argue along lines drawn in the past.[17] An insider network was rather successful in sustaining isolation from disturbing outside perspectives on trade law by creating and maintaining a very high threshold for policies to be justifiable under Art. XX.

C. The Era of the GATT

I. The Creation of an (Almost) Impossible Threshold

Starting at the end of the 1970s, a number of domestic regulatory policies would condition market access in a way that required the exporter (or the exporter's country) to meet certain criteria. Some early cases were rather obvious attempts of governments to disguise protectionist trade restrictions, while other cases were not so clear-cut. In *United States – Tuna*, a typical example, Canada filed a complaint against actions taken by the U.S. government prohibiting imports of albacore tuna and related products from Canada.[18] The context of events showed that the United States took such action in response to the seizure of

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[15] John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INTERNATIONAL ORGANIZATION 379 (1982). *See also* his seminal *International Responses to Technology: Concepts and Trends*, 29 INTERNATIONAL ORGANIZATION 557 (1975). *Cf.* Weiler (note 11), 194-195; Howse (note 11), 99.

[16] Howse (note 11), 99.

[17] HUDEC (note 8); Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in: THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, 505, 508 (Daniel L. Bethlehem, Donald RcRae, Rodney Neufeld & Isabelle Van Damme eds, 2009).

[18] GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198, 22 February 1982, BISD 29S/91.

nineteen fishing vessels and the arrest by Canadian authorities of a number of U.S. fishermen that, according to Canada, fished illegally within 200 miles of its West Coast and thus under its fisheries jurisdiction.[19] The embargo on imports was an evident violation of the prohibition of quantitative restrictions (Art. XI).[20] This part of the analysis did not yield any surprises and by the time the proceedings came to a conclusion, the United States had already lifted the import ban. The parties to the dispute nonetheless agreed that the panel should continue its work in order to settle the crucial question "whether or not a contracting party should have the right to disregard obligations under the GATT in order to use trade measures to bring bilateral pressure to bear on non-trade issues."[21] This is the question that would pervade significant parts of GATT/WTO adjudication on Art. XX in the following decades.

In *United States – Tuna*, the United States unsuccessfully tried to justify its actions on the basis of Art. XX(g). Its actions were rather evidently part of the larger squabble between the two countries as well as a response to pressure on part of the U.S. tuna industry.[22] The panel left open, however, what it also recognized as a key question: that is, whether market entry could in principle be conditioned by policies pursuing non-trade objectives.

The panel's analysis of whether the U.S. policy did actually pursue its stated aim might be read so as to suggest that such kinds of policies are at least not wholly excluded from the scope of Art. XX. This is how Canada later used the report in its defense in *Herring and Salmon* – another case that paradigmatically demonstrated how public policy considerations are invoked to justify unwarranted protectionism that works to the benefit of domestic pressure groups. GATT panels found the answer to this challenge by creating a standard for justification that would be next to impossible to meet, thus effectively excluding a whole range of alternative policy considerations from intermingling with free trade objectives.

One of the main questions in *Herring and Salmon* was to establish what it actually means that a policy must be "*related to* the conserva-

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19 *Id*., para. 2.1.

20 *Id*., para. 4.15.

21 *Id*., para. 3.4.

22 *Id*., paras 3.15 & 4.1.

tion of exhaustible natural resources."[23] The panel soberly decided that the text does not state how trade measures have to be related to the aim of conservation. It juxtaposed paragraph (g) with other paragraphs and came to the conclusion that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to be considered as "relating to" in the sense of Article XX(g).[24] It did not hint at any authority or offer any reasoning that might support its interpretative claim. With this interpretation in mind, it then had an easy time concluding that Canada's export prohibition on certain unprocessed salmon and unprocessed herring did not primarily aim at the conservation of exhaustible natural resources. It placed the weight of its findings on the fact that there were alternative means available that Canada could have employed. The fact that Canada did not resort to such alternatives was proof of ulterior motives, i.e., the protection of employment within the fish processing industry.[25] The panel did not look into Canada's legislative history nor into the decision-making process leading to the export prohibition but relied on an objective test of primary intent – the sole fact that alternative and less trade restrictive measures were available established that the measures did not primarily aim at the conservation of exhaustible natural resources.[26]

The panel's invention of a "primarily aimed at" standard had much appeal and a lasting impact. Subsequent legal practice centered on whether a measure was primarily aimed at the conservation of exhaustible natural resources as if the treaty text had been forgotten. A reference point in interpretation would no longer be "related to" but the panel's precedent. In the immediate follow-up, a panel under the Canada-United States Free Trade Agreement, which incorporates Art. XX GATT by reference, corroborated this interpretation, quoting the *Herring and Salmon* precedent at length.[27] It further cut down the legal analysis, arguing that there were alternative measures available to Canada that

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[23] GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, 22 March 1988, BISD 35S/98.

[24] *Id*., para. 4.6.

[25] *Id*., para. 4.7.

[26] *Cf*. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 516-518 (2005); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 JOURNAL OF WORLD TRADE 37, 50 (1991).

[27] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Final Report, 16 October 1989, paras 7.04-7.05.

would have been less trade restrictive; whether a measure employed is the least trade restrictive would establish whether it is "primarily aimed at." [28] In effect, "related to" now meant "least trade restrictive." This line of reasoning had repercussions far beyond the parties to the dispute and led all the way to adjudicatory practice in the WTO. It is illustrative to see that the panel in *United States – Gasoline*, one of the very first cases within the WTO context, again engaged with the *Herring and Salmon* precedent in detail.[29] The panel's decision was ultimately overruled by the new Appellate Body (AB), but the AB also invested considerable efforts in relating its argument to *Herring and Salmon* – thus only testifying to the authority of this earlier decision.[30]

The qualification that a measure be "necessary" was also shaped in GATT adjudicatory practice in a way that rendered the threshold for justification by way of Art. XX very hard to meet. The defining showdown took place in *United States – Section 337* in which the panel found that for a measure to be necessary, "a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[31] This line of jurisprudence then reached its peak in *Thai Cigarettes* where the panel found trade restrictions to be GATT inconsistent and not justified under XX(b) precisely because alternative, less trade restrictive measures were available that could have met Thailand's public health concerns. It held that "import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there was no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."[32]

The panel's reasoning was notably determined by the objective of upholding a high categorical standard that should save the GATT system

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[28] *Id*., paras 7.04-7.11 & 7.38.

[29] Panel Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996, para. 6.40.

[30] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 16. *See further infra* notes 57-63 and accompanying text.

[31] GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, 7 November 1989, BISD 36S/345, para. 5.26.

[32] GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, 7 November 1990, BISD 37S/200, para. 75.

from protectionist policies otherwise entering via Art. XX. According to its categorical pronouncement, the existence of an alternative that is less trade restrictive and reasonably available is sufficient to render a measure unnecessary. What might look like reasonable alternative policies in the eyes of the GATT panel in *Thai Cigarettes* might, however, be more burdensome and costly for Thailand to implement. In the making of this interpretation of general exceptions, panels reasoned along functionalist lines and stressed trade objectives. How this rhetoric played out in legal practice may further be shown in the analysis of another way by which panels sought to save the GATT system from policy considerations with a trade-distortive potential: The practice of adjudication arguably created a territorial limitation on the scope of the general exceptions.

II. A Territorial Limitation?

Disputes at the intersections between trade objectives and other public policy aims grew in prominence in the early 1990s, fuelled by the panel reports in the *Tuna – Dolphin* cases. At issue were U.S. policies conditioning market access for tuna exporters with the stated aim of protecting dolphins. These policies could not so easily be ruled out as rather evident expressions of protectionism, un*related to* or un*necessary for* achieving policy objectives listed in Art. XX. And still, in *Tuna – Dolphin I*, the panel found the U.S. import prohibition to be in violation of Art. XI GATT and not justified under Art. XX (b) or (g).[33] Picking up the arguments of the parties, it saw the crucial question to be "whether Article XX(b) covers measures necessary to protect human, animal or plant life or health *outside the jurisdiction* of the contracting party taking the measure."[34] It noted that the text of Art. XX does not give away the answer and turned to the drafting history as well as to the purpose of the provision. It purported to see that the provisions were only

[33] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155. One issue that has to be sidestepped here, but which is of curial significance generally, is the delineation of Art. XI dealing with quantitative restrictions from Art. III concerning internal regulations.

[34] GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155, para. 5.25 (italics added).

meant to allow the protection of human, animal and plant life that are under an importing country's jurisdiction. Its view might have been tainted by its apocalyptical angst. The panel argued at this juncture of its analysis that if this were otherwise, i.e., if members could unilaterally prohibit imports by way of setting up conditions under which products have to be produced, the multilateral trade regime would ultimately collapse:

> The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[35]

The panel could have stopped here. Instead, it proceeded to foster the jurisprudence on the relationship between the concrete policy and the stated aim. Even if an extraterritorial protection were permitted, it went on, the import prohibition would still not be justified because it was not "necessary." With reference to *Thai Cigarettes,* the panel found that a reasonable alternative was available, namely, negotiating international cooperative agreements. The panel even raised the threshold a notch. It required that the United States "had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement" for its policy to qualify as a necessary exception.[36] Concerning subparagraph (g), with reference to *Herring and Salmon*, the measure did not primarily aim at the conservation of natural resources, for the same reason that it was not necessary under subparagraph (b).[37] It merits emphasis that this GATT decision of 1991 is closely interwoven with a number of precedents – referenced in forty-five footnotes on its forty pages. International legal practice in trade law was already deeply embedded in a thick structure of precedents that structured the space of interpretation and that directed all actors' interpretative practice. The Contracting Parties did not adopt

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[35] *Id*., para. 5.27.

[36] *Id*., para. 5.28.

[37] *Id*., para. 5.31-5.33.

this report, but as later practice will show the panel's reasoning still influenced the discourse.

For the time being, panels and the GATT insider network had in fact established that trade was trump. This bottom line was certainly subject to thorough critique.[38] Indeed, many vested their hopes in political processes to correct the issues.[39] Yet political agreement was not forthcoming and the dispute continued to make its way into adjudication. International trade norms on this issue continued to be primarily formed in the practice of adjudication.

D. The Reign of the Appellate Body

Changes in the interpretation of Art. XX at the inception of the WTO were closely intertwined with institutional reforms. The working of precedents has come to be of still greater significance with the dynamics introduced by a dispute settlement mechanism that comes with appellate review (I.). GATT precedents continued to direct all actors' arguments on Art. XX in the early WTO cases but the new Appellate Body forcefully redirected the legal discourse (II.). A central point of controversy has again been the meaning of "necessary" (III.).

I. Institutional Changes and the Working of Precedents

Both *Tuna – Dolphin* panel reports pointed to the politico-legislative process as the appropriate venue for resolving disputes about conflicts between trade obligations and other public policy considerations. During the Uruguay Round negotiations leading up to the Marrakesh Summit of April 1994, state delegates tried to curb dissatisfaction with

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[38] For an overview that relates opinions to overall outlooks on the working of international law, *see* Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1 (1994).

[39] Armin von Bogdandy, *Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT*, 3 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 243, 247 (1992) (noting that GATT adjudicators lack the authority for balancing competing interests).

how GATT panels had dealt with the issue by enacting new legal provisions; but little agreement was forthcoming and protracted disagreement only allowed for a rather laudatory "Decision on Trade and Environment" that was of very little help, if any.[40] The task of finding a remedy to looming conflicts was delegated to the newly established Committee on Trade and Environment (CTE) that has so far not been able to secure even a modest consensus on the interpretation of general exceptions, let alone an interpretative statement or even a reform of the treaty text.[41] As a result, adjudicators were left with interpreting and developing the law through their practice without significant guidance from politico-legislative processes.

Major changes did however occur with regard to the institutional context and the dispute settlement mechanism.[42] One of the principal novelties that came with the DSU was the possibility for appellate review. Several signs suggest that the new Appellate Body was expected to assume a limited role. At least to some it looked like a not so significant by-product of the whole package deal. A critical part of that deal was that panel (and Appellate Body) reports would now be adopted unless there was a consensus against their adoption in the Dispute Settlement Body. It was clear that this new "negative consensus" rule would lead to the automatic adoption of reports in almost all practical circumstances. It would also have a lasting effect on the relationship between adjudication and politico-legislative control.[43] In this context, appellate

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[40] Decision on Trade and Environment, adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh, 14 April 1994.

[41] The Doha Declaration invested the CTE with a renewed mandate, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, paras 31-33. Little progress could be made. What the CTE indeed does, is to draft notes on Art. XX that summarize the pertinent case law and pay close lip service to the panel and Appellate Body reports. They barely add a single word of genuine assessment or direction, *see, e.g.*, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice relating to GATT Art XX, paragraphs (b), (d) and (g)*, Note by the Secretariat, WT/CTE/W/203, 8 March 2002.

[42] Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EJIL 161 (1995).

[43] Von Bogdandy (note 1); Robert Howse, *The Legitimacy of the World Trade Organization*, in: THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, 355, 374 (Jean-Marc Coicaud & Veijo Heiskane eds, 2001) (noting that real judicial power comes into being only with the changes of the

review promised corrective measures against faulty panel reports. According to a proposal by the European Communities, the AB would only act if the panel report was "erroneous or incomplete."[44] Canada saw the Appellate Body's role in correcting "fundamentally flawed decisions" and the United States also thought that the new body would only review "extraordinary cases."[45] The contracting parties apparently thought that appellate review would be so limited that its seven members would only need to be employed part-time.[46]

Since the day of its creation, however, the Appellate Body has grown from an "afterthought to a centrepiece" as now Appellate Body member Peter van den Bossche put it.[47] Its success is largely due to its own agency and part of a general shift in legal culture. The AB is composed of mostly international lawyers who had general legal training and who were not exceedingly focused on *trade* law. At an early stage it embraced the Vienna Convention on the Law of Treaties (VCLT) and the norm text as a starting point of legal interpretation, built up persuasive authority and a consistent body of case law, and succeeded in striking a rather apt balance between trade objectives and other public policy goals in its jurisprudence.[48] The frequent recourse to appellate review of course also helped – in the first two years following the establishment of the AB *every* panel report was appealed.

State representatives sought to limit the lawmaking dimension of adjudicatory practice by tying the adjudicators to their consent in a number of ways. An expression of anxiety that judicial interpretation might not always live up to the ideal of uncovering the law that is present in the applicable treaties can be found in the intriguing Art. 3(2) DSU. It

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new WTO Agreement and that previous treaty interpretation in dispute settlements was controlled by the GATT bureaucracy).

44 Peter van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 289, 292 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006).

45 *Id.*

46 Dispute Settlement Body, *Establishment of the Appellate Body*, 19 June 1995, Decision of 10 February 1995, WT/DSB/1, paras 11-12.

47 Van den Bossche (note 44). *See further* Hélène Ruiz Fabri, *Le juge de l'OMC: Ombres et lumières d'une figure judiciaire singulière*, 110 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 39 (2006).

48 Van den Bossche (note 44).

stipulates that recommendations and rulings of the DSB "cannot add to or diminish the rights and obligations provided in the covered agreements."[49] This provision was apparently so dear to the contracting parties that they reiterated this wording *verbatim* in Art. 19(2) DSU. It has figured as a reference point in panel proceedings and in the discussion of reports to buttress an actors' claim that the panel or AB transgresses its legal function and engages in lawmaking. While empirically speculative, it is probably true that this provision has done little to work against the phenomenon of judicial lawmaking. It is hard to see what more it does than to restate the adjudicators' task of applying the law.[50]

Art. 3(2) DSU also provides that "[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system." In its early steps in *Japan – Alcoholic Beverages II,* the Appellate Body leaned on this provision to argue that reports, even if they do not amount to binding precedents, "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[51] The Appellate Body went on to concur with the panel that unadopted reports have no legal status in the GATT/WTO system – leaving open what exactly the legal status of adopted reports would be – but "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."[52] The Appellate Body's take on the working of precedents underscores that a precedents' quality of being binding or not is second to its persuasive power.

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[49] *Cf.* Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 405 (2005) (offering a discussion of this qualification that borders on superb parody).

[50] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87 and 110/AB/R, 13 December 1999, para. 79 (noting that "we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements").

[51] Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS 8, 10 and 11/AB/R, 4 October 1996, 14-15. *Cf.* Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, 18 January 2011, para. 7.59.

[52] *Id*., 15; quoting Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10 and 11/R, 11 July 1996, para. 6.10.

As of late, the Appellate Body has fostered the authority of its reports as decisive reference points for panel proceedings. To a large extent this dynamic has unfolded in the context of disputes over "zeroing," a method for calculating anti-dumping duties. Panels have recurrently found that nothing prohibits zeroing while the Appellate Body has consistently reversed panel reports on this matter. In *United States – Oil Country Tubular Goods Sunset Review,* the AB eventually found that it is not only appropriate for panels to follow AB jurisprudence but that they would even be expected to do so.[53] In a renewed appeal on issues of zeroing, in *United States – Stainless Steel (Mexico)*, the AB then stressed that its findings are clarifications of the law and, as such, are not limited to the specific case. It rather strongly attacked the panel, "[w]e are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system".[54]

The AB effectively created a lingering threat by suggesting that disregard for its precedents might actually amount to a failure of exercising a proper judicial function.[55] What was already evident in the historiography of legal practice with regard to Art. XX throughout the GATT era, now appears but obvious: GATT/WTO judicial practice creates a body of precedent that strongly bears on what trade law is. Participants in legal argument can simply not escape the discussion of previous judicial interpretations and practice demonstrates the normative expectation that they (in particular adjudicators) *should* relate to precedents. How does this process of lawmaking by way of interpretation unfold with

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[53] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 17 December 2004.

[54] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para. 162; Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, paras 362-365. *Cf.* Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, para. 188 ("following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same").

[55] *Id.*, para. 162. The claim would be that panels fail to conduct an "objective assessment" of the matter before them as is required by Art. 11 DSU.

regard to the general exceptions of Art. XX GATT in the era of the WTO?

II. Sea-Shifts in Interpretation

The very first case that came before a panel within the brand new WTO institutional framework promptly played public policy concern (in this case issues of pollution) against trade objectives. Treading the path set in GATT jurisprudence, the panel in *United States – Gasoline* held that the measures imposed on foreign producers of gasoline could neither be justified under Art. XX (b) nor XX (g). It found that there was a less trade restrictive alternative reasonably available so that the measures taken were not necessary in the sense of Art. XX (b).[56] With *Herring and Salmon* it further argued that "relating to" in Art. XX (b) means "primarily aimed at" and that primary intent can be inferred from the fact of whether the measure was the least trade restrictive – levelling out any difference between the standards.[57] The panel's reasoning had by now become an easy exercise and at the time it was a predictable statement of the law.

The United States appealed and the Appellate Body's decision demonstrates a remarkable shift in interpretation. The aura of a new beginning did not, however, elevate its reasoning above the discussion of precedents. The AB saw itself forced to engage with the interpretation in *Herring and Salmon*. It took up the challenge head on and strove to get out of the deadlock built up by GATT jurisprudence. How did it do so? It found the panel's (and its predecessors') interpretation to be in violation of the Vienna Convention on the Law of Treaties because it disregarded the difference in the wording between the individual paragraphs of Art. XX.[58] It is interesting that none of the disputing parties questioned that "related to" means "primarily aimed at" implying a least restrictive measures test – this seems to have already been beyond doubt even if, as the AB pointed out, "the phrase 'primarily aimed at' is not treaty language and was not designed as a simple litmus test for inclusion or exclusion from Art. XX (g)."[59] With some uneasiness, the AB

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56 Panel Report, *US – Gasoline* (note 29), para. 6.28.

57 *Id*., para. 6.40.

58 Appellate Body Report, *US – Gasoline* (note 30), 16-17.

59 *Id*., 19.

still continued to use the expression "primarily aimed at" for a more lenient standard and concluded on that basis that the measures taken could in principle qualify under paragraph (g).

The AB then turned to the chapeau of Art. XX whose main purpose it found in preventing the abuse of exceptions.[60] It stressed that Art. XX requires a two-tiered analysis, first of the measures at issue and whether they fall within the purview of one of the paragraphs (a) to (j), and second, whether those measures meet the requirements set out in the chapeau. The second step would deal with the manner in which measures are applied rather than with their content.[61]

The shift in emphasis from the individual paragraphs to the chapeau in examining whether a measure may be justified by Art. XX has come with a significant change in the possibilities for future development. On the basis of the chapeau, the AB now opened up a new chapter of jurisprudence. It is also in this first report that the AB expands the outlook for the interpretation of trade law beyond the narrow functionalist lines that had confined previous practice – the GATT is not, the AB noted *en passant* and with considerable repercussions, "to be read in clinical isolation from public international law."[62] This has become of immediate relevance in the AB's second decisive redirection of legal interpretative practice with regard to Art. XX. After it had changed the interpretation of the threshold that a measure has to meet in order to be justifiable, it turned to the still pending question of what came under the heading of "extraterritoriality."

The famous *United States – Shrimp* case was concerned with U.S. import restrictions on shrimp and shrimp products. The United States required that shrimp be harvested in a way not exceedingly harmful for sea turtles, and only then could it be imported. This case resembled *Tuna – Dolphin I* in almost all relevant elements. It is most remarkable then that all parties to the dispute as well as the panel related their arguments to the *Tuna – Dolphin* reports even though neither of them

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60 *Id*., 22.; *cf*. Rüdiger Wolfrum, *Article XX GATT 1994, General Exceptions [Chapeau]*, in: 2 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 66 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds, 2006), margin numbers 8-12.

61 Appellate Body Report, *US – Gasoline* (note 30), 22. In concrete cases the distinction between the two may be far from evident.

62 *Id*., 17.

had been adopted.[63] The panel in *United States – Shrimp* was also wholly unimpressed with the AB's report in *United States – Gasoline*.[64] It followed the argumentative pattern carved out in GATT jurisprudence and resumed the apocalyptic note that, were the United States or any other member allowed to require that importers meet internal regulatory standards set unilaterally by the importing country, the whole multilateral trading regime would be at risk. It is the very nature of the measures, the panel argued, that puts the multilateral trading system at risk.[65] The only repercussions that *United States – Gasoline* had on the panel's reasoning is that it now tied its analysis to the chapeau of Art. XX, but evidently the panel saw this as just another reference point for its ready-made legal reasoning.[66]

The Appellate Body overturned the panel and established a lasting precedent on how to deal with the justifications in Art. XX.[67] Mirroring its report in *United States – Gasoline*, the AB criticized the fact that the panel had not followed the international law rules of interpretation and again underscored that the first task of the interpreter is to examine the ordinary meaning of the words of a treaty.[68] The AB found that textual and contextual evidence indicates that the purpose of Art. XX is not to safeguard a functioning multilateral trading system, but rather the abuse of exceptions. Again, reiterating its earlier reasoning, it had to first be established whether the policy falls within the purview of one of the paragraphs and, secondly, whether the manner in which it is applied amounts to an abuse.[69]

According to the Appellate Body, sea turtles can be considered "exhaustible natural resources" and the U.S. measures did in principle

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[63] *Cf*. David Driesen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VIRGINIA JOURNAL OF INTERNATIONAL LAW 279, 306 (2001).

[64] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/R, 15 May 1998, para. 7.53.

[65] *Id*., paras 7.44 & 7.60.

[66] *Id*., paras 7.31-7.62.

[67] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998.

[68] *Id*., para. 114.

[69] *Id*., paras 116, 117 & 121.

qualify under paragraph (g).[70] The decisive issue then was whether the measures conformed to the demands of the chapeau. The Appellate Body's legal analysis at this stage is remarkably strong and the legacy of GATT jurisprudence crumbles under its impact. The AB found that the purpose of a measure could not be invoked so as to categorically exclude a whole range of measures from the purview of Art. XX. Rather, the chapeau deals with the manner in which the policy is applied in order to part illegitimate protectionism from justifiable measures.[71] Neither Art. XX nor WTO law in general can be read so as to give effect to overarching trade objectives brushing aside all other considerations, the AB stated.[72] In the present case, however, it found U.S. policies to constitute an unjustifiable discrimination of international trade because the United States had failed to negotiate equally and seriously with all the complainants.[73] Its measures were also an arbitrary discrimination because of the regulations' rigidity and inflexibility and because of a lack of transparency and procedural fairness in the implementation of the regulations.[74]

The AB could have confined itself to precisely these findings. And yet it took a further step which it couched between these two parts of its legal analysis. Without direct reference to the unadopted *Tuna – Dolphin* panel reports, it argued that measures seeking justification under Art. XX will in most practical circumstances be measures "conditioning access to a member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by

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[70] It is interesting to note how the Appellate Body supported its reasoning that sea turtles are an exhaustible natural resources with reference to the Preamble of WTO Agreement, by pointing towards developments in international law pertaining to the protection of the environmental, and by stating that "the generic term 'natural resources' in Art. XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'". *Id*., paras 129-130; quoting *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, (1971) ICJ Reports 16, 31.

[71] *Id*., para. 149

[72] *Id*., paras 152-154 (citing ample evidence from the Uruguay negotiations in support). *Cf*. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case. A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491 (2002).

[73] Appellate Body Report, *US – Shrimp* (note 67), paras 161-176.

[74] *Id.*, paras 177-184.

the importing Member." To argue that such features make measures *a priori* incapable of justification under Art. XX would render "most, if not all, the specific exceptions of Art. XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."[75] Though a little later the Appellate Body noted that it does "not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation."[76] In the case at hand it could rely on a territorial nexus between sea turtles and the United States. The AB did however line up all the arguments that would be necessary to overturn the GATT reports on this issue.

This finding on the principled scope of Art. XX was not precisely necessary to overrule the panel. It marks a stark departure from the traditional take on the issue and formed the central point of controversy in the compliance proceeding that followed suit. In this second shot at challenging U.S. measures in the implementation of the findings in *United States – Shrimp*, Malaysia again emphasized the unilateral nature of the U.S. regulations conditioning market access and argued that such measures inevitably resulted in arbitrary or unjustified discrimination, recalling the apocalyptic scenario of the end of the free trade world. The panel rejected this claim closely along the lines of the AB report. Malaysia appealed and argued that the AB's earlier findings on the matter (i.e., that unilateral measures such as those by the United States were not *a priori* excluded from the scope or Art. XX), is only dicta and that the panel was wrong to rely on it.

Boldly and emphatically the AB stated that its original findings were not dicta, but rather expressed principles that were central to its ruling:

> The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not dicta; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in *United States – Shrimp*. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on

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[75] *Id.*, para. 121.

[76] *Id.*, para. 133.

> this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case.[77]

The AB had first challenged the "territorial limitation" that was part of legal contestation ever since *Tuna – Dolphin I* with a general statement in *United States – Shrimp* that was not precisely necessary for deciding the case. In *United States – Shrimp (21.5)*, it then elevated its earlier pronouncement to form an essential part of its original ruling.[78] This is an intriguing pattern of politics in interpretation: A general statement may first go without much criticism because it is not decisive and may at a later stage be invoked as a basis for carrying judgments concerning (il)legality. This appears to be a pattern that the AB has also used in another decisive case that will be addressed shortly: *EC – Asbestos*.[79]

The adjudicatory practice at the inception of the WTO shows how the Appellate Body has opened up avenues for member states to rely on general exceptions and at the same time it has considerably strengthened its own authority. As a bottom line, José Alvarez notes, "[n]either the WTO's admirers nor its detractors within the environmental community can deny that the *Shrimp/Turtle* Appellate Body has given a whole new layer of meaning to the bare text of Art. XX of the GATT."[80] Of course this meaning remains contested.

III. Proportionality, Interpretation and Legitimacy

Some have suggested that the notion of proportionality has found its way into legal practice in the context of the WTO with this new layer of meaning (1.). The Appellate Body does indeed seem to have further increased its powers by claiming that it needs to engage in an exercise of balancing competing interests in order to assess whether a measure can be justified on the basis of general exceptions (2.). Finally, with the advancement of the theme of proportionality, contestation as to the mean-

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[77] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5)*, WB/DS58/AB/R, 22 October 2001, para. 138.

[78] TREBILCOCK & HOWSE (note 26), 532.

[79] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, 12 March 2001.

[80] JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 472 (2005).

ing of Art. XX on the whole has turned into a discourse about the legitimacy of international adjudication in a scheme of multilevel governance (3.).

1. Proportionality

In *United States – Gasoline* and *United States – Shrimp* the Appellate Body saw its task with regard to the chapeau of Art. XX to lie in examining whether measures were "applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[81] In the latter report it specified that "[t]he chapeau of Article XX is … but one expression of the principle of good faith … . One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights."[82] It immediately went on to add that:

> The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions … . The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.[83]

With this reasoning the Appellate Body built up considerable strategic space and reserved for itself the right of case-by-case decision.

What is more, the report's language closely resembles a description of what would be required in the application of the principle of proportionality.[84] Proportionality certainly comes with an overabundance of meanings. A shared focus of its uses might lie in its reference to a bal-

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[81] Appellate Body Report, *US – Gasoline* (note 30), 22; Appellate Body Report, *US – Shrimp* (note 67), para. 151.

[82] Appellate Body Report, *US – Shrimp* (note 67), para. 158.

[83] *Id*., para. 159.

[84] For suggestions that proportionality analysis would now already be required in the application of Art. XX, *see*, *e.g.*, Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 111, 121 (2001); Trachtman (note 1).

ance that needs to be struck between competing rights or interests.[85] According to German legal doctrine, which has been quite influential on this issue, proportionality analysis demands four steps in the legal evaluation of a certain measure: First, the measure must pursue a *legitimate aim (legitimer Zweck)*; second, it must be suitable or *effective* (*geeignet*) for the achievement of the stated objective; third, it must be *necessary* (*erforderlich*), which means that no less restrictive or less intrusive alternative is available; fourth, it must be *appropriate* (*angemessen*) for the achievement of the aim. This last element, also termed proportionality *stictu sensu*, demands a weighing and balancing of competing interests with the possible consequence that a measure may be found illegal because it imposes an undue disadvantage even if no alternative was available that could achieve the stated objective to the same extent.[86]

The concept of proportionality eventually did appear in the WTO context in a number of cases dealing with trade remedies.[87] It remains thoroughly debated whether it has also become part of the legal analysis with regard to general exceptions.[88] Observers largely agree in any

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[85] Matthias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574 (2004) (suggesting to think of proportionality as an analytical structure for striking such balance); *cf.* Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, in this issue.

[86] Eberhardt Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 568 (1973) (on the formative years of the jurisprudence of the German Federal Constitutional Court); Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, in: FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT, 445 (Peter Badura & Horst Dreier ed., 2001).

[87] Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 8 October 2001, paras 120 & 122. *See also* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002, paras 257-259. *Cf.* Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EJIL 985 (2006); Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARVARD INTERNATIONAL LAW JOURNAL 337 (2007).

[88] *See* Axel Desmedt, *Proportionality in WTO Law*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (2001) (offering an overview and com-

event – be it in appraisal or dismay – that if proportionality analysis were part of the exercise, this would inexorably imply a whole range of rather discretionary judgments and would further increase the power of adjudicators.[89] The material for contestation and shades of contingent answers stem from judicial practice. The Appellate Body's report in *Korea – Beef* is the main point of reference on the issue.

2. The Contested Meaning of "Necessary"

In *Korea – Beef* the Appellate Body for the first time interpreted the term "necessary" in Art. XX (d). The AB got off to a surprising start when it turned to two standard dictionaries in order to find the ordinary meaning of the term.[90] This was not only surprising because parties in dispute over the meaning of "necessary" would hardly be convinced by the authority of a dictionary but also because the Appellate Body immediately afterwards rejected the definitions it had found in the dictionaries and came up with its own rather unpersuasive shot at the meaning.[91] The Appellate Body went on to state that:

> [A] treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument . …[92] In sum, de-

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parison of the fields of trade law where proportionality has or might become relevant).

[89] Anne-Charlotte Martineau, *La technique du balancement par l'Organe d'appel de l'OMC (études de la justification dans les discours jurisdiques)*, 123 REVUE DU DROIT PUBLIC 991, 1014 (2007).

[90] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/AB/R, 11 December 2000, paras 159-160. *Cf*. on the use of dictionaries Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 453, 461 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006); Douglas A. Irwin & Joseph H. H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE REVIEW 71, 95 (2008).

[91] *Id*., para. 161.

[92] *Id*., para. 162.

> termination of whether a measure, which is not "indispensable," may nevertheless be "necessary" within the contemplation of Article XX(d), *involves in every case a process of weighing and balancing* a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[93]

The AB then candidly asserted that this interpretation is supported by the *United States – Section 337* precedent. A process of weighing and balancing, it maintained, corresponds to the well-established qualification that an alternative measure be "reasonably available."[94] This is surely a far stretch and a valiant claim. If nothing else, it testifies to the Appellate Body's endeavor to connect its interpretations to precedents and to instantiate new meanings within prevalent discursive structures.

The AB further stated that "[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."[95] It then went on to address the question whether Korea could have reasonably been expected to employ an alternative measure "to achieve the *same* result."[96] It concurred with the panel that Korea's measures were "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices."[97] In a final step, it pointed to the administrative costs that alternatives might imply and found that these would not be extraordinary. The Appellate Body thus concluded that a less trade restrictive measure was reasonably available and Korea's measures were thus not necessary in the sense of Art. XX(d).

Any further elaboration on the Appellate Body's reasoning is doomed to be imbued by one or the other interpretation of what the Appellate Body actually did. This also holds true when discussing what the Appellate Body itself did with its reasoning in later cases. Has *Korea – Beef* introduced a fully-fledged proportionality analysis into the con-

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93 *Id*., para. 164 (italics added).

94 *Id*., para. 166.

95 *Id*., para.176.

96 *Id*., para. 178 (italics added).

97 *Id*., para. 179; referencing Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and 169/R, 31 July 2000, para. 675.

cept of necessity where it appears in Art. XX? Does Art. XX require that benefits achieved for a legitimate public policy aim are proportionate to the costs in terms of trade restrictions? Opinions diverge. One observation that could hardly be refuted is that there would be a rather manifest tension between the requirements of a proportionality analysis and the categorical statement that members are free to choose their own level of protection. In contrast to a test demanding that the measure be least trade restrictive, a fully-fledged proportionality analysis would demand that measures be *appropriate*; that is, their costs in trade restrictions must not be excessive in relation to the benefits for the public policy aim. A measure might then be found unjustifiable even if there was no alternative to meet the member's level of protection. The interest of free trade (the interest of other members in market access) might *outweigh* another member's interest in health protection, for instance.[98] It is certainly hard to see how such an exercise in balancing would not be in tension with the credo that a member state is free to choose its own level of protection.

In *EC – Asbestos*, the immediate follow-up to *Korea – Beef*, the Appellate Body repeatedly stressed the importance of health protection and found that asbestos and the French substitute, cellulose and glass fibers, were unlike products.[99] This would have resolved the issue of legality – only if a measure is discriminatory and therefore in prima facie violation of the GATT would it be in need of justification by way of Art. XX. The Appellate Body went on, however, to engage in an analysis of the general exceptions and extended its interpretation of "necessity" to subparagraph (b). It reiterated the central passages of *Korea – Beef* and reproduced its conflicting elements.[100] It found that no other alternative could have met France's concern to the same extent, thus making this case the first in which a member *could have* succeeded in justifying a policy by way of general exceptions. This finding was rather superflu-

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[98] *Cf.* Elisa Ruozzi, *L'application du principe de proportionnalité en droit de l'Organisation Mondiale du Commerce*, in: LA CIRCULATION DES CONCEPTS JURIDIQUES, 475 (Hélène Ruiz Fabri & Lorenzo Gradoni eds, 2009); Donald Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REVIEW 347, 347 (2007).

[99] Appellate Body Report, *EC – Asbestos* (note 79) paras 113-215 & 129-131.

[100] *Id.*, para. 172 (interestingly, however, it omitted in relation to its earlier findings that the impact on trade was a relevant factor).

ous because the measure had already been found to be consistent with Art. III(4) and was thus not in need of justification. It is interesting to note that with these pronouncements the AB again lined up all the arguments for eventually justifying a measure by way of Art. XX even if such arguments did not carry the decision in the present case.[101] This is the same pattern that it had employed before in the *United States – Shrimp* saga in which previous dicta ultimately came to carry its later decision.

In *Brazil – Retreaded Tyres* the Appellate Body was again emphatic about the need to balance the importance of competing interests.[102] It fuelled controversy by coalescing a proportionality analysis with the requirement that the measure be least trade restrictive:

> [I]n order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.[103]

It remains very dubious whether the Appellate Body really meant what it said or did what it pretended to do, i.e., whether it really required that measures under Art. XX can only be "necessary" if they meet a fully-fledged proportionality test and whether it would actually test measures against this standard. Debates pertaining to proportionality in Art. XX straightforwardly extend to political and legal philosophy: The

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[101] *Cf.* Hélène Ruiz Fabri, *Drawing a Line of Equilibrium in a Complex World*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 125, 141 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (suggesting that this may be read as a signal sent by the judges that, once they get the chance, they would decide accordingly).

[102] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 137.

[103] *Id*., para. 178.

dispute about meaning has transformed into the question of whether adjudicators *should* engage in proportionality analysis.[104]

3. Interpretation and Legitimacy

The Appellate Body's words and deeds lend themselves to a wide spectrum of interpretations. Some argue that it has already engaged in proportionality analysis, others say it has not. Those who argue that it has done so also believe that it should do so and those who say that it has not done so also argue that it should not do so – the Appellate Body was right in what it did, whatever it did. Usually normative assessments seem to precede the analysis of what the court actually did. The issue very much divides the community of scholarly commentators.

One group claims that the Appellate Body balances the benefits of a certain measure for the achievement of a certain legitimate public policy goal against the cost of that measure in terms of reduced trade. Those who see a proportionality test at work also argue that the adjudicatory bodies within the WTO are right to examine a measure's appropriateness.[105] A number of complementary reasons are offered in support of this suggestion: In a rational-choice perspective, balancing might be considered part of the task delegated to the courts (the agent) by the members (the principals).[106] From the point of view of constitutional

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[104] Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law,* in: THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?, 35 (Joseph H. H. Weiler ed., 2000) (developing an early argument to this effect).

[105] Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect*, 49 WASHINGTON AND LEE LAW REVIEW 1407 (1992) (already advocating proportionality in response to the *Tuna-Dolphin I* report); Meinhard Hilf & Sebastian Puth, *The Principle of Proportionality on its Way into WTO/GATT Law,* in: EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION, 199 (Armin von Bogdandy, Petros C. Mavroidis & Yves Mény eds, 2002) (making out the advent of proportionality in the *US – Gasoline* and *US – Shrimp* reports); Ruozzi (note 98), 480-484; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEXAS INTERNATIONAL LAW JOURNAL 371, 414 (2007) (suggesting that "the AB focuses on the balancing of competing rights, interests, and obligations as a pre-dominant feature within chapeau analysis").

[106] Trachtman (note 1), 362.

doctrine and legal theory, balancing also appears to be a quite natural part of legal reasoning and there is no apparent reason why this should be different in the context of the WTO.[107] Authors tend to stress the rationalizing and constraining function that proportionality analysis in their opinion entails.[108] Balancing may then also be linked to constitutional qualities within the WTO.[109] Also note that the WTO's World Trade Report of 2005 embraces the jurisprudence on balancing in support of trade law's openness for non-trade public policy considerations – a good thing after all.[110]

Conversely, another group claims that the Appellate Body's rhetoric on balancing is misleading and should not be taken to imply proportionality analysis.[111] Rather, the Appellate Body respects, as it says it does, the regulative autonomy of its members and their right to freely choose their level of protection. If it does engage in a balancing exercise, this balancing does not extend to the benefits of the measure for legitimate public policy aims. This would inevitably contradict the member's right to freely choose their level of protection. Rather, balancing might be part of examining whether an alternative measure is reasonably avail-

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[107] Piet Eeckhout, *The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 JOURNAL OF INTERNATIONAL ECONOMIC LAW 3, 18 (2010).

[108] Usually such emphasis comes with significant caveats, *see* Martineau (note 89), 1022-1030; Kleinlein (note 85).

[109] DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION 34 (2005); Ernst-Ulrich Petersmann, *From 'Member-Driven Governance' to Constitutionally Limited 'Multi-Level Governance'*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 86, 99 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006).

[110] WTO SECRETARIAT, WORLD TRADE REPORT 2005: EXPLORING THE LINKS BETWEEN TRADE, STANDARDS AND THE WTO 135-136 (2005).

[111] Regan (note 98); Petros C. Mavroidis, *Trade and Environment After the Shrimps-Turtles Litigation*, 34 JOURNAL OF WORLD TRADE 73, 79 (2000); Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in: EFFICIENCY, EQUITY, LEGITIMACY AND GOVERNANCE: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM, 227 (Roger B. Porter, Pierre Sauve, Arvind Subramian & Americo Beviglia Zampetti eds, 2001); Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW 53 (2009). *See also* Andrew Lang, *Reflecting on Linkage: Cognitive and Institutional Change in the International Trading System*, 70 MODERN LAW REVIEW 523 (2007).

able that would be less trade restrictive and would yet meet the same level of protection. Such an alternative measure might be more costly and this is where the Appellate Body engages in balancing the additional administrative or enforcement costs against the benefits in less trade restrictions. This leaves the public policy interests of a measure untouched. It is argued that the Appellate Body should not engage in examining the appropriateness of measures because it lacks a number of indispensable prerequisites for doing so.[112] Above all, judicial interpretation is not embedded in a functionally equivalent institutional context when compared to domestic or European arenas.

E. International Adjudication, Precedents and Legitimacy in Multilevel Governance

Legal discourse on Art. XX GATT is now largely concerned with questions of balancing, with establishing what proportionality analysis actually means, and with understanding how it relates to the regulatory autonomy of the contracting parties. The main reference point in legal contestation is the Appellate Body's enigmatic pronouncement in *Korea – Beef*.[113] The purpose of the preceding analysis has been primarily analytical. It has purported to show how international adjudication has developed the international trade law on general exceptions into standards for domestic regulatory policy. It has illustrated how participants in legal discourse cannot escape the spell of precedents as a matter of fact and that there is a prevailing understanding that they also should relate their arguments to previous decisions. Counsels and adjudicators seek the support of suitable precedents and twist those that are not quite fitting. Once a precedent is on the table, other participants in legal discourse are wise to relate to them just as well. The argument that precedents are not binding is of very little help and is barely ever made – if so, then only to discuss that same precedent in spite of its nonbinding nature. The quality of bindingness does not add to or take away from the authority of precedents and their contribution to the creation of le-

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[112] Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law after Korea – Beef, EC – Asbestos and EC – Sardines*, 37 JOURNAL OF WORLD TRADE 199 (2003); Desmedt (note 88), 475-476.

[113] Appellate Body Report, *Korea – Beef* (note 90), para. 162.

gal normativity. This is common knowledge among the actors and explains the interest of third parties in the proceedings as well as the concern with the reasoning that adjudicators employ. In the discussion of the *United States – Shrimp* Appellate Body Report in the DSB the Brazilian representative illustratively stated that:

> It was well-known that in practice any decision of a panel or the Appellate Body with regard to a specific case would go beyond such a specific case. Although no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement. Therefore, in light of these systemic implications of decisions and recommendations pertaining to a specific case, Brazil wished to state its position with regard to certain findings of the Appellate Body.[114]

Even if the outcome of a report might be shared, members still scrutinize the reasoning because it feeds into later practice.[115] As happened in both *Japan – Alcoholic Beverages (II)* and *EC – Asbestos*, they might appeal even if they had won the case at first instance in all practical matters.[116]

Such concern is not without cause. A number of decisive steps in the Appellate Body's work towards developing the law have first been paved in statements that were not necessary for resolving the case. It has made general statements that were not decisive, only to later build on its general pronouncements in decisive steps. One may then wonder about (and be wary of) the constant reiteration that adjudicators should take into consideration the importance of the value pursued in the process of balancing that is required for determining whether a measure is necessary. So far the Appellate Body has never said that the objective a member pursues is unimportant – but the arguments are out there and might, at one point in time, support the finding that a measure is not necessary because the trade restrictions are not proportionate to the importance of the goal pursued.

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[114] Dispute Settlement Body, Minutes of the Meeting held on 6 November 1998, WT/DSB/M/50, 12 (the meeting concerned the adoption of the Appellate Body Report in *US – Shrimp*).

[115] *Cf.* Abi-Saab (note 90), 455 (suggesting that members readily exercise their right to express their views on reports).

[116] Appellate Body Report, *Japan – Alcoholic Beverages II* (note 51); Appellate Body Report, *EC – Asbestos* (note 79).

It has been suggested, with good reasons, that this should not happen. Many argue that adjudicators in the WTO do not have the legitimate authority to engage in a fully-fledged proportionality test that would intrude far into members' regulatory autonomy and that would contradict the assertion that members are free to choose their own level of protection.[117] The balancing that might be sensible would not extend to the importance of the goal, but rather to the costs of alternatives that are no less suited to meet the same level of protection.[118]

I wish to close by placing this debate about what international adjudicators can legitimately do in a context of multilevel governance within the general framework on the legitimacy of judicial lawmaking. First of all, it merits emphasis that the spell of precedents in international trade law is neither all curse nor cure. While it might distance the law from the reach of political legislation, a body of case-law that aims at coherence and serves the imperatives of legal certainty and stability.[119] The stabilization of legitimate expectations is a central function of law and judicial practice needs to be embedded in the past in order to instruct the future.[120]

Second, the asymmetry between judicial lawmaking and politico-legislative processes is one of the decisive elements in the debate surrounding what adjudicators in the WTO can and cannot legitimately do.[121] One way of taking away some of the legitimatory weight that international adjudicators need to shoulder in the WTO might lie in a strategy of reviewing the process that has lead to a regulatory decision and to strengthen procedural elements in this process rather than to add to the substance of Art. XX. To illustrate the point, when trade mea-

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[117] That a fully-fledged proportionality analysis would encroach upon member state autonomy is well acknowledged also by those who argue in its favor, *see*, *e.g.*, Eeckhout (note 107).

[118] *Cf*. TREBILCOCK & HOWSE (note 26), 543-544 (arguing that *Korea – Beef* did not introduce any additional requirement of proportionality into the adjudicators' assessment but rather opened up more leeway on part of member state regulation and reversed the restrictive trend that took off with *Thai Cigarettes*).

[119] *See* Appellate Body Report, *Japan – Alcoholic Beverages II* (note 51), 15; Appellate Body Report, *US – Stainless Steel (Mexico)* (note 54), para. 162.

[120] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010).

[121] Bogdandy (note 1); Howse & Nicolaïdis (note 111).

sures are the result of a decision-making process that meets certain criteria, when it includes meaningful participation and reason-giving, then it might be presumed to be justified.[122] A complementary strategy would look at avenues of politicization that contribute to the creation and better use of fora in which judicial lawmaking may be politically embedded.[123]

Lastly, a particularly intricate issue concerns the repercussions of fragmentation. The isolation of trade law from non-trade objectives reached its problematic peak at the end of the GATT era with the *Tuna – Dolphin* cases. The Appellate Body has since done a lot to surmount this isolation and to open up to competing perspectives.[124] Apart from the extensive quarrels in terms of judicial methodology and possible confines placed on adjudicators by positive trade law, political considerations about the wisdom and likely effects of further introducing non-trade objectives like environmental or human rights protection into the WTO system and adjudication persist and need to be explored in further detail.[125]

There are many other elements to the legitimacy debate that are pertinent and that would need to be taken into account: considerations of due process, the use of amicus curiae briefs, and also more substantive considerations of what good has actually come out of judicial lawmaking, to name just a few. The point is that large parts of the legal dispute concerning what Art. XX means in its central elements can hardly be decoupled from considerations of legitimacy. The practice of the legal discourse testifies to how semantic struggles extend to debates about the legitimacy of international adjudication. The reign of the Appellate Body over general exceptions should be understood in the context of a scheme of multilevel governance. This demands above all due regard of

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[122] This thought is further pursued by Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, in this issue. *Cf*. Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, IILJ Working Paper 2009/7.

[123] Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests*, 20 EJIL 615 (2009).

[124] *See* Kleinlein (note 85).

[125] This has of course been done to a considerable extent; yet there remain large areas not only of disagreement but also of uncertainty and lack of empirical as well as conceptual clarification.

the repercussions that interpretations have for the purposes of international law just as well as for municipal legal orders.

A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law

*By Michael Ioannidis**

A. Introduction

Lawmaking by judicial institutions requires legitimation. As international courts gradually play an ever more significant part in the shaping of international law,[1] they share with any other lawmaker the need for a

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1 Participation in the process of international lawmaking can take two forms. First, international adjudicators may exercise discretion in specifying a general rule of international law when applying it to a specific dispute. The part of the final decision that is left to their discretion constitutes lawmaking. Second, pronouncements of international adjudicators do not confine to the settlement of specific disputes, but may also exert normative influence beyond the disputing parties. For the normative effects of judicial decisions beyond the settlement of specific disputes, *see* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue 986-989; Marc Jacob, *Precedents: Lawmaking Through International Adjudication,* in this issue 1014-1018; Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in this issue 1124.

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_7,

convincing basis of legitimacy.[2] In the case of international courts, however, this need has to be addressed by taking into account their special function: that is, to review decisions made by other lawmakers (mainly domestic). The question of the legitimacy of judicial institutions is thus crucially connected with the standard they apply in reviewing such decisions.

In the following, it will be examined whether a meaningful response to this question can be offered through the development of procedural standards of international adjudication. *Procedural*, as described here, is a standard of review that focuses on the procedure that was followed for the adoption of the challenged decision. The court does not, therefore, (in contrast to *substantive* review) second-guess the substance of the reviewed decision, but rather examines whether the respective process meets certain basic standards. Among these standards, especially important are those securing the participation of the parties affected by the decision. Accordingly, this approach views judicial lawmaking that sets procedural standards as less problematic than substantive lawmaking and invites courts to develop their case law accordingly.

To support the thesis that such a procedural understanding would enhance the legitimacy of international adjudication, arguments will be drawn from democratic deliberative theory. From this perspective, it will be argued that international adjudicators meet better democratic standards when they engage in the control of the lawmaking *processes* of other institutions, rather than pronouncing on the *substantive* merits of their outcome. International courts are here perceived as better placed to shape the conditions of procedural legitimacy by assuming a process-perfecting task of regulation with international repercussions.[3] This procedurally oriented standard of review could be a convincing alternative for the cases where adjudicators are called to apply particularly vague provisions. Instead of developing their own substantive rules through the concretization of open-ended clauses, courts could defer to the decisions of other lawmakers, under the condition that they are adopted through legitimate procedures.

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[2] *See* von Bogdandy & Venzke (note 1), 992. On the exercise of authority by international organizations, *see* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities,* 9 GERMAN LAW JOURNAL 1375 (2008).

[3] Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE LAW JOURNAL 1063, 1064 (1980).

The immediate background of this procedural approach forms a challenge central for contemporary international law in general: the question of the extraterritorial effects of domestic lawmaking. One of the major features of globalization is the aggravation of an old deficiency of a world organized along territorial lines: domestic decisions can affect interests[4] that have no standing in the process of their adoption. This incongruity between the actual reach of a polity's public authority and participation opportunities goes directly into the heart of authority and legitimacy questions.[5] It will be argued that judicial lawmaking in this procedural-participatory direction has the potential to bridge a part of the gap between authority and participation. In this way, it not only enhances the legitimacy of international adjudication, but also that of domestic decision-making.

Of the potential mechanisms that can be utilized by courts in this direction, this article will focus on the judicial development of participation rights. That is, rights that allow affected interests to have their views considered in the making of a norm with the potential to affect them. This mechanism has been utilized in order to address legitimacy concerns in the field of administrative law, from which interesting lessons can be learnt for the relevant discussions at the international level.

These general assumptions will be investigated in the case of WTO law and its adjudicating bodies. There are mainly three reasons for this choice. The first has to do with the ambit of international trade rules incorporated into the WTO agreements. These touch upon regulatory issues from environmental to health standards for 153 countries.[6] Second, the WTO regime disposes of an outstanding dispute resolution system that has proven both prolific and effective. This part of the institutional architecture of the WTO is not however paralleled by the most important part of a "usual" collective decision-making system: the WTO cru-

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[4] Persons, but also collectively organized interests, like those represented by states.

[5] *See* Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization,* in: INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, 103, 126 (Stefan Griller ed., 2003).

[6] As of 23 July 2010, *see* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

cially lacks an institutionalized legislating process.[7] These two characteristics make the WTO a striking case in which the balance of international authority decisively tilts to the adjudicating end rather than the legislating one. Third, WTO rules and case law exist that provide actual examples of the procedural understanding of international adjudication described above.

This article will proceed by outlining a general procedural understanding of judicial review, with special focus on the potential role of participation rights (Section B). In Section C, the validity of the legitimacy concerns raised by the lawmaking function of the WTO adjudicating institutions will be shortly addressed. Lastly, Section D will investigate whether these concerns can be met by the application of a procedural approach with special reference to the relevant WTO treaty provisions and the procedural repercussions of the *U.S. – Shrimp* decisions.

B. Judicial Lawmaking and the Quest for (Procedural) Legitimacy: The Example of Administrative Law

Judicial lawmaking has long been a difficult question for domestic public law. Although a creative moment inheres in the tasks of every adjudicating institution,[8] under some conditions it has the potential to upset the arrangements of a structure based on the separation of powers. In the following, the conditions under which judicial lawmaking can raise significant legitimacy concerns will be shortly presented (subsection I). Then, the potential of addressing these concerns through a procedural approach based on participation rights will be investigated (subsection II).

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[7] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK UNITED NATIONS YEARBOOK 609, 617 (2001).

[8] Defining is here of course the analysis of Kelsen, according to whom "[a]pplication of law is at the same time creation of law," HANS KELSEN, PURE THEORY OF LAW 234–37 (1960, transl. by Max Knight, 1967). In the words of Lauterpacht, "judicial law-making is a permanent feature of administration of justice in every society," HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 155 (1982). To that extent, the question of courts as lawmakers centres around the linguistic truism that there is a creative moment inherent in any form of interpretation.

I. Judicial Lawmaking as a Question of Legitimacy

The lawmaking potential of judicial institutions particularly appears when a court competes with another decision-maker for the ultimate interpretation of a norm. For example, the judicial review of an administrative decision interpreting the clause "public interest" in a certain way (e.g. by promulgating a specific secondary rule) means that the court has the chance to influence the content of this rule. If it is different, the interpretation given by the court takes precedence over that given by the administrative authority.

Such judicial lawmaking has a greater potential, the vaguer the relevant clauses are. Open-ended provisions confer to the body entrusted with their interpretation respectively broad discretion.[9] Although this kind of uncertainty is "the price to be paid for the use of general classifying terms,"[10] the judicial "sovereign prerogative of choice"[11] can be substantially wider when the court is called to decide upon clauses or concepts like "necessary," "equal," "reasonable," "least restrictive," or "adequate." These norms establish to a significant extent the adjudicator as the arbiter of what the law *should be*.[12] This observation allows the contours of judicial institutions as lawmakers to become clearer and courts to become visible as instances of lawmaking authority. The picture beyond the frame of a supposedly mechanical, cognitive function of courts may, however, create uneasiness.

Seen as lawmakers, courts can no longer divert the question of their legitimacy to the decisions of other lawmakers. Their legitimacy becomes an issue of separate concern,[13] and their discretion emerges as delegation

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[9] Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain and France*, 25 WEST EUROPEAN POLITICS 173, 175 (2002).

[10] HERBERT L.A. HART, THE CONCEPT OF LAW 125 (1961).

[11] OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 239 (1920). Hart also refers to "choice," HART (note 10), 124.

[12] As they actually defer to the adjudicator the assessment on proportionality, the question of which lies in the heart of the concept of justice, Aristotle, *Nicomachean Ethics*, in: 19 ARISTOTLE IN 23 VOLUMES, 1131a (transl. by Harris Rackham, 1934).

[13] Regarding lawmaking at the level of constitutional adjudication, *see* from different perspectives JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 293 & 295 (1994); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 & 23

of authority to institutions beyond the reach of democratic constituencies. The existence of such authority challenges, however, one of the central premises of democratic government: namely, that public authority should be traced back to processes to which the affected individuals can (directly or indirectly) participate and influence.[14] Institutions exercising public authority without an adequate connection to the affected subjects could be understood as frustrating a central premise of democratic decision-making[15] and an understanding of legitimacy based on the process conditions of the democratic genesis of law.[16]

To say that *some* connection is needed between the lawmaker and the addressee of the respective norm is, of course, one thing. What *actually* qualifies as an adequate connection in this sense has been the long-disputed object of democratic theory. Although neither a survey of democratic theories nor their relevance for decision-making at the international level fall within the scope of this investigation, the following argument needs an indicator against which the function of international adjudicating bodies – and of the WTO in particular – is to be assessed.

The basic premise of this understanding is that lawmaking fulfills better democracy-based standards of legitimacy, when the law emerges from procedures that allow for the effective consideration of the largest possible number of the subjects it affects.[17] From this claim follows the notion that lawmaking is more legitimate, the more open it is to the consideration of affected interests and their participation in the relevant processes.[18] That is to say, that all subjects whose freedom is restricted

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(1986); ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE 189 *et seq.* (1991); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 149 (1988).

[14] Aristotle, *Politics*, in: 21 ARISTOTLE IN 23 VOLUMES, 6.1317b (transl. by Harris Rackham, 1944).

[15] To that extent Bickel's remark that "[constitutional] review is a deviant institution in American democracy" is apt, BICKEL (note 13), 16–18.

[16] HABERMAS (note 13), 321.

[17] Furthermore, such a procedure is considered more effective when it allows for the reason-responsive exchange of normative arguments, Jürgen Habermas, *Law and Morality*, in: 8 THE TANNER LECTURES ON HUMAN VALUES, 219 & 243 (Sterling M. McMurrin ed., 1988).

[18] ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 127 (1989).

by a collective decision enjoy in principle a categorical right[19] to be considered before its adoption.

From this line of argumentation two points are most relevant for the following. First, in cases where a collective decision affects subjects beyond the membership of the association producing it (external effects), a coherent democratic theory would postulate that the respective lawmaking process is open to the effective consideration of these "external" interests as well. For example, in the case of a community organizing its decision-making processes along territorial or citizenship lines,[20] but making a decision that affects subjects beyond these lines,[21] the latter would enjoy a democracy-based claim to have their views considered in the respective procedure.

Second, an institution entrusted with the power to review collective decisions would be exercising its authority in conformity with this concept of legitimacy when defining the – procedural – conditions of adequate consideration.[22] Thus, when the applicable law uses vague clauses that leave substantial discretion to the adjudicator, and a lawmaker with a better capacity to consider the affected interests exists (for example, a parliament or an administrative authority), it is more legitimate to defer the decision to him, rather than have a court decide the substance of the issue.

Adjudicating mechanisms are perceived here as generally not meeting the requirements to function as the proper fora for substantive collective lawmaking.[23] Neither is their political unaccountability sufficient to

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[19] *Id.*, 122 & 127.

[20] The most prominent example in Western-type democracies is the legitimacy chain based on regular elections.

[21] This can be for example a decision with external environmental or security repercussions.

[22] DAHL (note 18), 188 & 191. Very influential to this "participation-oriented, representation reinforcing approach to judicial review" has been Ely's theory, JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Although arguing for an "antitrust approach" to constitutional adjudication, which "intervenes only when the … political market is systematically malfunctioning" (*id.*, 87), rather than from a deliberative point of view, Ely's theory meets many of the concerns regarding the establishment of constitutional adjudication.

[23] From another perspective argue MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 101 (1982); and RONALD

elevate them to the level of perfectly impartial moral reasoners,[24] as sometimes argued, nor do they possess the superior epistemic qualities to discharge an overwhelming task of platonic guardianship.[25] Beyond that, the essentially bipolar character of adjudication allows for the consideration of only a limited number of different views, and that in an environment of already entrenched positions. Moreover, as in many occasions, the importance of judicial decisions goes beyond the disputing parties and stabilizes the normative expectations of other actors as well,[26] interests can be affected that could not have their views considered during the relevant judicial process.

Especially when courts review parliamentary decisions, judicial lawmaking can raise much more substantial concerns than in other cases. What characterizes ordinary statutory adjudication is that the court offers an interpretation of the relevant norm open to rebuttal by the legislature enacting a subsequent rule.[27] In the case of courts, however, effectively applying norms that circumscribe the powers of an ordinary representative assembly – as is the case with constitutional or some international courts – the pronouncements of the judiciary share the (higher) rung of the law that constitutes the respective legal community.

Under these circumstances, the due function of review mechanisms seems to be closer to the development of the procedural conditions under which substantive norms are produced; their elaboration in a way

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DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 344 (1996) (disconnecting "matters of principle" from "ordinary politics" and assigning them to courts "whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence").

[24] *See* Jeremy Waldron, *Judges as moral reasoners,* 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 2 (2009) (investigating the question of whether judges have superior skills when it comes to addressing moral issues).

[25] The analogy of courts (especially constitutional or international) enjoying the power to overrule majoritarian decisions on the basis of superior moral qualities with the platonic institution of guardianship is often made, *see* LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958).

[26] *See* the contributions in this issue referred to above (note 1). For the stabilization of normative expectations as a central function of law, *see* NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 151 (1995) and for the application of this concept in addressing the lawmaking function of international courts, *see* von Bogdandy & Venzke (note 1), 987 & 998.

[27] CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 249 (2007).

that excludes no (or at least less) affected interest(s) from meaningful structures of deliberative consideration. What emerges as the proper standard of review in this sense is procedural: it ensures the deliberative and inclusive character of the will-formation that ultimately becomes the reviewed norm.[28] As the objective of such review is to ensure reason-responsive participation, violations of a broad spectrum of rights ensuring the adequate consideration of affected subjects fall within the ambit of judicial review.[29] Beyond this procedural infrastructure however, decisions on substantive issues of the polity should be at the sole disposal of the respective, deliberative, collective institutions[30] and fall within the realm of politics.[31]

II. Procedural Judicial Lawmaking Is Still Lawmaking

Of course, the task of judicial institutions in securing the procedural conditions of lawmaking is neither automatic nor free from discretionary assessments. The approach presented here should not be understood as an effort to conceal the inherently creative task of adjudication under a procedural guise. It does not seek to replace the fallacious picture of a court allegedly mechanically arriving at predetermined decisions, with its procedural version. Such an understanding would simply reduce the inaccurate description of the adjudicator as *bouche de la loi* to an equally misleading construct of *bouche de la loi procédurale*.

Judicial application of procedural law also includes elements of discretion. The identification of the parties that should enjoy access to a particular decision-making process and the enforcement of the relevant rights entail an exercise of choice. The procedural orientated adjudica-

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[28] *See* HABERMAS (note 13), 340.

[29] Including all rights necessary for the free, informed and effective participation of the individual, *see* DAHL (note 18), 178.

[30] According to Habermas, "[t]he democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy. But what provides this procedure with its legitimizing force? … [D]emocratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable," JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 448 (1997).

[31] DAHL (note 18), 182.

tor continues thus to be a lawmaker. First, he makes the particular norm that settles the specific dispute before him, in the form of the individual decision that sets the appropriate procedural standards. Beyond that, in the cases where the persuasive function of its decision is such as to shape the normative expectations of parties beyond the disputing ones, he can even make general procedural law. In any case, the exercise of discretion remains a structural characteristic of adjudication also under this procedural understanding.

Nevertheless, this "minimum" discretion is here understood to be in many cases the best alternative: procedural review imposes fewer demands on the courts' institutional capacities than substantive review. Deciding under a procedural-oriented standard, the court is not expected to determine whether the reviewed decision-maker reached *the correct decision*, but only that he made *a procedurally correct decision*. Where the applicable law leaves broad discretion to an adjudicator, it is more in conformity with deliberative-democratic standards to exercise the procedural aspect of this discretion than the substantive one. This enhanced legitimacy does not derive from the fact that, allegedly in this case, the court abstains from lawmaking altogether (it only abstains from *substantive* lawmaking), but from the legitimacy we ascribe to decision-making that fulfills better deliberative-participatory standards.

Summing up, the claim made here, and used as the normative backdrop for the assessment of the function of the WTO adjudicating mechanism, is that courts shaping the conditions of deliberative participatory decision-making yield results that better conform to the concept of democratic government adopted here than courts second-guessing substantive collective decision-making.

III. The Potential of Participation Rights: Judicial Lawmaking and Administrative Law

From the different possible strategies for addressing the question of legitimacy from a procedural perspective, the following will focus on the potential role of a legal institution developed at the level of administrative law: participation rights. That is, rights that allow an interested party to participate directly in the process of adopting an administrative

determination that affects him. This approach draws upon insights from the function of this legal institution at the administrative law level.[32]

Administrative law can indeed offer invaluable bearings regarding the questions of legitimate decision-making and judicial review for two reasons. First, it is a discipline paradigmatically engaged with the balance between judicial review and a form of decision-making which itself raises legitimacy concerns, as administrative decision-making does on occasion. Second, it offers a concept of participation beyond the parliamentary and electoral-orientated one; and this is an approach particularly appealing for governance at the international level.

1. Balancing Between Judicial Lawmaking and Administrative Discretion

The delegation of discretionary decision-making powers to administrative agencies has always presented a formidable challenge to democratic constitutional systems.[33] The exercise of coercive authority by unelected officials that is not adequately circumscribed by parliamentary general law brings majoritarian and electoral-based concepts of legitimacy to their limits. An administrator exercising discretion does not only administrate or execute the law, but effectively creates it. In short, administrative discretion challenges the continuity of the "chain of le-

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[32] An approach with a history going back to the creation of the International Trade Organization (ITO), *see* Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARVARD LAW REVIEW 78, 97 (1949). From the literature adopting this perspective analyzing WTO law, path breaking is the work of Richard Stewart, *see* Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 LAW AND CONTEMPORARY PROBLEMS 63 (2005); Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, NEW YORK UNIVERSITY SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPERS SERIES No. 09–71, 1 (2009). Regarding participation rights in particular, an important part of the recent literature addresses legitimacy concerns focusing on their function, *see*, *e.g.*, Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues,* 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 751 (2008).

[33] *See* RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 35 *et seq.* (2009).

gitimacy" connecting coercion (through the relevant administrative action) to democratic participation (through parliamentary lawmaking).[34]

Judicial review of this discretion presents then the additional complication of either replacing a democratically problematic decision-maker (administration) with a potentially even more problematic one (court), or leaving administrative discretion completely uncontrolled.[35] To the extent that both institutions enjoy discretion, such decisions are authoritative in the classical sense,[36] and both present comparable legitimacy questions. Reviewing courts, having to cope with the existence of authority beyond majoritarian-representative institutions in this sense, developed a series of strategies to provide for a response and ease the tension with the principles of democratic self-governance.[37]

2. The Judicial Development of (More) Legitimate Procedures

In the event that a parliament decides to delegate substantial parts of decision-making authority to the administration through broadly drafted statutes, the reviewing courts are left with essentially two options. First, they can review the decisions of administrative authorities on substantive grounds, basing their own perception of proper social regulation on the relevant broadly drafted clauses. Second, they can defer this task to the administration, ensuring however that it decides after the due consideration of the interests it affects. Under this second op-

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[34] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARVARD LAW REVIEW 1667, 1676 (1975).

[35] *See* Shapiro (note 9), 175 ("… when the legislature as principal chooses to police its delegation of law making authority to its administrative agent through the institution of judicial review, unavoidably it has also chosen to delegate law making authority to courts. And so it must confront the problem of policing them as well."). For a comparative approach of the problem, *see* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 19–21 (1989). For only an introduction to the discussion in the U.S., *see* PIERCE, SHAPIRO & VERKUIL (note 33), 364 *et seq*.

[36] In the sense that they restrict the freedom of their addressee as the decision-maker thinks expedient, THOMAS HOBBES, LEVIATHAN ch. XVII, para. 13 (Edwin Curley ed., 1994).

[37] *See* the seminal analysis of Stewart (note 34); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1998); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARVARD LAW REVIEW 1511 (1992).

tion, the reviewing courts are thought to assume the role of defining the conditions for a more open, deliberative and thus legitimate process.[38] Administrative procedure itself is thus seen as having a role beyond the simple execution of the legislative intention or the protection of private autonomy. Courts are called to investigate its potential as a "surrogate political process"[39] and shape it accordingly. A characteristic picture of this understanding can be given by the example of the reformation of U.S. administrative law, plastically described by Professor Stewart.[40]

Facing the vast expansion of administrative discretion after the New Deal, U.S. courts had to address the crisis of legitimacy created by the transference of an important part of lawmaking power to the competence of administrative agencies. One of the strategies they adopted in addressing this challenge was to shape administrative procedure in a way that could afford affected interests with the opportunity to influence its outcome. In order to ensure such an opportunity, U.S. courts expanded due process protection (at the level of individualized decision-making), liberalized standing requirements and demanded procedural devices beyond those explicitly provided for in the respective statutes.[41] From the rather sparse relevant statutory requirements, U.S. courts[42] thus developed a series of elaborate procedural conditions[43] significantly contributing to the broadening of participation in administrative decision-making.[44]

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[38] *See* Stewart (note 34), 1723 (explaining the role of hearing rights to the transformation of U.S. administrative law into a model of interest representation); SHAPIRO (note 37), 128.

[39] Stewart (note 34), 1670.

[40] *Id*. *See* also SHAPIRO (note 37).

[41] *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARVARD LAW REVIEW 505, 529 (1985).

[42] An especially important role to this direction played the judges sitting on the bench of the United States Court of Appeals for the District of Columbia (D.C. Circuit), which reviews more administrative rules and orders that any other federal court, *see* Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD JOURNAL OF LEGAL STUDIES 253, 256 (1983); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 THE SUPREME COURT REVIEW 345, 348 (1978).

[43] Asimow (note 42), 256; Shapiro (note 9), 182-183.

[44] *See* Scalia (note 42), 348 ("The history of the APA's informal rulemaking provisions, at least since the mid-1960s, has been characterized by the imposition of additional procedural requirements mandated neither by statute nor by

By expanding the opportunities of the interested parties to present their case and influence the exercise of administrative discretion,[45] courts claimed to offer a means to supplement its legitimacy. That is, to substitute a part of what was lost by the weakening of the legislature-executive chain. In this context, courts increasingly understood the main role of judicial review not as "the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."[46] Participation in the administrative process could thus confer on the final administrative determination the legitimacy produced by the fair and adequate consideration of competing interests. In this sense, administrative procedure could be deemed to offer on many occasions a forum for the deliberative exchange of views regarding the content of a sector-specific rule.[47] The direct influence by those affected can in turn endow the respective administrative determinations with a quality worthy of deference by other decision-making instances, like courts.

3. Lessons for the International Level

Administrative law can give a good example of an institutional equilibrium where first, the adjudicator reviews norms (administrative decisions) on the basis of broadly drafted superior law (statutory law); and, second, the reviewed decision itself raises legitimacy concerns. Within this framework, courts can be seen as responsible for guaranteeing that administrative decision-making meets conditions of effective participation, rather than substituting their judgment to that of the reviewed authority.[48] Administrative discretion, informed by the consideration of

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the Constitution, but crafted by the courts, with greater or lesser reliance upon the substantive statutes involved.").

[45] *See* Garland (note 41), 525.

[46] Stewart (note 34), 1712.

[47] For an overview of some of the literature on the deliberative qualities of administrative decision-making, *see* Seidenfeld (note 37); David Barron, *Note, Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARVARD LAW REVIEW 1401 (1994).

[48] From the rich relevant discussion in the context of U.S. administrative law, *see* the development of the so-called *Chevron* doctrine and *United States v. Mead Corp*, 533 U.S. 218, 230 (2001) (courts should accord deference to the statutory interpretations given by administrative agencies when the relevant

the interests it affects, is understood from this paradigm to be a better alternative to substantive judicial lawmaking.

Of course, decision-making at the administrative level is not always sufficient to alleviate legitimacy concerns. In the case of the United States, to refer again to this example, substantial criticism levied at the deficiencies of the procedure-perfecting role of the courts with the Supreme Court drawing limits to "judicial procedural activism."[49] The functioning of this administrative "interest representation" model has been especially targeted as leading to a bargaining-type decision-making that promotes power-based compromises over the genuine exchange of positions.[50] Moreover, the procedural standard of reviewing an administrative decision was often used as a façade under which substantive judicial lawmaking was only masked. And in any case, administrative courts, and U.S. courts in particular, did not always or consistently pursue the procedural approach. They have also been active in directly applying substantive, and in some cases very intruding, standards of review. Nevertheless, the alternative presented here offers a response to substantive judicial lawmaking that can gain additional support from convincing arguments of deliberative theory. Although the expressed concerns have substantial weight, this approach of decision-making bears a significant potential in offering an institutional model also at the international level.

First, as in the case of administrative law, courts review decisions that present legitimacy deficiencies. At the administrative level, this is due to the withdrawal of the parliament from vast territories of social regulation and the delegation of broad powers to unelected officials. At the international level, the problematic point is the disregard of legitimate international interests (of states or private actors) by domestic lawmakers. This latter deficit, it must be made absolutely clear here, only refers to specific decisions, namely those affecting external interests. Not all domestic decisions have such an effect, but an increasing number of them do.

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statute "provides for a relatively formal administrative procedure tending to foster … fairness and deliberation").

[49] *See Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council*, 435 U.S. 519 (1978).

[50] In the context of U.S. administrative law, *see* Stewart (note 34), 1779; JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 23 (1985).

Second, these legitimacy deficiencies cannot be rectified only with recourse to *parliamentary* deliberation. At the administrative level, the reasons for granting administrative discretion are connected with the need for expertise and the actual capacities of parliaments. At the international level, the merits of establishing a parliament-like institution are questionable in more fundamental terms. Exactly this function of administrative law in governing authoritative phenomena beyond the immediate control of majoritarian democracy can prove useful in addressing the question of authority at the international level.[51] As in the case of administrative discretion and its judicial review, decision-making beyond the state requires an approach that seeks legitimacy beyond majoritarian-representative institutions.[52]

The role of courts in developing this understanding at the international level will be investigated in the case of the WTO. In this example, mechanisms will be examined by which the adjudicating bodies could assume a role of reviewing and shaping decision-making procedures, rather than engaging in substantive lawmaking themselves. Before that, a short presentation of the conditions that reinforce the legitimacy concerns about WTO adjudication is necessary.

C. Adjudication at the Level of the WTO

The WTO is a paradigmatic case of an international regime facing the challenge of balancing adjudicatory and political decision-making. The success of the WTO adjudicatory system gradually revealed its poten-

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[51] *See* Daniel C. Esty, *Good Governance at the Supranational Scale*, 115 YALE LAW JOURNAL 1490, 1494 (2006); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS LAW REVIEW 927, 942 (2003–04).

[52] *See* David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization,* in: DEMOCRACY'S EDGES, 84, 104 (Ian Shapiro & Casiano Hacker-Cordón eds, 2001); DAHL (note 18), 319 *et seq*.; Stewart (note 32), 75. For only an example of the discussion at the European level, *see* Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Policy*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 135 (Joseph H.H. Weiler & Marlene Wind eds, 2003).

tial in shaping the rules of international trade and covering the need for regulation that the legislative process cannot meet.[53]

I. Institutional Imbalance and Judicial Lawmaking in the WTO

If in the case of administrative law legitimacy concerns are raised by the delegation of significant lawmaking powers to administrative authorities, in the case of the WTO there is no effective legislature whatsoever. Although the institutional architecture of the WTO broadly resembles a domestic constitutional system based on the separation of powers,[54] the actual division of decision-making power does not follow the same pattern. The most decisive difference from a domestic legal system is the lack of an efficient legislator.[55] No WTO body effectively exercises the task of general lawmaking on behalf of an international trade community.[56] In addition to that, the administrative-like organs of the

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53 On the role of the WTO adjudicating bodies in creating new normativity in world trade law, *see* Venzke (note 1).

54 Stewart & Ratton Sanchez Badin (note 32), 1.

55 By efficient legislator I mean here a body that is competent to make decisions of a general and abstract nature responding to the evolving needs of a collectivity.

56 Although it is debatable whether the WTO has a general lawmaking power, the WTO Agreement does confer to the Ministerial Conference the competence to adopt amendments (Art. X:1 WTO Agreement) and authoritative interpretations (Art. IX:2 WTO Agreement) on the basis of majority voting. Both procedures, however, have not evolved to functional instruments for the promulgation of general international rules on trade. Moreover, amendments to the WTO Agreement that alter the rights and obligations of the members either require a decision of the Ministerial Conference taken by consensus or produce results only for the members that have accepted them (Art. X:1 read together with :4 and Art. X:3 and :5 WTO Agreement). Beyond these instruments, waivers, although indeed utilized as general lawmaking instruments, are also adopted on the basis of consensus and have not yet been elevated at the level of a legislative surrogate. On the function and potential of waiver as a means of lawmaking within WTO, *see* Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests,* 20 European Journal of International Law 615 (2009).

WTO, despite their growing significance,[57] have not yet been developed so as to produce secondary norms to which an adjudicating instance could defer.[58]

In contrast to this weak legislative function, the WTO disposes of a paradigmatically well-developed third party dispute resolution system. The abolishment of the consensus rule regarding the adoption of the decisions of the adjudicating bodies created a de facto compulsory, binding, and exclusive international trade jurisdiction.[59] The result is that the adjudicating bodies are decisively disassociated from the consensus-based "political forum model," which is applied to the rest of the WTO institutions and their function comes closer to that of an independent organ making authoritative decisions on behalf of an international trade community.[60]

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[57] The WTO does indeed dispose of an administrative infrastructure which carries out significant functions, like consulting member states and offering a forum for information exchange and the dissemination of technical knowledge. On the function of the WTO administrative law bodies, *see* Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 575 (2009).

[58] As it is the case with the delegated legislation of domestic administrative agencies or the secondary rules promulgated by organs of other international organizations. But *see also* the tendencies towards a more "legislative like" decision-making on the example of the "equivalence decision" of the SPS Committee (Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc. G/SPS/19/Rev. 2, 23 July 2004); Lang & Scott (note 57), 599. Particularly interesting are here the findings in Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, 25 October 2010, paras 7.134–7.136. The Panel, called to interpret Art. 4 SPS Agreement, referred to the above mentioned "equivalence decision" of the SPS Committee, noting that "while this decision (sic) is not binding and does not determine the scope of Art. 4, we do consider that this Decision expands on the Members' own understanding of how Art. 4 relates to the rest of the *SPS* Agreement and how it is to be implemented."

[59] As well as regarding the establishment of a panel and the recourse to the Appellate Body, Arts 1, 16.4, 17.4 and 23 DSU. On the exclusive character of the WTO DSM, *see* Panel Report, *US – Section 301 Trade Act,* WT/DS152/R, 27 January 2000, para. 7.43.

[60] *See* Cass arguing in a similar vein that "the only power possessed by the central body is the power of treaty interpretation vested in the WTO central adjudicatory system," Deborah Z. Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional*

Moreover, the WTO adjudicating mechanism is provided with a set of norms that has, in many cases, afforded their interpreter a paradigmatically wide "sovereign prerogative of choice." The language of core WTO provisions establishes skeletal guidelines of permissible conduct, rather than giving details of what constitutes an infringement of WTO law. That is to say, that the provision applicable in a given case may cover types of conduct significantly different from each other. In such cases, it is the task of the adjudicator to distinguish which difference is relevant for the application of the rule and which is not.

This is arguably the case for the most important WTO rules[61] such as Articles I and III GATT[62] or the norms seeking to accommodate freedom of trade with other policy choices, such as Articles XX and XXI GATT, which enshrine the possible exceptions from the WTO free-trade obligations. Central here are the notions of "necessity"[63] and "arbitrariness,"[64] which invite the Appellate Body to engage in a propor-

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Development in International Trade, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 39, 56 (2001). As Cass further explains, the Appellate Body resorted to this lawmaking potential to redefine the limits of its competence and the boundaries of the WTO regime in general, *id*., 51 & 57 *et seq.*

61 *See also* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constrains,* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 247, 252 (2004).

62 The wording of these provisions makes the application of the cornerstones of the world trade regime, namely the MFN and the National Treatment principles, contingent upon the establishment of the "likeness" of the relevant products, *see also* Art. II and XVII GATS. The phrase "like product" appears in many different provisions of the covered agreements, for example, in Arts I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994, *see* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001, para. 88. The Appellate Body made furthermore clear that "there can be no one precise and absolute definition of what is 'like.' The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes indifferent places as different provisions of the WTO Agreement are applied," Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, 21.

63 *See* Arts XX (a), (c), (d) and XXI (b) GATT, 2.2, 5.6 SPS Agreement, 2.2, 2.5 TBT Agreement and XIV, VI:4 GATS.

64 Chapeau of Art. XX GATT.

tionality-type balancing test.[65] The function of the "less restrictive means" standard can be similar,[66] also leaving to the discretion of the adjudicator the identification of the *tertium comparationis* upon which the "restrictiveness" of the relevant means will be assessed.[67]

II. The Importance of Substantive Lawmaking by the WTO Adjudicating Bodies

The broad wording of the covered agreements makes thus in many cases proportionality-like tests and policy assessments unavoidable for the settlement of specific cases. In this way, a "discretionary judgment" by the adjudicating bodies on substantive issues of regulation often occurs, as the Appellate Body has itself recognized.[68] And where such discretionary power exists, it has the potential to interfere with domestic regulation at almost every level,[69] as there can hardly be any matter that

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[65] *See* Axel Desmedt, *Proportionality in WTO Law,* 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (2001); Gisele Kapterian, *A Critique of the WTO Jurisprudence on "Necessity,"* 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 89 (2010); Robert Howse & Elisabeth Türk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in: THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES, 283 (Gráinne de Búrca & Joanne Scott eds, 2001). Beyond the balancing of environmental, health, public morals protection *vis à vis* the distortion of the free movement of goods and services, proportionality assessments might inhere in all cases where the adjudicating mechanism is concerned with the relationship between a regulatory aim and the means to its attainment, *see* Mads Andenas & Stefan Zleptnig, *The Rule of Law and Proportionality in WTO Law*, in: REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW, 180 (Wenhua Shan, Penelope Simons & Dalvinder Singh eds, 2008).

[66] *See* Arts 2.2 TBT Agreement and 5.6 SPS Agreement.

[67] The *tertium comparationis* in the case of the "less restrictive means" test would be the capability to achieve a particular objective (*e.g.,* protection of human health) taking into account the effects on trade. Against this composite denominator are the potential alternatives to be assessed.

[68] In the case of "likeness," *see* Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/R and WT/DS48/R, 16 January 1998, para. 101; and Appellate Body Report, *Japan – Alcoholic Beverages* (note 62), para. 114.

[69] This power is in turn not confined to the generation of individual norms settling a particular dispute, although this would be already sufficient for the af-

cannot be subsumed under the rubric of potential trade impediment.[70] National decisions on a broad series of issues are thus subject to substantive lawmaking by the WTO adjudicating bodies, the decisions of which are in effect and from the perspective of the WTO, superior in the case of conflict.

Taking into consideration the lack of an effective legislating mechanism, the interpretation of international trade rules by the adjudicating bodies may thus be addressed as a fairly "cemented" set of norms, which is little adaptive to the developing interests of those it affects or the differing choices of subsequent domestic parliamentary majorities.[71] In the case that the latter are dissatisfied with international trade regulation as administered by the Appellate Body, they are left with little more than the option to withdraw from the WTO altogether. However, although the option to exit the WTO regime is indeed provided for in Article XV:1 of the WTO Agreement, it should be considered under the actual costs of making it. In cases like the WTO, with an indispensable role in the reduction of trade barriers and almost universal membership, the costs of disassociation form a substantial deterrent in exercising the respective legal right, if not totally foreclosing this course of action.[72] The current level of globalized economic interactions and the importance of an effective international trade regime for the enmeshed world economies, make withdrawal from WTO little more a viable option than the alternative of an individual to exit the social contract establishing a political

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firmation of its nature as an instance of authority. For the reasons described above, and developed by other authors in this issue, the substantive lawmaking potential of the DSM stretches well beyond the particular disputes at issue and plays an important role in stabilizing the normative expectations of parties other than the disputing ones. *See* Venzke (note 1); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1999).

[70] Cass (note 60), 74.

[71] The "single undertaking" approach, adopted after the Uruguay Round, makes compulsory the adoption as a whole of a body of law which incorporates twenty-nine Agreements and Understandings and extends to almost 25,000 pages. Furthermore, as the progress of the Doha Development Round of negotiations demonstrates, a "correction" of a potentially unsatisfactory judicial interpretation through treaty-change is a Sisyphean task to undertake.

[72] Tom Ginsburg, *International Judicial Lawmaking*, UNIVERSITY OF ILLINOIS LAW AND ECONOMICS WORKING PAPER NO. 26, 51–53 (2005). For the case of the European Union, *see* JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 18 *et seq.* (1999).

community. Although this option theoretically exists in a consistent contractual theory, the benefits of association are so vital, that, in both cases, the alternative of exit is hardly an affordable one.

In terms of exit and voice,[73] the WTO offers both a narrow option to withdraw[74] and an institutional structure bringing general lawmaking of a "legislative type" close to stalemate.[75] Substantive judicial lawmaking has then the opportunity to fill this void. In this way, judicial pronouncements emerge as part of an effective legal order[76] with the potential of setting vital economic decisions beyond the reach of the subjects whose conduct is ultimately regulated.

D. The Potential of Participation Rights: A Procedural Alternative of Judicial Lawmaking

Having identified the legitimacy concerns raised by the lawmaking potential of the WTO adjudicating bodies, this part will turn to the poten-

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[73] Classic remains here the analysis of ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970). For the application of this concept in the context of WTO, *see* Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW 1 (2005).

[74] This limited option to withdraw is reinforced by the development of the WTO dispute settlement process in a way that has effectively diminished "selective" exit options. After the Uruguay Round changes, diplomatic safeguards to the enforcement of WTO law are not any more available, *see* Pauwelyn (note 73), 24.

[75] Beyond its ineffectiveness in the case of WTO, the general deficiencies of a diplomacy-based "legislative" structure are well explored. It suffices here to refer to the inherent gaps and discontinuities of the chain connecting individuals to international rules. *See* von Bogdandy (note 7), 617; Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations,* 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 398, 408 (1996–97) (discussing in extent the problems connected with the exercise of discretion at the field of foreign policy); Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy,* in: EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, 264, 276 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia Zampetti eds, 2001).

[76] The concept of effectiveness is here used in the sense of Kelsen, KELSEN (note 8), 46.

tial of addressing them by utilizing concepts of participation in a way similar to the administrative law paradigm presented in Section B. As administrative law sought to compensate through participation mechanisms some of the legitimacy lost by the delegation of rulemaking powers to administrative agencies, the potential of a similar approach in the WTO context could be investigated. In both cases, it is characteristic that significant law is made beyond the parliament. In administrative law, this is done through the delegation of rulemaking powers to administrative agencies; in WTO law, because of the absence of an effective international trade legislator. At the same time, courts are entrusted to review decisions on the basis of broadly drafted norms. That gives them a substantial opportunity to engage in lawmaking themselves. The fact that, in the case of the WTO, not only decisions of administrative authorities are reviewed, but even those of democratically elected parliaments, merely aggravates the question of the legitimacy of judicial lawmaking.

In this sense, it will be suggested that the adjudicating bodies could develop parts of WTO law as *international procedural administrative trade law* in order to reinforce participation of foreign interests in the lawmaking procedures that affect them. This understanding enhances the legitimacy of both domestic lawmakers[77] (which are called to decide after considering the foreign interests they affect) and the adjudicating bodies (which guarantee that trade-related decisions are made in a procedurally fair way, rather than making the substantive decisions themselves).

I. Participation as Standard of Review: Developing International Standards for More Legitimate Procedures

This subsection will investigate the potential of the development of procedural standards requiring the participation of international interests (both state and private) in domestic processes.[78] The WTO Covered

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[77] And international in the occasions that this is relevant, *see* the case of international standards *infra* section D.I.1.

[78] On cases thus where WTO law imposes specific participatory standards to be met by domestic law as a response to the externalities that national regulation can produce. Comparable procedural-deliberative requirements can however also be relevant to WTO decision-making processes themselves as well as

Agreements offer a broad spectrum of specific provisions on which the adjudicating bodies can base the development of such mechanisms. Beyond that, one could speak of the gradual emergence of a general principle of procedural due process. The *U.S. – Shrimp* decisions deserve particular attention in this context.[79] Their importance is not restricted to the theoretical questions they touch upon, but also concerns their practical effects. The implementation stage of *U.S. – Shrimp* reveals, indeed, much of the actual potential of the approach presented here.

1. Sector-Specific Rules of WTO Law

The WTO Covered Agreements contain a number of special provisions that can offer the adjudicating bodies a starting point in developing standards that enhance the participation of otherwise excluded interests in the processes that affect them.

Relevant here are the rules that require domestic authorities to afford adequate hearing opportunities to affected parties that are outside the jurisdiction of the regulator. This is the case, for example, in the process of establishing whether a product is being unlawfully dumped for the purposes of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)[80] or subsidized according to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[81] Similar rights are also grounded to the agreements regulating non-tariff barriers to trade. Both the Agreement on the Application of Sanitary and Phytosanitary Mea-

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to other international bodies producing WTO-relevant law, like the Codex Alimentarius Commission.

[79] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/RW, 15 June 2001; and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/AB/RW, 21 November 2001.

[80] Arts 6.1, 6.2, and 6.11 Anti-Dumping Agreement. The Appellate Body understands these provisions as guaranteeing "fundamental due process rights" to all "interested parties", *see* Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 17 December 2004, para. 250.

[81] Arts 12 and 13 SCM Agreement.

sures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) require member states intending to enact a technical regulation to provide adequate notice, to allow other states to make comments on it, to discuss these comments upon request, and to take the comments and the resulting discussion into account when eventually deciding on the measure at hand.[82] These requirements are further refined by the respective WTO organs.[83] Regarding SPS measures for example, the regulating country shall explain, within a reasonable period of time, to any member from which it has received comments, how it will take these comments into account.[84] Notice and comment opportunities shall also be afforded to interested private parties.[85] The Agreement on Safeguards (Safeguards Agreement)[86] and the General Agreement on Trade in Services (GATS)[87] include similar guarantees.

Procedural conditions requiring notice and comment opportunities are also directed to international bodies that produce norms with relevance to WTO law, such as international standards.[88] Taking into account the actual importance of these standards for the application of WTO law,[89]

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82 Arts 2.9.4 TBT Agreement and 5(d) Annex B SPS Agreement. *See* also Arts 2.10.3 TBT Agreement and 6(c) Annex B SPS Agreement. "One stop" access to relevant documents and records is possible through the SPS and TBT Information Management Systems (SPS IMS and TBT IMS), *see* http://spsims.wto.org and http://tbtims.wto.org.

83 *See* Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7),* WTO Doc. G/SPS/7/Rev. 3, 20 June 2008; and Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat,* WTO Doc. G/TBT/1/Rev. 9, 8 September 2008.

84 *See* Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)* (note 83), 5.

85 Arts L and N of Annex 3 to the TBT Agreement.

86 Arts 3 and 12.3 Safeguards Agreement.

87 Arts XXII and VII 4(b) GATS.

88 *See* Art. 2.4 TBT Agreement, Arts 3.1, 3.2 SPS Agreement, Art. 3 of the Annex A thereof, and Art. 2.4 PSI Agreement.

89 *See*, *e.g.*, Art. 3.2 SPS Agreement (measures that are in conformity with standards promulgated by specific international organizations are presumed to be consistent with WTO law).

the procedure of their adoption becomes crucially connected to the legitimacy of WTO law itself. Beyond their own procedural requirements, these bodies are called by the WTO to award "meaningful opportunities to participate at all stages of standard development"[90] to any of their interested members.

The construction of these provisions by the WTO dispute settlement organs in such a way as to enhance the participation of international actors can offer an alternative to substantive judicial lawmaking. The decision, for example, on whether a TBT measure is "necessary to fulfill a legitimate objective,"[91] could accord substantial deference to the assessments of the national decision-maker when the latter can argue persuasively that a decision has been reached after effectively considering the relevant positions. That can be a convincing alternative to the substitution of the opinion of the adjudicator for that of the reviewed authority on what is actually "necessary to fulfill a legitimate objective." If a domestic measure is taken after the due consideration of the interests it affects, it should be addressed as having good chances to meet such broadly drafted WTO law requirements. Following the same rationale, the deference to standards promulgated by other international organizations could be made contingent upon them fulfilling minimum procedural safeties.[92] This would answer some of the legitimacy concerns raised by the judicial review of such rules on substantive grounds or their totally unchallenged adoption by the WTO organs.

Procedural requirements thus, like those presented above, can be construed by the adjudicating bodies in a manner that ensures that countries or private parties affected by technical or other rules are given an effective voice. If such procedural rights are duly respected by the respective decision-making authorities, the adjudicator could opt for greater deference to their decision, instead of engaging in substantive lawmaking through second-guessing them under the light of open-worded clauses.

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[90] Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat* (note 83), 38. The Decision extends to international bodies the standards developed for domestic authorities in Annex 3 to the TBT Agreement.

[91] Art. 2.2 TBT Agreement.

[92] Stewart & Ratton Sanchez Badin (note 32), 23–25.

2. The Procedural Reading of the U.S. – Shrimp Decisions: A General Principle of Due Process?

Beyond the development of standards of consideration based on specific WTO provisions, significant has been the elaboration of a general participation-based standard of review by the adjudicating bodies.[93] Particularly relevant in this context are the findings of the panels and the Appellate Body in their seminal *U.S. – Shrimp* decisions. In these cases, the adjudicating bodies gave an example of how an open-ended clause like the prohibition of "arbitrary and unjustifiable discrimination" can be given a procedural reading. Furthermore, this procedural reading was based on a language that could suggest that a general principle of procedural due process exists in WTO law.[94] As the relevant case law has indeed been widely investigated, the focus in the following will be on the due process and participatory facets of these decisions. Most interesting from this perspective, and maybe not adequately elaborated upon, is the implementation of these rulings and their actual effects in the restructuring of the respective domestic procedures.

The initially contested measure in these cases was a now famous U.S. prohibition on the importation of shrimp products. This prohibition was directed to shrimp products harvested in a way that did not meet the U.S. criteria for the protection of endangered sea turtles from accidental by-catch.[95] The conformity of foreign production with U.S. standards had to be assessed and certified by the U.S. administration.

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[93] On the development of a general principle of participation at the international level utilizing insights from administrative law, *see* GIACINTO DELLA CANANEA, AL DI LÀ DEI CONFINI STATUALI: PRINCIPI GENERALI DEL DIRITTO PUBBLICO GLOBALE 37 *et seq.* (2009). The Director-General of WTO, Pascal Lamy has also recently referred to procedural fairness as a "fundamental principle" of WTO law, Symposium on the Agreement on Government Procurement, Geneva 11 February 2010, available at: http://www.wto.org/english/news_e/sppl_e/sppl147_e.html.

[94] Della Cananea locates the source of the principles pronounced by the Appellate Body in *U.S. – Shrimp* in the national legal orders from which the Appellate Body "subsumed … some general or 'global' principles of administrative law," Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law,* 9 EUROPEAN PUBLIC LAW 563, 575 (2003).

[95] Section 609 of U.S. Public Law 101–62, 16 United States Code 1537 (21 November 1989) and associate guidelines and judicial rulings. For a full de-

The Appellate Body, in its first decision on the issue, decided that, although this measure provisionally qualified for an environmental-based exception under Article XX (g) GATT,[96] it failed to meet the additional requirements set out in the chapeau of the same Article. Despite the fact that it advanced a legitimate objective (namely, environmental protection), it was applied in an arbitrary and discriminatory way. One of the reasons why U.S. practice was found to be unjustifiably discriminatory in this sense was its "inflexibility" and the lack of due process standards in the application of the prohibition. The assessment of the U.S. authorities on the comparability of foreign environment protection mechanisms to those of the United States was first, absolutely orientated to the U.S. methods of protection[97] and second, not respectful of the due process rights of foreign interests.[98]

The Appellate Body, concerning this aspect, held that the "singularly informal and casual"[99] and *ex parte* processes followed for the application of the substantive provisions fell short of being "transparent and predictable."[100] U.S. procedures neither afforded the complainants with a "formal opportunity … to be heard, or to respond to any arguments that maybe made against it," nor did they provide for a formal written, reasoned decision, prior notification, and a procedure for review.[101] The Appellate Body concluded that "exporting Members applying for certification whose applications are rejected are *denied basic fairness and due process*, and are discriminated against, *vis-à-vis* those Members which are granted certification."[102] In sum, the Appellate Body found a violation of WTO law first, because the domestic authorities competent to assess the adequacy of foreign harvesting methods did not enjoy sufficient discretion and second, because they did not have to follow due process and participation standards.

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scription of the relevant domestic law and practice, *see* Appellate Body Report, *U.S. – Shrimp* (note 79), paras 2 *et seq*.

96 The U.S. measure was *prima facie* WTO-law inconsistent as contrary to the prohibition of quantitative import restrictions, Art. XI GATT.

97 Appellate Body Report, *U.S. – Shrimp* (note 79), part C.

98 Stewart & Ratton Sanchez Badin (note 32), 15.

99 Appellate Body Report, *U.S. – Shrimp* (note 79), para. 181.

100 *Id*., para. 180.

101 *Id*.

102 *Id*., para. 181, emphasis added.

To better understand the potential of this argument in terms of procedural/substantive judicial lawmaking, one might need to consider the alternative way in which the Appellate Body could proceed. That would be to assess whether the decision of the U.S. authorities on the environmental adequacy of foreign methods was *substantively* correct, engaging in an analysis of the merits of the domestic decision and second-guessing whether foreign measures were correctly assessed, from a WTO perspective, as (in)comparable to those of the United States. Thus, the Appellate Body could itself establish whether the measure in question unjustifiably treats differently countries where the same conditions prevail – an assessment that would presuppose a substantive decision on the similarity of the conditions and the suitability of the measure.

Instead of this, the Appellate Body focused on the failure of the United States to inquire into the appropriateness of the measure for the conditions prevailing in the exporting countries.[103] It condemned both the absence of discretion of the competent U.S. authorities in assessing this "comparability" and the absence of procedural safeties that could allow foreign interests to inform the exercise of this discretion with their views. In so doing, the Appellate Body effectively disciplined its own lawmaking potential and relocated the decision-making power back to the domestic level, under the condition that it is exercised after the meaningful consideration of foreign interests.

This understanding becomes clearer by following the implementation stage of the decision and the way it ultimately affected the structuring of the relevant domestic procedures. To the implementation of this ruling, the United States adopted a new set of administrative guidelines (1999 Revised Guidelines)[104] which introduced to the relevant U.S. law two major changes. First, they conferred substantial discretion to the respective domestic authorities when assessing the "comparability" of foreign turtle-protection measures with U.S. standards. Second, this discretion has now to be exercised under strict due process requirements that afford significant participation rights to external interests.

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[103] *Id.*, para. 177.

[104] These guidelines were directed to change the practice of U.S. authorities found to be incompatible with WTO law without amending the text of the relevant import prohibition as such, U.S. Department of State, 64 Federal Register No. 130 (8 July 1999), Public Notice 3086, 36946–36952. The 1999 Revised Guidelines are also attached to the Panel Report, *U.S. – Shrimp (Article 21.5)* (note 79).

Regarding the first change, not only the use of a particular turtle-protecting device (as under the prior regime) can now be identified as "environmental friendly," but also other regulatory programs,[105] as harvesting in sea environments where no actual danger for turtles exists.[106] Furthermore, and beyond the environmental program that a harvesting nation adopts, each individual foreign importer can assert that the particular harvesting means he uses do not pose a threat to sea turtles.[107]

This discretion is supplemented by broad due process safeties. The 1999 Revised Guidelines provide for visits of U.S. officials in the interested countries which should be concluded by a meeting with the government officials of the harvesting nation.[108] Countries that do not appear to qualify for certification, are given a written and reasoned notification, which can be followed by "face to face meetings" between relevant U.S. officials and officials of the harvesting nation to discuss the situation.[109] Within a period of one and a half months, harvesting countries are invited to submit all relevant information which U.S. authorities must "actively consider"[110] together with information made available by other sources,[111] while the final decision again needs to be reasoned and in writing.[112] The possibility of administrative review of this decision is also provided for,[113] whereas judicial remedies are available under the general conditions of U.S. administrative law.[114] This process seems to have been followed in a way so as to respond to the require-

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105 II.B of the 1999 Revised Guidelines.

106 *E.g.,* where only artisan means of harvesting are used, *id.*, II.A.

107 Because shrimps are harvested in an aquaculture facility, TED devices are used, the retrieval of fishing nets do not involve mechanical devices or shrimp is harvested in any other manner not posing threat to the incidental taking of sea turtles, *id*. I.B.

108 *Id.*, II.A, para. 26.

109 *Id.,* II.A, para. 27.

110 *Id.,* II.A, para. 28. *See also* I.E. para. 12.

111 *Id.,* I.E., para. 13 ("[t]he Department … will also take into consideration information on the same subjects that may be available from other sources, including but not limited to academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter.").

112 *Id.,* II.A., para. 29.

113 *Id.,* II.A., para. 30.

114 As set out in the Administrative Procedure Act (APA).

ments set by the Appellate Body in the certification of Australia and Pakistan.

Moreover, this change of U.S. law and practice was found by the panel and the Appellate Body to meet WTO requirements when challenged as insufficient by Malaysia under Article 21.5 DSU.[115] Both the initial Panel and the Appellate Body concluded that the discretion afforded by the 1999 Revised Guidelines to the respective authorities did rectify the "rigidity and inflexibility" of the initial measures that were condemned by the Appellate Body in the *U.S. – Shrimp* first decision.[116] The due process standards presented above were also found to adequately respond to the Appellate Body's ruling.[117]

In sum, the *U.S. – Shrimp* decisions seem to read into WTO law a right of foreign interests to be considered by the decision-making authority as part of a general duty to secure due process rights.[118] In this way, a functional instrument is offered which guarantees that extraterritorial interests should enjoy fair hearing and participation rights in domestic procedures, a requirement that is furthermore over-sighted by an international adjudicator. This instrument cannot, of course, substitute international substantive regulation. It might however offer an alternative precisely for these cases where the absence of intentional rules offers wide discretion to the adjudicative bodies. Deference to other decision-making instances under procedural conditions of adequate consideration might provide in such cases a more legitimate option than substantive lawmaking by the adjudicating bodies.

II. The Potential of a Procedural Standard of Review in WTO Law and Beyond

The existence of a broad spectrum of positive rights ensuring participatory decision-making and the development of the relevant jurispru-

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[115] Panel Report, *U.S. – Shrimp (Article 21.5)* (note 79), para. 6.1, *see*, *in particular*, paras 5.121-5.137.

[116] *Id.*, para. 5.104.

[117] *Id.*, para. 5.136.

[118] Even if they should not be any more interpreted as recognizing a self-standing duty to negotiate before the enactment of a domestic measure affecting foreign state-represented interests, after the clarifications the Appellate Body offered in *U.S. – Shrimp (Article 21.5)* (note 79).

dence allow the WTO adjudicating bodies to further shape the conditions of international procedural legitimacy. This understanding has the potential to address legitimacy concerns better than the function of the adjudicating bodies as ultimate arbiters of the substance of trade-related domestic and international decisions. Procedural rights and structures that allow for the consideration of interests otherwise inadequately represented in a decision-making process affecting them,[119] bear a significant potential in remedying a traditional deficiency of the nation-state model; namely, to internalize its interdependence with foreign interests. This understanding is in turn in line with the conception of WTO law as a system coordinating the factual interdependence of its actors,[120] rather than a regime directed to the harmonization of trade-related policies.

Under this approach, the WTO adjudicating bodies should consider deferring the decision to domestic authorities when applying open-textured standards like "necessity" or "less restrictive means." Such deference should however be made contingent upon the fulfillment of minimum due process requirements by the respective decision-maker, which would guarantee the inclusion and consideration of external interests.

In the case of domestic decisions for example, deference could be allowed to national authorities when assessing the "necessity" or "reasonableness" of an environmental, but trade-restrictive measure. This deference should be afforded under the condition that the domestic authority offered adequate opportunities for the consideration of potentially affected state or private actors. Regarding standards promulgated by other international bodies, but relevant to the application of WTO law, the adjudicating bodies could make their judgment on their "ap-

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[119] Andrew Guzman refers to this problem as being "inherent in the system of interdependent nation states," Andrew T. Guzman, *Global Governance and the WTO*, UC BERKELEY PUBLIC LAW AND LEGAL THEORY RESEARCH PAPERS No. 89, 74–75 (2002). To address this question is a postulate of the "very idea of democratic constitutionalism," *see* Christian Joerges & Jürgen Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector,* 4 JOURNAL OF EUROPEAN PUBLIC POLICY 609, 611 (1997).

[120] For the arguments advocating for a model of coordinated interdependence regarding the understanding of the nature and objectives of WTO law, *see* von Bogdandy (note 7), 647.

propriateness," "effectiveness," or "relevance"[121] contingent upon the adherence to consideration standards.[122] Even in cases where standards are inserted in the WTO regime by direct reference to the respective standardizing body,[123] the development of a general principle of consideration could take precedent over the automatic deference to the harmonizing standard. Such procedural assessments better meet the role of the adjudicating bodies as guardians of the deliberative quality of international decision-making than a *de novo* review of the substance of the respective decisions.

The development of such a standard of review[124] should not be understood as some kind of deference to national sovereignty as such, but rather as deference to procedurally legitimate decision-making. Ultimately, it can serve to demarcate competences in the international trade regime and has the potential of infusing elements of deliberative participation through procedures beyond electoral representation.[125] Such legitimacy strategies that go beyond transmission or chain models seem particularly appealing to a level of authority where the electoral-based source of legitimacy is highly problematic.

Again it should be made clear, however, that this approach has well-defined limits. It is, of course, not relevant in the cases were WTO law clearly imposes substantive conditions on domestic decision-making, such as under Article II GATT. The legitimacy of a DSM decision ap-

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[121] *See* Arts 2.4 TBT Agreement, 3(d) Annex A to the SPS Agreement, and 2.4 PSI Agreement.

[122] *See* Bonzon (note 32), 775; Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 NEW YORK UNIVERSITY LAW REVIEW 766, 790; Stewart & Ratton Sanchez Badin (note 32), 23–24.

[123] As is the case with Arts 3.1 SPS Agreement and 3(a), (b), (c) Annex A to the SPS Agreement.

[124] The role judicial standards of review play in this allocation is well known in domestic administrative and constitutional settings, *see* PIERCE, SHAPIRO & VERKUIL (note 33), 55 *et seq*. Compare the famous footnote 4 in *United States v. Carolene Products Company*, 304 U.S. 144 (1938) and the case *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1962) declaring that "whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of us," which signified the rise of administrative law as the proper domain of economic regulation rather than a constitutional "superlegislature" weighting "the wisdom of legislation."

[125] Stewart (note 32), 75.

plying such a provision can only be traced back to the agreement of the member states and its function in prohibiting origin-based discrimination. For these cases, however, that the wording of WTO law leaves the adjudicating institutions substantial discretion, a procedural approach may offer a convincing alternative.

Similar considerations might also favor a procedural understanding in other contexts where adjudicating institutions face legitimacy challenges, taking of course account of their specific characteristics. For example, international investment law could be a very interesting candidate.[126] Procedural elements have been here identified in some cases by tribunals as part of the "fair and equitable treatment" standard.[127] In any case, striking the balance between a procedural understanding of judicial review and the opposite direction of judicial development of particular economic models seems to be one of the major future challenges in establishing the frameworks of authority beyond the state.

E. Conclusion

This article presented a critique of the evolution of the role that the WTO adjudicating bodies have gradually assumed and a potential response that focuses on the development of procedural standards and participation institutions, which are already functional within WTO law.

This approach proceeds from the premise that one of the major challenges the world trade order faces is to address the legitimacy concerns resulting from the role that the adjudicating institutions have gradually assumed in shaping this order. This challenge needs to be read in conjunction with an understanding of the international trade regime as

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[126] For certain procedural elements of the concept of "fair and equitable treatment," *see* Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 151, 158 & 171 (Stephan Schill ed., 2010).

[127] *See Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award of 30 August 2000, paras 92 & 99; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 162.

aiming at the correction of the illegitimate pretensions of domestic jurisdictions.[128]

Regarding the role of the adjudicating mechanism in the WTO system, and in the absence of an effective political counterpart, the adjudicating bodies enjoy the opportunity to appropriate a large share of the competences that are claimed by the international trade regime as a whole.

Occupying the void left by the underdevelopment of political lawmakers, the adjudicating bodies will be increasingly often called to engage in substantive lawmaking. Considering the importance of WTO law in general however, this development raises serious concerns. Arguing from a concept of authority based on the deliberative consideration of affected interests and drawing from concepts developed in domestic settings, adjudicating instances are better placed to shape the conditions of the lawmaking process, than engaging in substantive lawmaking. At the WTO level, this could mean that the adjudicating bodies should move towards the development of international standards of adequate consideration and afford a higher degree of deference to domestic or international regulators that honor them.

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[128] *See* Anand Menon & Stephen Weatherill, *Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union,* LSE LAW, SOCIETY AND ECONOMY WORKING PAPER NO. 13, 9 (2007). Ultimately, this is an understanding orientated to the identification of the "appropriate locus for the articulation of the democratic political good," Held (note 52), 100; *see also* DAHL (note 18), 4.

Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law

*By Thomas Kleinlein**

A. Introduction

In the framework of this project, both the WTO dispute settlement system and international investment tribunals are portrayed as core actors in judicial lawmaking.[1] By weaving international trade law and investment law on the roughly timbered looms of imperfect treaty law, they have proven to be successful creators of the fabrics of a world trade order and of investment protection standards, respectively. Such effective lawmaking, on the part of particular "regimes," has the potential to increase the fragmentation of international law.[2] Consequently, international judicial institutions are not only spotted as originators of fragmentation, but – as interpreters of international law – also as addressees of strategies in response presented in the 2006 Report of the ILC Study

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[1] Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 German Law Journal (GLJ) 1111 (2011); Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GLJ 1083 (2011).

[2] Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GLJ 989, 996–997 (2011).

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_8,

Group on Fragmentation.[3] It is the Study Group's comforting message that a considerable part of the difficulties arising from the diversification and expansion of international law can be overcome by recourse to a "coherent legal-professional technique."[4] The Fragmentation Report highlights that conflict resolution and interpretation cannot be distinguished: "[w]hether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted."[5] According to the Report, coherence can be established by interpreting legal norms with due regard to their normative environment.

Yet, partially due to its deliberate focus on the substantive problems of fragmentation,[6] the Report of the Study Group does not address some fundamental concerns, both institutional and methodological: institutionally, it is important to know which actors on the international plane are in a legitimate position to perform the interpretive task of normative integration.[7] Whilst the Report refers to interpretation in the business of diplomacy and in third-party adjudication,[8] it does not broach the issue of whether diplomatic forums or specialized judicial institutions are best suited to resolve conflicts between different functional regimes in international law. Methodologically, the Report of the Study Group does not give clear guidelines on how the resolution of norma-

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3 Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International* Law, 13 April 2006, UN Doc. A/CN.4/L.682, finalized by Martti Koskenniemi.

4 ILC, Fragmentation Report (note 3), para. 487.

5 *Id.,* para. 412.

6 *Id.*, para. 13.

7 For a critique that the ILC Study Group Report is essentially silent on questions relating directly to the fragmentation of international authority, and for an exploration of the correlation between norm fragmentation and authority fragmentation, *see* Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW (LOY. U. CHI. INT'L L. REV.) 173, 175 (2008); *see further* Erich Vranes, *Völkerrechtsdogmatik als "self-contained discipline"? Eine kritische Analyse des ILC Report on Fragmentation of International Law*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 87, 90 (2010).

8 ILC, Fragmentation Report (note 3), paras 37, 43.

tive conflicts works in legal practice,[9] in particular with regard to conflicts between different social values and policy goals pursued in different legal regimes ("trade-off problems"). "Harmonization" as such is neither a specific legal technique nor a primary tool.[10] Both the institutional and the methodological issues are of particular relevance against the background of generally rather vaguely defined treaty provisions dealing with trade-offs,[11] and in view of the ILC's generally shared analysis that the whole complex of inter-regime relations can at present be considered a "legal black hole."[12]

Given the central function of interpretation as a response to fragmentation and the relative absence of normative guidance at regime interfaces, lawmaking by adjudicatory bodies is of particular relevance here. Conceptually, this judicial lawmaking function is based on the fact that decisions of international courts and tribunals figure as arguments and influence the law through their impact in the legal discourse.[13] Basically, precedents – even if they are not formally binding – redistribute argumentative burdens in legal discourse.[14] In view of governance deficiencies with regard to trade-off problems and inter-regime relations, the triggering function of precedents, the discursive exercise of authority by judicial institutions, and hence, judicial lawmaking, may be particularly effective in this important area of international law.

At the same time, the relative absence of norms and established practice as to trade-off problems and inter-regime relations calls into question whether leaving the development of the law to judicial institutions does not strain their efficiency and legitimacy. Both the potential lawmaking

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[9] *Id.*, para. 419: "None of this predetermines what it means to 'confront' a norm with another or how they might enter into 'concurrence.' These matters must be left to the interpreter to decide in view of the situation"; for a critique of this lacuna, *see* Vranes (note 7), 87.

[10] Nele Matz-Lück, *Harmonization, Systemic Integration, and 'Mutual Supportiveness' as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation*, 17 FINNISH YEARBOOK OF INTERNATIONAL LAW (FYIL) 39, 45 (2006).

[11] Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 GLJ 1175, 1189 (2011) – referring to Art. XX GATT.

[12] ILC, Fragmentation Report (note 3), para. 493.

[13] Von Bogdandy & Venzke (note 2), 990–993.

[14] Von Bogdandy & Venzke (note 2), 991; Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GLJ 1005, 1015–1016 (2011).

effect and the legitimacy of judicial pronouncements depend on their rationality and methodological soundness. If their methods of interpretation are irreproducible, their pronouncements cannot easily be transferred to different contexts or be generalized, and their relevance for the creation of legal normativity in discursive practices would be limited accordingly. Against this background, a discussion has been launched on judicial balancing and the principle of proportionality as a potential approach to "defragmentation."[15]

The present contribution analyzes the potential and the limits of balancing and proportionality analysis as a response to fragmentation. For this purpose, the contribution will first explore the fragmentation of international law and the role of lawmaking judicial institutions (B.). Subsequently, it will expound proportionality analysis as a doctrinal framework, retrace its workings at the interfaces of international trade and investment law as important examples for efficient sub-systems of international law, and explore how balancing can work as a general technique of systemic interpretation (C.). Furthermore, the contribution will analyze balancing as a tool that may contribute to the legitimacy of judicial lawmaking and discuss whether balancing procedures may be a recommendable strategy for courts to rationalize – and thereby legitimatize – their lawmaking activities in the fragmented international legal system (D.). This discussion will come to the conclusion that the legitimizing potential of this methodology is limited. However, it is suggested that international judicial institutions should take the opportunity – as they have already done on some rare occasions – to accommodate legitimacy concerns by introducing formal principles into the equation. These principles should reflect considerations of an adequate allocation of authority both between international judicial institutions and the domestic level of governance and amongst different international regimes. Insofar as these principles are reflective of institutional sensitivity, they will probably be met with approval. They could establish arguments which may then work as precedents in legal discourse on the allocation of authority in international law. What seems to be paradoxical at first sight may thus go together: judicial restraint may be an instrument of judicial lawmaking (E.).

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[15] Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 483 (2009).

B. Diversification and Expansion of International Law and the Role of Specialized Judicial Institutions

The term fragmentation describes the diversification and expansion of international law: specialized lawmaking and institution-building tend to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.[16] One of the pivotal points of the debate on this phenomenon is the multiplication or "proliferation" of international courts and tribunals.[17] Although the reasons for the fragmentation of international law are diverse, it can be seen in the general context of "functional differentiation": different parts of the global society are increasingly specialized and autonomous.[18] Correspondingly, in international law, issue areas such as human rights law, trade law, investment law, and environmental law form different regimes of relative autonomy and have an increasing impact on domestic legal systems. Since functional differentiation does not cut the linkages that exist between certain issue areas, such as trade and human rights, decisions taken within the framework of a particular regime often have a cross-sectional impact. Accordingly, functional differentiation amplifies the potential for substantial norm conflicts in international law and for conflicting interpretations.

In order to grasp fragmentation as a legal phenomenon, a broad notion of what constitutes a conflict is required. According to the ILC Study Group, conflict exists not merely when a party to two treaties can comply with one rule only by thereby failing to comply with another, but also when a treaty frustrates the goals of another treaty without strict incompatibility between their provisions.[19] Thus understood,

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16 ILC, Fragmentation Report (note 3), para. 8.

17 *See*, *e.g.*, *Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle*, 31 NEW YORK JOURNAL OF INTERNATIONAL LAW AND POLITICS 679 (1999).

18 ILC, Fragmentation Report (note 3), para. 7.

19 *Id.*, para. 24; for an approach to a categorization of different kinds of conflicts, *see* RÜDIGER WOLFRUM & NELE MATZ, CONFLICTS IN INTERNATIONAL ENVIRONMENTAL LAW 7 *et seq.* (2003); for the definition of conflicts of norms, *see also* Erich Vranes, *The Definition of 'Norm Conflict' in International Legal Theory*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 395 (2006); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003);

fragmentation affects both the international rule of law and the democratic legitimacy of international governance. With regard to the rule of law, constitutive elements like predictability, legal clarity and security, and equal treatment of legal subjects are at stake. Although a homogenous, hierarchical system of norms is realistically not available as a solution to the problem of coherence,[20] legal techniques that provide for coherence on an *ad hoc* basis may put things right. In this regard, the ILC report mainly relies on the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties (VCLT).[21] In particular, taking into account relevant "external" norms of international law beyond a specific sub-system (Article 31(3)(c) VCLT) may avoid conflicts from the outset. In case of a conflict, the techniques of *lex specialis* and *lex posterior*, *inter-se* agreements and the superior position given to peremptory norms and obligations *erga omnes* provide a basic professional toolbox that is able to respond to the most substantial fragmentation problems.[22] However, if coherence in the law depends on how the interpreter applies these techniques, legal security must wait for judicial pronouncements.

Coherence is a formal and abstract value[23] that for some time now has particularly concerned "generalist" international law scholars and practitioners in the name of the "unity" of international law.[24] Meanwhile, this debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of in-

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Carmen Thiele, *Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft*, 46 ARCHIV DES VÖLKERRECHTS 1, 4 (2008); van Aaken (note 15), 486.

[20] ILC, Fragmentation Report (note 3), para. 493.

[21] Vienna Convention of the Law of Treaties, 23 May 1969, UNTS, vol. 1155, 331.

[22] LC, Fragmentation Report (note 3), para. 492.

[23] *Id.*, para. 491.

[24] *Cf.* Tullio Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 COMUNICAZIONI E STUDI 821, 831 (2007). *See*, *in particular*, the statement by Gilbert Guillaume, President of the International Court of Justice, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, SPEECH BY HIS EXCELLENCY JUDGE GILBERT GUILLAUME, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS, 27 October 2000, available at: http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1 (last visited on 18 October 2010).

ternational law.[25] And even if various international courts do disagree on a point of law, the ensuing judicial dialogue may possibly further development of the law.[26] Thus, for most commentators, "proliferation" of international judicial institutions is either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change.[27] Fragmentation should, however, not be reduced to a technical problem of the missing substantive unity of international law.[28] This understanding would underplay the institutional dimension of fragmentation. If integrative solutions for norm and policy conflicts are to be found, the fundamental question arises of who is in the position to decide on how harmonization between different issue areas is to be reached.[29] The interdependence of policy fields requires an ongoing management in concurrent fields of jurisdiction.[30] For example, trade is not *just* about trade, but impacts other important policy fields like environmental protection or social security. Accordingly, trade actions or trade restrictions of states are not always primarily based on trade or economic considerations.[31]

Specialized international judicial institutions like the WTO Appellate Body pull the strings here: On the one hand, by focusing on efficiently developing the law of their legal sub-systems, they may contribute to

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[25] Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EJIL 265, 289 (2009).

[26] Bruno Simma, *Fragmentation in a Positive Light*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW (MJIL) 845, 846 (2004); Simma (note 25), 279.

[27] *Cf.* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553, 575 (2002), with references.

[28] *See id.*, 578; Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, 17 FYIL 91, 94 (2006); *see also* van Aaken (note 15), 485.

[29] *Cf.* Matz-Lück (note 10), 42.

[30] Robert Howse & Kalypso Nicolaidis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY. ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH, 163, 182 (Tomer Broude & Yuval Shany eds, 2008).

[31] Gabrielle Marceau, *Fragmentation in International Law: The Relationship between WTO Law and General International Law – a Few Comments from a WTO Perspective*, 17 FYIL 5, 6 (2006).

the fragmentation of international law. On the other hand, by opening up the perspective and broadening the applicable law, they may exercise lawmaking authority beyond their own sub-system by mediating between different issue areas. However, as already indicated, it is doubtful whether international judicial institutions are the best-suited actors to decide on conflicts of tremendous importance. Obviously, structuring the relationship between different issue areas involves political choices. Thus, a proper account of fragmentation perceives international law not only as a legal system, but as a phenomenon of governance. From this angle, the appropriate normative standard to be applied is not only coherence, but also democratic legitimacy. The commitment of specialized regimes to certain policy goals entails a certain bias[32] and thus contravenes the impartiality and openness of their decision-making processes. It is for this reason that, for some authors, fragmentation is not so much a technical problem resulting from lack of coordination, but rather a hegemonic struggle, where each institution, though partial, tries to occupy the space of the whole.[33] By contrast, if democracy is to realize (individual and collective) self-determination, democratic processes must be impartial and open, thus covering all conceivable issue areas. Any predetermined bias contradicts the idea of self-determination.[34] A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.[35] Therefore, leaving policy conflicts between different regimes to lawmaking by specialized judicial institutions is problematic from the perspective of democratic legitimacy.

In the face of these legitimacy concerns, the language of "defragmentation" is misleading, since "defragmentation" has a technical, neutral connotation. Most commonly, it is used with regard to the hard drive of

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[32] On 'structural bias', *see* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. REISSUE WITH A NEW EPILOGUE 600–615 (2005).

[33] Martti Koskenniemi, *What is international law for?*, in: INTERNATIONAL LAW, 32, 52 (Malcolm D. Evans ed., 2010); Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 14 FYIL 3, 11 (2003).

[34] CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG: LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH 50-51 (2005); Jürgen Bast, *Das Demokratiedefizit fragmentierter Internationalisierung*, in: DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT – SONDERBAND 18, 185, 188 (Hauke Brunkhorst ed., 2009).

[35] Von Bogdandy & Venzke (note 2), 996–997.

computers. Defragmenting a hard drive just makes a computer work more efficiently. Resolving policy-conflicts in fragmented international law, by contrast, is definitely not an issue of efficiency only, but depends on substantive value choices. Thus, we must not construe the issue as an expression of modesty if "defragmentation" is introduced as a new paradigm of inclusive international adjudication by judicial institutions like the WTO panels and Appellate Body, instead of "constitutionalization."[36] Rather, we must face a real dilemma: the activities of international judicial institutions raise concerns of democratic legitimacy both when contributing to fragmentation and when undertaking to "defragment" international law.

C. Proportionality Analysis as a Doctrinal Framework

I. Proportionality Analysis as a Balancing Process

This dilemma could be mitigated if necessary choices between different rationales in the course of "defragmentation" were at least made in a conscious and transparent manner.[37] Potentially, the balancing of different policy goals partially embodied in different regimes but cross-sectionally recognized can be rationalized on the basis of the clear analytical framework provided by proportionality analysis. The spread of the doctrine of proportionality all over the world[38] has received considerable attention in legal scholarship. One focus of the academic debate is the (ir)rationality of balancing processes, and the relationship between judges and the political branches of government. Remarkably, despite the relative deficits of international law as a legal system, international lawyers seem to be more optimistic than constitutional lawyers

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[36] *See* Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 LOY. U. CHI. INT'L L. REV. 209 (2008).

[37] *Cf.* Andreas Paulus, *International Adjudication*, in: THE PHILOSOPHY OF INTERNATIONAL LAW, 207, 209 (Samantha Besson & John Tasioulas eds, 2010). For a taxonomy of trade-off devices, including proportionality, balancing tests, and cost-benefit analysis, *see* JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 221 *et seq.* (2008).

[38] Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VIRGINIA JOURNAL OF INTERNATIONAL LAW (VJIL) 985 (2009); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).

with regard to the rationalization potential of proportionality balancing.[39]

Proportionality balancing is an "analytical structure"[40] employed by judges to deal with tensions between two values or interests. In domestic public law, proportionality analysis is a device of individual rights adjudication. It is a common instrument to mediate the conflict between private autonomy and the public good.[41] Additionally, it is a tool to resolve disputes which involve a conflict between two claims of rights. Proportionality analysis is less developed as an instrument for reviewing the exercise of competences. However, traces of a "federal dimension" of proportionality can be found both in Article 5 paragraph 4 of the Treaty on European Union and in U.S. case law concerning the "Interstate Commerce Clause" (Art. 1, Sec. 8 of the U.S. Constitution).[42] With regard to the fragmentation of international law, the

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[39] *See* van Aaken (note 15), 502. However, for the impression that most German scholars strongly defend the rationality of balancing, *see* JULIANO ZAIDEN BENVINDO, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM 136 (2010).

[40] Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 574, 579 (2004).

[41] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 72, 98 (2008).

[42] *Southern Pacific Co. v. Arizona ex. rel. Sullivan*, 325 U.S. 761, 768 (1945); *see* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, DUKE LAW JOURNAL 569, 580 (1987); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA LAW REVIEW 789, 851 (2007); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 678 (1981); *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941 (11th Cir. 1991); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); critically: *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 254 (1987); Scalia, J., concurring in part and dissenting in part; *United Haulers Association v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797, 1799 (2007); Scalia, J., concurring. Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 TEXAS INTERNATIONAL LAW JOURNAL 371, 404 (2007). The German Federal Constitutional Court leaves no room for proportionality in the area of federal relations (BVerfGE 81, 310, 338 - *Kalkar II*; but *see also* BVerfGE 106, 62, 164 - *Altenpflegegesetz*, where the examination, despite its intensity, only loosely resembles a classical proportionality test.). However, it explicitly acknowledged proportionality as a standard of re-

decisive question is whether both substantive and institutional questions can be adequately framed by recourse to proportionality analysis.

A prevalent model distinguishes three steps of a proportionality inquiry, or sub-principles of the principle of proportionality: suitability, necessity, and proportionality in a narrow sense (*stricto sensu*).[43] First, in order to be proportional, a state measure must be appropriate or helpful to achieve the desired (and legitimate) end. This presupposes that there is a causal relationship between the objective and the measure. Second, the measure must be necessary to achieve this end – it must be the least restrictive and least burdensome amongst equally effective alternatives. Finally, the measure must not impose a burden on the individual that is excessive or disproportionate in relation to the objective. Whereas the whole proportionality analysis can be understood as a balancing framework, this last step is also known as "balancing in the strict sense."

Arguably, the application of a proportionality analysis depends on the norm structure of the two values to be balanced. The norms which embody these values must be principles, as opposed to strict rules, because the legal technique of balancing and the principle of proportionality are related to specific characteristics of legal principles as optimization requirements.[44] According to Ronald Dworkin, principles do not set out legal consequences that follow automatically when the conditions provided are met, whereas rules are applicable in an all-or-nothing fashion. Principles state reasons that argue in one direction, but they do not necessitate a particular decision. They have a dimension of weight or importance. Consequently, whilst one rule cannot be applicable if two rules conflict, intersecting principles lead to a conflict which must be

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view in the relations between the EU and its member states (BVerfGE 89, 155, 212 - *Maastricht*).

[43] With 'legitimate ends' as a first step, the analysis involves four steps, *cf.* Stone Sweet & Mathews (note 41), 75.

[44] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002). For the purpose of this contribution, it will not be necessary to consider whether the distinction between rules and principles is dichotomous and whether principles are correctly qualified as optimization requirements only. For a discussion, *see* András Jakab, *Prinzipien*, 37 RECHTSTHEORIE 49, 54 (2006); MARTIN BOROWSKI, GRUNDRECHTE ALS PRINZIPIEN 105 *et seq*. (2007); Ralf Poscher, *Insights, Errors and Self-misconceptions of the Theory of Principles,* 22 RATIO JURIS 425, 433 (2009).

resolved by taking into account the relative weight of each.[45] For Robert Alexy, setting off from Dworkin's considerations, the decisive point in distinguishing rules from principles is that principles are "optimization requirements." They require that something should be realized to the greatest possible extent, given the legal and factual possibilities. Rules, on the contrary, are always either fulfilled or not. Accordingly, Alexy distinguishes rules and principles on the basis of the different way in which a conflict of rules is solved and competing principles are reconciled.[46] In the words of Alexy, a principle posits an "ideal-ought." Its weight in concrete cases is determined by its background justification as it applies to the given context. It is trumped whenever some competing principle has greater weight in the case at hand. Rules, by contrast, are not necessarily set aside just because their background justifications do not hold up in the context of a particular case.[47] As Alexy shows, each of the three steps involved in a proportionality analysis is derived from the nature of principles as optimization requirements.[48]

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[45] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 *et seq.* (1977). Several criteria have been brought forward for the distinction between rules and principles. For the proposition that that rules prescribe specific acts, whereas principles prescribe highly unspecific actions, *see* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE LAW JOURNAL 823, 838 (1972). According to him, the distinction is one of degree, which knows many borderline cases. *Cf. also* George C. Christie, *The Model of Principles*, DUKE LAW JOURNAL 649, 669 (1968); Graham Hughes, *Rules, Policy and Decision Making*, 77 YALE LAW JOURNAL 411, 419 (1968). Others qualify principles as reasons for the existence of certain rules which give meaning to a cluster of rules as tending towards the realization of a common objective: Neil MacCormick, *Principles of Law*, 19 JURIDICAL REVIEW 217, 222 (1974). For an overview, *see* HUMBERTO ÁVILA, THEORY OF LEGAL PRINCIPLES 8 *et seq.* (2007).

[46] ALEXY (note 44), 48 *et seq.*

[47] *Id.*, 57 *et seq.* For Alexy's later distinction between commands to optimize and commands to be optimized, *see* Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 RATIO JURIS 433 (2003).

[48] ALEXY (note 44), 66 *et seq.*

II. Proportionality Analysis of Trade-off Problems in International Economic Law

Elements of proportionality analysis also figure prominently both in WTO law (1.) and in international investment law (2.). In both cases, trade values and investor rights, respectively, need to be balanced against non-economic policy considerations. Here, proportionality analysis may provide a doctrinal structure for an integrative handling of regime interfaces.

1. Proportionality in WTO Law

In WTO law, the general exceptions in Article XX GATT and Article XIV GATS are key instruments for reconciling free trade with other policies. They involve certain elements of necessity tests and proportionality analysis.[49] Both Article XX GATT and Article XIV GATS consist of a chapeau and individual paragraphs. While the individual paragraphs serve the purpose of assessing the measure as such, the chapeau relates to the application of the measure.[50] Both provisions may be seen as regulations by default which address the negative externalities of trade.[51] Legal and institutional arrangements of globalization like the

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[49] Necessity tests can also be found in Arts VI (4), and (5), and XII (2)(d) GATS; 2 (2), (3), and (5) TBT, 2 (2), and 5 (6) SPS; and 8 (1) TRIPS and Art. XI (2)(b) and (c) GATT. Still, the WTO legal system does not contain a general proportionality requirement. *See* Jan Neumann & Elisabeth Türk, *Necessity Revisited: Proportionality in World Trade Organization Law after Korea - Beef, EC - Asbestos and EC - Sardines*, 37 JOURNAL OF WORLD TRADE (JWT) 199, 231 (2003). For details of the necessity test in the WTO jurisprudence, *see* Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 JOURNAL OF INTERNATIONAL ECONOMIC LAW (JIEL) 153 (2008); Stone Sweet & Mathews (note 41), 152–159; Andenas & Zleptnig (note 42), 408–416. However, *see also* Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, 4 JIEL 111, 120 (2001), who advocates a general principle of proportionality in WTO law, and ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 191 (2008), for whom proportionality is an "overarching" principle.

[50] Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 20; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras 115–116.

[51] Stone Sweet & Mathews (note 41), 153, referring to Art. XX GATT.

WTO have privileged certain interests and values over others.[52] In particular, international trade law has not arrived at a "positive integration" which would complement trade liberalization. The open formulations chosen in the general exception clauses – including vague terms like "arbitrary," "necessary," or "relating to" – and the absence of clear definitions of non-trade values put enormous weight on the WTO dispute settlement.[53] It also displays the functional mission of the WTO to trade, which neglects its impact on other policy areas like distributive justice, environmental concerns, and the protection of human health and safety as an aspect of fragmentation. Within the individual paragraphs of Article XX GATT, there is a notable textual difference. In the case of lit. (a), (b), and (d), a measure must be "necessary" to protect a specific public policy objective, whereas in lit. (c), (e), and (g), it must be "related to" such an objective.[54] Basically, the term "related to" is more flexible textually than the necessity requirement.[55]

Until the *EC – Asbestos* and *Korea – Beef* decisions, the Appellate Body's jurisprudence was generally understood as requiring the domestic regulation to be the least GATT-inconsistent method reasonably available to achieve the desired goal. The classic statement of this test was articulated in the GATT panel report in *US – Section 337*.[56] The *EC – Asbestos* and *Korea – Beef* cases, however, introduced a certain ele-

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[52] According to Howse, the WTO privileges the interests and values of liberal trade over distributive justice, environmental concerns, and the protection of human health and safety. *See* Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in THE EU, THE WTO, AND THE NAFTA, 35, 36 (Joseph H. H. Weiler ed., 2001).

[53] Piet Eeckhout, *The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch*, 13 JIEL 3, 12 (2010). For a critique of the whole structure of the trade-and-debate, *see* Andrew T. F. Lang, *Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System*, 70 THE MODERN LAW REVIEW 523 (2007).

[54] *See* Andenas & Zleptnig (note 42), 410. Measures under lit. (j) must be "essential" to the objective.

[55] *See* Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000, para. 161, footnote 104.

[56] GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345, para. 5.26.

ment of balancing into Article XX GATT.[57] In *Korea – Beef*, the Appellate Body acknowledged that the term "necessary" refers to "a range of degrees of necessity":[58] On the one hand, if a measure is indispensable, its necessity cannot be challenged. On the other hand, if other measures are reasonably available, and thus, the challenged measure is not indispensable, the latter can still be deemed "necessary."[59] To determine this, the WTO judiciary will apply a necessity test which amounts to a process of weighing and balancing a series of factors. Notably, the weighing and balancing does not take place after the necessity of the measure at issue has been established, but during the examination of the necessity of the measure.[60] In both cases, *Korea – Beef* and *EC – Asbestos*, the Appellate Body reiterated that WTO members had the right to determine for themselves the level of enforcement of their domestic laws.[61] Whilst the Appellate Body is said to repeat regulatory autonomy like a "mantra,"[62] some authors point to a logical contradiction at the heart of this reasoning. The argument goes that if WTO members have the right to determine the level of protection, there can be no weighing and balancing. The principle of regulatory autonomy would seem to mandate least-restrictive-measure tests and actually prohibit balancing.[63]

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[57] Neumann & Türk (note 49), 210. For a reconstruction of the Appellate Body's approach to Art. XX GATT as balancing of principles, *see* Anne-Charlotte Martineau, *La technique du balancement par l'Organe d'appel de l'OMC (études de la justification dans les discours juridiques)*, 123 Revue du droit public de la science politique en France et à l'étranger 991, 1005 (2007).

[58] Appellate Body Report, *Korea - Beef* (note 55), para. 161.

[59] *See also* Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 210.

[60] *Cf.* Peter Van den Bossche, *Looking for Proportionality in WTO Law*, 35 Legal Issues of Economic Integration 283, 289 (2008).

[61] Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para. 168; Appellate Body Report, *Brazil - Retreaded Tyres* (note 59), para. 140.

[62] Joseph H. H. Weiler, *Comment: Brazil - Measures Affecting Imports of Retreaded Tyres (DS332): Prepared for the ALI Project on the Case Law of the WTO*, 8 World Trade Review 137, 139 (2009).

[63] Donald H. Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 World Trade Review 347, 348 (2007); *cf.* Weiler (note 62), 139.

Yet, both *Korea – Beef* and *EC – Asbestos* can be understood as the Appellate Body trying to reconcile its new balancing test with the traditional least-restrictive-measure test.[64] The Appellate Body probably wanted to make clear that the "weighing and balancing" must not simply balance the level of protection against trade restriction.[65] In *EC – Asbestos*, the Appellate Body found that in light of the chosen level of protection, and noting that the protection of human life is vital and important to the highest degree, the remaining question was whether there was an alternative measure that would achieve the same end and that was less restrictive of trade than a prohibition.[66] While the Appellate Body thus referred to a test that weighs and balances to some degree the value of the regulatory goal, the contribution of the measure to achieving the regulatory goal, the cost of the regulatory measure, and the cost to trading partners via the mechanism of a restriction to trade, it has never documented in an opinion its application of this type of test.[67] Thus, although some claim that the Appellate Body has introduced a proportionality test *stricto sensu* into the introductory clause of Article XX,[68] a close examination reveals that the Appellate Body did not really balance free trade with non-trade values, but rather considered the chapeau as a prohibition of the abuse of rights.[69] Intervention on the basis of real balancing can be limited to cases where the restric-

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[64] Appellate Body Report, *Korea - Beef* (note 55), para. 166; Appellate Body Report, *EC - Asbestos* (note 61), para. 172.

[65] Neumann & Türk (note 49), 213.

[66] Appellate Body Report, *EC - Asbestos* (note 61), para. 172.

[67] Chad P. Bown & Joel P. Trachtman, *Brazil - Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 WORLD TRADE REVIEW 85, 88 (2008).

[68] Hilf (note 49), 121; Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39, 68 (2001); Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 JWT 811, 853 (2002); *see also* Martineau (note 57), 997 and *cf.* Neumann & Türk (note 49), 227, with further references in footnote 190.

[69] Axel Desmedt, *Proportionality in WTO Law*, 4 JIEL 441, 476 (2001); Neumann & Türk (note 49), 227, referring to Appellate Body Report, *US - Gasoline* (note 50), and Appellate Body Report, *US - Shrimp* (note 50), with further references in footnote 191.

tive effects on trade are wholly disproportionate when weighed against the local benefit.[70] Nevertheless, certain doubts with regard to the coherence of the "necessity" jurisprudence remain.[71]

With regard to inter-regime relations, it is to be noted that, so far, the sensitivity of the Appellate Body to non-trade values has not been the result of their taking into account the normative demands of extra-regime treaties, neither in interpretation nor in application of the WTO agreements. Rather, the Appellate Body has used other treaties only as evidence on empirical questions.[72]

2. Proportionality in International Investment Law

International investment law is often perceived as a sealed-off, biased regime that protects property, investment, and foreign investors without sufficient regard for other non-investment-related interests of host states.[73] However, balancing and proportionality analysis may offer a certain remedy and are therefore backed by academic defenders of the system.[74] Even though balancing or proportionality tests are not yet strongly conceptualized, several investment treaty arbitrations have ap-

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70 Eeckhout (note 53), 20.

71 Weiler (note 62), 138.

72 Donald H. Regan, *International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO*, in: THE PHILOSOPHY OF INTERNATIONAL LAW, 225, 239 (Samantha Besson & John Tasioulas eds, 2010), referring in particular to *US - Shrimp* and the notion of 'exhaustible natural resources'.

73 *See*, *e.g.*, Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VJIL 953, 956 (2007); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2008); and *cf.* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHICAGO JOURNAL OF INTERNATIONAL LAW 471, 474 (2009), with further references in footnote 14.

74 Alec Stone Sweet & Florian Grisel, *Transnational Investment Arbitration: From Delegation to Constitutionalization?*, in: HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE ARBITRATION, 118, 130 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds, 2009), embracing of balancing and proportionality by investment tribunals as an indicator of the gradual entrenchment of investment arbitration as a stable system of governance in the field of international investment.

plied them, providing some basis to counter the said critique.[75] Yet, comparable to the WTO dispute settlement system, proportionality analysis confers power on arbitrators to decide on policy conflicts, and *ad hoc* investment tribunals might be in a particularly weak institutional position to bear this weight.[76] In investment case law, proportionality analysis is referred to in order to distinguish between indirect expropriations that require compensation and non-compensable regulation. Furthermore, it is an element of assessing whether a regulatory measure is consistent with the fair and equitable treatment standard.[77] Apart from that, it plays a role in the application of so-called non-precluded-measures (NPM) clauses, which concern measures necessary for the maintenance or restoration of public order, international peace and security, and the protection of the host state's own essential security interests. Many bilateral investment treaties (BITs) contain such NPM clauses. In these different doctrinal contexts, states may defend themselves by recourse to principles of international law, which must be balanced with investor protection. For example, they may refer to international human rights law in order to justify protective measures for indigenous tribes,[78] affirmative action programs against race discrimination,[79] the freezing of water prices based on citizens' right to water,[80] or the introduction of rent control based on the right to housing.[81]

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[75] Brower & Schill (note 73), 484–489.

[76] *Cf.* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ WORKING PAPER 39 (2009/6).

[77] *Id.*, 30; Jasper Krommendijk & John Morijn, *'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration*, in: HUMAN RIGHTS, INTERNATIONAL INVESTMENT LAW, AND INVESTOR-STATE ARBITRATION, 422, 432 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds, 2009).

[78] Example taken from van Aaken (note 15), 507, with references.

[79] *Cf.* the case of *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.

[80] *Cf.* the cases of *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentine Republic*, ICSID Case No. ARB/03/17; *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3. For further cases involving water distribution, *see* van Aaken (note 15), 509, references in footnote 108. For the implications of the right to water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), *see* Committee on Economic, Social and Cultural Rights (hereafter

Investment treaty jurisprudence typically holds that covered direct and indirect expropriations are only lawful if they fulfill a public purpose, are implemented in a non-discriminatory manner, and observe due process of law. Additionally, both direct and indirect expropriations regularly require compensation. In order to distinguish between compensable and non-compensable regulation of property, the majority of tribunals do not solely consider the effects of the host state's regulatory measure, but also take into account the object and purpose of the measure, which must then be balanced in relation to its effects.[82] In *Tecmed v. Mexico*, the tribunal explicitly referred to the ECtHR jurisprudence on Article 1 of the First Additional Protocol to the European Convention on Human Rights,[83] and weighed the conflicting interests using a proportionality test.[84] In *LG&E v. Argentina*, a case that concerned the emergency measures Argentina passed in the context of its economic crisis in 2001/2002, the tribunal undertook a similar proportionality analysis.[85]

CESCR), General Comment No. 15, 20 January 2003, UN Doc. E/C.12/2002/11.

[81] Art. 11(1) of the International Covenant on Economic, Social and Cultural Rights, example taken from Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in: INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, 678 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds, 2009).

[82] Kingsbury & Schill (note 76), 31, with references.

[83] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, CETS No. 009.

[84] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 122. *See* Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153, 165 (2007); Moshe Hirsch, *Interactions Between Investment and Non-Investment Obligations*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 154, 170 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2008); Kingsbury & Schill (note 76), 32; van Aaken (note 15), 507.

[85] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 194 *et seq*. For an overview of the case law, *see* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, in: 1 YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY, 378 (Karl P. Sauvant ed., 2008–2009).

The standard of fair and equitable treatment, referred to in many BITs, offers an approach to disputes which involve tensions between an investor's rights (including legitimate expectations in investment security) and the host state's legitimate interest in regulating for the public good.[86] It has been interpreted by different tribunals as encompassing the stability and predictability of the legal framework, consistency in domestic decision-making, the protection of investor confidence or "legitimate expectations," procedural due process and the prohibition of denial of justice, the requirement of transparency, and the concepts of reasonableness and proportionality.[87] However, the protection of an investor's legitimate expectations does not subject every change to a compensation requirement. Rather, a balancing test is sometimes needed in order to actually apply the fair and equitable treatment in this context. For example, the tribunal in *Saluka v. Czech Republic* reasoned that, to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. Accordingly, the determination of a breach of the investment treaty required a weighing of the claimant's legitimate and reasonable expectations, on the one hand, and the respondent's legitimate regulatory interests on the other.[88] The general approach of the tribunal in *Saluka* has been endorsed by various other tribunals.[89] Arbitrators who take up this approach will balance the interests of the investor and the interests of individuals and social groups who seek protection against possible adverse impacts of the investment on their life or their environment.

Furthermore, some tribunals understood the application of so-called NPM clauses to imply judicial balancing. In *CMS*, *Enron*, and *Sempra*

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86 Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS OF HUMAN RIGHTS 47, 62 (2010); for an account of fair and equitable treatment, *see further* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 119 *et seq.* (2008).

87 Kingsbury & Schill (note 76), 10–16, 37, with references.

88 *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, paras 305 *et seq*.

89 *See*, *e.g.*, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of 24 December 2007, para. 298; *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para. 112.

the tribunals did not separate the NPM clause in the BIT from the customary law defense of necessity as set forth in Article 25 of the Articles on State Responsibility.[90] Based on this understanding, "necessary means" need to be the only means available, and the necessity test does not allow for balancing.[91] By contrast, in *LG&E* and in *Continental Casualty*, the tribunals distinguished between the state of necessity in customary international law and the requirements of the NPM clause. The *Continental Casualty* award explicitly referred to Article XX GATT and thus adopted the view that the necessity of a measure should be determined through "a process of weighing and balancing of factors."[92]

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[90] Report of the International Law Commission on the work of its Fifty-third session, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, FIFTY-SIXTH SESSION, SUPPLEMENT NO. 10 (A/56/10), ch. IV. E. 1, 43 *et seq.* With regard to the interpretation of non-precluded measures clauses, *see* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VJIL 307 (2008).

[91] *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, 353 *et seq.*; *Enron Corp., Ponderosa Assets, L. P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007. In its report of 25 September 2007, the Annulment Committee of the ICSID found that the *CMS* Tribunal had made a "manifest error of law" in its interpretation of the NPM clause. According to the committee, the tribunal had mistakenly conflated the stringent customary principles on necessity with the terms of the treaty exception. However, the committee denied a "manifest excess of powers." The initial awards both in *Sempra* and in *Enron* have meanwhile been annulled, *see* Decisions on the Argentine Republic's Application for Annulment of the Award of 29 June 2010 and of 30 July 2010, respectively. In the *Sempra* Case, the Annulment Committee reached the conclusion that the tribunal – in respect of the NPM clause – had failed altogether to apply the applicable law and, by failing to do so, has committed a manifest excess of powers (para. 165).

[92] *LG&E* (note 85), para. 245; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, paras 192–199.

III. Balancing as a Technique of Systematic Interpretation

Apart from the interpretation of general exception clauses in WTO law and certain BIT clauses, balancing may be an overall technique of systemic interpretation and "defragmentation" of international law.[93] Article 31(3)(c) VLCT specifies that, together with the context, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. The Study Group of the ILC emphasized the role of this provision and recognized in it a principle of harmonious or "system(at)ic interpretation."[94]

1. Two Different Relationships Between "External" Law and the Treaties Being Interpreted

Neither Article 31(3)(c) VLCT nor the Fragmentation Report expounds a methodology of how to incorporate "external" norms of public international law by treaty interpretation.[95] Based on the practice of international courts in applying Article 31(3)(c) VLCT, two different relationships between "external" law and the treaties being interpreted can be distinguished:[96] first, courts determine the meaning of a discrete or individual term appearing in a treaty by recourse to external law, referring to the normative content of the external rule to clarify the mean-

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93 Van Aaken (note 15), 484.

94 Terminology in the ILC report changes. *See* title of section F ("systemic"), paras 410–413 ("systematic"/"systemic"). The term 'systemic integration' may insinuate that, thanks to a process of harmonious integration, the system of international law is becoming more complete, firm, compact, and uniform – or: integrated, *see* Vassilis P. Tzevelekos, *The Use of Article 31 (3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration*, 31 MICHIGAN JOURNAL OF INTERNATIONAL LAW 621, 633 (2010). For a variety of further mechanisms by which a tribunal may undertake a broader interpretative approach by referring to extraneous legal material, *see* Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (ICLQ) 281 (2006).

95 ILC, Fragmentation Report (note 3), para. 419; van Aaken (note 15), 502.

96 ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 371, 373 (2008); Simma & Kill (note 81), 682.

ing of a specific term as used in the treaty.[97] Second, external law may exert a sort of "gravitational pull"[98] on a treaty rule, resulting in a treaty interpretation that coheres more closely with the external rule. It is submitted that in this second situation, where competing norms are to be taken into account, balancing could be an adequate method of interpretation in case of normative tensions between the treaty rule and an external rule.[99] As set out above, balancing presupposes that the norms to be balanced have the dimension of weight. Indeed, the Report of the Study Group on Fragmentation acknowledged that the dimension of weight plays a role under Article 31(3)(c) VCLT.[100] However, despite introducing a distinction between rules and principles, the Fragmentation Report did not discuss the potential ramifications of this distinction.[101] Balancing as an element of systemic interpretation in international law may nevertheless tie in with a reconstruction of the three sub-principles of proportionality analysis – suitability, necessity, and proportionality in a narrow sense – as *topoi* of a systematic-teleological interpretation.[102]

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[97] This is the only function of Art. 31(3)(c) VLCT, according to ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 366 (2009).

[98] Simma & Kill (note 81), 683; Regan (note 72), 235 – "normative gravitational force".

[99] Van Aaken (note 28), 108; Anne van Aaken, *Balancing of Human Rights – Constitutional Interpretation in International Law*, in: HUMAN RIGHTS TODAY – 60 YEARS OF THE UNIVERSAL DECLARATION, 51, 66 (Miodrag Jovanović & Ivana Krstić eds, 2010); Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 4 (Stephan Schill ed., 2010, forthcoming).

[100] ILC, Fragmentation Report (note 3), para. 473; to the same effect: Simma & Kill (note 81), 707; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279, 310 (2005).

[101] ILC, Fragmentation Report (note 3), para. 28; for a critique, *see* Vranes (note 7), 97.

[102] KLAUS F. RÖHL & HANS CHRISTIAN RÖHL, ALLGEMEINE RECHTSLEHRE: EIN LEHRBUCH 655 (2008); Erich Vranes, *Der Verhältnismäßigkeitsgrundsatz: Herleitungsalternativen, Rechtsstatus und Funktionen*, 47 ARCHIV DES VÖLKERRECHTS 1, 12 (2009), who also reports further foundations for the principle of proportionality.

2. Applicable Law

Applying the principle of proportionality as a tool of systemic integration presupposes that the competing external norm may be referred to within the framework of systemic interpretation. Notably, the WTO dispute settlement system only serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law (Article 3(2) WTO Dispute Settlement Understanding, DSU).[103] Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (see also Article 19(2) DSU in this respect). To restrain the significance of this restriction, different models for the use of non-WTO law in WTO dispute settlement have been developed.[104] By contrast, the range of applicable law in international investment law is generally less restrictive. Article 42(1) of the ICSID Convention[105] refers to "international law as applicable," and so do most BITs.[106]

At any rate, the application of "external" norms is unproblematic in the case of explicit reference to these norms, and whenever they can be referred to in the course of interpreting a treaty provision on the basis of its ordinary meaning or its object and purpose (Article 31(1) VCLT), or based on systematic interpretation (Article 31(3)(c) VCLT).[107] In the literature, a distinction has been introduced between direct and indirect application of sources beyond the respective legal sub-system. Whereas a direct application of external sources may be doubtful in the absence of concrete entry-points,[108] an indirect consideration when interpreting

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[103] Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, UNTS, vol. 1869, 401.

[104] For an overview, *see* HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 209 *et seq.* (2007).

[105] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, UNTS, vol. 575, 159.

[106] Van Aaken (note 15), 496; for the impact of non-investment international obligations in investment case law, *see* Hirsch (note 84).

[107] McLachlan (note 100), 305; RICHARD K. GARDINER, TREATY INTERPRETATION 288 *et seq.* (2008); van Aaken (note 15), 495.

[108] For some entry points of human-rights law in investment law, *see* van Aaken (note 15), 495.

"internal" law should generally be possible.[109] With regard to the latter, however, the question arises in the case of multilateral treaties whether all parties to the treaty equally have to be party to the other treaties relied upon. In this regard, the WTO panel in the *Biotech* case took a narrow view in order to ensure or enhance the consistency of the applicable rules of international law and contribute to avoiding conflicts between the relevant rules.[110] Although the panel accepted that Article 31(3)(c) VCLT applies to general international law and other treaties,[111] its approach makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) VCLT would be allowed.[112] This understanding leads to the odd consequence that the greater the membership of a multilateral treaty, the less other treaty laws could be taken into account.[113] Thus, in all probability, it does not correspond with the intent of most treaty-makers.[114]

3. Interpretation of Competing Norms as Principles

Apart from restrictions resulting from the applicable law, there are structural boundaries of balancing as a technique of systemic interpre-

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[109] Van Aaken (note 28), 100; van Aaken (note 15), 500.

[110] Report of the Panel, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr. 1 and Add. 1–9, 21 November 2006, paras 7.68–7.70.

[111] To the same effect: ORAKHELASHVILI (note 96), 366 – all relevant sources of international law; contra: MITCHELL (note 49), 83 – only rules, not principles.

[112] ILC, Fragmentation Report (note 3), para. 450.

[113] Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EJIL 753, 781 (2002); ILC, Fragmentation Report (note 3), para. 471.

[114] ILC, Fragmentation Report (note 3), para. 471. However, it is to be admitted that this interpretation is difficult to reconcile with the ordinary meaning of the term 'parties' in Art. 31(1) VCLT in its context in the VCLT. Obviously, there is no reference to a dispute in the VCLT. Thus, so the argument goes, 'parties' can only mean parties to the treaty. *See* Regan (note 72), 233; Thiele (note 19), 26. For a discussion of the pros and cons of different interpretations of Art. 31(3)(c) VCLT, *see further* Benn McGrady, *Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC - Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 42 JWT 589 (2008).

tation. The idea of a "gravitational pull" exerted by external rules is based on a presumption in favor of the coherence of international law. This presumption, however, has its limits. States will often conclude treaties for the precise purpose of producing effects that are not in accordance with the law that was previously binding upon them.[115] Thus, this type of systemic interpretation is excluded as far as the conflict rules of *lex specialis* and *lex posterior* apply.[116] Accordingly, the Report of the Study Group points to the limits of harmonization: though harmonization may resolve "apparent" conflicts, it cannot resolve "genuine" conflicts, especially where a treaty lays out clearly formulated rights or obligations of legal subjects.[117] In the language of principle theory, balancing is only possible where the competing norms can be considered as legal principles or optimization requirements. This situation must be contrasted with cases where the conflict rules of *lex specialis* and *lex posterior* apply and give preference to one of two rules. Whether a legal norm is a strict rule or a principle and whether the conflict rules of *lex specialis* and *lex posterior* apply is a matter of interpretation.[118] In most cases, the wording does not offer clear guidance here.[119] However, the general context of the treaty and the preambular paragraphs in particular may give an indication of how deeply a particular regime is embedded in its legal environment.

In order to extend the scope of application of balancing as a technique to solve norm conflicts, legal scholarship, not always convincingly, has qualified many of the goals which different regimes in public international law pursue as principles or optimization requirements: free trade,

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[115] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989, Part Three*, 62 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 60 (1991); Simma & Kill (note 81), 689.

[116] Matz-Lück (note 10), 45; ORAKHELASHVILI (note 96), 373 *et seq*.

[117] ILC, Fragmentation Report (note 3), para. 42 – with a caveat concerning the distinction between 'apparent' and 'genuine' conflicts. S*ee also* Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 573, 640 (2005). *See further* ILC, Fragmentation Report (note 3), para. 43: "Inasmuch as the question of conflict arises regarding the fulfilment of the objectives (instead of the obligations) of the different instruments, little may be done by the relevant body. In any case, the third party settlement body is always limited in its jurisdiction."

[118] Martineau (note 57), 1008.

[119] For the basic rights under the German Basic Law, *cf*. BOROWSKI (note 44), 114 *et seq*.

protection of foreign investors and development, protection of basic human rights, humanization of armed conflict, self-determination, putting an end to impunity for the perpetrators of international crimes, and protection of the environment. On this basis, conflicts between these goals can be tackled by the technique of balancing.[120] The hasty construction of the mentioned systems of rules as principles, however, is problematic. It would not be appropriate if international judicial institutions were in a position to weigh principles as they pleased and thereby soften an international order of strict rules. Therefore, considerable attention is to be paid to the qualification of norms as principles. A principle of "free trade," for example, is doubtful at best,[121] and balancing in WTO law presupposes concrete entry points such as Article XX GATT. At any rate, judicial practice based on Article 31(3)(c) VCLT, as reported in the Fragmentation Report,[122] is rather scarce.

D. The Legitimacy of Balancing as a Strategy in Response to Fragmentation

Balancing as a convincing "methodological proposal for defragmentation through interpretation"[123] not only presupposes that it has its space, albeit limited, in international legal doctrine, it also presupposes that balancing is a legitimate strategy in response to fragmentation. One important factor determining the need to justify balancing is its lawmaking potential: the more considerable its lawmaking effect, the greater its need for legitimacy. Intuitively, balancing is more context-sensitive than applying rules and thus less apt to create normative expectations beyond the settlement of the specific dispute at hand (I.). Nevertheless, due to well-known problems of justifying judicial lawmaking activities (II.), much depends on whether balancing processes can be subjected to rational criteria in order to avoid arbitrariness (III.).

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120 Van Aaken (note 15), 492.

121 *Cf.* Peter-Tobias Stoll, *Freihandel und Verfassung: Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung (GATT/WTO)*, 57 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 83, 116 (1997).

122 ILC, Fragmentation Report (note 3), paras 433–460.

123 Van Aaken (note 15), 484.

I. Creation of Normative Expectations by Balancing

1. Context-Sensitivity of Balancing

The balancing of principles gives judicial institutions considerable strategic space.[124] Still, on the face of it, the results of balancing processes do not seem to work particularly well as precedents, and accordingly, balancing would not appear to be a suitable instrument for the exercise of judicial authority beyond the case at hand. Basically, the balancing of principles appears to be more context-sensitive than interpreting rules and, thus, its potential to create normative expectations for the future appears to be limited. In legal theory, balancing and subsumption have been distinguished as two judicial techniques of applying norms to facts.[125] Whilst balancing is the basic operation of principles, subsumption refers to rules. Since both balancing and subsumption relate norms to facts, they are sensitive to the individual circumstances of the case. But beyond this coincidence, the context-sensitivity of balancing stems from the characteristics of principles. Since principles require something to be realized to the greatest possible extent legally and factually, they are not definitive, but only prima facie requirements.[126] The relationship between different principles is dynamic. In one case, the balancing of goods may lead to the result that principle A prevails over the colliding principle B, but under different circumstances principle B may be the stronger one. Accordingly, the balancing approach to regime conflicts "on a case-by-case basis" has been expressly contrasted to the establishment of fixed hierarchies of values,[127] which seems neither preferable nor realistic. Also, the ILC Study Group acts on the assumption that the "question of the normative weight to be given to particular rights and obligations at the moment they appear to clash with other rights and obligations can only be argued on a case-by-case basis,"[128]

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[124] For the WTO and Art. XX GATT, *see* Martineau (note 57), 1023; Venzke (note 1), 1113.

[125] Jan-Reinard Sieckmann, Regelmodelle und Prinzipienmodelle des Rechtssystems 18 *et seq.* (1990); Alexy (note 47), 433; Karl Larenz, Methodenlehre der Rechtswissenschaft 474 *et seq.* (1991).

[126] Alexy (note 44), 57.

[127] Niels Petersen, *How Rational is International Law?*, 20 EJIL 1247, 1257 (2009).

[128] ILC, Fragmentation Report (note 3), para. 474, quoting the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Bel-

and the WTO Appellate Body emphasized that the location of the "line of equilibrium" under Article XX is "not fixed and unchanging."[129]

2. Balancing and Precedent

Nevertheless, in the WTO, adjudication has already *de facto* taken steps towards establishing a balance between trade and environmental concern through adjudicative interpretation of Articles III and XX GATT.[130] Comparably, a look at domestic law reveals that, despite its context-sensitivity, the adoption of proportionality analysis by domestic constitutional courts has led to a steady accretion of judicial authority over how constitutions evolve: proportionality balancing constitutes a doctrinal underpinning for the expansion of judicial power globally.[131] This power is not only based on the capability of judicial institutions to leave the outcome of future balancing processes open. Through the balancing exercises undertaken by judicial institutions, over time a network of relatively concrete rules derived from different principles develops.[132] The mechanism, according to which the outcomes of judicial balancing function as precedents, is twofold. First, abstract evaluations of certain trade-off problems or inter-regime conflicts may be taken from the reasoning of courts. Second, normative expectations may rest on factual analogies, which give orientation for future cases with comparable facts. The Common Law tradition adequately reflects this working of precedents on the basis of factual analogies, which is, by contrast, underestimated, e.g., in German constitutional law scholar-

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gium) ICJ Reports 2002, 86, para. 79: "International law seeks the accommodation of this value [the prevention of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over another."

129 Appellate Body Report, *US - Shrimp* (note 50), para. 159.

130 Bugge Thorbjørn Daniel, WTO Adjudication: An institutional analysis of adjudicative balancing of competing interests – exemplified with developments in interpretation of GATT Article III and XX 13, 343 *et seq.* (2005); for a comprehensive analysis, *see also* Anupam Goyal, The WTO and International Environmental Law: Towards Conciliation (2006); Erich Vranes, Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory (2009).

131 Stone Sweet & Mathews (note 41), 72, 76.

132 *Cf.* Alexy (note 44), Röhl & Röhl (note 102), 667.

ship, which focuses on the abstract evaluations to be found in the legal reasoning of the Federal Constitutional Court.[133]

The recourse to precedents in the field of inter-regime law is, however, hampered by the obvious reluctance of specialized international judicial institutions to integrate external norms originating from other "regimes" into their own legal sub-system via balancing. Supposedly, the reason for this reluctance is to be seen in institutional concerns: normative integration may be deterred by concerns over an undue arrogation of authority.[134] Overall, the integration of external norms by balancing and other legal techniques leads to a dialectic interaction between norm integration and the assertion of authority over external norms.[135] First, to integrate norms of another system means to acknowledge the authority of that other system to produce pertinent norms. Conversely, it also means asserting authority over those norms.[136] Consequently, to integrate norms of another system is to introduce the problems of overlapping authority. Finally, these problems of overlapping authority foster authority-integrating solutions (e.g., deference).[137] In the end, specialized international courts will refrain from applying external norms as norms and consider them – in a kind of dualist approach – as factual evidence at best, as has already been shown with regard to the WTO Appellate Body.[138]

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133 For a comparison of German and U.S. constitutional law scholarship, and their approaches to the case law of the German Federal Constitutional Court and the U.S. Supreme Court, respectively, *see* Oliver Lepsius, *Was kann die deutsche Staatsrechtslehre von der amerikanischen Rechtswissenschaft lernen?*, in: STAATSRECHTSLEHRE ALS WISSENSCHAFT, 319 (Helmuth Schulze-Fielitz ed., 2007). For the common law and civil law paradigms of precedent, *see* Jacob (note 14), 1008–1010.

134 Broude (note 7), 190.

135 To be sure, qualitatively different models of norm integration can lead to different degrees of authority integration, *see* Broude (note 7), 176.

136 *Id.*, 187.

137 *Id.*, 186.

138 Regan (note 72).

II. The Problem of Justification

A certain uneasiness of international judicial institutions towards really applying external norms reflects their fragile standing in terms of legitimacy when deciding on policy conflicts.[139] The general quandary of justifying the exercise of authority by international judicial institutions apart,[140] it is notable that specialized judicial institutions, as already mentioned, may suffer from an institutional bias. Since resolving policy conflicts in fragmented international law involves substantive value choices, this bias is particularly problematic with regard to systemic interpretation as a response strategy to fragmentation. The general significance of this bias is debated in literature, in particular with regard to the WTO dispute settlement system.[141] For example, WTO panels were understood to be making a choice that trade liberalization should trump environmental rules.[142] To be sure, the panels' lack of sensitivity to non-trade preferences follows less from any malevolent bias in the panelists than from the function of the dispute settlement system to seek a response only to the question of possible violations of the WTO agreements (Article 7(1) DSU). Social and other positive human rights may be pursued by governments only to the extent to which they can be shown as "necessary" limits on market freedoms.[143] In case of conflict between a human rights or environmental treaty and a WTO agreement, WTO bodies are constitutionally prevented from conclud-

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[139] For a critical stance, *see*, *e.g.*, French (note 94), 314.

[140] *See*, *supra*, and, generally, von Bogdandy & Venzke (note 2), 989–997.

[141] With regard to human rights and the WTO, *see*, *in particular*, Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EJIL 621 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EJIL 815 (2002); Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EJIL 651 (2002); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice'*, 19 EJIL 769 (2008); Robert Howse, *Human Rights, International Economic Law and Constitutional Justice: A Reply*, 19 EJIL 945 (2008).

[142] Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 94, 103 (2002).

[143] Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EJIL 651, 655 (2002).

ing that the WTO standard has to be set aside.[144] If a WTO member is also a party to an environmental or a human rights treaty that conflicts with its WTO obligations, this should neither decrease nor increase a member's WTO rights or obligations.[145]

It is also relevant here that other sub-systems of international law are less developed institutionally, in particular with regard to litigation and compliance schemes. This unequal institutionalization of the different functional sub-systems gives the stronger system an advantage over the weaker system.[146] Naturally, this is deeply unsatisfactory from the perspective of the interests or values that present themselves as legitimate claims competing with trade interests. As some have observed, it is, for structural reasons, quite doubtful whether a trade regime is ever able to give effect to them.[147] Accordingly, the solution to the problem of institutional bias will not be reached by expanding WTO competence, since this would also expand the scope of the economic logic.[148] However, assessments of such in-built biases differ. It has also been said that a bias of the WTO tribunals in favor of a regime value "free trade" does not give much cause for concern at present. Rather, the Appellate Body cannot plausibly be accused of trade bias because it is not essentially biased in favor of trade.[149] Indeed, the Appellate Body used a variety of jurisprudential techniques to do justice to the delicate interrelationship of values and interests in such cases.[150]

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144 Koskenniemi & Leino (note 27), 572; Paulus (note 37), 214; *see also* David W. Leebron, *Linkages*, 96 AJIL 5, 22 (2002).

145 Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAS and other Treaties*, 35 JWT 1082, 1103 (2001).

146 Paulus (note 37), 214, with references.

147 Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EJIL 754 (1999); Koskenniemi & Leino (note 27), 573.

148 Dukgeun Ahn, *Environmental Disputes in the GATT/WTO: Before and After US - Shrimp*, 20 MJIL 819, 859 (1999); Koskenniemi & Leino (note 27), 574; Paulus (note 37), 214.

149 Regan (note 72), 238.

150 Howse (note 142), 109 - analyzing Appellate Body Report, *US - Shrimp* (note 50); Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998; Appellate Body Report, *EC - Asbestos* (note 61).

Furthermore, judicial lawmaking may be inappropriate because of the internal structure of international governance systems, which leads to a decoupling of law and politics. A particular concern about lawmaking by the WTO tribunals is the lack of an efficient legislator which makes the "correction" of an unsatisfactory interpretation through amendment an overwhelming task to undertake. Admittedly, in the WTO the relationship between judicial inventiveness and the impasse of the Doha Round negotiations is ambivalent. On the one hand, the judiciary may enhance the legitimacy of the system through evolving its practices to reflect shifting conceptions of a legitimate international order. On the other hand, the difficulty of political adjustments to the WTO bargain and the resulting situation of the "missing legislature" make the legitimacy of judicial activism in the WTO more precarious.[151] Subsequent domestic majorities unsatisfied with the interpretation of international trade regulations by the Appellate Body are left with little more than the option to withdraw from the WTO altogether.[152] From this perspective, it is problematic if interpretations of external law made under the system – with its built-in bias – will come to possess value as precedent not only within the WTO, but also more generally across the judicial board.[153]

III. Rationalization of Balancing Processes

However, the picture changes if a strict methodology of balancing could subject processes of judicial balancing to rational control. Rationality here relates to the purpose of providing decisions that could best fulfill the exigency of legitimacy.[154] The more rational judicial balancing is, the less problematic its justification is. In legal and constitutional theory, there is an ongoing debate whether balancing in cases of conflict

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[151] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, in: 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 609 (Jochen A. Frowein & Rüdiger Wolfrum eds, 2001); Robert Howse, *Moving the WTO Forward – One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223, 228 (2009), with further references; Ioannidis (note 11), 1187–1190.

[152] Ioannidis (note 11), 1191.

[153] Koskenniemi & Leino (note 27), 573.

[154] *Cf.* BENVINDO (note 39), 135.

between principles rationalizes legal discourse[155] or whether it is "arbitrary" and lacking "rational standards."[156] The very language of "balancing" evokes a sense of objectivity. A set of balance scales is the symbol of neutrality par excellence: its geometry seems incorruptible. Balancing may thus even serve as a tactical instrument in order to camouflage the exercise of power.[157] That said, many would say the idea that a method of balancing should provide for rational standards is counterintuitive. For them, the control of norms and legal methods ends when balancing, as an undifferentiated sense of justice,[158] cuts in and creates the space for judicial subjectivism and decisionism. Balancing lacks precision, it entails a comparison of two measures which, due to their radical differences, cannot be compared, and its results cannot be predicted.[159] In order to recover balancing in the law, a law-and-economics approach resorts to numerical systems of balancing.[160] It is, however, doubtful whether international judicial institutions will have recourse to numerical systems. At any rate, these systems will not be able to de-

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155 ALEXY (note 44), 100–109; Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 572, 577 (2005).

156 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 256 *et seq.* (1992, trans. William Rehg, 1996); *see*, *in particular*, 259: "Values must be brought in to a transitive order with other values from case to case. Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies." Note 38: "Because there are not unambiguous units for measuring so-called legal values, Alexy's economic model of justification also does not help operationalize the weighing process." *See also* Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, in: 2 KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS: FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT, 445, 460 (Peter Badura & Horst Dreier eds, 2001): essentially "subjective." For a critique vocalized in US scholarship, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE LAW JOURNAL 943 (1987).

157 Martineau (note 57), 1014.

158 Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 4, 19 (1990).

159 *Cf.* Carlos Bernal Pulido, *The Rationality of Balancing*, 92 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 195, 196 (2006) – with references.

160 *Cf.* EKKEHARD HOFMANN, ABWÄGUNG IM RECHT: CHANCEN UND GRENZEN NUMERISCHER VERFAHREN IM ÖFFENTLICHEN RECHT 5 (2007).

termine objectively the numerical values of certain goods,[161] which are instead defined by judges.[162] This objection corresponds to a significant blind spot of economic theory, which gives no suggestions as to how preferences come about.[163]

Alexy, who holds that constitutional rights are principles and that principles are optimization requirements,[164] accepts the critique that judicial balancing creates the space for judicial subjectivism and decisionism, insofar as he admits that balancing is not a procedure leading in every case to a precise and unavoidable outcome. Although not objective, balancing is a rational procedure for him.[165] According to this account, rationality and methodology are intimately related for the purpose of controlling empirical knowledge and constitutional evaluations. Although it is not possible to point out a substantive methodological or normative status of the evaluation demanded, at least a formal framework can be rationally conceived, in which different views establishing a rule for balancing can be made explicit. As a structural theory, which detaches itself from the substantive discussion that occurs when arguments are inserted into its framework, this approach does not intend to establish the solution to the case, but rather it intends to specify how, structurally speaking, a decision in the field of constitutional rights can be made.[166] A rational approach to balancing demands that every statement of preference be justified. For this justification, Alexy introduces the *Law of Balancing*, the most elementary rule which shall ensure the rationality of the procedure: the *Law of Balancing* states that the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[167] Accordingly, it is an essential ingredient of rational balancing that it provides for a transparent procedure of argumentation. The offering of reasons

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[161] Andreas Fischer-Lescano, *Kritik der praktischen Konkordanz*, 41 KRITISCHE JUSTIZ 166, 172 (2008).

[162] Martineau (note 57), 1011.

[163] Petersen (note 127), 1258.

[164] ALEXY (note 44), 388.

[165] *Id.*, 100; similarly Pulido (note 159), 198. For a challenge of Alexy's premises with Jacques Derrida's philosophy, *see* BENVINDO (note 39), 161 *et seq.*

[166] ALEXY (note 44), 137 *et seq*.

[167] *Id.*, 102. The *Law of Balancing* leads necessarily to the *Weight Formula*, *see* Alexy (note 47).

for decisions based on the legal materials, and consistency with the reasons given in other cases, provides a transparent, public basis for critique and contestability of the manner in which the tribunal has handled the legal materials in the presence of competing values.[168] By structuring the inquiry, balancing may add important, output-influencing burdens of justification. Specifying the burdens of justification and structuring the order of inquiry can make a difference.[169]

In order to face the potential arbitrariness of balancing, under the given circumstances of judicial lawmaking in international law,[170] a shift of attention to the mindset of judges is also advisable. In particular, two mindsets of judges may be associated with judicial balancing. On the one hand, there is the paradigm of rational choice. Balancing, then, is a technical, objective, efficiency-oriented optimization process: it is a cost-benefit analysis, which integrates social science knowledge and rational choice into the law.[171] On the other hand, balancing requires "a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end."[172] To be sure, the first two steps of proportionality analysis, suitability, and necessity tests, which demand factual determinations, are more open to cost-benefit analysis.[173] By contrast, proportionality balancing *stricto sensu*, as the third step of proportionality analysis and as a strictly legal question, is more open to value judgments and does not lend itself easily to social science

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[168] Howse (note 52), 51.

[169] Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS OF HUMAN RIGHTS 34, 36 (2010); for the WTO dispute settlement system, *see* Andenas & Zleptnig (note 42), 427; Martineau (note 57), 1022–1030.

[170] For strategies in response to the problem of justifying the exercise of public authority by international courts, informed by discourse theory, *see* Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GLJ 1341 (2011).

[171] Anne van Aaken, *A Functional Approach to International Constitutionalism: The Value Added of a Social Science Contribution*, LAW AND ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 2008-08, 10.

[172] *Cf.* ILC, Fragmentation Report (note 3), para. 487.

[173] ALEXY (note 44), 67 *et seq.*; ANNE VAN AAKEN, "RATIONAL CHOICE" IN DER RECHTSWISSENSCHAFT: ZUM STELLENWERT DER ÖKONOMISCHEN THEORIE IM RECHT 328 *et seq.* (2003).

approaches, but rather to rational justification in law application.[174] Here, following a Kantian understanding, law is "about the application of procedures of reasoning to the available materials, aiming toward conclusions that ha[ve] the best chance of impartial, perhaps even universal, approval."[175] Whereas judges should be open-minded towards insights of social science, they should also display a certain sensitivity towards the value choices of other actors, in particular democratic domestic legislators. In this vein, judicial balancing by international judicial institutions neither epitomizes the ultimate rule of law,[176] nor is it an instrument of judicial self-empowerment only. Of course, much will also depend on the personalities of judges in this regard.[177]

E. Recourse to Formal Principles as an Expression of Institutional Sensitivity

So far, we have seen that balancing by specialized judicial institutions is not only about striking the right balance between different policy goals set forth in different sub-systems of the international legal order. Rather, it is also a matter of an adequate allocation of authority. As already mentioned, proportionality analysis can refer to both the balancing of substantive goods and to the exercise of competences. If, with regard to the exercise of competences, a concern for institutional sensitivity is considered in the balancing processes,[178] the argument favors granting a margin of appreciation to other actors.[179] Here, it is important to note that "linkage" is a problem of allocating authority at three levels. Linkage in this sense refers to the horizontal allocation of juris-

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[174] Anne van Aaken, *How to do Constitutional Law and Economics: A Methodological Proposal*, LAW AND ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 2008-04, 10; van Aaken (note 99), 69.

[175] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization,* 8 THEORETICAL INQUIRIES IN LAW 9, 22 (2007).

[176] BEATTY (note 38).

[177] Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in this issue.

[178] *See* Howse & Nicolaidis (note 30), 184 – "spirit of subsidiarity" as an anchor for a global political ethics.

[179] van Aaken (note 15), 512.

diction among states, vertical allocation of jurisdiction between states and international organizations, and the horizontal allocation of jurisdiction among international organizations.[180] In several contexts, the relevant institution with a claim to superior legitimacy may not be domestic at all, but some other international regime (e.g., international environmental legal regimes in cases concerning trade measures to protect endangered species).[181]

Yet, concepts like "margin of appreciation," "deference" or "restraint" give little guidance as to how far the margin of appreciation, restraint or deference, respectively, should go in a given interpretive context. Compared to "deference" or "restraint," the concept of "margin of appreciation" has the advantage that it does not reduce available options to simply yielding to the determination of some other institution having some particular competence or credibility in dealing with a certain issue.[182] In fact, acknowledging certain margins of appreciation allows judges to make their own determinations, while giving special weight to aspects of that other institution's analysis that draws on its particular competency or legitimacy.[183]

The reasons for granting a margin of appreciation may be spelled out by including formal principles in the balancing process. In principle theory, there is a relatively new discussion about the existence, necessity, structure, and content of formal principles. Most importantly, principle theory employs formal principles in the reconstruction of the authority of the democratically legitimated parliament.[184] According to the so-called *Law of Combination*, formal principles do not, by themselves, have the power to outweigh a substantive principle. Rather, they can override substantive principles only in connection with other sub-

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[180] For a distinction of these dimensions, *see* Joel P. Trachtman, *Transcending "Trade and …"*, 96 AJIL 77, 79 (2002).

[181] Howse (note 52), 62.

[182] For the scope of a margin of appreciation doctrine in international law, *see* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 EJIL 907 (2006). For deference by the WTO adjudicating mechanism to the assessments of other bodies (domestic and international), *see* Ioannidis (note 11), 1194–1195.

[183] Howse (note 52), 62.

[184] ALEXY (note 44), 82, 313, 417; Martin Borowski, *The Structure of Formal Principles – Robert Alexy's 'Law of Combination'*, 119 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE – BEIHEFT 19, 27 (2010).

stantive principles.[185] Therefore, their impact is limited. In comparison to this approach in constitutional theory, international judicial institutions may introduce formal principles in their balancing exercises and thereby take up legitimacy concerns like institutional balance, respect for democratic legislators, and due process. They are in a good position to do so if the introduction of formal principles is an expression of judicial restraint. Arguably, formal principles here hold a promising potential for judicial lawmaking. Once certain formal principles are introduced in the course of exercising a certain degree of judicial restraint, the argument is out in the world, and it puts the argumentative burden on any participant in legal discourse who tries to deviate from it.

Some decisions of the WTO dispute settlement system back this approach. Arguably, a principle of simulated multilateralism and a principle of respect for responsible, representative governments have already been applied, though not explicitly introduced as principles. These decisions may be interpreted as expressions of institutional sensitivity, both horizontally towards other regimes and vertically towards member states. The Appellate Body, referring to Article XX GATT, held that, when a sovereign decision affects economic interests of people in other WTO members, their interest must be taken into account, either through a negotiated solution between the affected members, or, if that is impossible, through "simulated multilateralism" in the domestic legislative process.[186] This can be understood as a response to an undemocratic feature of globalization. In the course of globalization, decisions taken at a given place can have important effects outside the borders of the state to which the place belongs.[187] If democracy means that those affected have a say, an understanding that is reflected in the right to vote as guaranteed by Article 25 ICCPR, these external effects are a consequence of globalization that is difficult to reconcile with the democratic principle. Although Article XX GATT does not stipulate a general duty

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185 ALEXY (note 44), 423; Borowski (note 184), 19.

186 Von Bogdandy (note 151), 613, 666, referring Appellate Body Report, *US - Gasoline* (note 50), 27; Appellate Body Report, *US - Shrimp* (note 50), paras 166–176.

187 For a recent analysis and critique of the "argument from transnational effects", *see* Alexander Somek, *The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement*, 16 EUROPEAN LAW JOURNAL 315 (2010); *id.*, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUROPEAN LAW JOURNAL 375 (2010).

to negotiate,[188] it can nevertheless be said that WTO jurisprudence considers an aspect of the democratic principle in the balancing process induced by Article XX GATT. It defers substantive decisions to WTO members but proscribes a certain procedure.[189]

Furthermore, the Appellate Body in the *EC – Hormones I* dispute paid special attention to the acts of "responsible, representative governments."[190] Here, the Appellate Body would seem to be according an extra margin of deference to the judgment of WTO members, but only where those states have "responsible, representative governments."[191] Arguably, this argument may be restated as the introduction of the formal principle of respect for responsible, representative governments. If their right to determine the level of protection is understood not as a strict rule, but as a formal principle based on respect for responsible, representative governments, then the "mantra"-like repetition of domestic regulatory autonomy and elements of substantive balancing is no longer contradictory in logical terms. Unlike the *in dubio mitius* interpretation rule, which can no longer be considered as a primary rule for treaty interpretation,[192] the principle of deference here is not based on state sovereignty and national prerogatives, but on the responsibility of the state to protect its people and its accountability to citizens' interests and needs.[193] In turn, in the context of the proportionality analysis required by Article 2(2) SPS, the Appellate Body also considered cer-

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[188] Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491, 507 (2002); MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 535 (2005).

[189] S*ee further* Appellate Body Report, *Korea - Beef* (note 55), para. 178 – "responsible and representative governments may act in good faith".

[190] *EC - Hormones* (note 150), para. 124.

[191] *Cf.* Howse (note 151), 229.

[192] Rudolf Bernhardt, *Interpretation in International Law*, in: 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (EPIL), 1416, 1419 (Rudolf Bernhardt ed., 1995); Matthias Herdegen, *Interpretation in International Law*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 29 (Rüdiger Wolfrum ed., 2008), available at: http//:www.mpepil.com (visited on 18 October 2010).

[193] Howse (note 151), 229; with regard to health policies, *see further* Maxwell Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, 5 JIEL 825, 845 (2002).

tain legitimacy deficits of the Codex Alimentarius Commission and limited the impact of its standards.[194]

In international investment law, a comparable tendency can be discerned. Tribunals have emphasized that the conformity of an administrative measure with the relevant domestic legal rules normally excluded a violation of the fair and equitable treatment standard.[195] The relevant case law has been understood as broadly aligning with the democratic requirement that public power derive its authority from a legal basis and be exercised along the lines of pre-established procedural and substantive rules.[196]

F. Conclusion

Fragmentation has a substantive and an institutional dimension. Consequently, from a normative point of view, adequate response strategies must take into account both dimensions and conceive fragmentation as a problem not only of the rule of law, but also of democratic legitimacy. If specialized judicial institutions were simply regarded as reacting to fragmentation on a case-by-case basis, this would play down the institutional dimension of fragmentation. The balances specialized international courts and tribunals strike will have precedential value and thus raise questions about the allocation of authority in a fragmented international legal system. Proportionality analysis offers a framework for legal discourse about trade-off problems, and balancing may add important, output-influencing burdens of justification. Still, its rationalization potential is limited. Accordingly, recourse to the judicial technique of balancing cannot camouflage that judicial institutions exercise considerable authority at regime interfaces. Therefore, a certain institutional sensitivity of courts who act at these interfaces of legal subsystems is definitely in order. Additionally, legitimate adjudication with regard to trade-off problems and inter-regime relations demands ingredients of legitimacy in the adjudication of conflicting values that are

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[194] *EC - Hormones* (note 150), paras 176 *et seq*. and *cf.* MÖLLERS (note 34), 320–325.

[195] *See Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para. 178; *Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para. 297.

[196] Kingsbury & Schill (note 76), 14.

familiar to the theory and practice of domestic public law litigation – fair procedures, coherence and integrity in legal interpretation,[197] and political inclusiveness (which contrasts with the "club paradigm" at the WTO).[198] If these caveats are taken seriously, international judicial institutions can legitimately respond to governance deficiencies with regard to inter-regime relations and trade-off problems. To be sure, the allocation of authority beyond the state calls for further discussion. Still, international judicial institutions may produce important arguments here if they signal institutional sensitivity both vertically *vis-à-vis* domestic legislators and horizontally *vis-à-vis* other sub-systems of international law. Plainly, this would be judicial lawmaking by judicial restraint.

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[197] Howse (note 142), 42 *et seq.*

[198] Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, in: EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, 227, 243 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia Zampetti eds, 2001); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?,* 16 GOVERNANCE 74, 86 (2003); von Bogdandy & Venzke (note 2), 1356 – publicness, transparency and adequate participation as "minimal safeguards" against an "autocratic rule of courts" entrusted with the task of systemic integration.

III. Judicial Lawmaking to Protect the Individual:

The IACtHR, the ECtHR, and the ICTY

The Prohibition of Amnesties by the Inter-American Court of Human Rights

*By Christina Binder**

A. Introduction

The Inter-American Court of Human Rights has proven a particularly active defender of human rights in Latin America. The Court has developed an innovative and creative jurisprudence with respect to all kinds of human rights violations, including forced disappearances, extrajudicial killings, violations of indigenous peoples' rights or those of undocumented migrants.[1] Legal scholars have praised the Inter-American Court for its effective protection of human rights[2] and even the In-

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1 *See generally* on the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court, IACtHR) LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, LES GRANDES DÉCISIONS DE LA COUR INTERAMÉRICAINE DES DROITS DE L'HOMME (2008).

2 *See*, *e.g.*, Pía Carazo Ortíz, *El sistema interamericano de derechos humanos: democracia y derechos humanos como factores integradores en Latinoamérica*, in: ¿INTEGRACIÓN SURAMERICANA A TRAVÉS DEL DERECHO? UN ANÁLISIS INTERDISCIPLINARIO Y MULTIFOCAL, 231 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009); *see also* Laurence Burgorgue-Larsen, *El Sistema Interamericano de Protección de los Derechos Humanos entre Clasicismo y Creatividad*, in: ¿INTEGRACIÓN SURAMERICANA A TRAVÉS DEL

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236, DOI 10.1007/978-3-642-29587-4_9,

ternational Court of Justice has drawn on the judgments of the Inter-American Court.[3] The Inter-American Court has, however, also been criticized for adopting an overly broad standard of review, exceeding the competences conferred on it in the American Convention on Human Rights (ACHR, Convention)[4] and for its detailed reparation orders which encroached on the states' internal domestic affairs.[5] Put differently, the Court was blamed for being a too active judicial lawmaker. It has therefore been suggested that the Inter-American Court would be well advised to pay more attention to national sovereignty and the consent of the regional community of states when exercising its adjudicative function.[6]

In the extensive use of its powers, the Inter-American Court considerably draws on the competences attributed to it in the ACHR. The Court dynamically interprets the rights contained in the Convention, often

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DERECHO? UN ANÁLISIS INTERDISCIPLINARIO Y MULTIFOCAL, 311 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009).

[3] The Inter-American Court's interpretation of the right to information on consular assistance as an individual right of arrested persons adopted in the advisory opinion *Right to Information on Consular Assistance* (Inter-Am. Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16) was subsequently confirmed by the ICJ in the *LaGrand* and *Avena* cases (*LaGrand* (Germany v. United States), Judgment of 27 June 2001, ICJ Reports 2001, 466; *Avena and other Mexican Nationals* (Mexico v. United States), Judgment of 31 March 2004, ICJ Reports 2004, 12). *See also* the ICJ's reference to the IACtHR in *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of Congo, Judgment of 30 November 2010, para. 68.

[4] *See*, *e.g*, Gerald Neumann, *Import, Export and Regional Consent in the Inter-American Court of Human Rights,* 19 EJIL 101 (2008).

[5] *See* James L. Cavallaro & Stephanie E. Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AJIL 768, 824 (2008). *See*, *e.g*., *Miguel Castro-Castro Prison v. Peru* where the Inter-American Court directed the Peruvian state to inscribe the names of prisoners associated with the *Sendero Luminoso* who had died in politically motivated attacks on a national monument which provoked a public outcry. (Inter-Am. Court H.R., *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment of 25 November 2006, Series C, No. 160, para. 3.)

[6] Neumann (note 4).

widening their scope of protection.[7] It also finds innovative ways of implementation and enforcement.[8] These measures aim at ensuring that a state's human rights obligations are effectively implemented and give maximum effect to the ACHR. However, this dynamic has led to the Court's jurisdictional competence developing a life of its own which, at times, hardly finds a legal basis in the Convention. Moreover, the Inter-American Court has considerably restricted the scope of action of national institutions and domestic authorities in order to optimize the protection of human rights. This makes it a particularly interesting example in the broader perspective of this project on "lawmaking by international courts."

The Inter-American Court's proactive role with respect to a crucial Latin American legacy is especially telling: The passing of amnesty laws and decrees has shielded perpetrators of grave human rights violations from prosecution. The Court developed some of its most innovative and far-reaching approaches to the effective protection of human rights in its amnesty jurisprudence. The Inter-American Court – adopting a radically monist approach to the relationship between international and national law – gave direct effect to its judgments, determined that national laws lacked legal effects, and also obliged domestic courts to engage in a form of decentralized conventionality control (*control de convencionalidad*), whereby the domestic courts are prohibited from applying national laws which violate the ACHR.

This dynamism seems to be particularly necessary in the Latin American context of serious human rights violations, weak national institutions and fragile democracies. However, the restrictions that the Inter-American Court imposes on domestic authorities also raise questions concerning the delimitation of an international court's competence vis-à-vis domestic decision-making and the states' consent to such interference. In addition, the Inter-American Court needs the cooperation of national institutions, especially courts, to implement and enforce its judgments. The reactions of domestic actors and their acceptance of the Inter-American Court's jurisprudence are thus crucial.

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[7] *See infra* section C.III.

[8] *See generally* on the Inter-American Court of Human Rights Scott Davidson, The Inter-American Court of Human Rights (1992); Burgorgue-Larsen & Úbeda de Torres (note 1); Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, The Inter-American Court of Human Rights. Case Law and Commentary (2011).

This contribution will examine the lawmaking role of the Inter-American Court and its inherent tension with democratic self-determination. This will be done with special focus on the Court's jurisprudence on national amnesty legislation, which provides for impunity in cases of grave human rights violations. After a brief overview of the Court's role in the Inter-American system for the protection of human rights (part B), the Court's exercise of its judicial functions will be scrutinized with special focus on its amnesty jurisprudence (part C). It will be argued that the Inter-American Court considerably expands the competences originally attributed to it in the ACHR. It is against this background that the reception of its amnesty jurisprudence at the national level will be examined and evaluated (part D). Part E concludes.

B. Functioning and Jurisdiction of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights is, together with the Inter-American Commission on Human Rights, the main institution which was created by the Organization of American States (OAS) for human rights protection. Comparable to the European system before the entry into force of Protocol No. 11 to the European Convention on Human Rights, it is a two-track system, where the quasi-judicial Commission acts as first instance for victims of human rights violations. Where a state has accepted the jurisdiction of the Court in accordance with Article 62 ACHR, the Court acts as "second instance," issuing binding decisions on cases submitted to it by the Inter-American Commission or the affected state. Exercising jurisdiction over twenty one of the thirty five OAS member states,[9] the Inter-American Court might more appropriately be called the "*Latin* American Court of Human Rights," as neither the United States nor Canada has ratified the ACHR.

[9] The states which have recognized the IACtHR's jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. (As of June 2010, status of ratifications, available at: http://www.oas.org/juridico/spanish/firmas/b-32.html.)

The ACHR is the major source of human rights obligations in the region of the Americas.[10] The Convention also sets forth the competences attributed to the Inter-American Court.[11] The Court is composed of seven judges who are elected for terms of six years, with the possibility of one re-election, by the absolute majority of state parties to the ACHR.[12] Eminent (human rights) lawyers, such as Antônio Augusto Cançado Trindade and Thomas Buergenthal, have been appointed as judges and also presided over the Court.[13]

The Inter-American Court is not a permanent court but holds sessions at least twice every year.[14] In addition to exercising jurisdiction over contentious cases, including the competence to interpret its own judgments, the Court may also issue advisory opinions at the request of the Inter-American Commission, other organs of the OAS, and OAS member states. Furthermore, on the basis of the interpretation of its own mandate, the Inter-American Court retains the competence to supervise the execution of its judgments.[15]

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[10] The ACHR is ratified by 24 states. Grenada, Jamaica and Dominica have ratified the ACHR but not submitted to the jurisdiction of the Court. (*See id.*)

[11] *See* Arts 61-65 ACHR.

[12] Arts 52-54 ACHR; Arts 4-9 of the Statute Inter-American Court of Human Rights.

[13] Antônio Augusto Cançado Trindade (Brazil) acted as judge from 1995 to 2006; Thomas Buergenthal (United States) from 1979 to 1991. As of June 2010, the members of the Court were Rhadys Abreu Blondet (Dominican Republic, Ambassador with human rights portfolio); Leonardo A. Franco (Argentina, Professor for Human Rights Law at the National University of Lanús); Margarette May Macaulay (Jamaica, Attorney at Law at private practice); Diego García-Sayán (Peru, President of the IACtHR, General Director of the *Comisión Andina de Juristas*); Manuel E. Ventura Robles (Costa Rica, Vice-President of the IACtHR, *inter alia* former member of the Costa Rican foreign service); Alberto Pérez Pérez (Uruguay, Professor for Constitutional Law and Public International Law at the *Universidad de la República* in Montevideo) and Eduardo R. Vio Grossi (Chile, Professor for Public International Law at the University Diego Portales and the *Academia Diplomática de Chile "Andrés Bello"*). *See* Website of the Inter-American Court of Human Rights, available at: http://www.corteidh.or.cr/composicion.cfm.

[14] Art. 22 Statute of the Inter-American Court of Human Rights; Arts 11, 12 Rules of Procedure of the Inter-American Court of Human Rights.

[15] *See* Art. 63 Rules of Procedure of the Inter-American Court of Human Rights. The ACHR does not designate a body to supervise the execution of the Inter-American Court's judgments, but merely provides that the Court should

The Inter-American Court's proactive role as human rights defender and the fundamental importance given to its judgments stand in contrast to the number of cases it has decided so far. Especially in its early days, very few cases reached the Court. Although the Inter-American Court was established in 1979, it decided its first contentious case – *Velásquez Rodríguez v. Honduras*[16] – only in 1989.[17] The average caseload in the period 1989–2000 was three to four cases per year. Despite the fact that the number of cases that are submitted to the Court has increased in the last decade,[18] they remain few. In total, the Court has decided about 120 contentious cases, with around fourteen cases annually in recent years.[19] Given the more than 1,300 complaints received by the Inter-American Commission each year, themselves presenting only a small portion of the human rights violations in the region, the Court considers only a very small fraction of the human rights abuses committed in Latin America.

C. The Inter-American Court's Amnesty Jurisprudence

The problem of amnesty laws shielding perpetrators of grave human rights violations from prosecution is particularly critical in Latin America. Many states have a history of military dictatorships responsible for serious human rights violations, including forced disappearances, extrajudicial killings and brutal persecution of political opponents. In the

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indicate those states which have not complied with its judgments in its annual report to the OAS General Assembly (Art. 65 ACHR).

16 Inter-Am. Court H.R., *Velásquez Rodríguez v. Honduras,* Compensatory Damages (Art. 63(1) ACHR), Judgment of 21 July 1989, Series C, No. 7.

17 Before, the Inter-American Court issued numerous advisory opinions of major importance. (*See*, *e.g.*, Inter-Am. Court H.R., "*Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the ACHR),* Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1; Inter-Am. Court H.R., *Restrictions to the Death Penalty (Arts 4.2 and 4.4 of the ACHR)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3).

18 This is mainly due to a 2001 procedural reform modifying Art. 44.1 Rules of Procedure of the Inter-American Commission on Human Rights. Now, most cases have to be submitted to the Court in accordance with established criteria.

19 As of June 2010; the data are from: IACtHR, Jurisprudence: Decisions and Judgments, available at: http://www.corteidh.or.cr/casos.cfm.

context of transitions to democracy, amnesty laws were passed in numerous states (e.g., in Argentina, Chile, Uruguay),[20] establishing impunity for past human rights violations. In Peru, amnesty legislation was adopted under President Fujimori in 1995, shielding Fujimori himself and other human rights violators against prosecution for crimes they had committed in their fight against left wing guerrillas in the early 1990s.[21] Amnesty laws are still a major political topic in Latin America, given that transitions to democracy sometimes came "at the price" of amnesties. It proved difficult for young and only slowly consolidating democracies to struggle against impunity, as many of the previous leaders and human rights violators still remained in influential positions.[22] The Inter-American Court's amnesty jurisprudence appears to be particularly important in this context because it may support national efforts in this fight against impunity. The Court's jurisprudence is noteworthy moreover insofar as the ACHR – being adopted before the problem of impunity materialized in the region – does not explicitly deal with the problem of amnesties.

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[20] *See*, *for instance*, the notorious *Punto Final* and *Obediencia Debida* acts in Argentina which were passed in 1986 and 1987 and practically brought investigations on human rights violations committed by the military junta between 1976 and 1983 to a halt. *See also* the Chilean amnesty *decreto-ley* (decree-law) of 1978 (Amnesty decree law No. 2.191 of 18 April 1978, *Diario Oficial* [Official Gazette] No. 30.042) which established the non-responsibility for crimes committed between 11 September 1973 (military coup by Pinochet) and 10 March 1978. For Uruguay, *see* the Law Nullifying the State's Claim to Punish Certain Crimes/Limitations Act/Law of Expiry, Law No. 15.848 of 22 December 1986. For further reference, *see*, *e.g.*, STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 153 *et seq*. (2001).

[21] Law No. 26.479. *Conceden amnistía general a personal militar, política y civil para diversos casos* (Granting general amnesty for military, political and civil personnel for various cases) of 14 June 1995, published in *Normas Legales* (Legal Norms), No. 229 (1995) 200; modified by Law No. 26.492. *Precisan interpretación y alcances de amnistía otorgada por la Ley No. 26.479* (Detailing interpretation and scope of the amnesty granted by Law No. 26.479) of 28 June 1995, published in *Normas Legales* (Legal Norms), No. 230, 1995, 8.

[22] *See*, *e.g.*, Argentina, where President Carlos Menem pardoned around 30 top junta leaders in 1989 who had been imprisoned for human rights abuses due to the fear of a new military coup (decree 1002/89). The decree was recently declared unconstitutional by the Argentine Supreme Court in the *Mazzeo* Case, *see infra* section D.II.

The next sections will first examine the Court's jurisprudence concerning amnesty legislation contravening the ACHR. Second, it will be argued that the Inter-American Court's exercise of norm control – directly declaring a national amnesty law or decree to be without effect, or obligating national courts not to apply the law in a specific case before them (conventionality control/*control de convencionalidad*) – is based on a very broad interpretation of its own competences. Finally, potential problems of the Court's jurisprudence are highlighted.

I. Jurisprudence

Already in the early 1990s, the question of amnesty laws came up in the Inter-American system: In 1992 the Inter-American Commission stated that the Argentine and Uruguayan amnesty laws were inconsistent with those states' human rights obligations.[23] The Inter-American Court, asked by Argentina and Uruguay to render an advisory opinion on the Commission's competence to decide on the validity of domestic legislation, upheld the Commission's competence in this regard.[24] Still, "the political climate in the relevant countries remained hostile to the [Inter-American human rights] system's views on amnesty laws,"[25] and no immediate action at national level followed the Court's rulings. It was after 2000, with the Inter-American Court's landmark judgment in *Barrios Altos v. Peru* in 2001,[26] and later with the *La Cantuta v. Peru*[27] and

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[23] *See* Inter-American Commission on Human Rights, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311; IACHR Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992-93) (Argentina); Inter-American Commission on Human Rights, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375; IACHR Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, corr.1 (1992-93) (Uruguay). *See* Cavallaro & Brewer (note 5), 819 *et seq*. for further reference.

[24] Inter-Am. Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights (Arts 41, 42, 44, 46, 47, 50 and 51 of the ACHR)*, Advisory Opinion OC-13/93 of 16 July 1993, Series A, No. 13, paras 30, 37, 57(1).

[25] *See* Cavallaro & Brewer (note 5), 820.

[26] Inter-Am. Court H.R., *Barrios Altos v. Peru,* Merits, Judgment of 14 March 2001, Series C, No. 75.

[27] Inter-Am. Court H.R., *La Cantuta v. Peru,* Merits, Reparations and Costs, Judgment of 29 November 2006, Series C, No. 162.

Almonacid v. Chile[28] decisions in 2006, that the issue of amnesty legislation was brought back onto the regional human rights agenda.[29]

The *Barrios Altos* and *La Cantuta* cases against Peru concerned massacres in 1991 and 1992, which had been committed by the paramilitary death squad "*La Colina*" and ordered by then President Fujimori. Those responsible were shielded from prosecution by amnesty laws passed under the Fujimori government in 1995.[30] In the *Barrios Altos* case, the Inter-American Court found that such impunity for violations of non-derogable human rights norms was inadmissible:

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[31]

The Court accordingly established that the 1995 amnesty laws violated the rights of the victims' families and the survivors from being heard by a tribunal as contained in Article 8.1 ACHR and to judicial recourse as provided for in Article 25 ACHR. The Court furthermore stated that the amnesty laws impeded the investigation, capture, prosecution and conviction of those responsible for the human rights violations in the Barrios Altos massacre in contravention of Article 1.1 ACHR and obstructed the clarification of the facts of the case. In addition, the adoption of self-amnesty laws[32] was found incompatible with the ACHR and in violation of Peru's obligation to adopt the legislative measures necessary to give effect to its obligations under the ACHR in accordance with Article 2 ACHR. Finally, the Inter-American Court held

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[28] Inter-Am. Court H.R., *Almonacid Arellano y otros v. Chile,* Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Series C, No. 154.

[29] Concerning self-amnesties, *see also Loayza Tamayo v. Peru*, Reparations and Costs, Judgment of 27 November 1998, Series C, No. 42, paras 167 et seq. and operat. para. 2.

[30] Laws No. 26.479 and 26.492 (note 21).

[31] *Barrios Altos v. Peru* (note 26), para. 41.

[32] "Self-amnesties" are legal acts through which the regime committing the human rights violations shields itself from prosecution.

that the respective laws contributed to the defencelessness of victims and the perpetuation of impunity and were thus "manifestly incompatible with the aims and spirit of the [ACHR]."[33] Based on these considerations, the Inter-American Court ruled that the 1995 amnesty laws were devoid of legal effects ("*carecen efectos jurídicos*").[34] Subsequently, in an interpretation of its judgment (*sentencia de interpretación*), the Court confirmed the general effects of these rulings.[35]

These findings were reiterated in the *La Cantuta* case in 2006,[36] which prominently discussed the effects of the Peruvian amnesty laws before and after the *Barrios Altos* decision against the background of the massacre in La Cantuta in 1992.[37] The Inter-American Court established accordingly that, while between 1995 and 2001 (the *Barrios Altos* decision) the amnesty laws were applied and the situation was thus in contravention of the ACHR, after 2001, the amnesty laws were deprived of their legal effects in internal Peruvian legislation.[38] Survivors and victims' next of kin, whose perpetrators had not been prosecuted due to the effect of the amnesty laws between 1995 and 2001, were thus entitled to monetary compensation and psychological support. Furthermore, investigations and prosecutions had to proceed to hold responsible those who were accountable for the massacre.

The Court reached similar conclusions in *Almonacid v. Chile.*[39] The case concerned the extrajudicial killing of a professor (a supporter of the communist party) in September 1973 by state police forces of the Pinochet regime. The Inter-American Court found that the killing constituted a crime against humanity[40] and that such a violation could not remain unpunished.[41] The Court thus held that the non-prosecution of

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33 *Barrios Altos v. Peru* (note 26), para. 43.

34 *Id.*, operat. para. 4.

35 Inter-Am. Court H.R., *Barrios Altos v. Peru*, Interpretation of the Judgment on the Merits, Judgment of 3 September 2001, Series C, No. 83, para. 18 and operat. para. 2.

36 *La Cantuta v. Peru* (note 27).

37 *Id.*, paras 188, 189.

38 The Inter-American Court extensively listed Peruvian measures and jurisprudence to reach this conclusion.

39 *Almonacid v. Chile* (note 28).

40 *See*, *e.g.*, *id.*, para. 115.

41 *Id.*, para. 111.

those responsible by operation of the 1978 amnesty decree law (*decreto ley*)[42] constituted a violation of Articles 8.1 and 25 together with Articles 1.1 and 2 of the ACHR.[43] The Court, as in *Barrios Altos*, stated that the respective decree law was devoid of legal effects.[44] It ordered the compensation and satisfaction of the victims, including the prosecution of those responsible and the publication of the established facts in the *Diario Oficial* of Chile as well as in another newspaper of wide circulation. Furthermore, the Court found that the Chilean state was obliged to ensure that the 1978 amnesty decree law was no obstacle for the continuation of the investigations on the extrajudicial execution of the victim and similar situations, nor for the identification and punishment of those responsible in that case and similar cases.[45] Most importantly, in *Almonacid*, the Inter-American Court for the first time set forth its doctrine of conventionality control (*control de convencionalidad*).[46]

Thus, in the cases discussed above, the Inter-American Court adopts a similar approach with respect to domestic (self-) amnesty laws, which shield perpetrators of grave human rights violations from prosecution. The Court is less concerned about whether the respective law is a self-amnesty or an amnesty passed by a subsequent regime on the way of transition to democracy;[47] rather, it bases its argument on the amnesty laws' *ratio legis*: That such laws shield perpetrators of grave human rights violations from prosecution.[48] In doing so, the Court explicitly refers to the *jus cogens* character – the non-derogable nature – of the rights the crimes at issue had violated (prohibition of torture, prohibi-

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42 Amnesty decree law No. 2.191 (note 20).

43 *Almonacid v. Chile* (note 28), operat. para. 2.

44 *Id.*, operat. para. 3. The fact that the amnesty laws had not been applied by Chilean courts in various cases since 1998 was not considered sufficient to comply with the requirements of Art. 2 ACHR as the implementing authorities could change their approach (*id*., para. 121).

45 *Id*., operat. paras 5, 6.

46 *Id*., para. 124. For details, *see infra* sections C.II and III.

47 *Id*., para. 120.

48 *See Barrios Altos v. Peru* (note 26), para. 42. The Inter-American Court only generally refers to "amnesties" and "self-amnesties", without establishing clear procedural criteria as to the (in)admissibility of such laws. Only Judge Cançado Trindade, in a concurring opinion in the *Barrios Altos* Case, distinguished between amnesties and self-amnesties and considered self-amnesties as "particularly problematic". (*Barrios Altos*, Concurring Opinion of Judge Cançado Trindade (note 26), para. 7).

tion of extrajudicial killings, etc.).[49] It likewise rules that the respective amnesty laws are a violation of the survivors' and victims' family members' rights to a fair trial and to judicial protection[50] and declares them devoid of legal effects for being inconsistent with wording and spirit of the ACHR.[51]

II. Types of Norm Control Effectuated by the Court

In its amnesty jurisprudence (*Barrios Altos, La Cantuta* and *Almonacid*), the Inter-American Court does not oblige domestic authorities to amend or repeal deficient legislation. Rather, the Inter-American Court determines itself that the respective amnesty laws are without effects – *ab initio*[52] – for contravening central obligations under the ACHR. The wording chosen by the Court ("lack legal effects") shows that it does not consider an additional national legal act (e.g. a repeal of the amnesty law) necessary to give effect to its decision.[53] This is explicitly confirmed in the Separate Opinion of Judge García Ramírez in *La Cantuta*.[54] When affirming that national laws are without effects, the Inter-American Court attributes supranational force to its determina-

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[49] *See*, *e.g.*, *Barrios Altos v. Peru* (note 26), para. 41; *Almonacid v. Chile* (note 28), para. 111.

[50] Arts 8 and 25 ACHR.

[51] *See Almonacid v. Chile* (note 28), para. 119. *See also* the extensive appraisal of the Inter-American Court's contribution concerning the inadmissibility of self-amnesties by Judge Cançado Trindade, Separate Opinion, *La Cantuta v. Peru* (note 27), paras 23 *et seq*.

[52] This was stated most clearly in *La Cantuta*: "such 'laws' have not been capable of having effects, nor will they have them in the future." (*La Cantuta v. Peru* (note 27), para. 189).

[53] While especially the Court's findings in *La Cantuta* indicate that the Inter-American Court's statement is declaratory and not constitutive, such establishment would have been up to the competent institution at the domestic level (*e.g.* the constitutional court).

[54] *See* Separate Opinion of Judge García Ramírez, *La Cantuta v. Peru* (note 27), paras 4 and 5: "Basically, such laws are invalid – with no need for a special decision so holding as, in any event, any such decision would be a mere declaration of invalidity – from the very moment they conflict with the American Convention".

tions and acts like a domestic constitutional court.[55] Cassese highlights the importance of this feature by stating: "[C]'est la première fois qu'une juridiction internationale déclare que des lois nationales son dépourvues d'effets juridiques à l'intérieur du system étatique où elles ont été adoptées, et oblige par conséquence l'État à agir comme si ces lois n'avaient jamais été dictées."[56]

In addition to exercising a norm control which determines the validity of the respective laws, the Inter-American Court resorted to another innovative method to ensure the most effective implementation of the different states' human rights obligations in *Almonacid v. Chile*: The Court established that domestic courts were obliged not to apply national norms which were in violation of the ACHR and, what is more, in the interpretation given to the Convention by the Inter-American Court (*control de convencionalidad*).[57]

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of

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55 *See* Néstor Sagüés, *El 'Control de Convencionalidad' en particular sobre las Constitucionales Nacionales*, LA LEY of 19 February 2009, 3: "en ciertos veredictos … la Corte Interamericana habría incluso nulificado normas nacionales, como leyes de amnistía, con efectos *erga omnes*, comportándose así como un verdadero Tribunal Constitucional nacional." ("in certain judgments … the Inter-American Court has even nullified national norms, such as amnesty laws, with *erga omnes* effects, acting like a true national Constitutional Court.")

56 "It's the first time that an international court determines that national laws are devoid of legal effects within the state system where they have been adopted and consequently obliges the state to act as if these laws had never been enacted." Antonio Cassese, *Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?* in: CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES, 13, 16 (Antonio Cassese & Mireille Delmas-Marty eds, 2002).

57 Sagüés (note 55). *See also* Néstor Sagüés, *Obligaciones Internacionales y Control de Convencionalidad*, 8/1 ESTUDIOS CONSTITUCIONALES 117 (2010); Juan Carlos Hitters, *Control de Constitucionalidad y Control de Convencionalidad. Comparación (Criterios fijados por la Corte Interamericana de Derechos Humanos)* (2009), available at: http://www.scielo.cl/scielo.php?pid=S0718-52002009000200005&script=sci_arttext.

> laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. [58]

This decentralized conventionality control obliges national courts not to apply (provisions of) laws which are in contravention of the ACHR.[59] Crucially, this obligation is not conditional on obtaining a prior judgment by the Inter-American Court. The Inter-American Court bases the duty to exercise the *control de convencionalidad*, *inter alia*, on Article 27 VCLT, namely that a state cannot justify the non-compliance with an international treaty with reference to internal law.[60] Put differently, the Court asks domestic courts to exercise a conventionality control which is comparable to the constitutionality control in domestic constitutional law. The standard of review is not only the ACHR, but also "the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention."[61] The Inter-American Court thus obliges national judges to exercise their review also with reference to its own case law. According to the Court, national judges have to engage in such control not only when requested by a party to the case but also *ex officio*[62] and, where an internal norm violates the ACHR, abstain from applying it to the concrete case.[63] In situations where the national legislator has failed

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[58] *Almonacid v. Chile* (note 28), para. 124.

[59] In the interpretation of the Inter-American Court; for further details, *see infra* sections C.II and III.

[60] *Almonacid v. Chile* (note 28), para. 125.

[61] *Id*., para. 124.

[62] *See also* Inter-Am. Court H.R., *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 2006, Series C, No. 158, para. 128.

[63] *Almonacid v. Chile* (note 28), paras 123-125. The effect of such control by national judges is *inter partes*. (Sagüés (note 55), 2.) The Inter-American Court has not rendered a decision on what happens when the respective national tribunal is competent to invalidate norms *erga omnes*. Still, according to Sagüés, it might do so. (*Id*.)

to act and to amend the deficient law,[64] it is thus domestic courts and judges which have to give effect to the human rights guarantees in the ACHR. After being applied first in the *Almonacid* case 2006, the doctrine was confirmed in subsequent jurisprudence, including *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Peru* (November 2006),[65] *Heliodoro Portugal v. Panama* (August 2008)[66] and *Radilla Pacheco v. Mexico* (November 2009).[67]

III. Appreciation

Both forms of norm control, by the Inter-American Court and by domestic courts, aim at an effective implementation of a state's human rights obligations and give the maximum effect to the ACHR. The Inter-American Court's supranational determination that national laws (or decrees) are without effects bypasses the need for an additional national legal act.[68] Especially the *control de convencionalidad* has far-reaching consequences for the Latin American system of human rights protection, as it makes national judges the guardians of the human rights guarantees enshrined in the ACHR[69] and thus provides for its effective implementation at the decentralized level. In particular the latter,

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64 *See in this sense*, *Almonacid* (note 28), para. 123.

65 *Trabajadores Cesados del Congreso v. Peru* (note 62), para. 128.

66 Inter-Am. Court H.R., *Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 12 August 2008, Series C, No. 186, paras 180-181.

67 Inter-Am. Court H.R., *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 November 2009, Series C, No. 209, para. 339. *See furthermore* Inter-Am. Court H.R., *Boyce y otros v. Barbados*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2007, Series C, No. 169, para. 78.

68 This facilitates the work of national institutions, especially when the nullification of amnesty laws is met with domestic resistance. The effectiveness of such international human rights protection seems particularly warranted in the Latin American context of fragile democracies and weak domestic institutions (*see infra* section D).

69 The Inter-American Court appears to leave open whether such control must also be exercised with respect to other human rights treaties. *See Almonacid v. Chile* (note 28), para. 124, "an international treaty, *such as* the American Convention" (emphasis added).

if properly effectuated, would counterbalance the limited number of cases which are brought before the Inter-American Court of Human Rights, as domestic judges are required to ensure the ACHR's effectiveness at the national level. This may be needed in the field of amnesties in particular; and, more generally, in the Latin American context of serious human rights violations.

In fact, the Inter-American Court explicitly relies on the particularly grave character of human rights violations when establishing the nullity of amnesty laws and decrees by affirming that the respective human rights (prohibition of torture, etc.) are recognized as non-derogable in international human rights law. The Court thus introduces a certain graduation as regards the seriousness of violations based on a hierarchy of norms. This is likewise evidenced by the Court's jurisprudence with respect to other laws which violate the ACHR but do not establish impunity for the most serious human rights violations. In such cases, the Inter-American Court orders national authorities to amend the respective laws but does not declare them to be without effects itself. For instance, in *Fermín Ramírez v. Guatemala*[70] the Court established that a provision of the Guatemalan penal legislation which contravened the ACHR should be modified in a reasonable time and not be applied as long as it was not amended.[71] In *"La Última Tentación de Cristo,"* the Court asked Chile to amend a provision of its Constitution as the preliminary censorship established therein violated Article 13 (freedom of thought and expression) of the ACHR.[72] Consequently, the Court resorts to the drastic sanction of determining that a national law is devoid of legal effects[73] only when confronted with breaches of *jus cogens* and

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[70] Inter-Am. Court H.R., *Fermín Ramírez v. Guatemala*, Judgment of 20 June 2005, Series C, No. 126. In the case at issue, an individual had been condemned to death *inter alia* on the basis of a provision of the Guatemalan penal legislation which provided for an evaluation of the threat the individual posed *pro futuro*.

[71] *Id*., operat. para 8.

[72] Inter-Am. Court H.R., *"La Última Tentación de Cristo" (Olmedo Bustos y otros) v. Chile,* Merits and Reparations, Judgment of 5 February 2001, Series C, No. 73, operat. para. 4.

[73] The illegality of amnesty laws which establish impunity for the perpetration of most serious human rights violations meets a general trend in international law as evidenced in the practice of the UN Human Rights Committee, the ICTY and the Special Court for Sierra Leone. *See*, *for further reference*, Leyla Sadat, *Individual Progress in International Law: Considering Amnesty,*

only acts as a supranational court in case of most serious human rights violations.

Still, neither of the norm controls which were introduced by the Inter-American Court has a firm legal basis in the ACHR. The Court's direct determination that national norms are without effects is in certain contradiction to Article 2 ACHR, which establishes the obligation of *states* to bring their legislation in line with the ACHR and thus may be taken as indication that domestic rather than international action is required. The Inter-American Court's reference to Article 27 VCLT[74] – that no state can justify the non-compliance with an international treaty with reference to internal law, is not pertinent insofar as Article 27 VCLT is, according to the overwhelming opinion, directed to *inter-state* relations.[75] A violation of the ACHR in contravention of Article 27 VCLT entails state responsibility, but a violation of Article 27 VCLT does not as such have consequences for the validity of the internal norm contravening the international obligation (in this instance the ACHR).

The decentralized system of norm control by national courts, the *control de convencionalidad*, is not contemplated at all in the ACHR. The Inter-American Court seems to rely on an *effet utile* argument; that effect has to be given to the ACHR.[76] However, the need for an effective implementation of the Convention at the national level does not necessarily give the Inter-American Court the competence to determine *how* this is to be done. Rather, it would be up to the respective state to decide how best to comply with its obligations under the ACHR in accordance with the specificities of its domestic legal system. For example, implementing the *control de convencionalidad* may pose institutional and procedural problems, especially for states with centralized systems of norm control, i.e. where only one court (the Supreme Court or the Constitutional Court) is competent to safeguard the integrity of the Constitution, such as in Uruguay or Costa Rica.[77] Furthermore, the conventionality control may be incompatible with a state's internal

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in: PROGRESS IN INTERNATIONAL LAW, 335, especially 348 *et seq*. (Russel Miller & Rebecca Bratspies eds, 2008).

74 *Almonacid v. Chile* (note 28), para. 125.

75 *See* MARK VILLIGER, COMMENTARY TO THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 370 *et seq*. (2009).

76 *See* reasoning in *Almonacid v. Chile* (note 28), para. 125.

77 Since the 2005 constitutional reforms and the introduction of a centralized system of norm control this might be problematic also in Chile.

normative hierarchy, especially in states where the ACHR is not incorporated at constitutional level[78] or where provisions of national constitutions are found to violate the ACHR.[79] The Inter-American Court alluded to these problems when it stated that domestic institutions should engage in norm control within the ambit of their respective competences and with due regard to pertinent procedural regulations.[80] The Inter-American Court failed, however, to further elaborate and omitted to specify whether, for instance, in systems of centralized norm control, lower-instance judges would be exempt from conducting a *control de convencionalidad*.[81]

Finally, certain questions relate to the Court's statement that national judges have to base their conventionality control on the ACHR *in the interpretation made thereof by the Inter-American Court*. It seems to be based on the Court's competence as set forth in Article 62.3 ACHR to exercise jurisdiction on all cases concerning the "interpretation and application of the provisions of the Convention."[82] Still, the Inter-American Court's jurisprudence considerably extended the standard of review and also included universal human rights documents (the International Covenant on Civil and Political Rights (CCPR); Concluding Observations on Country Reports; and General Comments of the UN-Human Rights Committee (HRC))[83] and even soft law standards (e.g.

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[78] In Uruguay, the ACHR has the same rank as statutory laws (Art. 6 of the Constitution of Uruguay). *See*, *for further reference*, Allan Brewer Carías, *La interrelación entre los Tribunales Constitucionales de America Latina y la Corte Interamericana de Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela*, in: DIREITOS HUMANOS, DEMOCRACIA, E INTEGRAÇÃO JURÍDICA NA AMÉRICA DO SUL, 661 (Armin von Bogdandy, Flávia Piovesan & Mariela Morales Antoniazzi eds, 2009).

[79] As stated, in *"La Última Tentación de Cristo"* the Inter-American Court found that a provision of the Chilean Constitution was inconsistent with the ACHR and asked Chile to modify it. *"La Última Tentación de Cristo" v. Chile* (note 72). *Also see* Sagüés (note 55), 3. *Cf.* Hitters (note 57).

[80] *Trabajadores Cesados del Congreso v. Peru* (note 62), para. 128.

[81] It has been suggested in literature that in systems with centralized norm control domestic courts should adopt a pragmatic stand and simply refer the respective cases to the competent tribunal. (Sagüés (note 55), 2.)

[82] *See* the Inter-American Court's definition of its role as "the ultimate interpreter of the ACHR" in *Almonacid v. Chile* (note 28), para. 124.

[83] *See*, *e.g.*, Inter-Am. Court H.R., *Ricardo Canese v. Paraguay,* Merits, Reparations and Costs, Judgment of 31 August 2004, Series C, No. 111, paras 115-135 (relying on HRC General Comment No. 27); Inter-Am. Court H.R.,

the UN Guiding Principles on Internal Displacement[84]) when examining whether a violation of the respective state's human rights obligations had occurred. Already the Inter-American Court's own competence to engage in such extensive review seems a somehow doubtful extension of its mandate.[85] To ask domestic judges to review cases according to these strict human rights standards appears to broaden the Inter-American Court's competences even further. In addition, where the review competence of domestic judges comprises only the ACHR, this may pose institutional problems at the national level.[86]

To sum up, despite the above-mentioned compelling practical reasons for the Court's lawmaking and its introduction of both systems of norm control, they lack a firm legal basis in the ACHR. Rather, the Inter-American Court resorts to an (overly?) extensive interpretation of its own competences. In addition, the Court considerably restricts domestic authorities (legislators and courts in particular) in their choice of

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Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 June 2005, Series C, No. 127, para. 208 (quoting from HRC General Comment No. 25); Inter-Am. Court H.R., *Raxcacó Reyes v. Guatemala*, Judgment of 15 September 2005, Series C, No. 133 (2005), para. 69 (citing HRC Concluding Observations on reports of Iran and Iraq). *See generally* Neumann (note 4), 109 *et seq*. *See also*, most recently, Inter-Am. Court H.R., *Saramaka People v. Suriname*, Judgment of 28 November 2007, Series C, No. 172, paras 92-94, where the Inter-American Court drew *inter alia* on Arts 1, 27 CCPR, HRC Concluding Observations on the Russian Federation and HRC General Comment No. 23: The Rights of Minorities (Art. 27), to interpret the right to property in Art. 21 ACHR with special focus on indigenous peoples. *See*, *for further reference*, Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE JOURNAL OF INTERNATIONAL LAW 699 (2008).

84 *Guiding Principles on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add. 2, relied upon by the Inter-American Court in the *Moiwana Village* Case. (Inter-Am. Court H.R., *Moiwana Village v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C, No. 124, para. 111.)

85 The Inter-American Court stated respectively that "a certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the Convention" ("*Other Treaties*" (note 17), para. 41) and also relied on Art. 29(b) ACHR. *See* critically Neumann (note 4), 111 *et seq*; and Cavallaro & Brewer (note 5), 817.

86 Certain national constitutions enumerate exhaustively the human rights treaties which are incorporated at constitutional level. (*See*, *e.g.*, Art. 75.22 of the Argentine Constitution).

how to best give effect to the ACHR at the national level, which raises legitimacy concerns as regards domestic decision-making. Against that background, it seems particularly fruitful to examine the reception of the Inter-American Court's amnesty jurisprudence in the states under its jurisdiction.

D. Reception of the Inter-American Court's Amnesty Jurisprudence at the National Level

The following section examines the reception of the jurisprudence of the Inter-American Court in selected states where (self-) amnesties proved to be particularly problematic, namely in Peru, Chile, Argentina and Colombia. One may distinguish between two sets of cases: First, those where states are obliged to implement the Court's decision pursuant to Article 68 ACHR;[87] and second, cases where states were not party to the proceedings and are thus not directly legally bound to follow the Inter-American Court's amnesty jurisprudence ("spill-over effect").

I. Effect Given to the Inter-American Court's Judgments by the States Parties to the Dispute

Peru fully complied with the *Barrios Altos* decision and followed the Inter-American Court's determination that the 1995 amnesty laws were devoid of legal effects. This was done on the basis of the incorporation of the ACHR in the domestic legal system[88] and national legal provisions making it possible to give effect to international decisions.[89] Ac-

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[87] Under Art. 68 ACHR states undertake "to comply with the judgment of the Court in any case to which they are parties."

[88] Arts 55-57 of the Peruvian Constitution. The Peruvian Constitution does not provide for an incorporation of international (human rights) treaties at a certain rank in legal hierarchy. Still, Art. 55 of the Constitution states that international treaties are "part of national law" and its final provisions establish that constitutional rights and freedoms have to be interpreted in accordance with international human rights treaties ratified by Peru.

[89] *See*, *e.g.*, Law No. 27.775 *Regula el procedimiento de ejecución de sentencias emitidas por Tribunales Supranacionales* (Regulating the procedure for the

cording to the Peruvian Constitutional Court (*Tribunal Constitucional*), [90] the Inter-American Court's interpretative authority in accordance with Article 62.3 ACHR made its interpretations binding upon all national authorities, including the Peruvian Constitutional Court. More particularly, the Constitutional Court found that not only the operative part of the judgments but also the Inter-American Court's reasoning had binding force.[91] The Constitutional Court was perhaps most outspoken on 29 November 2005[92] when it stated, in ordering investigations to be continued in compliance with the *Barrios Altos* decision, that the obligation of the Peruvian state to establish the facts and sanction the responsible did not only imply the nullity of those trial proceedings where the amnesty laws in question had been applied, but also of all other practice with the objective to prevent the investigation and sanction of violations of the right to life and physical integrity.[93]

In general, the Peruvian domestic authorities took a series of measures to eliminate the effects of the 1995 amnesty laws in the aftermath of the *Barrios Altos* judgment. These culminated in the conviction of former President Fujimori, who was sentenced to twenty five years of imprisonment in April 2009 by a Special Criminal Chamber of the Peruvian Supreme Court for the Barrios Altos and La Cantuta massacres, among

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execution of judgments handed down by Supranational Tribunals); Art. 115 *Código Procesal Constitucional* (Constitutional Procedure Code).

[90] The Peruvian Constitutional Court acts as the final interpreter of the Constitution with the competence to derogate, with *erga omnes* effects, unconstitutional legislation. In addition, ordinary judges may decide not to apply or enforce unconstitutional laws with effects *inter partes*. (System of judicial diffuse norm control in combination with a centralized control in a specialized court, *see* Arts 138, 201, 202 and 204 of the Peruvian Constitution.) (*See* Néstor Sagüés, *Regional Report Latin America*, VII. Konrad Adenauer Stiftung Conference on International Law, The Contribution of Constitutional Courts in Safeguarding Basic Rights, Democracy and Development 10 [2009]). As to the Peruvian Constitutional Court's composition of June 2010: all seven judges were professors of law at different Peruvian Universities. (*See* Website of the Peruvian Constitutional Court, available at: http://www.tc.gob.pe/magistrados/magistrados.html.)

[91] This even in cases where Peru was not a party to the dispute, *see infra* note 133.

[92] *See* Constitutional Court of Peru, *Santiago Martín Rivas*, Expediente N° 4587-2004-AA/TC, 29 November 2005.

[93] *See id.*, para 63.

other charges.[94] Furthermore, all judicial and prosecutorial institutions were ordered to give effect to the *Barrios Altos* decision.[95] Cases where the amnesty laws had been applied to shield perpetrators from prosecution thus had to be reopened.[96] Military tribunals also determined – in reliance on Article 27 VCLT – that the 1995 amnesty laws were devoid of legal effects for violating the ACHR.[97]

The Inter-American Court's position on the nullity of amnesty laws contravening the ACHR is thus given effect by Peruvian tribunals.[98] In so doing, the tribunals seem to adopt a radically monist understanding concerning the relationship between national and international law. The Peruvian Constitutional Court, in particular, supporting a full incorporation of the Inter-American Court's *Barrios Altos* decision in the national legal system, accepts the Inter-American Court as supreme interpreter of the ACHR and treats its decisions and reasoning as having a direct binding effect for Peruvian national authorities.

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[94] Sala Penal Especial, Corte Suprema de Justicia, *Sentencia Alberto Fujimori Fujimori*, Expediente N° AV-19-2001, 7 April 2009. The Special Criminal Chamber was composed of three Supreme Court judges. The charges were grouped into three different public trials, with the first trial focussing on human rights issues including the Barrios Altos and La Cantuta massacres. The decision was rendered on 7 April 2009 with Fujimori being found guilty on all charges. As of June 2010 it was under appeal before a second panel of five Supreme Court judges whose decision will be final. For details, *see* Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 INTERNATIONAL JOURNAL OF TRANSNATIONAL JUSTICE 384, 396 (2009).

[95] *Resolución de cumplimiento de sentencia del 22 de Septiembre de 2005*. *See also La Cantuta v. Peru* (note 27), para. 179.

[96] Peruvian judicial authorities declared "amnesty exceptions" or the denial of the opening of criminal investigations as inadmissible arguing with the inapplicability of amnesty laws in reliance on the *Barrios Altos* Case. *See*, *e.g.*, Segundo Juzgado Penal Especializado, *Causa Pedro Yauri Bustamante*, Causa N° 044-2002, 20 October 2004; Juez Penal Titular Superior de Justicia de Lima, *Caso Acumulado Barrios Altos*, *La Cantuta, Pedro Yauri y El Santa*, Causa N° 032-2001, 7 December 2004.

[97] *Consejo Supremo de Justicia Militar*, *Sala Plena,* Judgment of 1 June 2001; *Sala Revisora* (second instance tribunal in the Peruvian military justice system), Decision of 4 June 2001.

[98] *See*, *e.g.*, the findings of the Inter-American Court in *La Cantuta* where the Court establishes that Peru had fully implemented the *Barrios Altos* judgment (*La Cantuta v. Peru* (note 27), para. 186).

Moreover, the Inter-American Court's amnesty jurisprudence lent support to Peruvian human rights and victims' associations in their fight for truth and reconciliation and against impunity.[99] The Court's judgments gave momentum to movements that were pushing for the prosecution of human rights violators at the domestic level. This alliance of forces culminated in the conviction of former President Fujimori in April 2009. Burt concludes after an extensive analysis of the Inter-American Court's contribution to Peru's struggle against impunity: "The Fujimori trial … also reveals the rich synergy between domestic and international actors in the struggle to achieve accountability after atrocity. The Peruvian case thus reflects the ways international tribunals can complement and contribute to local efforts in favor of an accountability agenda."[100]

The effects of the Inter-American Court's amnesty jurisprudence, though considerable, are somewhat less evident in Chile. The implementation of *Almonacid* was more indirect.[101] In Chile,[102] no direct effect is attributed to the Inter-American Court's judgments. Furthermore, a bill promoted by the Chilean government to amend the Chilean criminal code so that serious human rights violations were not subject to amnesties or statutes of limitation (such as foreseen in the 1978 amnesty decree law) remained deadlocked in Congress as of June 2010.[103]

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[99] *See* Burt (note 94).

[100] *Id.*, 403.

[101] For a general appraisal, *see* Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law*, 12 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 429, 455 (2005-2006).

[102] The 2005 reforms of the Chilean Constitution introduced a system of centralized norm control located at the Constitutional Court, which is vested with a monopoly to rule on the constitutionality of legislation with *erga omnes* effects (Art. 82 of the Chilean Constitution). Still, the Chilean Supreme Court is tasked to engage in norm control until the end of its term of office (*Cuadragesimacuarta*, Chilean Constitution). Art. 5 of the Chilean Constitution establishes the obligation to respect the fundamental rights of persons as recognized in the Constitution and international human rights treaties ratified by Chile. Thus, international human rights treaties arguably have constitutional rank.

[103] Interview with Gonzalo Aguilar Cavallo, Professor for Public International Law and Human Rights Law at the *Universidad de Talca*, Heidelberg, 29 June 2010; *see also* Human Rights Watch, Chile, Events of 2009, available at: http://www.hrw.org/en/node/87512.

At the same time, the 1978 amnesty decree law is not applied in practice as the Chilean Supreme Court has ruled consistently that the amnesty decreed by the military government in 1978 was inapplicable to war crimes or crimes against humanity, and that these crimes were not subject to the statute of limitations.[104] The Chilean Supreme Court referred *inter alia* to the Inter-American Court's *Almonacid* decision (as well as to *Barrios Altos*) when ruling that domestic legal norms could not be used as obstacles for the prosecution of perpetrators of gross human rights violations.[105] Also, the Inter-American Court's amnesty jurisprudence is generally well received and favourably discussed in Chilean and Latin American scholarship.[106]

To sum up, the Inter-American Court's broad interpretation of its own competences in the field of amnesties was accepted in Peru as well as in Chile. What is more, the Court's amnesty decisions generally supported domestic actors in their struggle against impunity. In fact, in both countries, the nullification of amnesty laws through the Inter-American Court "facilitated" the work of Chilean and Peruvian authorities, as it dispensed the need for an additional national act. This pragmatic approach seems to be especially appropriate in cases where it is difficult – due to internal resistance – to domestically amend or repeal problematic amnesty laws. This also points to the crucial role of domestic judges where the implementation of human rights obligations is concerned.

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[104] *See id.*

[105] Supreme Court of Chile, Criminal Chamber, *Molco Case*, No. 559-2004, 13 December 2006, paras 19-20, available at: http://www.cecoch.cl/htm/htm/revista/docs/estudiosconst/revistaano-5-1-htm/sentencimolco5_l-2007.pdf. (*See*, *however*, the Inter-American Court's findings in *Almonacid v. Chile* (note 28), para. 121; *see*, *for further reference*, note 44).

[106] Interview with Gonzalo Aguilar Cavallo (note 103). *See*, *e.g.*, Carlos M. Ayala Corao, *La ejecución de sentencias de la Corte Interamericana de Derechos Humanos / The execution of the decisions of the Inter-American Human Rights Court*, 5/1 ESTUDIOS INTERNACIONALES 127 (2007), available at: http://www.cecoch.cl/htm/revista/revistaano_5_1_2007.html; *see* more generally publications by Centro de Estudios Constitucionales de Chile (CECOCH), available at: http://www.cecoch.cl/htm/Imagenes.htm; and Scientific Electronic Library Online (SciELO Chile), available at: http://www.scielo.cl.

II. Reception of the Inter-American Court's Judgments in Other States

The "spill-over effect" of the Inter-American Court's amnesty jurisprudence to states not parties to the dispute is facilitated by the high rank accorded to the ACHR in the constitutions of most Latin American states and the self-executing character attributed to the rights enshrined in the Convention.[107] In fact, the constitutionality control of laws or decrees, which is exercised by domestic judges, often automatically includes a conventionality control because the ACHR is incorporated at constitutional level.[108] The Convention's direct incorporation also reduces legitimacy concerns as the Inter-American Court's exercise of authority is sanctioned by previous national constitutional processes. Still, what remains to be seen is to what extent domestic judges follow the Inter-American Court's interpretations of the Convention and whether they accept the doctrine of *control de convencionalidad*.

To make a long story short, domestic courts in Argentina and Colombia attached great importance to the Inter-American Court's amnesty jurisprudence;[109] especially the *Barrios Altos* case, which is frequently referred to. The "spill-over effect" of the Inter-American Court's jurisprudence thus seems considerable. Amnesty legislation is not applied to specific cases or is declared unconstitutional *inter alia* in reliance on the criteria established in the judgments of the Inter-American Court.

Argentine amnesty legislation cases reflect the establishment of the Inter-American Court's doctrine of *control de convencionalidad* in 2006.[110] Already in the case, *Julio Héctor Simón* of 2005,[111] the Argen-

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[107] *See*, *for further reference*, Brewer Carías (note 78). *See generally* Thomas Buergenthal, *Self-executing and Non-self-executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 326 (1992).

[108] *See*, *e.g.*, María Angélica Gelli, *El Liderazgo Institucional de la Corte Suprema y las Perplejidades del Caso "Mazzeo"*, LA LEY of 7 December 2007, 1.

[109] For a detailed appraisal, *see* Tittemore (note 101), 449 *et seq*.

[110] Argentina has a system of diffuse norm control where judges are obliged not to apply unconstitutional legal provisions to a particular case with effects *inter partes*. Thus, the legislation remains in force. Still, as Argentina applies a doctrine similar to the American "*stare decisis*" doctrine, this implies a certain binding effect on later decisions. (*See* Sagüés (note 90), 3 *et seq*.) In Argentina, certain international human rights treaties, including the ACHR, are incorporated at constitutional level in accordance with Art. 75.22 of the Argentine Constitution.

tine Supreme Court relied extensively on the *Barrios Altos* decision when stating that Argentina's amnesty laws (*Punto Final* and *Obediencia Debida*) were unconstitutional.[112] The Argentine Supreme Court referred to the Inter-American Court's reasoning, specifically when stating that the Argentine amnesty laws had the same deficiencies as the Peruvian ones: They were self-amnesties, laws *ad hoc* and intended to prevent the prosecution of grave human rights violations.[113] The Supreme Court supported this reliance by arguing that the decisions of the Inter-American Court had to be interpreted in good faith and taken as "jurisprudential blueprints."[114]

The Argentine Supreme Court's most important decision, however, is *Mazzeo,*[115] where, in 2007, the Supreme Court determined that the 1989 decree passed by President Menem,[116] by which the President had pardoned thirty former military officers of the *Videla* regime, was unconstitutional. In so doing, the Argentine Supreme Court applied the *control de convencionalidad* and recognized the interpretative authority of the Inter-American Court as to the rights contained in the ACHR.[117] It

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[111] Argentine Supreme Court, *Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, Causa No. 17.768, Judgment of 14 June 2005. *See*, *for further reference*, Diego García-Sayán, *Justicia interamericana y tribunales nacionales*, in: ¿INTEGRACIÓN SURAMERICANA A TRAVÉS DEL DERECHO? UN ANÁLISIS INTERDISCIPLINATIO Y MULTIFOCAL, 463, 473 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009).

[112] *See Julio Héctor Simón* (note 111), para. 24.

[113] *Id.*

[114] *Id.* Argentine appeals courts, such as the *Cámara Federal de Apelaciones de Salta,* also referred to the Inter-American Court's reasoning in the *Barrios Altos* Case when stating that the Argentine amnesty laws *Obediencia Debida* and *Punto Final* were unconstitutional. (*See* García-Sayán (note 111), 474.)

[115] Argentine Supreme Court, *Mazzeo Julio Lilo y otros*, Judgment of 13 July 2007, Jurisprudencia Argentina 2007-III-573, para. 21.

[116] Decree 1002/89 (note 22).

[117] *Mazzeo* (note 115), para. 21: "En otras palabras, el Poder Judicial debe ejercer una especie de "*control de convencionalidad*" entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos. En esta tarea, el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana." ("Put differently, the judiciary must exercise a sort of "conventionality control" between internal legal norms which apply in concrete cases and the American

relied on the criteria which were developed by the Inter-American Court[118] when analysing a state's duty to investigate and prosecute crimes against humanity, to ultimately conclude that such crimes could not be pardoned and that the 1989 decree was unconstitutional.[119]

These examples show that Argentine courts generally accept the Inter-American Court's authority in the field of amnesties. The Court's important role was aptly summarized by Tittemore:

> It is apparent, therefore, that over the past several years, the inter-American jurisprudence has had a specific and significant impact upon efforts by the judiciary in Argentina to remove amnesties and statutes of limitations as obstacles to prosecutions for serious human rights violations committed during the military dictatorship in that country.[120]

Similarly, at the political level, the Inter-American Court's amnesty jurisprudence and, more generally, the Inter-American system of human rights protection – including, e.g. the Inter-American Commission's on-site country visits – has had an impact.[121] For example, people with experience in the Inter-American human rights system who, in addition, had sometimes been victims of the former military regime, served in the Argentine government.[122] This, as argued by Tittemore, is likely to have influenced Argentina's human rights policies and contributed to advancements in the fight against impunity at the domestic level.[123]

Convention on Human Rights. In so doing, the judiciary must not only take into consideration the Convention, but also the interpretation which is made thereof by the Inter-American Court, the ultimate interpreter of the American Convention").

[118] The Argentine Supreme Court also referred to the IACHR and the UN-HRC.

[119] *Mazzeo* (note 115), paras 21 and 29.

[120] Tittemore (note 101), 455.

[121] For details, *see id.,* 457 *et seq*. and 463 *et seq.*

[122] For instance, former IACHR Member and President Oscar Luján Fappiano served as the Secretary for Human Rights in the Argentine Ministry of Justice, Security and Human Rights. Jorge E. Taiana, who had been the IACHR's Executive Secretary from 1997 to 2001 held the position of Secretary of Foreign Affairs with the Government of President Nestor Kirchner. Taiana had also been political prisoner under the Argentine military dictatorship. *See id*., 463.

[123] *Id*., 465.

Likewise, in Colombia, the impact of the Inter-American Court of Human Rights is noteworthy. The Colombian Constitutional Court (*Tribunal Constitucional*)[124] based itself repeatedly on the Court's reasoning when deciding on the constitutionality of (self-) amnesties.[125] For example, when declaring unconstitutional a provision on the general inadmissibility of amnesties and acts of grace for participants of serious crimes of a Colombian law,[126] the Constitutional Court drew on the decisions of the Inter-American Court to distinguish between different categories of amnesties.[127] Likewise, when declaring constitutional the law ratifying the Statute of the International Criminal Court,[128] the Colombian Constitutional Court referred to the jurisprudence of the Inter-American Court when establishing that only specific amnesties (such as for political offences) might be permissible under certain conditions, but not amnesties which shielded the perpetrators of serious human rights violations from prosecution.[129] In a decision concerning acts of grace and amnesties in cases of forced disappearances, the Constitutional Court relied on the jurisprudence of the Inter-American Court to hold that the right to legal recourse for victims had improved through the evolution of international human rights protection.[130] In other cases, not related to amnesties, the Colombian Consti-

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[124] In Colombia, a decentralized system of norm control, where all judges are bound to use the "unconstitutionality exception" with effect *inter partes*, coexists with a control exercised by the Constitutional Court which declares unconstitutional laws to be unenforceable with general effects. (Arts 241-243 of the Colombian Constitution). Pursuant to Art. 93 of the Colombian Constitution, international human rights treaties are arguably incorporated at constitutional rank (so called "*bloque constitucional*"). *See* Manuel José Cepeda Espinosa, *Country Report Colombia*, VII. Konrad Adenauer Stiftung Conference on International Law. The Contribution of Constitutional Courts in Safeguarding Basic Rights, Democracy and Development 5 (2009).

[125] For a full list of cases, *see* http://www.corteconstitucional.gov.co. For further reference, *see* Tittemore (note 101), 457 *et seq*.

[126] Art. 13 of Law 733 of 29 January 2002.

[127] Colombian Constitutional Court, Judgment C-695/02 of 28 August 2002, para. 8.

[128] Law 742 of 5 June 2002.

[129] Colombian Constitutional Court, Judgment C-578/02 of 30 July 2002, 4.3.1.2.5.

[130] Colombian Constitutional Court, Judgment C-875/02 of 15 October 2002. The Colombian Constitutional Court distinguished the case under review

tutional Court explicitly recognized the jurisprudence of the Inter-American Court as binding.[131]

Also in states that are not party to the dispute, the Inter-American Court's amnesty jurisprudence is thus, at a minimum, relied upon as interpretative guidance;[132] sometimes it is accepted as mandatory.[133] Consequently, domestic jurisprudence shows the positive impact, the "spill-over effect," of the Inter-American Court's judgments. The Inter-American Court's far-reaching interpretation of its own powers, its lawmaking, has been accepted in the case of amnesty laws contravening the ACHR.

Moreover, reference to the Inter-American Court's judgments seems to assist domestic courts in their fight against impunity and inadmissible amnesties at the national level, as it gives moral and legal authority to their decisions.[134] The Inter-American system also positively influences the different states' human rights policies in the field of amnesties. Most

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from a different decision in an earlier case (1995) with reference to the 2001 *Barrios Altos* Case.

[131] *See* Colombian Constitutional Court, Judgments T-568 of 10 August 1999, C-010 of 19 January 2000 and C-200 of 19 March 2002, available at: http://www.corteconstitucional.gov.co.

[132] This was also the case in Chile, where judgments of the Inter-American Court were relied upon for interpretative guidance when dealing with problematic amnesty laws which were not applied to a particular case already before the *Almonacid* decision. For example, the Appellate Court of Santiago de Chile, when rejecting the appeal presented by those prosecuted for the detention and later disappearance in the case of *Miguel Ángel Sandoval Rodríguez*, referred to the *Barrios Altos* case. *See*, *for further reference*, Humberto Nogueira Alcalá, *Una senda que merece ser transitada: la sentencia definitiva de casación de la Quinta Sala de la Corte de Apelaciones de Santiago, Rol 11.821-2003, Caso Miguel Ángel Sandoval Rodríguez*, 9 REVISTA IUS ET PRAXIS 233 (2003). *See also* García-Sayán (note 111), 473.

[133] The Peruvian Constitutional Court generally affirmed that even when Peru had not been party to the proceedings, the Inter-American Court's judgments were binding on the state. Peruvian Constitutional Court, *Caso Arturo Castillo Chirinos*, Expediente N° 2730-06-PA/TC, Judgment of 21 July 2006, para. 12.

[134] For the case of Peru, *see* Burt (note 94). *See generally* Tittemore (note 101), 461, "courts in [the OAS] region are playing an increasingly proactive and independent role in addressing issues involving accountability for serious violations of human rights, and are drawing considerably upon the instruments and doctrine of the inter-American human rights system in this effort."

importantly, it provides support to civil society and human rights and victims associations, which rely on the national-international alliance in their fight against impunity.[135]

In the final analysis, the Inter-American Court's far-reaching exercise of authority in the field of amnesties and the broad interpretation of its own mandate seem to further democratization in various Latin American countries. The emphasis on accountability and the Court's effective human rights protection facilitates the efforts of domestic institutions in their endeavour to implement human rights and the rule of law. In so doing, the Court supports democratic transition and consolidation.[136] Thus, the tension between the Inter-American Court's proactive role, its lawmaking, and democratic self-determination appears to have been overcome in the field of amnesties at least.

E. Conclusion

The Inter-American Court has developed a dynamic jurisprudence and engaged in important lawmaking to give effect to the ACHR's human rights guarantees in the field of amnesties. Interpreting its own powers broadly, the Court not only declared national amnesty laws contravening the Convention devoid of legal effects, but also obliged domestic

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[135] *See*, *e.g.*, Burt (note 94), 385-386, as regards the Peruvian civil society's search for accountability: "Of special importance was their increasingly effective use of the inter-American system of human rights protection to advance this agenda: once Peru's transition to democracy was under way, the rich jurisprudence of the Inter-American Court of Human Rights (Inter-American Court), as well as the recommendations by the Inter-American Commission on Human Rights (IACHR), fundamentally shaped the policies regarding truth, justice and reparations adopted by the transitional government and key judicial bodies."

[136] *See id*. *See also* Tittemore (note 101), 469, "over time, the inter-American human rights system has had a domestic political impact in some Member States upon efforts to ensure accountability for serious human rights violations and thereby combat impunity in the region. Moreover, these effects, together with the influences upon the judiciary, can be viewed as potentially long-term and enduring, as they have contributed to the consolidation of a culture of democracy and the rule of law within the Member States concerned. In this way, the Inter-American system has helped to empower member States themselves to be the principal guarantors and defenders of fundamental human rights".

judges to exercise a decentralized conventionality control in accordance with its own interpretation of the ACHR.

This arrogation of competences through the Inter-American Court seems to have been accepted by domestic courts in Peru, Chile, Argentina and Colombia. The Inter-American Court's judgments concerning amnesty laws were implemented not only in the states which were parties to the cases (Peru, Chile), but also relied on in states not parties to the dispute (Argentina, Colombia). In this context, legal scholarship has referred to a veritable "dialogue" which developed between the Inter-American Court and domestic courts.[137]

In the field of amnesties, the impact of the Inter-American Court of Human Rights' lawmaking is thus considerable. Through the direct incorporation of the ACHR in most Latin American constitutions, the Inter-American Court's jurisprudence gains immediate force at the national level as it is relied on by domestic courts when exercising a constitutionality/conventionality control. This is supported by the radically monist understanding concerning the relationship between international and national law as regards human rights norms prevalent in most Latin American states. The limited number of cases brought before the Inter-American Court is thus overcome by the guidance its interpretations give to domestic courts and tribunals.

Still, the Inter-American Court's amnesty jurisprudence is to be appreciated against the background of the generally favourable political climate in Latin America, which turned against impunity in the 1990s, culminating in Pinochet's arrest in 1998. The Inter-American Court's jurisprudence on amnesty laws thus supported efforts by domestic judges, legislatures and civil society groups to invalidate amnesty laws. The growing distance to former (military) governments also contributed to a climate in which the invalidation of an amnesty could meet with both public and institutional support.[138] The Court's amnesty jurisprudence was thus well received and generally welcomed by public opinion, the media and civil society organisations in the respective

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137 Karla Quintana Osuna, *Diálogo entre la jurisprudencia interamericana y la legislación interna: el deber de los estados de adoptar disposiciones de derecho interno para hacer efectivos los derechos humanos*, in: ¿INTEGRACIÓN SURAMERICANA A TRAVÉS DEL DERECHO? UN ANÁLISIS INTERDISCIPLINARIO Y MULTIFOCAL, 573 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009).

138 Cavallaro & Brewer (note 5), 82.

states.[139] Likewise, it seems to have contributed to democratic consolidation in different Latin American states and, ultimately, to domestic self-determination.

The Inter-American Court's exercise of its competences may be more controversial in areas where public opinion is divided and the political context different. The decision of the Venezuelan *Sala Constitucional del Tribunal Supremo,*[140] which declared a judgment of the Inter-American Court[141] as non-executable, may serve as warning. In the same decision, the *Sala Constitucional* also asked the Venezuelan government to denounce the ACHR. Whereas the Venezuelan tribunal's decision was clearly politically motivated, most of its judges being appointed because of their closeness to President Chavez, it shows that the judgments of the Inter-American Court, when touching on sensitive issues at the national level, are far from undisputed. Likewise in Peru, after the Inter-American Court's ruling in *Castillo Petruzzi*[142] that the conviction of four Chileans for life-imprisonment by a so-called "faceless" Peruvian tribunal[143] was a violation of due process guarantees, the *Fujimori* regime asserted that the Court's orders were an intrusion on

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[139] For Peru, *see*, *e.g.*, Burt (note 94).

[140] Tribunal Supremo Venezolano, Sala Constitucional, *Caso Abogados Gustavo Álvarez Arias y otros,* Judgment No. 1.939 of 18 December 2008. *See*, *for further reference*, Brewer Carías (note 78), 669.

[141] Inter-Am. Court H.R., *Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 5 August 2008, Series C, No. 182. The Inter-American Court established in *Apitz Barbera* that Venezuela had violated the right to a fair trial of the judges of the Venezuelan *Corte Primera de lo Contencioso Administrativo*, who had been destituted. The Inter-American Court ordered that Venezuela compensate the judges and re-institute them in their posts or in similar positions.

[142] Inter-Am. Court H.R., *Castillo Petruzzi y otros v. Peru,* Merits, Reparations and Costs, Judgment of 30 May 1999, Series C, No. 52, paras 1, 86.

[143] The main characteristic of faceless judges (*jueces sin rostro*) is their secrecy, with judges and prosecutors only being identified by codes, judges at all time invisible to the defendants and their council and trial proceedings being conducted in private. See UN Commission on Human Rights, Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Addendum: Report on the Mission to Peru, 19 February 1998, II (B), para. 4.

state sovereignty and the Congress approved a resolution attempting to retract Peru's recognition of the Inter-American Court's jurisdiction.[144]

Further challenges to the authority of the Inter-American Court are sure to come. Still, one way for the Inter-American Court to shield itself against such challenges are its well-reasoned judgments firmly grounded on established legal bases. According to Sagüés, the success of the *control de convencionalidad* will depend on the Inter-American Court's sound legal reasoning and its balanced approach to issues.[145] In the regional context of Europe, a study by Helfer and Slaughter identified factors such as functional capacity, fact finding capacity, quality of legal reasoning, and independence from political interests as decisive for an international court's impact and acceptance.[146]

So far, the Inter-American Court has been a vital guardian of human rights in critical areas such as problematic amnesty laws. What is more, its judicial lawmaking seems to have supported democratic consolidation in the concerned states. Still, a long way lies ahead. For the effective exercise of its powers, the Inter-American Court needs domestic courts and institutions. A lot will depend on its perceived legitimacy. An overly broad interpretation of its own powers may do more damage

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[144] Legislative Resolution No. 27.152 of 8 July 1999. *See also* Inter-Am. Court H.R., *Castillo Petruzzi y otros v. Peru,* Compliance with Judgment, Resolution of 17 November 1999, Series C, No. 59, para. 3. The situation changed some years after Fujimori had left power. For example, in 2003 Peru's Constitutional Court cited *Castillo Petruzzi* to strike down several pieces of antiterrorist legislation. *See* Peruvian Constitutional Court, *Marcelino Tineo Silva y más de 5,000 ciudadanos*, Expediente N° 010-2002-AI/TCLIMA, Judgment of 1 March 2003, available at: http://www.tc.gob.peljurisprudencia/2003/00010-2002-AI.html. For further reference, *see* Cavallaro & Brewer (note 5), 789 *et seq*. *See also* Trinidad and Tobago's withdrawal from the ACHR when confronted with its capital punishment procedures' inconsistency with the Convention. Notification of withdrawal by the *Ministerio de Relaciones Exteriores de Trinidad y Tobago* to the Secretary General of the OAS, 26 May 1998. The text of the notification is available at: http://www.oas.org/juridico/spanish/firmas/b-32.html. *See* Sergio García Ramírez, *The Inter-American Court of Human Rights and the Death Penalty*, Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas del UNAM, 2009, available at: http://info8.juridicas.unam.mx/pdf/mlawrns/cont/5/nte/nte5.pdf, for details.

[145] Sagüés (note 55), 3.

[146] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE LAW JOURNAL 273, 300 (1997-1998).

than good.[147] In short, the future of the Inter-American Court's important lawmaking role depends not least on its well-reasoned judgments and its balanced approach to cases.[148] Perhaps, as convincingly argued by Cavallaro and Brewer, it may also prove helpful for the Court to look for public support and increasingly engage with social movements, civil society and the media to further the acceptance of its jurisprudence in the affected states.[149]

[147] *E.g.*, to apply an overly strict standard of review to state actions may be detrimental to the Court's cause.

[148] In this respect, the Court's reference to non-derogable norms when nullifying unconventional amnesty laws introduced a welcome hierarchy and indicated the required prudence in the Court's approach.

[149] Cavallaro & Brewer (note 5), 770.

Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights

*By Markus Fyrnys**

A. Introduction

The institutional design of the Strasbourg system that has evolved over the last decades is an expression of contemporary debates surrounding the system's very nature and purpose. The current debate primarily bears on the range of choices that the Council of Europe faces in adapting to the changes in Europe, which largely have been caused by its expansion to cover nearly all post-Communist States of Central and Eastern Europe since the 1990s. This expansion, and with it the extension of the scope of the European Convention on Human Rights (the Convention) to now more than 800 million people in forty seven countries, has confronted the European Court of Human Rights (the Court) with a far broader range of human rights problems than had previously ex-

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isted.[1] By 2010, the number of pending cases had risen to 139,650 but the Court's adjudicative capacity remains limited.[2]

Against the background of an overwhelming number of applications,[3] the current debate regarding its core functions raises the question of whether the Court should engage in "constitutional," in contrast to "individual," adjudication. The "constitutional"[4] concept highlights the Court's function in a pan-European standard setting. In this respect, individual cases are the material from which legal arguments about what the concrete provisions of the Convention mean are extrapolated[5] and the general content of the legal order provided by the Convention is developed.[6] According to this conception, it is the lawmaking role – the generation and stabilization of normative expectations beyond an individual case by providing legal arguments for later disputes[7] – that

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1 Robert Harmsen, *The European Court of Human Rights as a 'Constitutional Court': Definitial Debates and the Dynamics of Reform*, in: JUDGES, TRANSITION, AND HUMAN RIGHTS, 33 (John Morison, Kieran McEvoy & Gordon Anthony eds, 2007).

2 On the latest data, *see* Eur. Court H.R., *Analysis of Statistics 2010, 7.* On the Court's adjudicative capacity, *see* Steering Committee for Human Rights (CDDH), *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention*, Document CM(2004)65 Addendum, 7 April 2004, para. 7, also published in 26 HUMAN RIGHTS LAW JOURNAL 90, 91 (2005).

3 *See* THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS (Rüdiger Wolfrum & Ulrike Deutsch eds, 2009).

4 STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 7 (2006), stating that the Court "is already 'the Constitutional Court for Europe', in the sense that it is the final authoritative judicial tribunal in the only pan-European system." *See also* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUMAN RIGHTS LAW JOURNAL 161, 162 (2002). On the constitutional role of the Inter-American Court of Human Rights, *see* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN LAW JOURNAL 1203 (2011).

5 Harmsen (note 1), 36.

6 Wildhaber (note 4), 162.

7 On the lawmaking role of judicial decisions, *see* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute? International Judicial Institutions as Lawmakers*, 12 GERMAN LAW JOURNAL 979, 986 (2011).

should be seen as the Court's main *raison d'être*.[8] In contrast, the "individual" concept emphasizes the Court's core function of individual human rights adjudication that is geared towards ensuring, on a case-by-case basis, that every genuine victim of a violation receives a judgment from the Court.[9]

It is worth noting that approximately two-thirds of the admissible complaints[10] are repetitive cases that concern systemic human rights violations within the domestic legal order. Against this backdrop, the Court's judicial elaboration of the so-called "pilot judgment procedure" is an innovative response to the problem of repetitive cases and rests on the idea of the Court's constitutional function. Besides finding an individual violation of Convention rights, a "full" pilot judgment[11] consists of the following steps: first, identifying a systematic malfunctioning of domestic legislation or administrative practice; second, concluding that this systematic problem may give rise to numerous subsequent well-founded applications; third, recognizing that general measures are called for and suggesting the form such general measures may take in order to remedy the systematic defect; and fourth, adjourning all other pending individual applications deriving from the same systematic defect. Finally, the Court uses the operative part of the judgment to reinforce the obligation to take general measures.[12]

The very fact that pilot judgments are focused on the identification of systematic malfunctioning of the domestic legal order and on the indication of appropriate general remedial measures normatively extends the binding effect of the Court's judgments and changes their legal nature, accentuating the Court's constitutional function. The pilot judgments' legal nature reveals features combining individual and general effect in the domestic legal order by extending an individual complaint

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8 Harmsen (note 1), 36.

9 Christian Tomuschat, *Individueller Rechtsschutz: das Herzstück des "ordre public européen" nach der Europäischen Menschenrechtskonvention*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 95, 96 (2003).

10 Around 90 % of all individual applications are inadmissible.

11 On a systematic analysis of different types of pilot judgments, *see* PHILIP LEACH, HELEN HARDMAN, SVETLANA STEPHENSON & BRAD K. BLITZ, RESPONDING TO SYSTEMATIC HUMAN RIGHTS VIOLATIONS 13 (2010).

12 Luzius Wildhaber, *Pilot Judgments in Cases of Structural or Systematic Problems on the National Level*, in: THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS, 69, 71 (Rüdiger Wolfrum & Ulrike Deutsch eds, 2009).

procedure through elements of judicial review of legislation. The paper argues that a pilot judgment is an innovative strategy of imposing the Court's judicature on the domestic legislative process. The Court generalizes the legal arguments of its judgment beyond the individual case by issuing a programmed lawmaking obligation to the domestic legislature. The Court uses the generality of domestic legislative acts to solve its docket problem of repetitive cases. This judicial lawmaking by requesting domestic legislation is a remarkable judicial strategy of compliance or internalization, which is able to substitute the lack, in doctrinal terms, of direct effect of the Convention and the lack of *erga omnes* effect of the Court's judgments in the domestic legal system.

The judicial elaboration of the pilot judgment procedure with its extension of the effect of the Court's judgments has an impact on the distribution of competences in the multi-leveled Convention system, particularly between the Court and the state parties in a vertical dimension, but also between the Court and the Committee of Ministers in a horizontal dimension. This judicialization of politics on different levels of the Convention system is a particularly interesting example in the broader perspective of this project on "International Judicial Institutions as Lawmakers." In order to elucidate and explore repercussions in the distribution of competences, this paper first highlights the judicial elaboration of the pilot judgment procedure in *Broniowski v. Poland* (B.). Second, the paper explores the judicial elaboration of the pilot judgment as procedural and substantial lawmaking by the Court and analyses the vertical and horizontal impact on the Convention's system of competences (C.). Third, the paper addresses the issue whether such lawmaking by an international adjudicative authority can be justified particularly in terms of procedural and democratic legitimacy and in respect of the consequences for the individual in the Convention system (D.), followed by a concluding outlook (E.).

B. Judicial Elaboration of the Pilot Judgment Procedure

The Court's judicial elaboration of the pilot judgment procedure extends, *inter alia*, the binding effect of its judgment beyond the decisive case, with a vertical and horizontal impact on the multileveled Convention system's distribution of competences. It is therefore of critical importance to first outline the prevalent understanding of the effect of the Court's judgments, to show how they are executed by state parties and to discuss the supervisory authority of the Committee of Ministers

(B.I.). After recapitulating the unsuccessful initiative of installing the pilot judgment with Protocol No. 14 (B.II.), the section highlights the judicial elaboration of the pilot judgment procedure in *Broniowski v. Poland* (B.III.).

I. Effect, Execution, and Supervision of the Court's Judgments

From the perspective of the Convention, the substantive binding effect of the operative part of the Court's judgment is limited *ratione personae*, *ratione temporis*, and *ratione materiae*.

According to effects *ratione personae,* the judgment of the Court has a binding effect *inter partes* – on the individual applicant and on the state party against which an individual application is directed. Article 46 of the Convention clarifies this by providing: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Basically, no other state party is legally bound by the judgment in the sense of the doctrine res judicata.[13] At the same time, in accordance with Article 1 of the Convention,[14] the state parties are, however, obliged to respect the rights and freedoms defined in Section I of the Convention,[15] and the Court's judicature substantially concretizes the rights and freedoms' substance.[16] Thus, even if the Court's case law may only be considered to have the normative effect of orienting[17] and guiding others, as opposed to creating legal obligations in the sense conveyed by the doctrine of res judicata, many domestic

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[13] Eckart Klein, *Should the Binding Effect of the Judgments of the European Court of Human Rights be Extended?*, in: PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE – STUDIES IN MEMORY OF ROLV RYSSDAL, 705, 706 (Paul Mahony, Franz Matcher, Herbert Petzold & Luzius Wildhaber eds, 2000).

[14] Art. 1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[15] Peter Leuprecht, *The Execution of Judgments and Decisions*, in: THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, 801, 812 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds, 1993).

[16] Klein (note 13), 706.

[17] Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEXAS INTERNATIONAL LAW JOURNAL 359, 374 (2005).

authorities (legislative, executive, and judicial) recognize the Court's case law and act accordingly.[18]

With regard to *ratione temporis*, the binding effect of judgments of the Court is retrospectively limited to the matter in dispute. There is no direct prospective effect apart from the normative effect of orientation mentioned above.

Finally, under *ratione materiae*, the binding effect is generally limited to the facts of the individual case. Taking into account the fact that the state parties have accepted the jurisdiction of the Court in certain cases as final, the term of Article 46 (1) of the Convention "to abide by the judgment" primarily means that the responsible state party has to accept that, with regard to a certain case, a violation of the Convention has, or has not, occurred.[19]

Despite the limitations of the effect of its judgments, the Court has never hesitated in identifying the legislative origin of an individual violation.[20] As the Court has observed in several judgments, "in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it."[21] Right from the beginning of its case law, the Court has stipulated that a judgment might create the obligation for a state party to amend its legislation if a violation of the individual applicant's right caused by legislation would otherwise con-

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[18] *Id.*, 706. Parliamentarians across Europe sometimes consult the Courts case law when drafting and revising statutes and administrative regulations, *see* Tom Barkhuysen & Michel L. van Emmerik, *A Comparative View on the Execution of Judgements of the European Court of Human Rights*, in: EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS, 1, 15 (Theodora A. Christou & Juan Pablo Raymond eds, 2005). On the differences of the effect of the judgments of the Inter-American Court of Human Rights, *see* Binder (note 4), 1218.

[19] JÖRG POLAKIEWICZ, DIE VERPFLICHTUNGEN DER STAATEN AUS DEN URTEILEN DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE 251 (1993).

[20] Eur. Court H.R., *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31, paras 25-68.

[21] Eur. Court H.R., *Maestri v. Italy*, Judgment of 17 February 2004, Reports of Judgments and Decisions 2004-I, para. 47.

tinue.[22] Even if the violation is caused by an individual judgment by a domestic judicial authority, or by an administrative act of a domestic authority, the responsible state party is obligated to investigate whether an abstract provision of law predetermines the individual violation of the applicant's right. If this is the case, it must amend its legislation in order to avoid repeating the violation of the same individual, as established by the Court's judgment,[23] or foreseeable violations in parallel cases.[24]

Even where violations stem from discretionary acts of national courts or authorities, that is the legislation has not strictly programmed the violation, or where other cases are only similar without being connected to the same legal provision, it is quite plausible to consider the responsible state party to be bound to avoid similar infringements in parallel cases.[25] This obligation, however, does not extend the binding effect of the Court's judgment in the sense of the doctrine res judicata, but rather derives from the normative effect of the concrete Convention provision concerned[26] and/or from the general obligation of the state parties to respect the Convention in accordance with Article 1 of the Convention.

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[22] Jochen Abr. Frowein, *The Binding Force of ECHR Judgments and its Limits*, in: HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW – LIBER AMICORUM LUZIUS WILDHABER, 261, 262 (Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel & Beatrice Wagner Pfeifer eds, 2007).

[23] In order to adapt its legislation to the requirements of the Convention for cases, which are merely parallel as they are normatively not pre-determined by law at the national level, the State Party is obligated to do legal "comparisons" because cases have to be tested whether they are truly in parallel to the case decided by the Court or whether they can for some reason be distinguished, HANS-JOACHIM CREMER, HUMAN RIGHTS AND THE PROTECTION OF PRIVACY IN TORT LAW 12 (2010).

[24] JOCHEN ABR. FROWEIN & WOLFGANG PEUKERT, EUROPÄISCHE MENSCHENRECHTSKONVENTION KOMMENTAR 604 (2009). The non-application of the legal provision violating the Convention is insufficient. The existence of the legal provision presents a steady and imminent danger to the Convention guarantees. In democracies governed by the rule of law the law-applying national authorities will have difficulties avoiding the application of a norm that has not been nullified. Therefore legislative action is necessary, *see* Klein (note 13), 707.

[25] CREMER (note 23), 11.

[26] *Id.*, 12.

Consequently, the legislative origin of an individual violation has not affected the mode in which the operative part of the judgment used to be drafted.[27] The malfunctioning of domestic legislation was only sometimes discussed in the reasoning followed by suggestions for prospective amendments.[28]

The *travaux préparatoires* suggest that the Court was for a moment intended to be empowered to nullify internal administrative and judicial decisions or legislation, but the state parties eventually rejected this constitutional or supranational approach.[29] Although it is not written anywhere in the Convention, it follows from its structure, its preparatory work and the wording of Article 41 of the Convention,[30] that there is no positive legal basis empowering the Court as an appellate or cassation body.[31]

Created to provide subsidiary human rights protection in relation to the state parties,[32] the Court is limited to issuing declaratory judgments.[33] By virtue of Article 1 of the Convention, the primary compe-

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[27] Lech Garlicki, *Broniowski and After*, in: LIBER AMICORUM LUZIUS WILDHABER – HUMAN RIGHTS – STRASBOURG VIEWS, 177, 183 (Lucius Caflisch, Johan Callewaert, Roderick Lidell, Paul Mahoney & Mark Villiger eds, 2007).

[28] Eur. Court H.R., *Scozzari and Giunta v. Italy*, Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII, para. 249; Eur. Court H.R., *Kudla v. Poland*, Judgment of 26 October 2000, Reports of Judgments and Decisions 2000-XI, para. 150-160; Eur. Court H.R., *Assanidze v. Georgia*, Judgment of 8 April 2006, Reports of Judgments and Decisions 2004-II, para. 198.

[29] COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRE" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 45 (1975). On nullifying effects of the judgments of the Inter-American Court of Human Rights, *see* Binder (note 4), 1212.

[30] Art. 41 of the Convention reads: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[31] Frowein (note 22), 261; FROWEIN & PEUKERT (note 24), 603.

[32] Eur. Court H.R., *Handyside v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 24, para. 48; Eur. Court H.R., *Sadik v. Greece*, Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, para. 30.

[33] FROWEIN & PEUKERT (note 24), 602; POLAKIEWCZ (note 19), 217; Helmut Steinberger, *Reference to the Case Law of the Organs of the European Convention on Human Rights before National Courts*, 6 HUMAN RIGHTS LAW JOURNAL 402, 407 (1985).

tence for securing compliance with the Convention's provisions is placed on the authorities of the state parties.[34] The state party, which is found to violate the Convention, has the discretion to decide on the "means to be utilized in its domestic legal system for performance of its obligation."[35] The state party enjoys certain discretion that can be conceptualized as a concretization of the principle of subsidiarity.[36] Only "if the internal law of the High Contracting Party concerned allows only partial reparation to be made,"[37] does the Court have the authority to demand a just satisfaction (*restitutio in integrum*) in accordance with Article 41 of the Convention. In all other respects, the Convention entrusts the choice regarding the execution of a judgment to the domestic authorities under the supervision of the Committee of Ministers.

In accordance to Article 46 (2) of the Convention, the judgments "shall be transmitted to the Committee of Ministers, which shall supervise its execution." The Committee of Ministers consists of one representative from each state party of the Council of Europe and is considered to be the Council of Europe's policy-making and executive organ.[38] In accordance with Rule 16 of the Rules of the Committee of Ministers,[39] "the Committee of Ministers may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make the suggestion with respect to the execution."[40] Aside from these political and diplo-

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[34] Paul Mahony, *Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUMAN RIGHTS LAW JOURNAL 57, 78 (1990).

[35] Eur. Court H.R., *Marckx v. Belgium* (note 20), para. 58.

[36] Mark E. Villiger, *The Principle of Subsidiarity in the European Convention on Human Rights*, in: PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW – LIBER AMICORUM LUCIUS CAFLISCH, 623, 632 (Marcelo G. Kohen ed., 2007).

[37] *Id.*, para. 58.

[38] *See* Leo Zwaak, *The Supervisory Task of the Committee of Ministers,* in: THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 291, 291 (Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak eds, 2006).

[39] Adopted by the Committee on Ministers on the basis of Art. 46(2) of the Convention.

[40] Interim resolutions take various forms, *see* ELIZABETH LAMBERT-ABDELGAWAD, THE EXECUTION OF JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS 40 (2002).

matic injunctions, expulsion of a responsible state party is the *ultima ratio* sanction in accordance with Article 8 of the Statute of the Council of Europe.[41] Expulsion, however, would be counterproductive since the violating state party would no longer be under the control of the Strasbourg system.[42] Therefore, the Committee of Ministers regularly refrains from applying this sanction; instead, it usually provides a monitoring system of compliance and functions as a political forum for constructive dialogue assisting state parties in amending domestic legislation. Briefly, the Convention system attributes the power to supervise the execution of judgments to the Council of Europe's political body.

Despite the lack of a mechanism of direct coercion with respect to the implementation of judgments, the Court generally enjoys a high rate of compliance with its judgments.[43] Nonetheless, there have been several instances of slow and reluctant reactions by domestic governments and legislators and, in effect, repetitive cases kept accumulating before the Court,[44] derived from the same structural cause as an earlier application that had lead to a judgment finding a breach of the Convention.[45] The situation of repetitive cases appeared dangerous for both the authority of the Court as well as the effectiveness of the Strasbourg system as a whole.[46]

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41 *Id.*, 40.

42 *See* Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 100; Helen Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights: A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long Term Effectiveness of the Convention System*, 26 HUMAN RIGHTS LAW JOURNAL 1 (2005).

43 Laurence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE LAW JOURNAL 273, 296 (1997); DAVIS HARRIS, MICHAEL O'BOYLE & COLLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION 878 (2009).

44 Garlicki (note 27), 183.

45 Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 91.

46 Garlicki (note 27), 183.

II. Protocol No. 14 as a Failure

The judicial elaboration of the pilot judgment procedure as a legal framework to deal with repetitive cases is no *deus ex machina*.[47] The innovation has to be seen in the context of the broader reform discussion regarding Protocol No. 14. The Court itself initially demanded an explicit jurisdiction to issue pilot judgments in its September 2003 Position Paper, submitted as part of the drafting process for Protocol No. 14.[48] According to this proposal, a pilot judgment would be delivered where the Court deemed that a systematic malfunctioning of domestic legislation or practice of the respondent state party causes a violation in an individual case. Such finding of systematic malfunctioning would be communicated to both the Committee of Ministers and the state party concerned, triggering an accelerated execution process. The respondent state party would be obliged by a pilot judgment to introduce a general remedy, by regularly amending domestic legislation. Furthermore the pilot judgment would have the effect of suspending applications of other individuals against the state party before the Court concerning the same matter. Once the Court has assured that the domestic legal order had been amended appropriately, the remaining applications issued on the same matter could be struck off the docket and referred back to the appropriate domestic authorities.[49] The intention of the Court was to provide for a procedure dealing more effectively with systematic human rights violations causing repetitive cases by obliging the responsible state party to adopt general remedial measures rather than dealing with each repetitive complaint individually case-by-case.[50]

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[47] Elizabeth Lambert-Abdelgawad, *La Cour européenne au secours du Comité des Ministres pour une meilleure execution des ârrets "pilot,"* 61 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 203, 213 (2005); Stefanie Schmahl, *Piloturteile des EGMR als Mittel der Verfahrensbeschleunigung*, 35 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 369, 371 (2008).

[48] *See* EUR. COURT H.R., DOCUMENT CDDH-GDR (2003) 024, POSITION PAPER OF THE EUROPEAN COURT OF HUMAN RIGHTS, 12 September 2003, paras 12-13; Harmsen (note 1), 45.

[49] Harmsen (note 1), 45, 46.

[50] *Id.*, 46.

The Steering Committee for Human Rights[51] was sympathetic to the Court's proposal and recognized the usefulness of such a solution,[52] but it was against amending the Convention due to political resistance that had been expressed within Council of Europe governmental circles against the introduction of a Convention-based pilot judgment procedure that would create formal obligations for the respondent state parties to adopt general measures.[53]

Therefore, the Court's proposal has not found its way into the new wording of Article 46 of the Convention as amended by Protocol No. 14.[54] However, the Committee of Ministers adopted a resolution in which it invited the Court:

> to identify … what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding

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[51] The Steering Committee for Human Rights (usually known by its French acronym, CDDH) is the expert, intergovernmental body within the Council of Europe charged with overseeing the functioning and development of the organization's human rights activities. As such, it plays a proactive role in the process of amending the Convention.

[52] Steering Committee for Human Rights, Explanatory Report to Protocol No. 14 (note 2), 92.

[53] Harmsen (note 1), 46.

[54] Art. 46 of the Convention reads: "(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. (2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. (3) If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee. (4) If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1. (5) If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

the appropriate solution and the Committee of Ministers in supervising the execution of judgments.[55]

The Committee of Ministers concurrently recommended[56] the improvement of domestic remedies, emphasizing that, in addition to the obligation under Article 13 of the Convention to provide an individual who has an arguable claim with an effective domestic remedy, state parties have a general obligation to solve the problems underlying the violations found.[57] Mindful that the improvement of remedies at the domestic level, particularly in relation to repetitive cases, should also contribute to reducing the workload of the Court, the Committee of Ministers advised the state parties, executing the judgments that point out domestic structural deficiencies, to review and "[to] set up effective remedies, in order to avoid repetitive cases being brought before the Court."[58] In spite of the state parties' resistance to the Court's initiative in the reform process of Protocol No. 14, in its executive documents the Committee expressed the political will[59] to handle the problem of repetitive cases and invited the Court to do so.

III. Broniowski v. Poland

The Court immediately acted on those political suggestions when it delivered its precedent pilot judgment in the case of *Broniowski v. Po-*

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[55] Committee of Ministers of the Council of Europe, Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem, 12 May 2004, 26 HUMAN RIGHTS LAW JOURNAL 119 (2005).

[56] Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 on the Improvement of Domestic Remedies, 12 May 2004, 26 HUMAN RIGHTS LAW JOURNAL 116 (2005).

[57] Garlicki (note 27), 184. Art. 13 of the Convention reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[58] Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 117; Garlicki (note 27), 184.

[59] Art.15.b of the Statute of the Committee of Ministers, provides for the Committee of Ministers to make recommendations to member states on matters for which the Committee has agreed "a common policy."

land[60] in June 2004.[61] The case concerned a compensation claim for the loss of property that is located in an area known as the "territories beyond the Bug River," which comprises pre-World War II eastern provinces of Poland. As a consequence of the changes of Poland's borders, more than one million people had to leave this territory that became incorporated into the Soviet Union. While many of the repatriates received some land in the new Western territories of Poland, a group of nearly 80,000 people remained uncompensated, although Polish legislation has recognized since 1946 that the repatriates were entitled to receive the value of their surrendered property. Over the next fifty years, several legislative acts of compensation appeared ineffective. These ineffective entitlements were dubbed as "right to credit," by Polish legislation (the Land Administration Act 1985) and by the Polish Constitutional Court, which held that the "right to credit" has a special nature as an independent constitutionally guaranteed property right, allowing repatriates to bid for state assets. Due to the unwillingness of the Polish authorities to take effective and necessary action, in practice, however, only few "Bug River claims" could be satisfied by the system of "right to credit."

In 1996, the first applications of the "Bug River claims" were brought to the Court. In 2002, it declared the application by *Broniowski* admissible.[62] The applicant claimed that the compensation, which he had received for the loss of his mother's property in the former Polish terri-

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[60] Eur. Court H.R., *Broniowski v. Poland (GC),* Judgment of 22 June 2004, Reports of Judgments and Decisions 2004-V. Since *Broniowski v. Poland* in 2004 the Court had issued several judgments that are expressly identified as pilot judgments by the Court itself: Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII; Eur. Court H.R., *Burdov v. Russia (No. 2)*, Judgment of 15 January 2009; Eur. Court H.R., *Olaru and others v. Moldova*, Judgment of 28 July 2009; Eur. Court H.R., *Yuri Nikolayevich Ivanov v. Ukraine*, Judgment of 15 October 2009; Eur. Court H.R., *Suljagic v. Bosnia and Herzegovina*, Judgment of 3 November 2009; Eur. Court H.R., *Rumpf v. Germany*, Judgment of 2 September 2010; *see* LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 13.

[61] Garlicki (note 27), 184; Harmsen (note 1), 52.

[62] Eur. Court H.R., *Broniowski v. Poland (GC),* Decision on Admissibility of 19 December 2002, Reports of Judgments and Decisions 2002-X, *see* Garlicki (note 27), 178.

tory, was inadequate under the terms of Article 1 of Protocol No. 1 to the Convention.[63] In particular, the application contended that the system of "right to credit" had proven to be of little or no value as the relevant assets had largely been withdrawn from the bidding process.

In 2004, the Court issued the judgment[64] that a claimant's entitlement to compensation, which represented only 2% of the original value of the lost property, was in violation of Article 1 of Protocol No. 1 to the Convention[65] and reserved the question of the application of Article 41 of the Convention for a future decision.

In the operative part of the 2004 judgment, the Court found that the violation of *Broniowski's* right provided by Article 1 of Protocol No. 1 to the Convention "has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants."[66] Therefore, the Court stated:

> [t]he respondent State must secure, through appropriate legal measures and administrative practices, the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance

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[63] Art. 1 of Protocol No. 1 to the Convention reads: "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." *See* Garlicki (note 27), 178.

[64] Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60).

[65] The relocation that took place at the end of the 1940s remains – *rationae temporis* – outside the jurisdiction of the Convention and the Court. The situation is different when a State Party enacts new legislation or maintains old legislation providing compensation for loss property confiscated under a previous regime. Once such a entitlement has been provided for by legislation postdating the ratification of the Convention and of its Protocol No. 1, the compensation claim for the loss of property enjoy full protection under the Convention, Garlicki (note 27), 179, 181. *See* Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 125.

[66] *Id.*, operative part, para. 3.

> with the principles of protection of property rights under Article 1 of Protocol No. 1.[67]

In the reasoning of the judgment, the Court firstly cited the Committee of Minister's resolution,[68] which invited the Court to identify in its judgments an underlying systemic problem and to assist state parties in finding the appropriate solution. The Court secondly cited the Committee of Minister's recommendation[69] reminding the state parties of their obligation to set up effective remedies, in order to avoid repetitive cases being brought before the Court.[70] According to the Court's estimation, 167 further applications were already on its docket concerning the same subject matter, while the settlement of the Bug River claims more generally concerns nearly 80,000 people.[71] The Court thus recognized the "threat to the future effectiveness of the Convention machinery."[72]

The Court argued that:

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation … also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.

The Court also noted that:

> [a]lthough it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected.[73]

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67 *Id.*, operative part, para. 4.

68 Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

69 Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 116.

70 Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 190.

71 *Id.*, para. 193.

72 *Id.*, para. 193.

73 *Id.*, paras 192, 193. *See* Garlicki (note 27), 185.

Once Poland adopted new legislation providing for adequate compensation, the Court confirmed a friendly settlement concluded by the parties in 2005.[74]

C. Judicial Lawmaking and Its Impact on the Distribution of Competencies Within the Convention System

This part first briefly analyses the judicial elaboration of the pilot judgment procedure in the case of *Broniowski v. Poland* as procedural but also as substantive lawmaking by the Court (C.I.). It then examines the impact of such judicial lawmaking on the institutional design of the Strasbourg system particularly in regard with the state parties' competence to amend the Convention (C.II.), the state parties' competence to implement the Convention (C.III.), and the Committee of Ministers' competence to supervise the implementation by state parties (C.IV.).

I. Pilot Judgment as Judicial Lawmaking

In its precedent pilot judgment the Court evolved a new procedural regime by extending the operative part of the final judgment far beyond the individual case identifying a structural problem, and requested the respondent state party to adopt specific general and/or individual measures.

Next to this procedural lawmaking the request may be understood as a substantively programmed lawmaking obligation, which demands the domestic authorities of the respondent state party to amend specific legislation to remedy the systemic defect of its domestic legal order. In post-*Broniowski* pilot judgments the Court further stated, "measures must also be taken in respect of other persons in the applicant's position."[75] By issuing such a programmed lawmaking obligation, which

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[74] Eur. Court H.R., *Broniowski v. Poland (GC),* Judgment of 28 September 2005 (friendly settlement and just satisfaction), Reports of Judgments and Decisions 2005-IX.

[75] Eur. Court H.R., *Olaru and Others v. Moldavia (GC),* Judgment of 28 July 2009, para. 49; citing Eur. Court H.R., *Scozzari and Giunta v. Italy* (GC), Judgment of 13 July 2000, Reports of Judgments and Decisions 2000-VIII, para. 249; Eur. Court H.R., *Christine Goodwin v. the United Kingdom (GC)*, Judg-

demands national authorities to amend legalization in respect of other individuals, the Court uses the generality of domestic legislative acts to generalize the legal argument of its judgment beyond the concrete individual complaint to solve its docket problem of repetitive cases. By generating domestic legislation the Court stabilizes normative expectations, which are enshrined in the Convention and are concretized by the Court, in the domestic legal order for numerous cases. This judicially decreed cooperation of an international court with domestic legislation is an innovative judicial strategy of imposing the Court's legal arguments on domestic legal and political systems.

As mentioned above, the Court has no appellate jurisdiction, nor is there an *erga omnes* effect of the Court's judgments or any mechanism of preliminary reference to the Court for domestic judges. Thus, internalization by cooperation between the Court and domestic courts or executive authorities seems to be ineffective in contrast to the judicial system within the European Union. The judicial lawmaking in cooperation with domestic legislation can be ascribed as a Court's strategy to secure compliance against the backdrop of the lack of doctrines of direct effect and supremacy of the Convention and the lack of *erga omnes* effect of the Court's judgments in the domestic legal order.

In the follow-up friendly settlement the Court reviewed Poland's domestic legislation in regard of the individual applicant but also in a general perspective in regard of all other repetitive cases. The very fact that pilot judgments are focused on the identification of a systematic problem and on the indication of appropriate general remedial measures has an impact on their binding effect and their legal nature, accentuating the Court's lawmaking function in terms of the constitutional concept. The pilot judgments' legal nature reveals features combining individual and general effect in the domestic sphere by extending an individual complaint procedure by elements of judicial review of legislation[76] in regard of the concrete application but also in general.

The idea of judicial discretion and agency in lawmaking that exceed the lines between discourses of norm application and discourses of norm

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ment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, para. 120; Eur. Court H.R., *Lukenda v. Slovenia*, Judgment of 6 October 2005, Reports of Judgments and Decisions 2005-X, para. 94; Eur. Court H.R., *S. and Marper v. the United Kingdom (GC)*, Judgment of 4 December 2008, para. 134.

[76] Garlicki (note 27), 186.

generation[77] challenges the principle of democracy as well as the understanding of the rule of law. In any domestic democratic legal order with a constitutional guarantee of fundamental rights and the rule of law, it is necessary to develop a theory of law and a theory of democracy combined in a theory of judicial review, that is a theory of separation of powers, to define the proper role of the judiciary in relation to the legislative.[78] This need of theoretical reflection nonetheless exists in regard to the multileveled Convention system.

The primary function of the Court is the settlement of legal disputes. In the exercise of this function, however, the Court quite inevitably concretizes and develops the provisions of the Convention, thus portraying an important lawmaking dimension. It was the Court that answered the question as to its function by interpreting the Convention not as an asset of reciprocal rights and duties among the state parties, but, far more momentously,[79] as a "constitutional instrument of European public order."[80] The term "constitutional" is ambiguous and has appeared in several judicial forms. The Court maintains the "European public order" by balancing its lawmaking function and the legislative power of the state parties.

The Court is prone to an evolutionary interpretation of the Convention, with results that could hardly be foreseen at the Convention's ratification. By virtue of the Convention, the Court is empowered by the state parties to exercise public authority by issuing final judgments, which determine the legal or factual situation of domestic authorities, of the judgment supervisory machinery within the Strasbourg system and

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[77] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 192-193 (1997); Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010); von Bogdandy & Venzke (note 7), 988, 989.

[78] HABERMAS (note 77), 238 *et seq*.; Mahony (note 34), 58; CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG – LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH (2005).

[79] Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EJIL 125, 138 (2008).

[80] Eur. Court H.R., *Loizidou v. Turkey*, Judgment of 23 March 1995, Series A, No. 310, para. 75.

of individuals.[81] Due to the combination of the wide-reaching substantive scope, the compulsory character – in law, in fact or both – and the lawmaking function the Court exercises functions may interfere with the domestic legislative, executive, and judicative in a vertical dimension but also in a horizontal one with the supervisory machinery within the Convention system.[82]

This paper cannot provide the elaboration on a comprehensive theory of judicial review in the multileveled Convention system. With an interest in highlighting the political repercussions of the Court's pilot judgment procedure, it may suffice to offer an analysis of the impacts on the distribution of competences between the Court, the state parties and the Committee of Ministers within the Convention system.

II. Judicial Lawmaking and the State Parties' Competence to Amend the Convention

By elaborating the pilot judgment procedure the Court has extended the binding effect *ratione personae*, and *ratione materiae* beyond the wording and the prevalent understanding of Article 46 of the Convention. According to Article 35 of the Convention,[83] the Court's competence is to interpret and to apply, not to amend, the Convention. The competence of amendment as such rests with the state parties of the Council of Europe. Thus, the elaboration of the pilot judgment proce-

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[81] For the concept of international public authority, *see* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375, 1381 (2008). *See* for judicial decisions von Bogdandy & Venzke (note 7), 989.

[82] Compare von Bogdandy & Venzke (note 7), 990. More generally on the international judiciary in a constitutionalist reading, Geir Ulfstein, *The International Judiciary*, in: THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, 126, 127 (Jan Klabbers, Anne Peters & Geir Ulfstein eds, 2009).

[83] Art. 35 of the Convention reads: "(1) The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47. (2) In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

dure causes the judicialization of politics[84] at the Convention's amending level.

III. Judicial Lawmaking and the State Parties' Competence to Implement the Convention

The distinction between the Court's competence of judicial review by interpretation, on the one hand, and the state parties' competence to amend the Convention, on the other, is not the only distribution of competences operated by the Convention.[85] By virtue of Article 1 of the Convention, the primary competence for securing compliance with the Convention provisions is placed on the domestic authorities (legislative, executive and judicial) under the supervisory authority of the Committee of Ministers in accordance with Article 46 (2) of the Convention.[86]

As mentioned above, the Court interprets the Convention as a "constitutional instrument of European public order."[87] The Court maintains the "European public order" by calibrating the balance between judicial review and deference to domestic law-makers.[88] In accordance with Article 1 and Article 46 of the Convention the Court concretized the principle of subsidiarity in relation to the implementation of judgments of the Court[89] in terms of judicial self-restraint to recognize the horizontal and vertical distribution of competences between the Court and domestic authorities of the state parties with consequences for the supervisory

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84 Torbjörn Vallinder, *When the Courts go Marching in*, in: THE GLOBAL EXPANSION OF JUDICIAL POWER, 13 (C. Neal Tate & Torbjörn Vallinder eds, 1995).

85 Mahony (note 34), 78.

86 Art. 1 of the Convention reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." *See* Mahony (note 34), 78.

87 Eur. Court H.R., *Loizidou v. Turkey* (note 80), para. 75.

88 Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EJIL 125, 131 (2008).

89 Eur. Court H.R., *Norris v. Ireland*, Judgment 26 October 1988, Series A, No. 142, para. 50; Eur. Court H.R., *Clooth v. Belgium*, Judgment of 5 March 1998, Reports of Judgments and Decisions 1998-I, para. 14.

function of the Committee of Ministers. Deriving from the principle of subsidiary and linked with the principle of democracy,[90] the state parties enjoy a certain margin of appreciation that gives them the discretion to decide "the choice of means to be utilized in its domestic legal system for performance of its obligation"[91] because "[t]he national authorities have direct democratic legitimation and are … in principle better placed than an international court to evaluate local needs and conditions."[92] Furthermore, state parties have different written and unwritten constitutional systems and traditions and are exposed to different challenges when implementing international decisions.[93] For instance, the relations between national and international law differ or federal state parties encounter the particular problem of a separation of powers on different levels.[94] In such varying pluralistic democracies there is a spectrum of measures to the domestic authorities for fulfilling their obligation of implementation. Any choice within this spectrum is within their discretion and not contrary to the Convention.[95]

The Convention system, like a domestic constitution protecting fundamental rights and freedoms, reflects the function to restrict democratic discretion to a certain extent.[96] Nonetheless, not all discretion is removed since the state parties have preserved the competence for implementing the execution of judgments. The Court's judicial review forms part of a vertical system of checks and balances. A degree of judicial self-restraint can be required for an appropriate balance between judicial review and deference to domestic law-makers. On the one hand, the Court stresses the subsidiary nature of the Strasbourg system in relation to domestic human rights protection systems.[97] On the other hand, the Court, however, proactively reviews domestic legislation, administrative acts and judicial rulings using distinctive methods of interpretation and an evolving understanding of Convention rights and

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[90] Dinah Shelton, *Subsidiarity and Human Rights Law*, 27 HUMAN RIGHTS LAW JOURNAL 4, 9 (2006); Villiger (note 36), 632.

[91] Eur. Court H.R., *Marckx v. Belgium* (note 20), para. 58.

[92] *Id.*, para. 48.

[93] Villiger (note 36), 632.

[94] *Id*., 632.

[95] Mahony (note 34), 78.

[96] *Id.*, 81.

[97] Eur. Court H.R., *Handyside v. United Kingdom* (note 32), para. 48; Eur. Court H.R., *Sadik* v. *Greece* (note 32), para. 30, *see* Helfer (note 79), 138.

freedoms.[98] Over time, the Court has employed the judicial methodological instruments to generate a slow but constant change of the sphere of autonomy of the state parties.[99]

This is the case in a pilot judgment. Although Poland was technically given a choice of how to comply, the *Broniowski* judgment did not exemplify the same discretion usually given to the respondent state party. Instead, Poland had only two choices left: Firstly, to amend domestic legislation to provide the realization of the property rights, or secondly, to compensate the claimants with equivalent redress. Another pilot judgment, the *Hutten-Czapska* judgment,[100] illustrates that this discretion can be further narrowed.

Similar to the *Broniowski* judgment, the *Hutten-Czapska* case concerned the violation of Article 1 of Protocol No. 1. Here the applicant was one of around 100,000 landlords in Poland affected by a restrictive system of rent control. The Court held that the violation has originated in a systemic problem connected with the malfunctioning of domestic legislation imposing restrictions on landlords' rights, including defective provisions on the determination of rent and not providing for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance. The Court commanded that Poland had to, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism to maintain a fair balance between the interests of landlords and the general interest of the community, in accordance with the standards of protection of property rights under the Convention.

This case illustrates that it:

> is not simply a question of instituting a compensation procedure which … applies to a series of clearly defined individual cases. On the contrary, the solution to the problem in the present case involves a total overhaul of the legal system governing owners' rights vis-à-vis tenants, taking into account all the known difficulties, options and alternatives in such matters and the need to adopt a gradual approach in such a sensitive area – what is more, during the transition from a communist to a free-market regime.[101]

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98 Id., 138.

99 Id., 138; Ress (note 17), 374.

100 Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII.

101 *Id.*, Partly Dissenting Opinion of Judge Zagrebelsky.

By issuing such a programmed lawmaking obligation in the operative part of the judgment, the judicial review in the follow-up procedure of a friendly settlement in accordance to Article 38 of the Convention innovatively moves "beyond the sole interests of the individual applicant and requires the Court to examine the case also from the point view of 'relevant general measures.'"[102] The Court, in accepting the terms of the settlement in respect of both individual and general measures, attached particular weight to the general measures already taken and to be taken by the state party. These measures include legislation that had been passed between the initial judgment and the friendly settlement judgment, which was intended to remedy the structural problem.

The legal nature of friendly settlements after pilot judgments reveals different features, combining individual and general effects by extending an individual complaint procedure with elements of judicial review of legislation in regard to plaintiffs of parallel cases. It is questionable whether the Court is at all competent and has the necessary knowledge to express a view in abstract and in advance on the consequences of legislative reforms already introduced by a state party and to give a vague positive assessment of a legislative development whose practical application might subsequently be challenged by new applicants.[103]

IV. Judicial Lawmaking and the Committee of Minister's Competence to Supervise the Implementation

The distinction between the Court's competence of judicial review and the state parties' primary competence for securing compliance with the Convention provisions is not the only distribution of competence operated by the Convention. According to Article 46 (2) of the Convention, once the Court's final judgment has been transmitted to the Committee of Ministers, the latter invites the respondent state party to inform it of individual and general measures taken to abide by the judgment and of steps taken to pay any amounts awarded by the Court in respect of just satisfaction.

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[102] Eur. Court H.R., *Broniowski v. Poland (GC)* (note 74), paras 5-10.

[103] Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 28 April 2008 (friendly settlement), Separate Opinion of Judge Zagrebelsky joined by Judge Jaeger.

The Court's competence to examine the judgments' execution in regard of the vertical relation to the state parties is related to the Court's competence in regard to the supervisory function of the Committee of Ministers in a horizontal relation.

An ordinary judgment of the Court does not expressly order the respondent state party to a specific measure to rectify the applicant's situation and prevent further violations. According to the principle of subsidiarity the state parties have discretion to choose the means by which they will implement individual or general measures under the supervision of the Committee of Ministers. This political body provides a forum of constructive dialogue and political review of individual and general measures. The supervision of execution is treated as a cooperative political task and not an inquisitorial one[104] with the lawful/unlawful concluding binary decision. By issuing a substantively programmed lawmaking obligation pilot judgments impose the legal arguments on the political process at the supervisory level. This form of judicialization of the political mechanism of supervision[105] restricts the Committee of Ministers' competence to supervise the implementation of judgments.

D. Justification of Judicialization of Politics within the Convention System

The pilot judgment causes the judicialization of politics[106] at the Convention's amending level, at the domestic legislative level as well as at the Convention's supervisory level. This section addresses the issue of how such lawmaking by the Court can be justified particularly in terms of procedural and democratic legitimacy.

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[104] Committee of Ministers of the Council of Europe, CM/Inf(2008)8 final, Committee of Ministers on Human Rights Working Methods – Improved Effectiveness of the Committee of Minister's Supervision of Execution of Judgments, 7 April 2004, para 13.

[105] Helfer (note 79), 149.

[106] Vallinder (note 84).

I. Justification of Judicial Lawmaking at the Convention's Amending Level

The Court has extended the binding effect *ratione personae*, and *ratione materiae* beyond the wording and the prevalent understanding of Article 46 of the Convention. Thus the question arises, whether the judicial elaboration of the pilot judgments procedure is an *ultra vires* act. The extensive interpretation of Article 46 of the Convention as an act of judicial lawmaking in relation to the amendment competence of the state parties affects the tension between international judicialization and democratic control. This tension should influence the Court in exercising its power in terms of an appropriate balance between activism and restraint. The application of an expansive or more restrictive approach is primarily determined on the basis of the mandate of the Court.[107]

According to Article 35 of the Convention the Court's mandate is to interpret and to apply Article 46 of the Convention, not to amend. The Court has opted for an approach of developing the meaning of indeterminate concepts by employing the method of evolutionary interpretation.[108] In its case law, the Court affirmed, "the Convention is a living instrument which … must be interpreted in the light of present-day conditions."[109] The Convention's Preamble explicitly states that the purpose of the Convention is both the "maintenance" and the "further realization of human rights and fundamental freedoms." Therefore, the Court concluded that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard, and develop the rules instituted by the Convention."[110] The interpretation of human-rights treaties falls into a special category, since the quite distinct object and purpose of a human-rights treaty take on a special importance.[111] The distinctive nature of the Convention as a

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[107] Ulfstein (note 82), 150.

[108] Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN YEARBOOK FOR INTERNATIONAL LAW 11, 17 (1999); Mahony (note 34), 61.

[109] Eur. Court H.R., *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Series A, No. 26, para. 31, *see* Mahony (note 34), 61.

[110] Eur. Court H.R., *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A, No. 25, para. 154.

[111] Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in: PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION – STUDIES

human-rights treaty compels a flexible and evolutionary teleological interpretation of its open-textured terms if the Convention is not to become progressively ineffective with time.[112]

The overwhelming number of applications often concerning repetitive cases threatens "the future effectiveness of the Convention machinery."[113] However, questions arise whether the approach of evolutionary interpretation only allows the development and concretization of material provisions of fundamental rights and freedoms that are already spelled out in the Convention. In this respect the Court's practice in developing procedures of judicial review, which are not spelled out in the Convention, would no longer correspond to the essence of the evolutionary method.

Furthermore, the preparatory works of the Convention speak against the extension of res judicata of the Court's judgments. As emerges from the *travaux préparatoires,* it was at some point proposed that the Court's judgments should have *erga omnes* effect on national jurisdictions, but the state parties rejected this approach.[114] In addition, Protocol No. 14 has not formally introduced the pilot judgment procedure.[115]

Next to formal mandating by the Convention, the Court's mandate in terms of Article 46 of the Convention can also be extensively interpreted in the light of consensual subsequent practice of the state parties in accordance with Article 31 (3) lit. b of the Vienna Convention on the Law of Treaties. The application of the pilot judgment procedure is broadly considered to have been successful, because many post-*Broniowski* pilot judgments have led to legislative changes in the domestic legal orders.[116] Thus, the state parties accepted the new procedure. Furthermore, the resolution of the Committee of Ministers[117] inviting the Court to identify in its judgments finding an underlying sys-

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IN HONOUR OF GERARD WIARDA, 65 (Franz Matscher & Herbert Petzold eds, 1988).

112 Mahony (note 34), 65.

113 Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 193.

114 *Id.*, Partly Dissenting Opinion of Judge Zupančič.

115 Eur. Court H.R., *Hutten-Czapska v. Poland*, Judgment of 19 June 2006, Reports of Judgments and Decisions 2006-VIII, Partly Dissenting Opinion of Judge Zagrebelsky.

116 LEACH, HARDMAN , STEPHENSON & BLITZ (note 11), 178.

117 Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

temic problem and to assist state parties in finding the appropriate solution allows for an assumption of consensual subsequent practice of the state parties. Thus, the judicial elaboration of the pilot judgment procedure is based on the political will of the state parties. Nonetheless, the judicial lawmaking relies on the consensual or majoritarian[118] will of the executives of the state parties represented in the Committee of Ministers; it does not rest on the will of the legislator in the Strasbourg system, which is the consensual will of the state parties' legislatives, who regularly amend the Convention in a formal process of democratic delegation. Otherwise domestic parliaments tend to be deferential to the executive in treaty negotiations.[119] Thus, the autonomy of governmental-administrative elites in amending the Convention is relatively great.[120]

II. Justification of Judicial Lawmaking at the Domestic Legislative Level

In a concurring opinion to the *Hutten-Czapska* friendly settlement Judge Ziemele wrote: "As to the scope of the Court's competence, the fact that the Court has the jurisdiction to develop procedures, especially where States have invited it to do so, does not answer the question about the scope and the limits of the exercise of such a power."[121] In relation to the domestic legislative the pilot judgment moves towards a constitutional court-type jurisdiction reviewing domestic legislation and issuing a programmed lawmaking obligation in its operative part. One could use the constitutional argument conferring legitimacy by a higher order of norms that guides and channels the parliamentary legis-

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[118] Under Art. 20 of the Statute the Committee of Ministers, adoption of a recommendation requires a unanimous vote of all representatives present or a majority of those entitled to vote. However, at their 519 bis meeting in November 1994 the Ministers' Deputies decided to make their voting procedure more flexible and made a "Gentleman's agreement" not to apply the unanimity rule to recommendations.

[119] von Bogdandy & Venzke (note 7), 994.

[120] *Id.*

[121] Eur. Court H.R, *Hutten-Czapska v. Poland* (note 103), Concurring opinion of Judge Ziemele; citing *Nuclear Tests Case* (Australia v. France), ICJ Reports 1974, para. 23, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock.

lative process.[122] The presence of such norms within the framework of an international organization could promote its legitimacy by virtue of the norm's status, which could impose a legal duty to comply even against the will of the parliamentary majority. This "constitutional" argument is often made in respect to international human rights treaties. The provisions of the Convention as mutually defined by the state parties, but beyond the reach of domestic legislation, may justify restrictions on the national legislator[123] to protect human rights within an international constitutional framework.[124]

The purpose of the Court is, according to its own understanding, "to elucidate, safeguard, and develop the rules instituted by the Convention"[125] as a "constitutional instrument of European public order."[126] One could view the Court as "the Constitutional Court for Europe," [127] in the sense that it is the final authoritative adjudicative body in the pan-European constitutional system,[128] performs its adjudicatory role within the limits of the Convention system.[129]

Nonetheless, such interpretation in terms of the liberal paradigm of judicial constitutional review[130] camouflages the vertical relation between the Court and domestic legislator in regard of the pilot judgment procedure. Pilot judgments do not restrict the domestic legislator to regulating a matter concerning human rights provisions of the Convention. In contrast, by its programmed lawmaking obligation the Court mobilizes the democratic legislator to amend in a self-regulatory manner domestic legislation in a Convention provision-related matter. As mentioned above, the Court wants to use the generality of domestic legislative acts to internalize and generalize the legal argument of its judgment

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[122] von Bogdandy & Venzke (note 77), 22-25; Joshua L. Jackson, *Broniowski v. Poland: A Recipe for Increased Legitimacy of The European Court of Human Rights as a Supranational Constitutional Court*, 39 CONNECTICUT LAW REVIEW 759, 799 (2006).

[123] Ulfstein (note 82), 151.

[124] GREER (note 4), 7; Wildhaber (note 4), 162.

[125] Eur. Court H.R., *Ireland v. United Kingdom* (note 110), para. 154.

[126] Eur. Court H.R., *Loizidou v. Turkey* (note 80), para. 75.

[127] STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 7 (2006).

[128] *Id.*, 7.

[129] Jackson (note 122), 799.

[130] HABERMAS (note 77), 240-253.

in the domestic legal order. Pilot judgments are a form of judicially decreed cooperation between the Court and national parliaments. Thus, pilot judgments have a catalyzing effect on the domestic democratic legislative process, especially in the ongoing democratic transition in the new state parties of the Central and Eastern Europe.

As mentioned above, the state parties' discretion secures the vertical distribution of competences between the Court and the domestic legislator, that is the relation between the co-original individual autonomy protected by fundamental rights and freedoms and the autonomy of the domestic democratic sovereign. The Court has to respect this flexible principle in programming its lawmaking obligation. The scope of discretion should differ according to the type of Convention provisions of the alleged violation. In the context of the right to property, the state parties should enjoy wide discretion, particularly in redistributing private property, being a domain where differences of opinion may vary largely in pluralistic democracies.[131] The Court should exercise judicial self-restraint in programming the lawmaking obligation in pilot judgments related to economic and social rights. In the context of procedural and participatory rights, providing procedural and democratic participation and effective legal protection, the discretion should be reduced.[132]

III. Justification of Judicial Lawmaking at the Supervisory Level

By issuing a substantively programmed lawmaking obligation, a pilot judgment imposes its legal arguments on the political process at the su-

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[131] Mahony (note 34), 79.

[132] *Compare* Shelton (note 90), 10, stating: "the Court has applied a reduced margin of appreciation … where the government has interfered with democratic institutions, such as dissolving political parties or restricting freedom of information on issues of public interest." *See* Eur. Court H.R., *Refah Partisi (The Welfare Party) and Others v. Turkey (GC)*, Judgment of 13 February 2003, Reports of Judgments and Decisions 2003-II; Eur. Court H.R., *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Judgment of 13 November 2003, Reports of Judgments and Decisions 2003-XI. Nonetheless, it should grant wide margin of appreciation for matters concerning elections, noting that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe, *see* Shelton (note 90), 10.

pervisory level. The question arises whether such judicial lawmaking at the supervisory level would be an *ultra vires* act. Indeed, the judicial lawmaking at the supervisory level can be justified by a resolution[133] and a recommendation[134] of the Committee of Ministers itself.[135] Nonetheless, the concern of the Court's competence in regard to the supervisory authority of the Committee of Ministers is not only formal. Reminiscent of the *Hutten-Czapska* case, the structural problem was a large-scale one and required the adoption and carrying out of complex measures of a legislative and administrative character with an economic and social content.

On the one hand, it has been argued that such cases would pose legal and practical difficulties that the Committee of Ministers would be much better equipped to monitor than the Court, especially as to the implementation of complex, long-term measures.[136] The Committee of Ministers could take prospective examination into consideration in its initial interim resolutions. By contrast, the Court would regularly be the inadequate institution for the prospective examination of domestic legislative amendment because it might have to exercise caution in relation to future applications or it might have to examine impartially in adversarial proceedings.

On the other hand, the judicial lawmaking at the supervisory level is in accordance with the political reform process of Protocol No. 14. The question of the Court's relationship to the Committee of Ministers can be linked with the reform process leading to Protocol No. 14. The amended Article 46 of the Convention extends the judicial role in the supervisory mechanism by introducing two new mechanisms enabling the Committee of Ministers to bring supervision matters before the Court. First, the Protocol establishes a form of infringement proceedings, modeled on that existing in European Union Law.[137] This provision permits the Committee, by a two-thirds majority vote, to make a reference to the Court seeking to determine whether a state party has

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[133] Committee of Ministers of the Council of Europe, Resolution Res(2004)3 (note 55), 119.

[134] Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 (note 56), 116.

[135] Schmahl (note 47), 379.

[136] Eur. Court H.R, *Hutten-Czapska v. Poland* (note 103), Concurring Opinion of Judge Ziemele.

[137] Harmsen (note 1), 52.

fulfilled its obligation regarding the execution of a previous judgment.[138] Second, the Protocol institutes a form of clarification ruling. [139] Under this provision, the Committee of Ministers, again by a two-thirds majority vote, may request a ruling on a question of interpretation where the Committee of Ministers has found that its supervision of execution of a judgment has been hindered by the existence of problems surrounding the interpretation of that judgment.[140]

Both amendments clarify the nature of the Convention as an interlocking horizontal set of institutions in which both the judicial and the political organs have distinctive and necessary functions.[141] Nonetheless, Protocol No. 14 particularly strengthens the judicial role in the supervisory mechanism. In combination with a pilot judgment requesting the respondent state party in the operative part to adopt general measures in terms of a substantively programmed lawmaking obligation, an infringement proceeding will generate a "judicial review of legislative action" in general as well as a friendly settlement past to a pilot judgment.

Furthermore, much criticism has been levied at the effectiveness of, the lack of access to, the transparency of, and the publicness of the supervisory mechanism of the Committee of Ministers.[142] In practice, the Committee only meets twice a year.[143] In the meantime its tasks are discharged by the so-called "Committee of the Ministers Deputies," consisting of high officials who are generally the permanent representatives of their governments to the Council of Europe.[144] The sessions of the Committee of Ministers are not public, unless the Committee decides otherwise.[145]

In this respect, the Court's procedural legitimacy is much more developed. Under Article 40 of the Convention, all the Court's hearings are public absent exceptional circumstances, and all documents are open to the public unless the President of the Court decides otherwise. In ac-

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[138] *Id*., 52.

[139] *Id*., 52.

[140] *Id*., 52.

[141] *Id.*, 52.

[142] Philip Leach, *On Reform of the European Court of Human Rights*, 14 EUROPEAN HUMAN RIGHTS LAW REVIEW 725, 732 (2009).

[143] *See* Art. 21(c) of the Statute of the Council of Europe.

[144] Zwaak (note 38), 45.

[145] *See* Art. 21(a) of the Statute of the Council of Europe.

cordance with Article 36 of the Convention,[146] third parties have the right to submit written comments and to take part in hearings. According to Article 45[147] of the Convention, all judgments have to be reasoned. With regard to democratic legitimacy, the Court' judges are elected by the Parliamentary Assembly in accordance with Article 22 of the Convention.[148] In order to improve independence and impartiality of the judges, Protocol 14 extends the terms of office period to nine years while abolishing the re-election of judges.

IV. The Individual?

From the perspective of the individual applicant, the whole complicacy of the pilot judgment procedure becomes particularly apparent. The adjournment of similar, pending cases is the central element of a pilot judgment to solve the Court's docket problem.[149] Coevally, the adjournment weakens the individual's right of access to the Court in accordance with Article 34 of the Convention.[150] Once the respondent

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[146] Art. 36 of the Convention reads: "(1) In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. (2) The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings."

[147] Art. 45 of the Convention reads: "(1) Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible. (2) If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

[148] Art. 22 of the Convention reads: "(1) The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party. (2) The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies."

[149] However, similar pending cases will not always be adjourned. This is a matter of discretion for the Court depending on all relevant circumstances, *see* LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 176.

[150] Art. 34 of the Convention reads: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the

state party has introduced a remedy in compliance with the pilot judgment these adjourned cases can subsequently be referred back. If the state response is insufficient, the adjourned cases could be re-opened by the Court. There is no guarantee that the application of the pilot judgment exactly reflects all the facts and legal issues related to numerous violations.[151] Furthermore, the applicant of the pilot judgment is privileged in relation to the others. Whilst reviewing the application of the pilot judgment, the others remain in stasis.[152] Justice delayed is justice denied. The possibility that the applicant of the pilot judgment will negotiate a friendly settlement that favors an individual damages award over systematic non-monetary remedies is even more worrying for subordinated applicants.[153] If the state party's response is insufficient, the adjourned cases could be re-opened by the Court, of course. However, the re-opening of similar, pending cases is a discretionary act by the Court[154] that could leave the remaining applicants in an uncertain position[155] and extend considerably the length of such proceedings.[156] The Court has to pay attention to the procedure's legitimacy if the pilot judgment is to serve as an effective tool for improving compliance with

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rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[151] Helfer (note 79), 154.

[152] *Id.*, 154; citing Registrar of the European Court of Human Rights, *"Pinto" cases adjourned pending decision on test case*, Press Release 014, 18 January 2005, stating that the Court had adjourned over 800 Italian length-of-proceedings cases, pending its decision in a test case concerning the application of Italy's "Pinto Law."

[153] Helfer (note 79), 154; citing Andreas von Staden, *Assessing the Impact of the Judgment of the European Court of Human Rights on Domestic Human Rights Policies*, paper prepared for delivery at the Annual Meeting of the American Political Science Association, noting that a "state may prefer to simply pay just satisfaction without taking substantive steps to remedy the situation and fully remove the consequences of the violation and suggesting that many governments enter into friendly settlements for that reason." Helfer points out that the Court "may not approve a friendly settlement unless it manifests a "respect for human rights as defined in the Convention and the Protocols thereto" in accordance to Art. 37 of the Convention."

[154] LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 176.

[155] *Id.*, 30.

[156] *Id.*, 31.

the Convention.[157] The elaboration of procedural safeguards to ensure the adjudication on class-wide relief applications appropriate to the systematic human rights issues could improve the procedural situation. In this respect the establishment of Rule 61 of the Rules of the Court in February 2011 is a substantial progress. However, the term of "class action" and "collective applications"[158] has not yet been defined and further research needs to be conducted into their potential efficacy at the international level.[159]

E. Outlook

Referring to this paper's title and the question whether the pilot judgment is a form of judicial expansion of competences without politics, it has been shown that the procedural lawmaking by elaborating the pilot judgment procedure was carried by the political will of the state parties' executives convened in the Committee of Ministers. Even though the international legislator had not solved the docket problem by Protocol No. 14 the political body of the Convention system invited the Court to react to the crisis. In the absence of a functional legislator, lawmaking by an international adjudicative body tried to solve a functional crisis in an international legal regime by realigning the competences in the Convention system. The state parties in post-*Broniowski* pilot judgments have accepted this shift of competences.[160] Furthermore, pilot judgments are a form of judicially decreed cooperation between the Court and national parliaments and have a catalyzing effect on the domestic democratic legislative process. Thus, the pilot judgment is a form of judicial lawmaking including domestic legislatives at the expense of the individual. That might be the cause for the Court's reasoning not invoking the effectiveness of the concrete Convention provision applied by the individual but the "effectiveness of the Convention machinery"[161] as a whole.

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157 Helfer (note 79), 154.

158 Eur. Court H.R., Memorandum of the President of the European Court of Human Rights to the States with a View to Preparing the Interlaken Conference, 3 July 2009, 8.

159 Leach (note 142), 731.

160 LEACH, HARDMAN, STEPHENSON & BLITZ (note 11), 178.

161 Eur. Court H.R., *Broniowski v. Poland (GC)* (note 60), para. 193.

Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals

*By Milan Kuhli & Klaus Günther**

A. Introduction

Without presenting a full definition, it can be said that the notion of *judicial lawmaking* implies the idea that courts create normative expectations beyond the individual case. That is, our question is whether courts' normative declarations have an effect which is abstract and general. Our purpose here is to ask about judicial lawmaking in this sense with respect to international criminal courts and tribunals. In particular, we will focus on the International Criminal Tribunal for the Former Yugoslavia (ICTY). No other international criminal court or tribunal has issued so many judgments as the ICTY, so it seems a particularly useful focus for examining the creation of normative expectations.

This issue of judicial lawmaking can be examined from different points of view. One viewpoint is the perspective of third parties. Here, the question is how and in what way third parties refer to judicial decisions in regulating their own conduct, thus giving the decisions an impact that goes beyond the individual case. Another viewpoint – and this is the main focus of our paper – is the perspective of the courts themselves, or more precisely: The perspective of the courts and judges as

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decision-makers. Our inquiry concerns whether and to what extent the ICTY judges should regard themselves as creative in arriving at some of their decisions.

The tradition of discourse theory provides tools with which to identify instances of judicial lawmaking on an analytically principled basis. As discussed at length below, discourse theory makes a distinction between discourses of norm *justification* and discourses of norm *application* – two ideal types. We will be modifying this traditional distinction; for our purposes, the distinction is between norm *justification* and norm *identification*. The first (norm justification) is paradigmatically the business of legislatures; when courts engage in a discourse of norm justification, they are engaged in judicial lawmaking. Now, a judiciary might engage in lawmaking without formally presenting arguments of a justificatory sort; a court could, for example, simply announce a new norm. But where a court does engage in norm justification, it is always engaging in or at least shading into lawmaking. Norm identification, by contrast, although it has a creative element, is not *essentially* creative.

This distinction in hand, we argue that elements of norm justification, rather than merely norm identification, can be seen in the ICTY's work, and specifically in its handling of the issue of belligerent reprisals. The article is divided into four main parts. Part B highlights the history of the establishment of the ICTY and the content of the ICTY Statute. This background will prove indispensable in comprehending the ICTY's lawmaking character. Part C probes the theoretical background of the norm justification/identification distinction. Part D provides a case study of the ICTY engaging in a discourse of norm justification: The case against Zoran, Mirjan, and Vlatko Kupreškić from 14 January 2000, concerning the issue of belligerent reprisals.[1] We will show that in this case, the ICTY did not identify particular norms of international customary law, but rather determined the validity of those norms – a justificatory form of discourse. Part E takes up the question of the legitimacy of judicial lawmaking.

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[1] ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment of 14 January 2000.

B. The Establishment of the ICTY

The ICTY was established in 1993 in response to mass atrocities committed in the territory of the former Yugoslavia beginning in 1991.[2] The immediate grounds for this development were "continuing reports of widespread violations of international humanitarian law … including reports of mass killings and the continuance of the practice of 'ethnic cleansing.'"[3] But of crucial importance for making the new tribunal realizable – being the first of its kind since the Nuremberg and Tokyo tribunals after World War Two – was the end of the Cold War and with it the end of an "animosity that had dominated international relations for almost half a century."[4]

The ICTY is based, not on a multilateral treaty, but on a resolution of the United Nations Security Council. With Resolution 808 (1993) the Security Council requested that the Secretary General submit a report on the possibility of establishing an ad hoc international tribunal for the former Yugoslavia.[5] The Secretary General carried out this request and submitted a report which contained, among other things, a draft Statute of the Tribunal.[6] The Security Council adopted the draft Statute without amendment, establishing the ICTY with Resolution 827 on 25 May 1993.

This Statute defines the ICTY's mandate, determining its purpose, jurisdiction, organizational structure, and (to a limited extent) even its criminal procedure.[7] The ICTY is an ad hoc tribunal whose jurisdiction is limited temporally and territorially but not personally.[8] Under Arti-

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2 *See* M. Cherif Bassiouni, Introduction to International Criminal Law 426 (2003); Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in: 1 The Rome Statute of the International Criminal Court, 3, 12 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds, 2002).

3 S.C. Res. 808, UN Doc. S/RES/808 (1993) of 22 February 1993, para. 7.

4 Antonio Cassese, International Criminal Law 324 (2008).

5 UN Doc. S/RES/808 (note 3), para. 15.

6 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 of 3 May 1993.

7 *See* Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, in: The Prosecution of International Crimes, 125, 129 (Roger S. Clark & Madeleine Sann eds, 1996).

8 Bassiouni (note 2).

cle 1, the ICTY "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Articles 2 through 5 define those violations: Grave breaches of the Geneva Conventions of 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4) and crimes against humanity (Article 5).

Now, since the ICTY was the first international war crimes tribunal in more than four decades, the creators of the ICTY Statute could rely only upon small portions of existing jurisprudence.[9] In addition, crimes against humanity had never been part of a treaty.[10] And finally, the ICTY Statute was drafted in a compressed period of time. Naturally enough, then, parts of the Statute were and are vague in the extreme.[11] For example, the Statute names crimes without providing any explicit definitions of those crimes, trusting the Tribunal to uncover those definitions by reference to customary international law – in contrast to, say, the Rome Statute of the (permanent) International Criminal Court. In addition, the ICTY Statute does not precisely fix the Tribunal's jurisdiction – for example, providing jurisdiction over prosecutions of persons accused of violating the laws or customs of war (in Article 3), but also stating that the Tribunal's jurisdiction *is not limited to* such violations (also in Article 3). Thus the Statute gives us a floor but is vague about the ceiling.[12] As Allison Danner puts it: "[T]he ICTY Statute resembled the bold outlines of a coloring book: much remained for the judges to fill in."[13]

Despite this statutory vagueness, the Secretary General claimed that the Tribunal could not create new law. In his original report containing the draft Statute, he stated:

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9 *See* CASSESE (note 4), 17.

10 Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT LAW REVIEW 1, 41 (2006).

11 *Id.*, 19.

12 *See* Karin Oellers-Frahm, *Das Statut des Internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 416, 423 (1994); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS. THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 76 (2006); Christopher J. Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EJIL 265, 282 (1996).

13 Danner (note 10), 46.

> [T]he application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise … The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims … the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907 … the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 … and the Charter of the International Military Tribunal of 8 August 1945.[14]

But apart from those examples, what in international humanitarian law is genuinely "beyond any doubt" part of customary international law? The Secretary General's explanation demonstrates the vagueness as much as dispels it. And, of course, vague statutes are a means of delegating lawmaking authority; they are *de facto* delegations.[15]

For what reasons did the Security Council give the ICTY *de facto* lawmaking authority in 1993? That is, why was the Security Council willing to leave the ICTY alone with such a vague statute? First, it must be borne in mind that the Yugoslavian conflict was ongoing at the time. Both the Council and the Secretary General were acting under immense time pressure. Resolution 827 expressed the Security Council's belief, or rather its hope, that "the establishment of an international tribunal and the prosecution of persons responsible for the … violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed"[16] – *halted and* redressed, because it was too early to aim only for redress. Second, as remarked already, there was little existing jurisprudence upon which one could rely in 1993. Given this time pressure and lack of precedent, writing a comprehensive, detailed statute was unrealistic. Third, to some extent the participating states were willing to leave the ICTY alone with a vague statute because the court was created for a limited purpose connected to the Yugoslavian conflict. In 1993, it seemed unlikely that a citizen of a

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14 UN Doc. S/25704 (note 6), paras 34-35; *see* Oellers-Frahm (note 12), 420.

15 *See* CASSESE (note 4), 17; Danner (note 10), 4.

16 S.C. Res. 827, UN Doc. S/RES/827 (1993) of 25 May 1993, para. 8.

state sitting on the Security Council at the time would ever face the ICTY as a defendant.[17]

C. Theoretical Background: Discourses of Norm Justification

From the vantage point of discourse theory, one can distinguish between discourses of norm justification and discourses of norm application. To understand this distinction, we need to think about two ways of challenging a norm in any particular case. On the one hand, one could challenge the norm as invalid – that is, as wrongly specified, or ill-considered, or simply mistaken. On the other hand, one could challenge the norm as inapplicable – that is, as inappropriate in this particular circumstance. Consider the norm: "One should never lie." Someone could think this norm invalid as stated, perhaps regarding it as excessively rigid. Or someone could think that the norm is valid, but not applicable in the case of, for example, social "white lies," such as pleasantries. The former would be a position regarding the norm's justification, the latter a position regarding the norm's application.[18]

In parallel to this distinction between norm justification and norm application, there is a distinction between two kinds of *discourse*: A *discourse* of norm justification, which as an ideal type is characteristic of legislatures, and a *discourse* of norm application, which as an ideal type is characteristic of courts. In a discourse of norm justification, we determine the validity of a particular norm by testing whether the norm lies in the common interest of all participants in the discourse. In a discourse of norm application, the decision is whether a norm, already determined to be valid, is appropriate in a given factual context.[19] Each of these two types of discourse, which arise vividly in the legal context, is marked by its own distinctive patterns of argumentation.[20] Participants

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[17] Danner (note 10), 22.

[18] Klaus Günther, The Sense of Appropriateness. Application Discourses in Morality and Law 2 *et seq.* (trans. by John Farrell, 1993).

[19] Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy 172 (1996); Klaus Günther, *Ein normativer Begriff der Kohärenz. Für eine Theorie der juristischen Argumentation*, 20 Rechtstheorie 163, 172 (1989).

[20] Habermas (note 19), 192.

in a legal discourse of justification enjoy unlimited access to normative, pragmatic, and empirical reasons, whereas participants in a discourse of application are required to treat the norm in view as settled and are limited to a constrained set of "moves" with regard to whether the norm applies to the facts of a case.[21] Thus discourse theory allows us to identify lawmaking by the types of reasons to which the lawmaker refers: To the extent the reasons in view concern a norm's validity, the institution involved – whether legislature or court – is engaged in lawmaking. That is not to say that all lawmaking involves a discourse of norm justification. But it is to say that all discourses of norm justification, at least in a legal context, involve lawmaking.

In international criminal law, norm identification is particularly difficult because the norms in question are often unclear. Consider the situation facing the ICTY. This Tribunal is tasked with applying customary international law. But the norms of customary international law are famously elusive and vague. And so part of the enterprise of a court working with international customary law is identifying these elusive and vague customary norms. Norm identification is distinct, even here, from norm justification, for when a court is authentically engaged in norm identification with respect to customary international law, it is not trying to answer the *prescriptive* question of whether a norm is valid or desirable. Rather, it is trying to answer the (more or less) *descriptive* question of whether a norm is already acknowledged in the international community.

Therefore, the distinction in this article is between a discourse of norm justification and a discourse of norm identification. This opens the question of whether international courts only identify norms in a (more or less) descriptive way or if they make decisions as to the validity of norms in a normative (and therefore prescriptive) way. What we must do is examine the arguments that are presented for the identification of international law to see what types of arguments they are.

Note, incidentally, that Habermas himself sees the possibility of judicial discourses of justification, and therefore the possibility of judicial lawmaking. In *Between Facts and Norms*, Habermas states: "To the extent that legal programs are in need of further specification by courts – because decisions in the gray area between legislation and adjudication

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[21] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010).

tend to devolve on the judiciary, all provisos notwithstanding – juristic discourses of application must be visibly supplemented by elements taken from a discourse of justification."[22] But from his point of view, these elements of a quasi-legislative sort require another kind of legitimation than does adjudication proper. This is a point to which we shall return later.

D. The ICTY Judgment in the *Kupreškić* Case

On 14 January 2000, the ICTY Trial Chamber made a decision in the case against Zoran, Mirjan, and Vlatko Kupreškić, as well as three other defendants. The case concerned a massacre of Muslims committed at a small Bosnian village named Ahmići in April 1993 during the conflict between Bosnian Muslims and Bosnian Croats. The village is located in central Bosnia in the Lašva Valley. It had been under Croatian control since October 1992. According to a census in 1991, Muslims represented 32% of the population in the area, Croats 62%, and minority groups 5%.[23]

Prior to the attack, most of the Croatian inhabitants of Ahmići had been warned of the planned massacre. On 16 April 1993, Croat forces attacked the Muslim population, targeting civilians and civilian objects (such as homes). A large number of the Muslim citizens of Ahmići were killed or expelled from their homes as part of a campaign of "ethnic cleansing." The purpose of the attack was to kill all men of military age, to destroy as much Muslim property as possible, and thereby to prompt all others to leave the village and move elsewhere. The Trial Chamber determined that there were no Muslim military forces in the village and that the village contained no military objectives.[24]

The defense stated that the massacre could be justified as a form of belligerent reprisal. There had undoubtedly been attacks, as the Trial Chamber itself agreed, by Muslim forces on Croat villagers in the region in early 1992.[25] To support this thesis the defense provided a list of Croatian villages from which Croats allegedly had been expelled and

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22 HABERMAS (note 19), 439 *et seq.*

23 *Prosecutor v. Kupreškić et al.* (note 1), para. 149.

24 *Id.*, paras 31 *et seq.*

25 *Id.*, para. 68.

their houses burnt.[26] Therefore the question arose of whether the subsequent massacre committed in Ahmići could be justified as a reprisal.[27]

Below, this paper introduces the doctrine of belligerent reprisals (Part D.I), then gives an account of the kind of argumentation used in the *Kupreškić* case (Part D.II), and finally takes up the development of this area of law after the *Kupreškić* case (Part D.III).

I. The Doctrine of Belligerent Reprisals

Generally speaking, the doctrine of belligerent reprisals refers to an act which occurs within the context of an armed conflict, and which in the ordinary course of events would be a violation of the law of armed conflict, but which is taken in retaliation by one party to a conflict in order to stop an adversary from violating international law.[28] The ICTY Statute itself does not expressly address the subject of belligerent reprisals. However, this does not mean that reprisal justification is unavailable under the ICTY Statute: Conduct that is a legitimate belligerent reprisal cannot constitute a war crime since it is not a violation of the law of armed conflict. The extent to which the parties to an armed conflict are entitled to take belligerent reprisals is one of the most controversial issues in modern international humanitarian law.[29]

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[26] *Id.*, paras 125 & 515 (note 767).

[27] The *Kupreškić* Case was actually the second ICTY decision regarding the issue of belligerent reprisals. Four years earlier, on 8 March 1996, the ICTY had addressed the reprisal issue in the case against Milan Martić. (ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-R61, Trial Chamber, Decision of 8 March 1996.) However, this earlier decision is not as important for our examination as the *Kupreškić* decision because the reasoning in the later case was much more detailed than in the earlier one.

[28] Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 43, 44 (1990); Christopher J. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 35, 37 (1989); Stefan Oeter, *Methods and Means of Combat*, in: THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, para. 476 (Dieter Fleck ed., 2008); Drucksachen des Deutschen Bundestags (BT-Drs.), No. 14/8524, 15.

[29] Christopher J. Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in: INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL

Belligerent reprisals force an adversary who is committing a violation of international humanitarian law to stop the violation and respect the law in the future.[30] From this vantage point, the law of reprisals serves the enforcement of international law.[31] But on the other hand the use of reprisals can involve serious dangers, particularly concerning questions of effectiveness and abuse. Regarding the former, there can be cases in which reprisals fail to make the adversary obey international humanitarian law and even do the opposite, prompting new unlawful reactions by the other side and therefore leading to a spiral of violence.[32] And as to abuses, it is easy to imagine breaches of humanitarian law being committed on the pretext of reprisals. Thus there have been trends for a long time in international law to limit belligerent reprisal doctrine and to demand a strict observance of legal preconditions.[33]

What are these preconditions? The law of armed conflict requires first that a reprisal be reasonably proportionate to the prior illegal act committed by the adversary.[34] This principle of proportionality "entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued."[35] Apart from that, reprisals must be a last resort: They must be preceded by a warning and are legal only if other means of enforcing compliance have failed.[36] The decision to take reprisals must be made at the highest political or military level of the particular state; an individual soldier or local commander is not au-

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Law. Current Developments, 539 (Horst Fischer, Claus Kreß & Sascha Rolf Lüder eds, 2001); Kalshoven (note 28).

30 Oeter (note 28).

31 Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in: The Handbook of International Humanitarian Law, para. 1406 (Dieter Fleck ed., 2008).

32 Kalshoven (note 28); Oeter (note 28).

33 *See* Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 Dickinson Journal of International Law 1, 99 (1996).

34 Michael A. Newton, *Reconsidering Reprisals,* 20 Duke Journal of Comparative & International Law 361, 374 (2010); Greenwood (note 29), 542.

35 *Prosecutor v. Kupreškić et al.* (note 1), para. 535; *see* Newton (note 34).

36 *See Prosecutor v. Kupreškić et al.* (note 1), para. 535; Oeter (note 28), para. 478.

thorized to order reprisals.[37] Thus the extent to which reprisals are motivated by emotive acts of personal revenge can be minimized.[38] And reprisals must be taken for the *purpose* of enforcing compliance with international law.[39] Thus they must be publicized and taken openly, since otherwise they could not be expected to facilitate deterrence.[40]

Apart from these preconditions, international treaties have limited the subjects against whom reprisals can be legally directed.[41] Reprisals may not be directed against, for example:

- the wounded, sick, or shipwrecked (Article 46 GC I; Article 47 GC II; Article 20 AP I);
- medical or religious personnel (Article 46 GC I; Article 47 GC II; Article 33[1] GC III; Article 20 AP I);
- prisoners of war (Article 13[3] GC III);
- medical facilities or supplies (Article 46 GC I; Article 47 GC II; Article 20 AP I);
- the natural environment (Article 55[2] AP I); and
- works or installations containing dangerous forces (such as atomic power) (Article 56[4] AP I).[42]

One of the most important provisions in this area is Article 33 of the Fourth Geneva Convention, prohibiting reprisals against civilians who qualify as protected persons under the Convention, i.e., those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (Article 4[1] GC IV). Additional Protocol I extends these categories, indeed prohibiting all reprisals against civilians (Article 51[6]) and civilian objects (Article 52[1]).[43]

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[37] *Prosecutor v. Kupreškić et al.* (note 1), para. 535; Oeter (note 28), para. 477.

[38] Newton (note 34).

[39] Wolfrum & Fleck (note 31).

[40] Greenwood (note 29), 541.

[41] *See* CHRISTIANE NILL-THEOBALD, "DEFENCES" BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLANDS UND DER USA 291 *et seq.* (1998); Greenwood (note 28), 39.

[42] *See* Oeter (note 28), para. 479.

[43] Greenwood (note 29), 543.

II. Discourses of Norm Justification in the ICTY?

As mentioned above, in the *Kupreškić* case, the question arose of whether the attacks on Muslim civilians and civilian objects in the Ahmići village could be justified as a belligerent reprisal. Doctrinally, this meant that the ICTY had to determine whether Articles 51(6) and 52(1) of the Additional Protocol I – the provisions prohibiting all reprisals against civilians and civil objects – had "been transformed into general rules of international law,"[44] that is, whether "a customary rule of international law has emerged on the matter under discussion."[45] (The Chamber does not distinguish between "general" and "customary" rules in this context.[46]) The Trial Chamber states: "In other words, are those States which have not ratified the First Protocol (which include such countries as the United States, France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions?"[47] What is striking in this context is that the Tribunal, by *expressly* referring to those states, decided the customary law question with a view toward possible future cases (involving the United States, France, etc.) over which the ICTY itself would almost certainly have no jurisdiction.

The Trial Chamber first concluded that the weight of state practice did not support the conclusion that all reprisals against civilians are prohibited.[48] And indeed one has to take into consideration that a number of major military powers, as just mentioned, have not ratified the First Protocol.[49] Yet the Trial Chamber did *not* then decide against the existence of a general rule of customary law prohibiting reprisals against civilians. Rather, it raised the question of whether the provisions of the First Additional Protocol *should* apply – and therefore *do* apply – to those states that have not ratified both provisions.[50] The ICTY answered that question, as we will see, in the affirmative. In short, it con-

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[44] *Prosecutor v. Kupreškić et al.* (note 1), para. 527.

[45] *Id.*, para. 531.

[46] KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS. ANSÄTZE EINER DOGMATISIERUNG 305 *et seq.* (2002).

[47] *Prosecutor v. Kupreškić et al.* (note 1), para. 527.

[48] *Id.*, para. 527; *see* AMBOS (note 46).

[49] *See Prosecutor v. Kupreškić et al.* (note 1), para. 527; Greenwood (note 29), 543; *see* BT-Drs. 14/8524, 16.

[50] *Prosecutor v. Kupreškić et al.* (note 1), para. 527; *see* AMBOS (note 46).

cluded that the treaty provisions prohibiting all reprisals against civilians and civilian objects *has* become customary law because the requirement of humanity dictates that it *should* become customary law.

What arguments did the ICTY use in reaching this conclusion? First, the ICTY invoked the "Martens Clause." This general rule of humanity has been expressed in different ways,[51] but to quote the version in Article 1(2) of Additional Protocol I: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."

The Chamber expressed the view that:

> [T]his Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[52]

(In the scholarly literature, this interpretation, according to which the Martens Clause could substitute considerations of humanity for State practice, has been criticized for being "unduly extensive."[53]) Against this background, the Trial Chamber states that "the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights."[54]

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[51] The Martens Clause first appears in the preamble of the 1899 Hague Convention on Land Warfare. For details, *see* Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EJIL 187 (2000).

[52] *Prosecutor v. Kupreškić et al.* (note 1), para. 527; *see* ROBERT HEINSCH, DIE WEITERENTWICKLUNG DES HUMANITÄREN VÖLKERRECHTS DURCH DIE STRAFGERICHTSHÖFE FÜR DAS EHEMALIGE JUGOSLAWIEN UND RUANDA 306 (2007).

[53] Greenwood (note 29), 556; *see also*, for a critical view, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 250 (2000).

[54] *Prosecutor v. Kupreškić et al.* (note 1), para. 529.

In addition to this argument from humanity, the ICTY also makes an argument from effectiveness. The Tribunal states that, in comparison to reprisals, the punishment of war crimes and crimes against humanity by national or international courts constitutes a more effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in the future with international law than reprisals.[55] This also legitimizes, of course, the ICTY's own function, namely, applying international criminal law.

It is striking to note the *types* of reasons that the ICTY is providing here. We hear practical arguments concerning the effectiveness of reprisals relative to the effectiveness of courts. We hear purely moral arguments concerning the inhumanity of attacking civilians and civilian objects. These are not the kinds of reasons that bear on the task of identifying existing international law. They are reasons taken from a discourse of norm justification. Effectively, the ICTY is arguing that customary law in this instance should be *created*.

So, again, the Chamber concluded that the Additional Protocol's provisions prohibiting all reprisals against civilians and civilian objects has become customary law. And regarding the *Kupreškić* case, the Trial Chamber rejected a defense of belligerent reprisals. Now, our point here is not to speak to the issue of legitimacy. That issue will be taken up later. Our point here is simply that the ICTY was engaged in the construction of international criminal law, and not just for the case at hand or even for its own possible future cases, but for other international tribunals that do exist or might later exist. This leads to the next Part.

III. After the Kupreškić Case

Judicial discourses of norm justification become more important when they are taken up by reference – implicit or explicit – in future legal instruments. This consideration in the *Kupreškić* case leads, among other things, to the Rome Statute of the International Criminal Court (the ICC Statute) and to the German *Völkerstrafgesetzbuch* (VStGB), a code of crimes against international law.

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[55] *Id.*, para. 530; *see* Meron (note 53).

1. The ICC Statute

The ICC Statute does not expressly address the subject of belligerent reprisals. But this does not mean that justification under the doctrine of belligerent reprisals is impossible under the ICC Statute: As remarked above concerning the ICTY Statute, conduct which is a legitimate belligerent reprisal cannot constitute a war crime since it is not a violation of the law of armed conflict.[56] This view is confirmed by Article 31 of the ICC Statute, a provision that deals with grounds for excluding criminal responsibility. Article 31(1) recognizes four such grounds: (a) mental disease or defect, (b) intoxication, (c) self-defense, and (d) duress/necessity.[57] However, Article 31(3) states that the International Criminal Court will not be limited to the defenses explicitly mentioned in the ICC Statute:

> At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 21 makes reference to "applicable treaties and the principles and rules of international law." As Kai Ambos points out: "It was generally accepted in Rome that such a 'window' is necessary since the Statute cannot possibly foresee all defenses which could become relevant in a concrete case."[58] Therefore, this window leaves room also for the defense of belligerent reprisals – and any such defense will likely take into account the interpretation of that doctrine given by the ICTY in the *Kupreškić* case. It remains to be seen whether, when such a case arises, the ICC will refer to the ICTY's decision.

2. The German Völkerstrafgesetzbuch (VStGB)

The VStGB is a German penal code concerning international crimes and created to bring German criminal law into accordance with the ICC Statute. It contains provisions concerning genocide, crimes against

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[56] Greenwood (note 29), 540.

[57] Kai Ambos, *Other Grounds for Excluding Criminal Responsibility*, in: 1 The Rome Statute of the International Criminal Court, 1003 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds, 2002).

[58] *Id.*, 1028.

humanity, and war crimes, among other things.[59] Like the ICC Statute and ICTY Statute, the VStGB does not expressly address the subject of belligerent reprisals. However, Article 2 of the VStGB states that the general criminal law shall apply to VStGB offenses so long as there are no conflicting, special VStGB provisions.[60] According to the legislative commentary, Article 2 of the VStGB refers *inter alia* to international customary law, and in this context – the commentary though not the penal code itself – the German legislature refers explicitly to both the issue of belligerent reprisals and the *Kupreškić* case specifically.[61]

Although the commentary expresses some doubts about the customary law character of Articles 51 and 52 of Additional Protocol I prior to the *Kupreškić* decision, it states that those Articles may have become customary law on account of the *Kupreškić* decision. The commentary thus argues that international law in the area of belligerent reprisals is still in flux and that it is therefore best to leave the development of the law in this area to the criminal courts, rather than regulating it directly in the VStGB.[62] This is a remarkable openness to judicial legal development for the German criminal system, given the centrality in that system of the "*nullum crimen, nulla poena sine lege*" principle of Article 103(2) of the German constitution ("no penalty without a law").[63]

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[59] *See* Milan Kuhli, *Bestrafung aufgrund von Gewohnheitsrecht? Zum Menschlichkeitsverbrechen der Vertreibung und zwangsweisen Überführung nach § 7 Abs. 1 Nr. 4 VStGB*, in: JAHRBUCH ÖFFENTLICHE SICHERHEIT 2010/2011 (vol. 2) (Martin H. W. Möllers & Robert Chr. van Ooyen eds, 2011) 387 *et seq.*; MILAN KUHLI, DAS VÖLKERSTRAFGESETZBUCH UND DAS VERBOT DER STRAFBEGRÜNDUNG DURCH GEWOHNHEITSRECHT 35 *et seq.* (2010).

[60] The German wording of Art. 2 VStGB is:

Auf Taten nach diesem Gesetz findet das allgemeine Strafrecht Anwendung, soweit dieses Gesetz nicht in den §§ 1 und 3 bis 5 besondere Bestimmungen trifft.

[61] Bt-Drs. 14/8524, 16.

[62] The German wording is:

Angesichts dieser Tendenz der Völkerrechtsentwicklung, die sich noch im Fluss befindet, empfiehlt es sich nicht, die Repressalie als Rechtfertigungsgrund im Völkerstrafgesetzbuch zu regeln. Für den schmalen Bereich, in dem die Repressalie derzeit noch als Rechtfertigungsgrund in Betracht kommt, kann es der Rechtsprechung überlassen bleiben, im Einzelfall unter Berücksichtigung des jeweiligen Entwicklungsstandes des humanitären Völkerrechts zu entscheiden (BT-Drs. 14/8524, 16).

[63] *See* KUHLI (2010) (note 59), 113 *et seq.*

But for immediate purposes, what is important is the clear effect of the *Kupreškić* decision beyond the *Kupreškić* case itself.

E. The Question of Legitimacy

Obviously in the *Kupreškić* case, the ICTY did more than observe a norm of state practice. Whether what it did constitutes an example of judicial lawmaking, however, depends on how we understand a coordinate concept: the concept of norm identification. On the one hand, norm identification is not the mere observation of legal habits from an external, observer's point of view. On the other hand, the legitimacy of norm identification depends on the difference between it and straightforward procedures of lawmaking that are reserved to legislative bodies alone.

One crucial point is that a practice of norm identification always presupposes that the law *is already there* and only has to be identified correctly. The process of identification is thus more akin to a process of discovery than to a process of invention, construction, or creation. This is even true if one admits that there is no discovery without some elements of invention, construction, and creation. What is important here is that the presupposition that there already is a norm (which has only to be identified correctly) includes also the presupposition that the norm has validity and acceptance, that it is binding upon those to whom it applies. Thus the identification of the norm does not add anything to its validity but always already presupposes it. The procedure of norm identification does not lead to a practical discourse about the acceptability of the norm on the basis of reasons and justifications which could be brought forward by participants in a legislative body or by a global audience. The criteria according to which a norm is identified are independent of those sorts of reasons and justifications. In particular, the state practice criterion presupposes that somebody else, for example, the states, and not the judges, have already come to a decision about the norm's validity.

Furthermore, the identification of a norm is accompanied by the attitude that the valid norm will serve as a reason and justification for legal claims and demands – that it will serve as a standard according to which certain kinds of behavior will be criticized, evaluated, and judged. The expectation is that, a norm having been correctly identified, there will be no adjudicative ground on which to criticize the use of the norm as

justification or standard. If a norm is identified in this spirit of, let's say, critical and reflective acceptance, norm identification is done from an internal point of view in the sense of H.L.A. Hart.[64]

This is why norm identification requires more than a mere observation of state practice as one might find in anthropology or social science. Of course, norm identification requires the collection of data about factual patterns of behavior. Those factual observations are empirical, as well as theoretical, and can be criticized as either true or false. But in the context of judicial norm identification, this is not the whole story. The collection of data is done from an external point of view; it only prepares the way for a shift of attitude to the internal point of view. If a judge has identified the norm with the help of the collection of data, the judge then has to change from the observer's to the participant's point of view. The theoretical discourse about the correct identification of a norm operates under the hypothesis that once a norm has been identified correctly, then it has to serve as a normative, legal standard for the judges. We see now why norm identification falls within the larger category of norm application: Both take place within the internal point of view. We see also more clearly why norm application (including norm identification) is distinct from norm justification, which does not adopt the internal point of view: Participants in a discourse of norm application refrain from arguing about the validity of a (correctly identified) norm, while participants in a discourse of norm justification engage in just that argument.

In the ICTY's *Kupreškić* decision, when the Tribunal switches from the discourse of norm identification to a discourse of norm justification, it starts to make law. But even then, what seems to be judicial lawmaking on a first level (applying the Additional Protocol to non-member states) turns out to be an act of norm identification on a second level. The Court did not enter into straightforward lawmaking but put itself into a position of a critical reflective attitude to the principles of humanity and public conscience. These principles are regarded and treated as being already there, and as principles whose validity shall not be contested or put into question. At least one could say that there is a kind of judicial lawmaking that includes inventive and creative elements, but nonetheless takes place from within an internal point of view.

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[64] Here we are following the illuminating analysis of Scott Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM LAW REVIEW 1157 (2006).

This would be a paradoxical result. How can a judge create new law from a point of view which is defined as a critical reflective *acceptance* of a norm? Perhaps – and this is a tentative suggestion – this has to do with the enigmatic status of the principles of humanity and public conscience. They are given, but they are given in such a way as to lack a plain and determinate meaning.[65] The problem of indeterminacy in legal concepts, of their contestability with regard to new and unforeseeable facts and cases, is notorious with almost all legal norms, but becomes severe in the case of principles like humanity and public conscience. But a closer look reveals that these principles cannot be applied as rules according to a limited range of necessary and sufficient conditions. They require courts to broaden their view, to justify some proposed norm according to principles that are shared by all human beings. They thus require courts to broaden the scope of their critical reflective attitude to valid norms in such a way as to include not only norms accepted by a particular group of states or by one region only, but by humanity in general. Furthermore, there is a way by which the principles of humanity and public conscience become more explicit within a legal system over time: The meaning of the principles becomes more determinate through concrete cases of violation. From an historical point of view, moral learning processes are dependent on experiences of injustice.[66] If one looks at the *Kupreškić* decision with this broader view, the following features become more relevant:

(1) The Court refers to an already ongoing public discussion. It does not invent the norm but takes it from this ongoing discussion.

(2) The Court participates in that public debate with a concrete case that has something to teach us about what different interpretations of the principles of humanity and public conscience might mean.

(3) The Court's decision regarding the principles of humanity and public conscience can be criticized by the public and overruled by legislative bodies (as the ICC Statute overruled various other ICTY decisions). To some extent, any published judicial

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[65] *See* Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM LAW REVIEW 2451, 2478 (2010).

[66] Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in: THE EU AND HUMAN RIGHTS, 117 (Philip Alston ed., 1999).

decision is subject to public criticism. But the criticism is especially important where a court has engaged in a discourse of norm justification. For when a court has entered into such a discourse, the court acts with less singular authority than when it decides a particular case according to a given, valid, and already identified norm. With regard to the ICTY, which is facing a fragmented and pluralist global public, the possibility of a public debate can and should be secured by institutional arrangements and procedural rules. For example, NGOs could be given the opportunity to participate via amicus curiae briefs.

(4) The norms and principles of humanity and public conscience are of a moral, as well as a legal, kind. In international law, the procedures by which moral norms become legal norms are complex and tangled. The decisions of the ICTY are part of this process. They recognize some moral norms as legal norms and integrate them into the web of legal principles and rules, while at the same time treating those moral norms as if they were already there in the law, and already valid.[67] This is characteristic of lawmaking from an internal point of view.

(5) Insofar as judges enter into a discourse of norm justification, they are only one participant among others. In the particular case at hand, the ICTY had to reach a decision from an internal point of view, i.e., to justify its ruling by referring to other valid rules and principles, though those rules and principles might be as abstract and indeterminate as those mentioned in the Martens Clause. But the legally binding nature of such a rule for other cases has to be contested publicly in an ongoing discourse of justification. Whereas judges are authorized to decide and settle the discourse of legal norm application in concrete cases, its lawmaking remains subject to the acceptance of later participants in the normative discourse whose number is – in principle – infinite. In this later practice, the validity that a court claims for a norm, which it has created and justified to resolve a singular case, remains defeasible. Indeed, the ICTY Statute and the ICC Statute themselves are good examples of the power of other discourse participants to overcome the

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[67] Klaus Günther, *Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory*, 5 NO FOUNDATIONS – JOURNAL OF EXTREME LEGAL POSITIVISM (FOR KAARLO TUORI ON HIS SIXTIETH BIRTHDAY) 5 (2008).

> opinions of courts in a discourse of norm justification. They overcame the traditional ruling of courts, which had prevailed throughout the world for some years, that measures taken by members of a government are considered acts of state and are immune from criminal prosecution even if those governments have ordered a humanitarian atrocity.

The ICTY's ruling on belligerent reprisals in the *Kupreškić* case was thus an instance of judicial lawmaking, but not an illegitimate one when correctly understood. It was an instance of the court as participant in a discursive community and of a ruling that sets forth a claim of international law that remains contestable. Time will tell whether the discursive community as a whole will accept it.

IV. Further Fields of Judicial Lawmaking:

The ICJ and the CAS

Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function

*By Karin Oellers-Frahm**

A. Preliminary Remarks

In international law, jurisdiction serves the same principal aim as in national law, namely the settlement of disputes in order to maintain (legal) peace and security. In international law, as in national law, judicial procedures take time, sometimes a lot of time, during which the rights at stake may be negatively affected by acts of one of the parties potentially resulting in an ineffective judgment. A remedy against such an occurrence has been developed through an instrument of interim protection by which the court directs the parties to leave the rights as they stand and not to interfere with the situation.[1] Such an instrument appears indispensable in order to ensure that a court or tribunal is able to effectively exercise its function.[2] At the national level, interim protection is usually unproblematic since the competence of the tribunals is mostly comprehensive. In international law, in contrast, the competence of ju-

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1 The aim of provisional measures as a remedy against "la lenteur de la justice" was explicitly expressed by the Mixed Arbitral Tribunal in the case *Ellermann v. Etat polonais*, 5 TAM 457, 459 (1924).

2 Rüdiger Wolfrum, *Interim (Provisional) Measures of Protection*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL), margin number 7 (Rüdiger Wolfrum ed., 2006), available at: http://www.mpepil.com; Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 RECUEIL DES COURS 9, 19 (1992/III).

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236, DOI 10.1007/978-3-642-29587-4_12,

dicial organs is one of the most discussed problems because it depends on the consent of states.[3] Any expansion of competence without an explicit agreement of the states concerned is therefore of utmost significance for the role and the acceptance of international courts and reflects the organizational status of international society. Thus, in the context of the project "Beyond Dispute: Lawmaking by International Judicial Institutions," the subject-matter of this contribution mostly relates to the role and self-understanding of international judicial organs; it is less concerned with the creation of substantive normative expectations between international subjects.[4] Yet, the expansion of judicial competences fits into the conceptual apparatus of this research as it innovates the legal order and reaches beyond the case at hand. The case of provisional measures provides a particularly fine example of incremental judicial law-making through progressive interpretation, supported by a holistic vision of the international judiciary, reciprocal strengthening and later state practice, as well as its functional legitimation and its limits.

B. Summary Overview Over the Institution of Provisional Measures

I. Historical Development

The power to issue provisional measures, a characteristic of the national judiciary, only appeared in the international context at the beginning of the 20th century. At the Hague Peace Conferences of 1899 and 1907, the peaceful settlement of international disputes was one of the three

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[3] This is the undisputed basic principle of international jurisdiction; *cf.* Christian Tomuschat, *International Courts and Tribunals*, in: MPEPIL, margin number 46 (Rüdiger Wolfrum ed., 2006); JOHN G. MERRILS, INTERNATIONAL DISPUTE SETTLEMENT ch. 6 (2005); Karin Oellers-Frahm, *Nowhere to Go? – The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction*, in: A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT; DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE, 435 (Thomas Giegerich ed., 2009); SABINE SCHORER, DAS KONSENSPRINZIP IN DER INTERNATIONALEN GERICHTSBARKEIT, 2003; *see also Eastern Carelia Case*, PCIJ 1923, Series B, No. 5, 27 and *Mavrommatis Palestine Concessions Case*, PCIJ 1924, Series A, No. 2, 16.

[4] *Infra* section B.II.

items on the agenda; but neither the then elaborated Convention for the Pacific Settlement of International Disputes nor the 1907 project of a Permanent Court of Arbitration addressed the issue of provisional measures. However, an initial provision relevant in this context dates back to the same period: Art. 18 of the Convention for the Establishment of a Central American Court of Justice of 1907 provided (in a very general manner) for the preservation of the *status quo* while a case was pending. This provision was followed by a more detailed rule in the Bryan Treaties of 1914.[5] Although the Bryan Treaties did not institute a court, but rather a Commission for the settlement of disputes, they served as a basis for what became Art. 41 of the Statute of the Permanent Court of International Justice (PCIJ). This article provided that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." This clause has been maintained in the Statute of the International Court of Justice (ICJ), the "successor" of the PCIJ; it also served as a model for a large number of other international courts and tribunals,[6] such as the Commission of Investigation and Conciliation founded by the Pact of Bogotá of 1948; the Arbitration Tribunal established by the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Supreme Restitution Court after World War II; the International Tribunal of the Law of the Sea; the OSCE Court of Arbitration; the Inter-American Court of Human Rights; the African Court of Human Rights; the European Court of Justice; the EFTA Court; the MERCOSUR Court; the NAFTA Court; the ECOWAS Court; ICSID tribunals and the Permanent Court of Arbitration; as well as a large number of tribunals instituted in treaties on technical matters.[7] Additionally not so much judicial bodies but rather Committees were created under several human rights instruments, e.g., the Committee on the Elimination of All Forms of Racial Discrimination, the Human Rights Committees established according to Part IV of the Interna-

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5 For more details, *see* Karin Oellers-Frahm, *Art. 41*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A COMMENTARY, 925, margin number 1-3 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

6 Oellers-Frahm (note 5), 929, margin number 17.

7 KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 2 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1075 *et seq* (2001).

tional Covenant on Civil and Political Rights respectively the International Covenant on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination Against Women as well as the Committee established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide for the adoption of interim measures of protection.

This impressive number of courts and tribunals empowered to issue provisional measures and the increasing use made of this power reflect the fact that the preservation of the rights at stake in a particular case is an indispensable means of guaranteeing the effectiveness of a final decision. This is in particular due to the fact that international procedures often take rather long.

II. Requirements of Interim Protection

The particularity of interim protection, as provided for in the instituting treaty or the statute of an international court or tribunal, lies in the fact that the power of the judicial body is not strictly defined but is, to a high degree, discretionary,[8] a fact that is inherent in the character of the institution of interim protection which aims to preserve the rights at stake of either party in order to guarantee the effectiveness of the judgment. Art. 41 of the ICJ Statute, which can be considered the model rule, does not contain more details circumscribing the "circumstances" which require the adoption of provisional measures, and the Rules of Court are also silent on this point. Thus, the appreciation of the "circumstances" and also the choice of the measures to be indicated are left to the court. The parameters governing the exercise of the court's discretion have to be guided merely by the aim to preserve the rights of either party. According to the jurisprudence of the PCIJ, in particular, and the ICJ, measures aimed at preserving the rights at stake are required if an irreparable damage is imminent. The key aspects are thus the irreparability of the damage and the urgency of action.[9] The relevant provision in the Inter-American Convention on Human Rights, Art. 63 (2), which dates from 1969, explicitly contains these basic requirements by stipulating: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt

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8 Collins (note 2), 24.

9 Wolfrum (note 2), margin number 32 *et seq*.

such provisional measures as it deems pertinent … .” However, these are also rather vague terms which reflect the discretionary task of the judicial body and which in fact open the door for expanding the power to issue provisional measures. Yet the exercise of interim protection and the interpretation of urgency and irreparable damage are only provisional in character: They will be reviewed during the procedure on the merits on the basis of a detailed examination of facts and law. Although the contents of the provisional measures can be confirmed in the judgment, it is only the judgment that definitely decides the dispute, and thus the legal question at stake. Accordingly, under the aspect of the legitimacy of lawmaking by international judicial organs, developing the competence on interim measures of protection is not to be seen as dramatic, because these measures are only in force until the final judgment is delivered. At the same time, the development of interim protection in the context of the project of international jurisdiction is interesting with regard to other aspects which rather refer to questions of competence than to questions relating to substantial law.

C. The Competence to Issue Provisional Measures

I. The Basis of the Competence: Explicitly Conferred or Implied Power?

As already mentioned, the competence of judicial organs is one of the core aspects of international jurisdiction because it depends on the consent of the states parties to the treaty instituting a court or tribunal. As third party dispute settlement requires a limitation of state sovereignty, the competence of any international judicial organ is usually limited to the powers explicitly conferred upon it. These, however, also include those powers that are inherent in those explicitly conferred.[10] With regard to interim protection this principle is reflected in the fact that the power to issue provisional measures is provided for in the instituting treaties or statutes of a great number of international courts and tribunals.[11] Therefore, the question whether such an explicit provision was indispensable or only declaratory of a power already inherently existing was not advanced. This question did, however, become relevant in the

[10] Tomuschat (note 3).

[11] *Supra* section B.I.

context of the European Convention of Human Rights, where the power to indicate provisional measures is not provided for in the Convention, but only in the Rules.[12] Due to the fact that the rules of procedure, which are elaborated and adopted by the Court itself,[13] have to keep within the framework set by the Statute or Convention creating the court or tribunal, the question arose whether the Court had overstepped its competences or whether the power to issue provisional measures need not be provided for in the instituting treaty because it is implied in the powers of a court. There is, in fact, a longstanding opinion according to which interim protection has to be considered as an implied power of any judicial organ.[14] This opinion, that today is generally accepted,[15] finds support in a case going back as far as 1906;[16] as another example, reference may be made to the Administrative Tribunals of the United Nations and the ILO, which used to issue provisional measures notwithstanding the absence of any provision to this effect.[17]

This result raises the question of whether the presently undisputed power to issue provisional measures also in the absence of an explicit

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[12] Until the coming into force of Protocol No. 11 of 1994, Rule 36 of the Commission provided for the power to adopt provisional measures; today Rule 39 of the Rules of Court of 1998 contains a provision on the adoption of provisional measures by the Court.

[13] Art. 26 of the Convention as amended by Protocol No. 11.

[14] *Cf*. for a rather early example the *Northern Cameroons Case*, Individual Opinion of Sir Gerald Fitzmaurice, ICJ Reports 1963, 3, 103; KARIN OELLERS-FRAHM, DIE EINSTWEILIGE ANORDNUNG IN DER INTERNATIONALEN GERICHTSBARKEIT 122 *et seq*. (1975); JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT 221 *et seq*. (1983).

[15] Wolfrum (note 2), margin number 1; SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW 10 (2005); Collins (note 2), 215.

[16] The relevant case concerning a revolution in Honduras which allegedly was supported by Nicaragua was brought before an arbitral tribunal on the basis of Art. 11 of the Peace and Arbitration Treaty of 20 January 1902 between Costa Rica, El Salvador, Honduras and Nicaragua. The arbitral tribunal "ordered the immediate disarmament and disbandment of force, in order that this may return to the pacific state which the arbitral *compromis* contemplates". This measure was taken for the reason that the tribunal "considered its principal duty was to see to it that the award to be pronounced should be made effective", *cf*., for more details, DANA G. MUNRO, THE FIVE REPUBLICS OF CENTRAL AMERICA 208 *et seq*. (1967).

[17] OELLERS-FRAHM (note 14), 127 *et seq*.

provision constitutes an expansion of the Court's powers exceeding the underlying consent of the states concerned – a question that must be answered in the negative: An implied power to issue provisional measures does not constitute an expansion of competences. The reason for this finding refers to the fact that the adoption of provisional measures is part of what is generally known as *incidental* jurisdiction of international courts and tribunals. Incidental proceedings[18] (or incidental or implied jurisdiction) means that a court or tribunal seized of a case, can take all necessary decisions pending the final decision, provided that it has at least prima facie jurisdiction[19] over the merits. As interim protection is an instrument for the conduct of the case, the consent of a state to the jurisdiction of the Court to decide the particular case on the merits carries with it, so goes the core legal argument, the consent to exercise any incidental step necessary to guarantee the effectiveness of the judgment.[20] The competence to issue provisional measures is thus governed by the competence of the court to decide upon the merits of the case. If this competence exists, provisional measures can be adopted whether there is a provision to this effect in the statute or the rules of court or not.

II. The Question of Competence

The only relevant particularity with regard to the competence of a judicial organ to issue provisional measures relies on the fact that the competence to decide the case must not have been definitely decided before provisional measures are adopted, but that such competence must only be asserted prima facie. This exception to the requirement that international courts can only act if their competence is established constitutes a compromise between the urgency of action, where the rights at stake in a dispute are endangered, and the sovereignty of states which need not accept any action of a court without their consent. This compromise was considered justified because interim measures of protection are without prejudice to the final decision, including a decision on the ju-

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18 This term is used in the Rules of the ICJ, section D.

19 ROSENNE (note 15), 9, whether this statement is valid without any restriction will be discussed *infra* text to note 57.

20 ROSENNE (note 15), 9.

risdiction or the admissibility of the case.[21] Furthermore, and more importantly, provisional measures were largely regarded as lacking binding force[22] so that there was no interference with the sovereign rights of states if the jurisdiction had to be later denied. Whether this appreciation requires reconsideration with regard to the fact that, at present, the binding character of such measures is generally affirmed, will be examined in the following section.

III. The Effect of Provisional Measures

International treaties or statutes creating a court or tribunal provide for detailed rules concerning its competence. Usually there is a provision concerning the effect of decisions of the judicial organ because it is relevant for the obligations of the states flowing from these decisions. While all treaties or statutes instituting a judicial organ explicitly provide that its final decision is binding upon the parties,[23] they mostly lack a clear provision concerning the effect of provisional measures. Art. 41 of the ICJ Statute, which has been copied by numerous other international courts and tribunals, is by no means clear in this regard because it uses the term "indicate" provisional measures, instead of "prescribe" or "order." This term was deliberately chosen for the reason that "great care must be exercised in any matter entailing the limitation of sovereign powers"[24] and, furthermore, because the Court had no means of assuring execution.[25] The practice of state parties to disputes

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[21] Wolfrum (note 2), margin number 19 *et seq*.; Oellers-Frahm (note 5), 934, margin number 26 *et seq*.; HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 254 *et seq*. (1958).

[22] For an overview over court practice and doctrine, *see* Oellers-Frahm (note 5), 953, in particular margin number 85 *et seq*.

[23] *Cf*., *e.g.*, Art. 59 ICJ Statute.

[24] *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* 735 (1920); *see also* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 423 (1943).

[25] With regard to this difference, *see Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Separate Opinion of Judge Weeramantry, ICJ Reports 1993, 325, 374; and para. 107 of the Judgment of the Court in the *LaGrand* Case where the Court affirms that "the lack of means of execution and the lack of binding force are two different matters", ICJ Reports 2001, 466.

before the ICJ concerned by provisional measures reflects this ambiguity.[26] This question became relevant for the first time when the United Kingdom brought a complaint before the Security Council against Iran for non-compliance with the provisional measures indicated by the Court in the *Anglo-Iranian Oil Co.* case.[27] Although the complaint was not made under Art. 94, para. 2, of the Charter, which provides for the involvement of the Security Council only in case of non-compliance with a judgment, the discussion in the Security Council centered essentially on the question whether decisions other than judgments empowered the Security Council to make recommendations concerning the implementation of that decision. As no agreement could be reached, the question was finally postponed until the Court had pronounced on its jurisdiction and became moot when, on 22 July 1952, the Court found that it had no jurisdiction. The Security Council had no occasion to resume this item, which became, however, a permanent issue in legal writings, which were divided on that issue.[28] The majority of the authors have denied the binding force relying on the texts of drafting history and concerns regarding restrictions of sovereignty without specific consent. The argumentation of authors supporting the binding character of provisional measures centered on the effectiveness of the judicial function, on the one hand, and the prestige of the Court, namely that it cannot be assumed that the Statute of the Court contains provisions relating to any merely moral obligations of States, on the other.

While the question remained controversial with regard to the ICJ, partly due to the fact that the Court did not pronounce itself on the issue,[29] other judicial organs expressed the view that the provisional

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[26] Oellers-Frahm (note 5), 956, margin number 88.

[27] ICJ Reports 1951, 89; *see also* SHABTAI ROSENNE, 1 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 249 *et seq*. (2006).

[28] Oellers-Frahm (note 5), margin number 86 *et seq*.

[29] The clearest statement that does, however, also not support the binding character of provisional measures can be found in the *Nicaragua* Case, where the Court stated: "When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. This is particularly so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to be contrary to international law", ICJ Reports 1986, 114, para. 289; a similar statement can be found in the *Genocide Convention* Case (Provisional Measures), where the Court required their "immediate and effective implementation", ICJ Reports 1993, 325, 349, para. 59.

measures they issued are binding although the relevant provisions in their statutes were as unclear as Art. 41 of the ICJ Statute. The first court, which explicitly held that its provisional measures are binding, was the Inter-American Court on Human Rights which stated that the relevant provision of the Convention "makes it mandatory for the state to adopt the provisional measures ordered by this Tribunal."[30] What seems even more significant in this context is the fact that the Human Rights Committee established under the Covenant on Civil and Political Rights (which does not even have the power to deliver binding decisions) also considers non-compliance with provisional measures adopted under Rule 86 to be a violation of the obligations flowing from the Covenant as well as a violation of the obligation to cooperate with the Committee in the context of its consideration of communications.[31] Furthermore, the Committee established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[32] (which is not empowered to give binding decisions) stated that provisional measures issued by the Committee under Rule 108, Section 9, require compliance in order to prevent the occurrence of ir-

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[30] Inter-Am. Court H.R., *Constitutional Court Case (Peru)*, Provisional Measures, Judgment of 14 August 2000, Series E, No. 3; it has, however, to be mentioned that Art. 25(1) of the Rules of the IACtHR empowers the Court to "order" provisional measures what raises again the question whether the Rules exceed the frame set by the Convention.

[31] *See Glenn Ashby v. Trinidad and Tobago,* 27 July 1994, UN Doc. CCPR/C/74/D/580/1994; and *Dante Piandong et al. v. The Philippines,* 19 October 2000, Un Doc. CCPR/C/70/D/869/1999 where the Committee stated in para. 5.1: "By adhering to the Optional Protocol, a state party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. … Implicit in a state's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views. … It is incompatible with these obligations for a state party to take action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views". For the follow-up, *see* Nisuke Ando, *The Follow-Up Procedure of the Human Rights Committee's Views*, in: 2 LIBER AMICORUM JUDGE SHIGERU ODA, 1437 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds, 2002).

[32] Convention of 10 December 1984, UN GAOR, 39th Session, Resolutions, Supp. 51, UN Doc. A/39/51, 197.

reparable damage with regard to the individual concerned.[33] It is in fact not surprising that it was in the field of human rights protection where judicial bodies particularly insisted on the effectiveness of the means of guaranteeing and controlling implementation (including interim protection), which in this context is of particular relevance.

However, these developments are certainly not unrelated to the fact that the unsatisfactory situation, in particular with regard to the ICJ and the lesson learned there, led the drafters of the United Nations Convention on the Law of the Sea and the Statute of the ITLOS[34] to explicitly provide for the binding effect of provisional measures by stipulating, in Art. 290 of the Convention and Art. 25 of the Statute, that they are "prescribed." There is no doubt that this solution not only best fits the function of dispute settlement, but also the prestige owed to international courts and tribunals. Under these conditions it did not come as a surprise that the ICJ also affirmatively decided on the binding character of its provisional measures when asked to take a decision on this issue in the *LaGrand* case.[35] The example of the ICJ was followed by the ECHR which found in favor of the binding nature of provisional measures in the *Mamatkulov v. Turkey* case, reversing its previous jurisdiction in the judgment *Cruz Varas v. Sweden.*[36]

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[33] *Cf*. case *Rosana Nunez Chipana v. Venezuela,* 10 November 1998, UN Doc. CAT/C/21/D/110/1998, Annex; and case *T.P.S. v. Canada,* 16 May 2000, UN Doc. CA T/C/24/D/99/1997.

[34] Convention of 10 December 1982, 21 INTERNATIONAL LEGAL MATERIALS 1261 (1982).

[35] *LaGrand* Case, Merits, ICJ Reports 2001, 466, 502, para. 100 *et seq*.; *cf*. Karin Oellers-Frahm, *Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht*, 28 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 265 (2001); Jochen A. Frowein, *Provisional Measures by the International Court of Justice – The LaGrand Case,* 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 55 (2002); Jörg Kammerhofer, *The Binding Nature of Provisional Measures of the International Court of Justice: the "Settlement" of the Issue in the LaGrand Case*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 67 (2003); Shabtai Rosenne, *The International Court of Justice: The New Form of the Operative Clause of an Order Indicating Provisional Measures*, 2 THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 201 (2003).

[36] *Mamatkulov v. Turkey,* Judgment of 6 February 2003; *cf*. Karin Oellers-Frahm, *Verbindlichkeit einstweiliger Maßnahmen: Der EGMR vollzieht – endlich – die erforderliche Wende in seiner Rechtsprechung*, 30 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 689 (2003); and *Mamatkulov v. Turkey,* Judgment

On the basis of this development, it can be stated that provisional measures today are considered as having binding effect, which in fact constitutes an enhancement of international jurisdiction.[37] In the present context concerning the expansion of the competence of international courts, the decisive question refers to the reasons advanced for affirming the mandatory nature of provisional measures.[38] If the binding character can be justified by inferring it from the terms of the treaty instituting the court, there will be no expansion of competence;[39] if,

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of the Grand Chamber of 4 February 2005; Karin Oellers-Frahm, *Verbindlichkeit einstweiliger Anordnungen des EGMR – Epilog, Das Urteil der Großen Kammer im Fall Mamatkulov u.a. gegen Türkei*, 32 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 347 (2005).

[37] OELLERS-FRAHM (note 14), 107 *et seq*.; Wolfrum (note 2), margin number 45 *et seq*.; Oellers-Frahm (note 5), 953, margin number 79 *et seq*.

[38] Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 13 (2010).

[39] All clearly defined competences explicitly conferred upon a court or tribunal in the instituting instrument are irrelevant in a discussion concerning the question of expansion of competences. They may, however, reflect a development of international law, such as the provision in Art. 290 UNCLOS which empowers the competent court or tribunal to issue provisional measures not only to preserve the respective rights of the parties, but also "to prevent serious harm to the marine environment". This provision differs from the usual rules concerning interim protection; as, however, it is part of the Treaty and thus based on the consent of the states parties to the Convention, it does not raise questions of expansion of competence which may only come up in the context of the use made of the provision; *cf*. Philippe Gautier, *Mesures conservatoires, préjudice irréparable et protection de l'environnement*, in: LE PROCÈS INTERNATIONAL, LIBER AMICORUM JEAN-PIERRE COT, 131-154 (2009). In the same context reference can be made to the Stockholm Arbitration Center, Chamber of Commerce, which on 1 January 2010 introduced an emergency arbitration procedure providing for the adoption of binding pre-arbitral provisional relieve which in fact raises questions of expansion of competence; text of the new rules, available at: http://www.sccinstitute.com/forenklade-regler-2.aspx; for a first comment, *see* Charles N. Brower, Ariel Meyerstein & Stephan W. Schill, *The Power and Effectiveness of Pre-Arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-States Disputes*, in: BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE, 61 (Kaj Hobér, Annette Magnusson & Marie Öhrström eds, 2010).

however, it is considered as merely following from the purpose of the judicial function alone, this might be different.

IV. Expansion of Competence?

In the *LaGrand* case the argument of the United States against Germany's contention supporting the binding effect of provisional measures relied on the Court's and state practice and the "weight of publicists' commentary."[40] The United States further referred to the fact that "the sensitivities of states, and not abstract logic, had informed the drafting of the Court's constitutive documents" and that in this context "it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures."[41] The binding effect of provisional measures would, in the view of the United States, have "quite dramatic implications," because "by merely filing a case with the Court, an applicant can force a respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court's rules and practices relating to provisional measures would be surplusage. This is not the law, and this is not how States or this Court have acted in practice."[42] These arguments of the United States were simply reproduced, but not discussed by the Court which concentrated initially on the interpretation of the terms of Art. 41 of the Statute. Secondly, the Court (by way of confirming its interpretation of Art. 41) referred to the *travaux préparatoires* of the Statute and the purpose of the judicial function for justifying the binding character of its provisional measures. The Court's reasoning relied on the consideration that although Art. 41 uses the vague term that provisional measures can be "indicated," their binding nature had to be affirmed by referring to the context, which in the English version provides that the measures indicated "ought to be taken" versus the French version which employs a clearer usage of the terms "*doivent être prises*." These terms affirm, in the view of the Court, the binding effect of provisional measures as part of the compe-

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40 ICJ Reports 2001, 500, para. 96.

41 *Id.*

42 *Id.*

tence explicitly conferred upon the Court.[43] Thus, no question of competence expansion would arise since the Statute of the Court is an integral part of the UN Charter and thus the agreed treaty basis governing the Court's competences.

In contrast to the findings of the ICJ in the *LaGrand* case, the reasoning of the ECHR in the *Mamatkulov* case was not based on an interpretation of the underlying provision but followed the considerations of human rights bodies according to which non-compliance with provisional measures constitutes a violation of the obligation to cooperate with the body and a frustration of the function conferred on the body.[44] This finding is particularly interesting as it deviates from earlier considerations of the Court on the effect of provisional measures. In the *Cruz Varas* case[45] and again in the *Conka* case[46] the Court explicitly stated that in the absence of a provision in the Convention and in the Rules of Court concerning the effect of provisional measures neither Art. 34 of the Convention nor other sources of law allow for a finding in favor of the binding effect of interim measures.[47] In the *Mamatkulov* case the Court justified the deviation from the earlier cases by referring to general principles of law and the decisions of other international organs as well as the rules of treaty interpretation,[48] which resulted in the statement that under Art. 1, 34 and 46 of the Convention provisional measures are binding because the effective exercise of the individual complaint procedure would otherwise be jeopardized. This reasoning also refers to the argument of "incidental jurisdiction" of the relevant judi-

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[43] *Id*., 502 *et seq*., paras 100 *et seq*.; *see LaGrand* (note 35).

[44] *Supra* note 31 and 33.

[45] *Cruz Varas v. Sweden,* Judgment of 20 March 1991; *see also* the critical comments to this decision by Karin Oellers-Frahm, *Zur Verbindlichkeit einstweiliger Anordnungen der Europäischen Kommission für Menschenrechte*, 18 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 197 (1991); Ronald S. J. Macdonald, *Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights*, 52 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 703 (1992); Gerard Cohen-Jonathan, *De l'effet juridique des "mesures provisoires" dans certaines circonstances et de l'efficacité du droit de recours individuel: à propos de l'arrêt de la Cour de Strasbourg Cruz Varas du 20 mars 1991*, 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME 205 (1991).

[46] *Conka et al.v. Belgium,* Judgment of 13 March 2001.

[47] *Mamatkulov v. Turkey* (note 36), para. 109.

[48] *Id*. paras 110 *et seq*.

cial organ, however not in relation to the explicitly conferred competences concerning the judicial function as such but with regard to the general obligations flowing from the treaty. However, due to the principle of consent to international jurisdiction, the existence of a judicial body alone cannot justify the binding character of provisional measures which depends on the power conferred upon the court or tribunal to deliver binding judgments. In this alternative, declaring provisional measures binding does not constitute an expansion of competence – at least at a first glance[49] – because it is part of the competence transferred upon the judicial organ. Applying these findings to the ECHR's reasoning in the *Mamatkulov* case, it can consequently be stated that its decision that provisional measures are binding does not constitute an expansion of competence because the ECHR has the power to deliver binding decisions. The Grand Chamber explicitly relied on this argument when it stated that since 1 November 1998 an individual complaint is no longer optional and that an assessment of the effect of provisional measures cannot be separated from a decision on the merits which they shall protect according to Art. 46 of the Convention.[50]

With regard to the human rights bodies, on the other hand, which do not have the power to deliver binding decisions, these findings lead to the conclusion that the declaration of the binding nature of provisional measures clearly amounts to an unlawful expansion of their competence. The binding effect of provisional measures in these cases cannot be inferred from any consensual basis which only exists with regard to delivering non-binding "views" and thus constitutes an expansion of the competences conferred on the body. This finding does not, however, affect the fact that the lack of cooperation with a judicial organ, in particular the hindrance of the effective exercise of the judicial function, constitutes a violation of the treaty obligations. The Human Rights Committee rightly stated that "apart from any violation of the Covenant charged to a state party in a communication, a state party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its views nugatory and futile,"[51] but such treaty violation is not comprised in the competence of

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[49] *Infra* section C.V.

[50] Paras 122 *et seq*. of the Judgment.

[51] UN Human Rights Committee, *Dante Piandong et al. v. The Philippines,* 19 October 2000, Un Doc. CCPR/C/70/D/869/1999, para 5.2.

the judicial body which is merely empowered to take "views" on particular violations of the Covenant in a particular case. The ICJ in the *Nicaragua* case rejected the assertion that a compromissory clause in a treaty, "providing for the jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose."[52] According to this consideration, the rules on international jurisdiction do not empower judicial organs to go beyond their explicitly agreed competences. Where the competence does not imply the delivery of binding decisions, provisional measures cannot have binding effect although noncompliance with such measures may constitute a treaty violation.

V. Binding Character of Provisional Measures and Prima Facie Jurisdiction

In the above considerations it has been stated that declaring provisional measures binding constitutes an unlawful expansion of competence only with regard to those judicial bodies that do not have the power to deliver binding decisions. This does not imply, however, that declaring provisional measures binding could never amount to an expansion of competence due to the fact that a judicial body making such a declaration has the power to deliver binding judgments. This question requires a differentiated assessment not only with regard to the position taken by the ECHR, but also with regard to the decision of the ICJ and its seemingly safe argument inferring the binding nature of its provisional measures from Art. 41 of the Statute.

The argument of the ECHR in the *Mamatkulov* case relied primarily on the functional approach according to which the final settlement of the dispute shall not be frustrated by acts occurring during the proceedings, the so-called "reflector effect" of the final judgment;[53] it thus referred to the idea of incidental jurisdiction. As already mentioned, incidental jurisdiction is not dependent on the specific consent of the parties, but is part of the overall consent as to the exercise and functioning of that court including any decision that becomes necessary for the conduct of a particular case. What is relevant is thus the jurisdiction and competence of the court to decide on the merits of the claim which

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[52] ICJ Reports 1986, 136.

[53] Oellers-Frahm (note 14), 109 *et seq*.

seems to support the conclusion that where a court is entitled to deliver binding decisions on the merits of a case, incidental decisions should also share the binding nature. However, in international law it does not follow from the mere fact that a court is entitled to give binding decisions that each and every incidental decision has binding character; this is the case only for those decisions that are covered by the consent of the states concerned. If, consequently, the jurisdiction of the judicial organ concerned is uncontroversial, the binding character of incidental decisions is implied and does not constitute an expansion of competence. As the jurisdiction of the ECHR was established with the ratification of the Convention and as no particular act of submission is required nor any reservation to the jurisdiction admissible, the overall jurisdiction on the merits of a case covers the extent of the incidental jurisdiction. Thus, the adoption of binding provisional measures does not constitute an unjustifiable or unlawful expansion of the competence of the Court because the issue of provisional measures as well as their binding character is incidental to the jurisdiction conferred to the ECHR.[54]

This conclusion cannot be transferred to the ICJ, whose jurisdiction depends on a particular act of submission and, furthermore, is not all-comprehensive but open to reservations. This fact may explain the effort of the ICJ to justify the binding nature of provisional measures by referring to the terms of the relevant provision, Art. 41 of the Statute, in order to rely on a safe legal basis comparable to Art. 290 of the Law of the Sea Convention as an expression of the explicit consent of the parties to the binding nature of provisional measures. There is, however, a significant difference between the wordings of Art. 290 of UNCLOS and Art. 41 of the ICJ Statute in that Art. 290 explicitly provides that "if a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction …" it may "*prescribe* [emphasis added] any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute … ." The *caveat* concerning the prima facie jurisdiction refers to the fact that in the case that the jurisdiction is controversial, the measures are nonetheless binding even if, at a later stage the case could be dismissed for lack of jurisdiction. The explicit consent to the binding nature of provisional measures in the absence of undisputed jurisdiction seems necessary because it obliges states to comply with a decision which might ultimately not be covered by their consent and which

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[54] *Supra* text to note 50.

therefore interferes with their sovereignty. In this context it has to be stressed that the ICJ, if seized under UNCLOS, is also covered by this provision which governs any dispute "duly submitted to a court or tribunal" with the consequence that provisional measures may have different effects depending on whether the ICJ was seized under UNCLOS or under the Statute. This is due to the fact that Art. 41 of the ICJ Statute lacks any reference to the jurisdictional aspect of interim protection. Although it is undisputed that the adoption of provisional measures does not require a definite decision on jurisdiction, it hardly seems acceptable to interpret Art. 41 as implying the consent of the parties to binding provisional measures even in cases of controversial jurisdiction.[55] As any restriction to state sovereignty requires consent and cannot be presumed, the binding effect of provisional measures issued by the ICJ is dependent from the consent concerning the binding effect of the judgment. This consent is, however, restricted to cases where the Court's jurisdiction is uncontroversial. This conclusion reflects a more differentiated understanding of incidental jurisdiction than that supported by Rosenne[56] who only requires the existence of prima facie jurisdiction in order to justify incidental jurisdiction, a view which, with regard to the binding nature of provisional measures, is not in line with the consensual principle of international jurisdiction in cases of controversial jurisdiction.[57]

The above considerations lead to the conclusion that neither the textual approach nor the incidental jurisdiction approach provides a basis for empowering the ICJ to issue binding provisional measures in cases where its jurisdiction is not established. The fact that the Court has categorically stated that all provisional measures are binding upon the parties irrespective of the status of certainty of its jurisdiction thus con-

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55 This aspect was explicitly underlined by Judge Dugard in his separate opinion in the case concerning *Armed Activities on the Territory of the Congo*, where he stated that due to their binding character provisional measures will assume greater importance than before and that in these circumstances "the Court should be cautious in making Orders for provisional measures where there are serious doubts about the basis for jurisdiction …", ICJ Reports 2002, 265.

56 ROSENNE (note 15), 9: "'Incidental jurisdiction' is a term with no precise legal meaning in international law. It implies that the court or tribunal regularly seized of a case, and provided that it has *prima facie* jurisdiction over the merits, can take all necessary decisions for the conduct of the proceedings …".

57 Oellers-Frahm (note 5), 957, margin number 92; Mita Manouvel, *Métamorphose de l'article 41 du Statut de la CIJ*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 103, 135 (2002).

stitutes an unlawful expansion of the competence of the Court not covered by the required consent of the parties.

D. Concluding Remarks

It has been stated above that attributing binding force to provisional measures can constitute an unlawful expansion of competence even if the court has the power to deliver binding judgments. This is the case where the competence of the court – when adopting provisional measures – is only found to exist prima facie. If there is no provision as that in Art. 290 of UNCLOS, the binding character of provisional measures amounts to an expansion of competence, raising the question of which practical effects follow.

There can be no doubt that non-compliance with the orders contained in provisional measures may result in a violation of international law leading to the application of the rules on state responsibility. In practice, however, the unwillingness of a state to comply with provisional measures does not have concrete consequences. Of course, the court can take note of non-compliance in the final judgment; it may even decide to grant reparation, but the means of forceful implementation of provisional measures are even more restricted than those regarding the final judgment because the effect of provisional measures is limited – they are terminated with the delivery of the judgment on the merits – and forceful measures of execution are wanting in international law unless there is a threat to or breach of the peace.[58]

Nevertheless, the expansive interpretation of the competence to issue binding provisional measures under particular, in fact rather limited, conditions constitutes a positive development reflecting the status and acceptance of international jurisdiction. The fact that implementation is not guaranteed is a characteristic, although regrettable element of inter-

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[58] Karin Oellers-Frahm, *Souveräne Gleichheit der Staaten in der internationalen gerichtlichen Streitbeilegung? Überlegungen zu Art. 94 Abs. 2 und Art. 27 UN-Charta*, in: VERHANDELN FÜR DEN FRIEDEN, LIBER AMICORUM TONO EITEL, 169-191 (Jochen A. Frowein, Klaus Scharioth, Ingo Winkelmann & Rüdiger Wolfrum eds, 2003); Yuval Shani, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009); Rudolf Bernhardt, *Art. 59*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A COMMENTARY, 1246, margin number 52 *et seq* (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

national law that should not diminish the achievements which have been made on the way to improving international jurisdiction, bringing it more in line with the jurisdiction at the national level in the sense that judicial dispute settlement is regarded as a normal instrument and not as something extraordinary, e.g., an unfriendly act, in state relations. The significance of this development should not be underestimated although in international law the distinction between binding and non-binding decisions or even, more generally, binding or non-binding commitments concerning coercive implementation is blurred.[59] What is of relevance in this context is finally the authority of the organ delivering the decision, the acceptability of the decision and issues of prestige of the state concerned in the advent of non-compliance.

Finally, the question concerning the "democratic justification"[60] for competence expansion to adopt provisional measures will be addressed shortly. As has been shown, such expansion has developed particularly in the context of human rights protection[61] where the implementation of the values at stake is of particular relevance. As the expansion of competence, namely the binding character of provisional measures, in this context benefits an individual whose rights are preserved against an allegedly illegal interference by a state, this fact alone may be considered as a justification. As, however, in international law states are still the dominant law-makers today, the "democratic justification" for competence expansion of at least some judicial bodies in claiming the binding force of provisional measures should rather be seen in the fact that this expansion has not met with general protest – although states have not always acted accordingly – and, moreover, in the fact that the alleged binding effect of provisional measures requires states to justify or at least to explain why they have not complied with a binding interim order. That such attitude is particularly hard to justify in cases of human rights violations plays a significant role in explaining why competence expansion, particularly in human rights bodies, has apparently been accepted, in principle, although not always followed in a concrete case.

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[59] Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65 *et seq*., 87 (1980).

[60] *See* von Bogdandy & Venzke (note 38), 4.

[61] *Supra* section C.III.

The international community seems, in principle, ready to accept the requirements of the effective peaceful settlement of disputes including the binding effect of provisional measures, although in practice not all states will always act accordingly. As, however, states make increasing, if not even excessive,[62] use of provisional protection, they may be inclined to comply with these measures in order to have a strong position if other states fail to comply with their international obligations. On the other hand, it depends, of course, on the sensible use of this instrument by international courts and tribunals in order to keep within the framework of acceptability of the exercise of their functions for only then will the judicial dispute settlement expand. In this context the concern of the United States, expressed in its argument against the binding character of provisional measures during the *LaGrand* case (namely that by merely filing a case an applicant can force the Respondent to refrain from certain acts)[63] should be seriously taken into consideration in every single case concerning the adoption of provisional measures and induce courts and tribunals to be particularly cautious in assessing the urgency of action and the proportionality of the measures required.

[62] Oellers-Frahm (note 5), 962, margin number 102.

[63] ICJ Reports 2001, 500, para. 96.

Lawmaking by the International Court of Justice – Factors of Success

*By Niels Petersen**

A. Introduction

The process of norm evolution and development in international law has been highly debated in recent international law and international relations scholarship. However, the debate focuses primarily on states or non-state actors as the agents responsible for shaping international law. In contrast, the role of the judiciary is often neglected in the debate.[1] It is an open secret, though, that courts are not merely Montesquieu's *bouche de la loi*, impartial arbiters, who apply and interpret exogenous norms. Armin von Bogdandy and Ingo Venzke have already pointed out that decisions for concrete cases can hardly be derived from abstract legal concepts by the mere exercise of logical deduction.[2] Instead, the application of legal provisions often involves the development of the applied norm itself. This not only applies in the domestic setting, but is also valid in the international arena. This contribution will deal specifically with lawmaking by the International Court of Justice (ICJ).

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1 There are, however, exceptions. *See*, *notably*, Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance*, in: THE POLITICS OF INTERNATIONAL LAW, 238 (Christian Reus-Smit ed., 2004).

2 Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue, 3, 10.

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_13, Published by Springer-Verlag Berlin Heidelberg 2012

If you want to analyze the lawmaking of the World Court, you must first define what lawmaking is. There are two elements to the definition: First, we have to observe a development in the law. The law on a particular matter has to be different in point t_2 than it was in point t_1. Second, this development has to be caused by a judgment of the ICJ. We thus have to analyze whether the development observed would also have occurred in the counterfactual situation that no judgment had been entered. In the following, we will have a closer look at these two elements. First, I will try to identify criteria of how we can observe a development in the law (B). Then the circumstances under which judgments influence the state of the law will be examined in more detail (C). The theory will then be put to the test in two case-studies (D), before it is finally examined from the wider perspective of the framework of the project (E).

B. The Concept of Law and the Three Dimensions of Lawmaking

A development of the law occurs when the law is actually different in point t_2 than it was in a prior point t_1. To observe a development in the law, we thus have to define what the law is conceptually and how we measure the state of the law in a specific point t. There are, basically, two principal ways of defining the law. One can define law either from an external or an internal perspective.[3] The internal perspective is the perspective of judges and legal practitioners who want to determine the actual content of the law. It thus contains normative guidelines for courts to come to their decisions. The most adequate definition for this internal perspective seems to be a formal definition – as provided by legal positivism – that principally concentrates on the sources of the law.[4] The external perspective, in contrast, observes law as a social phenomenon. It wants to describe certain factual developments or analyze causal relationships. In order to be able to do that it considers law to be the body of the actual legal practice. The choice between these two perspectives is not one of right or wrong. It is rather one of the more or less appropriate. Just as melancholic music can be a wonderful enjoyment, it is, perhaps, not the right thing if you are looking to be exhila-

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3 *See* HERBERT L. A. HART, THE CONCEPT OF LAW 86-88 (1961).

4 *See id.*; HANS KELSEN, PURE THEORY OF LAW (1967).

rated. As I try to analyze the causal effect of court judgments on the law, the external perspective seems to be more adequate for the purposes of this study.

This contribution will adopt a discourse-oriented understanding of the law, according to which the state of the law is determined by the legal discourse. This discourse has two dimensions, which overlap but are not perfectly identical. First, we have the formal legal discourse, which is led by courts, legal practitioners and international law scholars. The starting point for an analysis of the legal discourse is certainly court judgments.[5] But we will have to go beyond the mere analysis of judgments of the World Court. Other important indicators of the state of this discourse are scholarly books and articles, as well as general textbooks on international law. After important judgments, many scholars comment on the soundness of the legal reasoning of the particular court decision. These case comments are an indication for how the judgment was received by international law scholars and lawyers. However, we have to be aware of a possible selection effect.[6] Scholars have incentives to write something innovative. They will, therefore, rarely comment on a decision they completely agree with because they would not have much to add worth to be published. We will get a more accurate picture by contrasting the case comments to the reception of the judgment in legal textbooks, as the goals of textbooks are different than those of scholarly articles.

But we have to look beyond the formal legal discourse on international law. If the legal discourse were completely utopian and detached from the legal understanding of states, it would still not be a good yardstick of the state of international law. Therefore, it is also necessary to analyze whether the judgment of the ICJ is reflected in state practice and, in particular, the opinion of state representatives about the state of international law in t_1 and t_2. According to this perspective, norms of international law are all those norms that states perceive to be normative restrictions on their conduct. Indicators are similar to the ones that are commonly used for the identification of *opinio juris* in the discussion

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[5] Some scholars even limit their analysis of lawmaking by international courts to an analysis of court judgments, *see* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 272-311 (2007).

[6] On the issue of selection effects, *see* GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128-139 (1994).

on customary international law.[7] In this study, there will be a particular focus on legal opinions of states issued for particular occasions, such as the drafting of new legal texts.

C. The Causal Mechanism: Lawmaking Through Persuasion in the Legal Discourse

There has been an intense debate about whether and to what extent international law influences the behavior of states despite the lack of a central enforcement mechanism.[8] Similar concerns can also be raised with regard to judgments of the International Court of Justice. As these judgments are not centrally enforced, it is not self-evident that states comply with them[9] or that they serve as guidelines for the future conduct of all members of the international community. Thus, how do judgments influence the legal discourse among legal scholars as well as the perception of states of the law? In the following, a general model of the influence of judgments on the legal discourse will be developed (I.). In a second step, I will look at potential factors that will make it more or less likely that an ICJ judgment will influence state conduct (II.).

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[7] *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74-102 (1971); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW. A NEW THEORY WITH PRACTICAL APPLICATIONS 171-228 (2010).

[8] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE LAW JOURNAL 2599 (1997); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 EJIL 289 (2006); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008). The traditional view of the mainstream legal doctrine is probably best represented by Louis Henkin, according to whom "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (1979).

[9] For a study on compliance of states with judgments of the ICJ, *see* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

I. The Cycle of Normative Development

The model for the influence of judgments on the legal discourse and state conduct will be based on Wayne Sandholtz's model of normative change.[10] Sandholtz's cycle has four steps: at the starting point, rules provide a normative structure within which actors decide what to do and what not to do. However, rules are often ambiguous and do not provide orientation for every possible situation. In such cases, a dispute between states may arise that leads to a discourse about the content of the law. This discourse leads to a development of the rule because one of its competing interpretations is strengthened in the discourse. That rule will then again structure the behavior of actors in the international arena so that the cycle is closed.

This cycle of normative development is not unique to the international system. The basic structure of the process will be the same in societies without any legal institutions as well as in advanced, institutionalized legal systems in modern nation states. However, there are differences with regard to the quality of the discourse about the content of rules and its effect on rule development. In an institutionalized legal system, the *form* of the discourse about the rule will be preponderantly legal. Although important cases may be accompanied by a general public discussion, the discourse is mainly led by the parties in the formal *forum* of the courthouse. It is decided authoritatively by the court through a formal decision. There is thus a strong likelihood that this court judgment will directly lead to a development of the norm(s) at issue and influence future behavior because of the changed norm structure.

In a small society without legal institutions, the rules will basically emerge out of behavioral patterns.[11] If there is a dispute about the content of a rule, the discourse will not be led by legal experts, but potentially by all interested members of the society. There is no authoritative decision that ends the discourse and determines the future state of the law. But we may observe the formation of a majority opinion changing the rule and influencing future conduct. However, the connection between the discourse about the content of the "law" and rule develop-

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[10] Wayne Sandholtz, *Dynamics of International Norm Change: Rules against Wartime Plunder*, 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 101 (2008).

[11] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

ment is much less direct and certain than in the model of the institutionalized system.

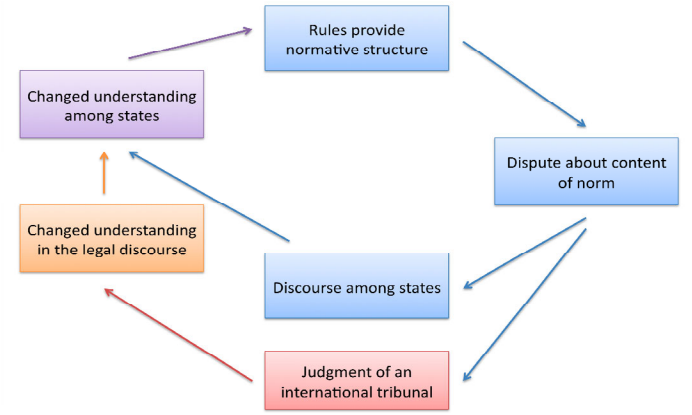

Figure 1: The Cycle of International Normative Change and the Dual Legal Discourse

In the international arena, we observe a hybrid between these two models (Figure 1). When a dispute about the content of a rule arises, we observe parallel discourses. On the one hand, we have an expert discourse that is led by legal scholars and in which the ICJ may be involved. On the other hand, the states as addressees of the international norms will voice their own opinions about what they think the law is. Even if a dispute is brought to the ICJ, the connection between a court judgment and a development of the rule is often weaker than in a domestic legal system. Whether a court judgment effectively influences what states think about the law and thus creates legitimate expectations will depend on whether a considerable number of states actually accept the interpretation of the court. If individuals do not accept the interpretation of a competent court in the domestic setting, they risk losing in a subsequent legal proceeding and facing a sanctions-backed judgment. In the international arena, it is not certain whether states that do not accept an interpretation of the ICJ will ever face a legal proceeding before a court.

Despite these differences to the domestic setting, court judgments may not only have an influence on the internal understanding of legal rules

in the legal discourse, but also on the external evaluation of states. One of the problems of a decentralized discourse on the content of rules, such as a discourse among states, is that there is no arbiter who finally decides the discourse and determines the prevailing rule. However, if rules are supposed to structure normative thinking and to determine behavior, then it is important to know what the rules are, or – more precisely – to know what the other members of the international community think the rules are. Michael Byers once emphasized that customary law is the shared understanding of the legal importance of acts in international relations.[12] Yet, it is not always clear what this shared understanding is. In such situations of uncertainty, decisions of the World Court offer a focal point to make this shared understanding salient.[13]

II. Factors Determining Whether Judgments Have an Influence

Even if we assume that judgments of the ICJ influence the perception of legal norms by states and thus make law, this does not mean that all judgments have an automatic effect. Whether a judgment has an influence on the legal discourse and the communicative practice of states might – in some cases – depend on historical circumstances. We may, nevertheless, be able to identify certain factors that make it more or less likely that a judgment of the ICJ will have a sustainable effect on the subsequent development of international law. Whether a judgment of the ICJ translates into a "norm development" in the legal discourse depends on the perceived legitimacy or acceptability of a judgment.[14] Legitimacy can be defined either in a procedural or in a substantive way. One could imagine that the legitimacy of a judgment rather depends on procedural criteria, such as the methodological soundness of the legal

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12 MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999).

13 *See also* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WILLIAM & MARY LAW REVIEW 1229, 1269 (2004), according to whom judgments of the ICJ provide focal points when resolving ambiguity in the interpretation of international treaties.

14 *See* FRANCK (note 8); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887 (1998).

argumentation. If one applies a substantive perspective, by contrast,[15] the result of the judgment is more important than the quality of its reasoning.

The hypothesis of this contribution is that the substantive quality of the legal concept elaborated by the ICJ is the decisive factor for its subsequent influence on the legal discourse and state opinion about the law. What, then, constitutes a "good" decision? The question is complex, and I will only be able to give a few guidelines. The answer depends on what kind of normative problem the court has to address. I will distinguish three types of situations in which international norms may have different effects – coordination games, cooperation games and ethical norms.

Coordination games in the sense of this contribution are situations in which there are multiple equilibria[16] of conduct so that states have an incentive to coordinate on one of these equilibria. This does not mean that states are indifferent with regard to the concrete equilibrium they coordinate on. An example from game theory for coordination games with distributive consequences is the battle of the sexes game, in which a couple has to decide what to do on a Saturday night. While she wants to see a baseball game, he would prefer to go to the theater. However, they still prefer doing something together to following their individual preferences. States might thus individually prefer to coordinate on a different equilibrium, but they are nevertheless better off coordinating than acting unilaterally.[17]

In such situations legal norms may be focal points, which make a particular equilibrium salient.[18] They thus create legitimate expectations of behavior and facilitate coordination among states. If the ICJ faces a coordination problem, a judgment will influence the legal discourse if the solution can be framed in the legal discourse as an equilibrium of the

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15 The position of FRANCK (note 8), can be qualified as a substantive one.

16 An equilibrium is a stable point of coordination, in which no participant has an individual incentive to deviate from this point if the other participants do not change their conduct. One the concept of equilibrium, *see* DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING 28-36 (1990).

17 On games with multiple equilibria, *see* DREW FUDENBERG & JEAN TIROLE, GAME THEORY 18-23 (1991).

18 *Seminally* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VIRGINIA LAW REVIEW 1649 (2000). For an application of this theory to customary international law, *see* Edward T. Swaine, *Rational Custom*, 52 DUKE LAW JOURNAL 559 (2002).

problem. The decision will then be understood as making one of the equilibria salient, and it is likely that the states will coordinate on this equilibrium. However, if the solution found by the court does not achieve an equilibrium, it will neither have a lasting effect on the legal discourse nor on state conduct.

Cooperation games, in contrast, are characterized by a divergence of the game-theoretical equilibrium and the social optimum. Classical examples are the prisoner's dilemma or the public good game, where states have individual incentives not to cooperate although cooperation would provide the most social benefit.[19] In such situations, states are usually conditional cooperators. They only cooperate if they can expect that other states do cooperate as well.[20] Legal norms supporting the social optimum create legitimate expectations of general cooperation.

If a state does not comply, this may damage its reputation and reduce the opportunities for future cooperation with other members of the international community.[21] It may also face decentralized sanctions in the form of retaliation.[22] An ICJ judgment in such a situation will be effective if the solution can be understood as highlighting the social optimum or a point close to the social optimum. If the norm is perceived to promote the social optimum in a cooperation problem, it will create legitimate expectations of states that all members, or at least the majority of the international community, will comply with the norm and exert pressure on states to justify deviant behavior.

Ethical norms in the sense used in this contribution are norms which do not protect the interests of a particular state. Instead, they protect the interests of an entity that is not involved in the formation of international law. This may be individuals or the environment if the environment is also protected for its own sake and its protection is not understood as an exclusively anthropocentric endeavor. Ethical norms exert influence by being perceived as models highlighting accepted standards of conduct to be considered a modern state by the international com-

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19 *Seminally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

20 *See* STEFAN MAGEN, GERECHTIGKEIT ALS PROPRIUM DES RECHTS 114-117 (2009) (habilitation thesis, Universität Bonn) (on file with author).

21 ROBERT O. KEOHANE, AFTER HEGEMONY. COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); GUZMAN (note 8).

22 George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541, 560 (2005).

munity.[23] They thus force states to justify deviant behavior, which may also lead to an increase in norm-conforming conduct if there is considerable internal or external pressure.[24] Ethical norms are rarely absolute, but subject to reasonable disagreement.[25] Their scope and applicability depend on the concrete situation, potential conflicting values and the cultural context.[26] They will be more likely to become accepted standards of behavior the more they accommodate these different factors and the less they give room for reasonable disagreement about their validity and scope.

It has to be noted that the three situations highlighted here are certainly neither exclusive nor totally distinct. An environmental norm may at the same time be an ethical norm as well as a standard of a social optimum in a cooperation game. Furthermore, the matter is complicated by the fact that incentive structures are rarely exogenously given, but may themselves be social constructs. Environmental problems, for example, were perceived differently forty years ago than they are today. Nevertheless, although the distinction is only an approximation, it is of some analytical value for highlighting slight differences in how judgments can influence the perception of states about the law.

D. The Case-Studies

In this section, I illustrate the theoretical considerations elaborated in the previous section using two case studies of judgments of the World Court. If we want to observe the causal effect of judgments on the perception of states of what the law is, in theory we have to compare the

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[23] Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EJIL 725, 728 (2008).

[24] Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders. Advocacy Networks in International Politics (1998); Thomas Risse, *International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area*, 27 Politics & Society 529 (1999); Thomas Risse, "*Let's Argue!": Communicative Action in World Politics*, 54 International Organization 1 (2000); Goodman & Jinks (note 23), 738.

[25] *See* Samantha Besson, The Morality of Conflict. Reasonable Disagreement and the Law (2005).

[26] *See* Niels Petersen, *International Law, Cultural Diversity and Democratic Rule – Beyond the Divide between Universalism and Relativism*, 1 Asian Journal of International Law 149, 152-154 (2011).

state of the world in which such a judgment occurs to the hypothetical, counterfactual situation in which no such judgment has occurred. A change in the legal opinion of states and legal scholars that follows after a judgment can also be a mere coincidence that is due to other factors and not necessarily causally related to the court's opinion. But a comparison of the current state of the world to the counterfactual state would imply that we could rerun history, holding everything constant except the issuance of the judgment of the ICJ.

One potential way to get around this problem would be to find similar cases whose principal difference lies in the main explanatory variable: the verdict of the ICJ.[27] However, such comparable cases are often hard to find. One advantage of qualitative research is that we are not limited to observing causal effects, but that we can also trace causal mechanisms. We not only know that there is development in the factor we want to explain, the state of the law, but we can observe, to a certain extent, how this development comes about. If the observations of the causal process correspond to the causal mechanism described in the theory, this would be strong evidence that the analyzed judgment did in fact have a causal influence on the states' and legal scholars' perception of the specific law. Thus, this study will not make an inter-case comparison, but a within-case comparison, and compare our cases to the underlying theory.[28]

One practical problem of selecting the cases is that we need to observe reactions to the judgment by legal scholars and by states in order to be able to draw inferences regarding the acceptance of the judgment by the legal discourse. In order to get a coherent picture of these reactions, we have to observe a certain time frame. Consequently, earlier decisions of the ICJ are more suitable for this analysis than very recent ones. The two cases selected for this case study thus both stem from the 1970s. One of them concerns an ethical norm: the *Barcelona Traction* judgment. In this case, the ICJ made a proposition that was widely accepted in the legal discourse of scholars and states. The other one concerns a coordination problem. In the *Fisheries Jurisdiction* case, the ICJ failed

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[27] *See* Arend Lijphart, *The Comparable-Cases Strategy in Comparative Research*, 8 COMPARATIVE POLITICAL STUDIES 158 (1975); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 83 (1994).

[28] On the within-case comparison, *see* ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005).

to achieve an equilibrium. The result of this judgment was that the judgment did not have an influence on the further legal development of this field.

I. Proposing an Ethical Norm – The Barcelona Traction Case

On its face, the judgment of the ICJ in the *Barcelona Traction* Case is a decision about the diplomatic protection of corporations.[29] The World Court had to decide whether the standing of a state exercising diplomatic protection depended on the nationality of the corporation or the nationality of the majority of the shareholders. However, the judgment is more famous for something else: an obiter dictum, in which the Court first mentioned the conception of obligations *erga omnes* in international law.[30]

1. The Judgment

The case concerned the Barcelona Traction company, a company established under Canadian law operating in Spain with a majority of Belgian shareholders. After the Spanish Civil War, Barcelona Traction needed an authorization from the Spanish authorities to import foreign capital in order to be able to service its sterling bonds. However, the Spanish authorities refused to give such an authorization. Consequently, the company could not service its bonds. As a result, three Spanish holders of such bonds filed a bankruptcy case before a Spanish court, which declared the company bankrupt on 12 February 1948. Following the judgment, the appointed bankruptcy commissioner dismissed the principal management of the company and appointed Spanish directors. Several countries, including Canada and Belgium, protested these measures. However, after a diplomatic compromise failed, Belgium filed a proceeding before the International Court of Justice.

The main question the Court had to answer was whether Belgium had sufficient standing to represent the legal interests of Barcelona Traction before the Court. Before going into the particulars of the doctrine of diplomatic protection, the ICJ generally stated:

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[29] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), ICJ Reports 1970, 3.

[30] *Id*., para. 33.

> When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[31]

This was the first time that the term obligations *erga omnes* was ever mentioned. It had not previously appeared in any legal texts, judgments of international courts or tribunals or contributions in international law scholarship. However, despite the novelty of the conception, the reasoning of the Court is brief and apodictic. It neither refers to state practice nor to legal precedents. It does not even try to deduce the principle of obligations *erga omnes* from established, more abstract legal principles. Instead, the Court simply states that there are not only obligations under international law that are owed towards specific states, but that there are obligations that are owed towards the international community as a whole. Because of this lack of reasoning, the judgment is often cited as a prominent example of lawmaking by the ICJ.[32] However, before we can draw this conclusion, we first have to analyze whether the principle of obligations *erga omnes* was truly a novel concept, or just a new expression for an already existing one, and what impact the judgment had on the international legal discourse of scholars and states.

2. The State of Law Before the Judgment – Old Wine in New Bottles?

Although the term obligations *erga omnes* appeared for the first time in the *Barcelona Traction* judgment, there are indications that the concept was not entirely new.[33] The question of obligations *erga omnes* is, in principle, a question of standing – whether a state is entitled to make a

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[31] *Id.* (italics in the original).

[32] *See* BOYLE & CHINKIN (note 5), 271.

[33] MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 18-42 (1997); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 69-96 (2005).

certain legal claim either before an international court or tribunal or, decentrally, through the use of countermeasures. Traditionally, states only had standing to enforce a violation of international law if this violation infringed their subjective rights or legal interests or the rights of their citizens.[34] Four years before the *Barcelona Traction* judgment, the ICJ had denied standing to two African states invoking the violation of international law through South Africa's Apartheid regime.[35] However, even before the World Court issued the *Barcelona Traction* judgment, there were certain exceptions to this rule.

These exceptions concerned, in particular, the implementation of humanitarian and human rights standards.[36] On the one hand, there were several multilateral treaties in this area that recognized the right to bring proceedings or take countermeasures for the protection of minorities or human rights.[37] The principal example is Art. IX of the 1948 Genocide Convention, which proclaimed that any party could bring a dispute concerning the violation of another party to the ICJ.[38] On the other hand, there was, even before *Barcelona Traction*, a debate on the admissibility of humanitarian intervention – countermeasures for humanitarian reasons that are taken by states not specially affected in order to protect the population or a certain group of the population of a third country.[39]

There were even some instances of state practice.[40] In 1960, Ghana and Malaysia adopted economic sanctions against the South African Apart-

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[34] *See* HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 347-348 (1955); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 386-390 (1966).

[35] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, ICJ Reports 1966, 6.

[36] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), First Phase, Separate Opinion of Judge Jessup of 21 December 1962, ICJ Reports 1962, 387, 425.

[37] LAUTERPACHT (note 34), 348.

[38] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, 277.

[39] On this debate, *see* LAUTERPACHT (note 34), 312-323; Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA LAW REVIEW 325 (1967); Myres McDougal & William Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AJIL 1 (1968).

[40] TAMS (note 33), 90-91.

heid regime in the form of quantitative restrictions within the meaning of Art. XI GATT. As they were not covered by Art. XX, XXI GATT, they could, if at all, only be justified if they were considered countermeasures.[41] In 1967, the member states of the European Communities partly suspended the association agreement with Greece as a reaction to violations of political human rights by the Greek military regime. This action was not covered by the treaty regime and could thus only be justified as a countermeasure. In such an environment, it is not surprising that the 1966 *South West Africa* judgment of the ICJ received a lot of criticism in the legal literature. Many commentators favored a broader interpretation of the mandate treaty's standing provision, allowing the two applicants (Liberia and Ethiopia) to invoke human rights violations by South Africa.[42] Even before the *South West Africa* judgment, some scholars expressed the desire to recognize standing for third states in some instances.[43]

Consequently, the ICJ did not act in a legal vacuum when rendering the *Barcelona Traction* judgment. Attempts to extend standing so that states not directly affected could better react to violations of human rights had existed before. Yet there was no overarching, general framework with regard to the standing of third states. Nor was it clear that the standing of third states could not only be achieved by treaty, but also by "general international law,"[44] i.e. customary law. The Court thus

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[41] There is a controversial discussion on whether there the GATT regime leaves room for general countermeasures that do not fall under Art. XX, XXI GATT. *See*, *e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333 (1999); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EJIL 753 (2002); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW. HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 4 April 2006, UN Doc. A/CN.4/L.682.

[42] *See* Dietrich Kappeler, *La récente décision de la Cour internationale de Justice dans les affaires du Sud-Ouest africain*, 85 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 335 (1966); Brian Flemming, *South West Africa Cases*, 5 THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 241 (1967).

[43] WILHELM WENGLER, 1 VÖLKERRECHT 580-581 (1964); Michael Akehurst, *Reprisals by Third States*, 44 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (1970).

[44] *Barcelona Traction* (note 29), para. 34.

pushed the legal discourse in a specific direction in a situation where no clear prevailing legal view was identifiable.

3. The Subsequent Developments – A Revolution of International Law?

The ICJ confirmed the concept of obligations *erga omnes* in several subsequent judgments. In the 1995 *East Timor* case, the ICJ qualified the respect of the right of peoples to self-determination as an obligation *erga omnes*.[45] In 2004, the Court confirmed this qualification of the right to self-determination as a right opposable *erga omnes* in its *Israeli Wall* decision.[46] From the *erga omnes* character of the principle of self-determination, the Court drew the conclusion that all states were obliged "not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory."[47]

However, the effects of the principle of obligations *erga omnes* were not limited to the jurisprudence of the ICJ. It also found expression in one of the most important developments in the law of state responsibility – the drafting process of the Articles on State Responsibility by the International Law Commission (ILC). In 1976, the ILC adopted a new Art. 19, which made a distinction between two different kinds of wrongful acts: international crimes and international delicts.[48] This distinction had been proposed by the Special Rapporteur, Roberto Ago, in his report.[49] Although the ILC did not include what specific consequences could be drawn from this conclusion either in the Draft Articles or in its comments,[50] one popular interpretation was that every

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[45] *Case Concerning East Timor* (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995, 90, para. 29.

[46] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, paras 155-156.

[47] *Id*., para. 159.

[48] 1 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1976, 253 (then article 18).

[49] Fifth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – the Internationally Wrongful act of the State, Source of International Responsibility (continued), UN Doc. A/CN.4/291, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1976, Pt. 1, 3, 24.

[50] Bernhard Graefrath, *International Crimes – A Specific Regime of International Responsibility of States and its Legal Consequences*, in: INTERNATIONAL CRIMES OF STATE – A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON

state had standing to react to international crimes.[51] Ago himself referred to the obiter dictum in the *Barcelona Traction* judgment in making his case for the distinction and pointed out that every state should be entitled to invoke responsibility where a state is committing an international crime.[52]

In 1984, Special Rapporteur Willem Riphagen proposed a new Art. 5 lit. e, according to which all states should be considered to be injured states if the international wrongful act constitutes an international crime.[53] This specification was received very positively by the international community of states. Thirty-five states explicitly or implicitly welcomed the extension of standing to third states for certain international wrongful acts, while only two states – Sweden and Madagascar – were opposed to it.[54] Even states that had been reluctant to recognize the concept of an international crime accepted the concept of obligations *erga omnes* proposed by Riphagen. Germany, for instance, had objected to the notion of an international crime,[55] but was favorable to the extension of standing to third states.[56] France had claimed in 1976 that any *actio popularis* should be considered illegal under international law.[57]

STATE RESPONSIBILITY, 161, 161 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989).

51 *See* Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in: INTERNATIONAL CRIMES OF STATE – A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 151, 156 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989).

52 Fifth Report on State Responsibility (note 49), 28-29.

53 Fifth Report on the Content, Forms and Degrees of International Responsibility (part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/380, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1984, Pt. 1, 1, 3.

54 *See* Marina Spinedi, *International Crimes of State: The Legislative History*, in: INTERNATIONAL CRIMES OF STATE, – A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 7, 72 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989), with further references.

55 UN Doc. A/CN.4/342 and Add. 1-4, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1981, Pt. 1, 71, 75.

56 *Id.*

57 UN Doc. A/C.6/31/SR.26, para. 6.

However, it equally welcomed the proposal of Special Rapporteur Riphagen.[58]

After severe criticism of the notion of an international crime by many state representatives, the ILC deleted the distinction between international crimes and international delicts in its final draft in 2001. Instead, it introduced a distinction with regard to the right to invoke state responsibility. According to Art. 48 of the final draft, all members of the international community may invoke state responsibility if the breached obligation is owed to the international community as a whole.[59] Thus, the provision basically codifies the concept of obligations *erga omnes*.[60] Giving third states the opportunity to invoke state responsibility for the breach of obligations *erga omnes*, was widely supported in the comments of state representatives.[61] China was the only country openly opposed to the idea of granting third states the right to invoke state responsibility for violations of obligations *erga omnes*.[62]

Although the Articles on State Responsibility have not yet been finally adopted as of the writing of this contribution,[63] their drafting history and the numerous positive comments of state representatives show that a considerable number of states today accept the concept of obligations *erga omnes*, whose breach enables third states to invoke state responsibility. This conclusion is confirmed by an analysis of state practice since the *Barcelona Traction* judgment. The most comprehensive study in this respect is probably Christian Tams' dissertation, in which the author comes to the conclusion that state practice supports a right for third states to invoke countermeasures for breaches of obligations *erga om-*

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58 UN Doc. A/C.6/37/SR.38, para. 13.

59 Responsibility of States for Internationally Wrongful Acts (2001), U.N. Doc. A/56/49(Vol. I)/Corr.4.

60 JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 276 (2002).

61 There was implicit or explicit support by Austria, Denmark, Finland, Iceland, Norway, Sweden, Denmark, the Netherlands, South Korea, Slovakia, the United Kingdom and the United States, *see* UN Doc. A/CN.4/515, 62-64, 69-71 (2001).

62 *Id*., 69-70.

63 *See* GA Res. 62/61, U.N. Doc. A/RES/62/61 (2007).

nes.[64] Countermeasures have been employed in a variety of different instances and are not limited to Western countries.[65]

The concept of obligations *erga omnes* was not only accepted in the discourse of states. The reaction in the legal literature to the obiter dictum in *Barcelona Traction* was also preponderantly positive.[66] While early comments in France expressed some reluctance,[67] the concept of obligations *erga omnes* was mostly welcomed in the German and English speaking literature.[68] Although there is still discussion about the scope and the details of the concept, there seems to be consensus about the existence of the concept of obligations which enable even states not directly affected to react to international wrongful acts.[69]

4. Résumé

The analysis of the historical development of the concept of obligations *erga omnes* shows that the ICJ did not invent the concept; the Court did not decide in a void. There was a growing discussion in international law scholarship about whether legal standing should be extended

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[64] TAMS (note 33), 207-251. *See also* Jochen Abr. Frowein, *Reactions by not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 416 (1994).

[65] TAMS (note 33), 250.

[66] *See* Frowein (note 64), 408.

[67] *See*, *e.g.*, BRIGITTE BOLLECKER-STERN, LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE 83-90 (1973); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

[68] Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 182 (1982); Jochen Abr. Frowein, *Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung*, in: VÖLKERRECHT ALS RECHTSORDNUNG – INTERNATIONALE GERICHTSBARKEIT – MENSCHENRECHTE. FESTSCHRIFT FÜR HERMANN MOSLER, 241 (Rudolf Bernhardt, Wilhlem Karl Geck, Günther Jaenicke & Helmut Steinberger eds, 1983); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT 907 (1984).

[69] *Id*.; Karin Oellers-Frahm, *Comment: The Erga Omnes Applicability of Human Rights*, 30 ARCHIV DES VÖLKERRECHTS 28 (1992); Olivia Lopes Pegna, *Counter-claims and Obligations Erga Omnes before the International Court of Justice*, 9 EJIL 724 (1998); ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 381-382 (2001); TAMS (note 33); SANTIAGO VILLALPANDO, L'ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ÉTATS (2005).

to third states in certain situations. There were even some sporadic instances of state practice. However: an acknowledgment of obligations *erga omnes* did not yet represent the prevailing view. The majority opinion was still expressed by the *South West Africa* decision of the ICJ,[70] according to which only directly affected states could invoke state responsibility. The *Barcelona Traction* judgment can thus be seen as a tipping point, which caused the majority opinion among states and legal scholars to shift from a rather bilateral understanding of state responsibility to a more nuanced concept extending legal standing to third states for certain legal principles.

Why did the judgment have an influence on the subsequent legal discourse and the communicative practice of states? The postulation of an *erga omnes* character of certain provisions can, to a certain extent, be qualified as an ethical norm. Certainly, the question of standing is, at first glance, a procedural question that seems to have little moral impact. However, the norm has its biggest impact in the field of human rights.[71] Here, it allows states to invoke human rights violations by other states even if their own nationals have not been affected. It is thus a mechanism to make reaction to non-compliance with human rights norms more effective. Because of its procedural nature, the principle of obligations *erga omnes* is accessory to the underlying ethical principles. Therefore, there is less potential for reasonable disagreement than for many substantive principles.

One might disagree about the substantive ethical principles and individual rights that are embraced by international law. However, if there is agreement on certain ethical principles, then it would seem to be inconsistent not to provide an opportunity to react to a violation of the principle:[72] States who oppose procedural mechanisms to implement certain legal obligations expose themselves to the suspicion of acting strategically to avoid compliance with the underlying substantive principles. Therefore, the concept of obligations *erga omnes* offered little

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70 *South West Africa Cases* (note 35).

71 The examples given by the ICJ for obligations *erga omnes* all originate in the field of human rights law. *See Barcelona Traction* (note 29), para. 34.

72 Stefan Kadelbach, *Folgen von Rechtsverletzungen gewohnheitsrechtlicher Menschenrechtsverpflichtungen*, in: MENSCHENRECHTSSCHUTZ DURCH GEWOHNHEITSRECHT, 198, 218 (Eckart Klein ed., 2003); VILLALPANDO (note 69), 371.

room for reasonable disagreement, so that it was likely to be accepted by the states at least on the communicative level.[73]

Today, *Barcelona Traction* is the main point of reference for every legal study in the field of obligations *erga omnes*.[74] Furthermore, the International Law Commission referred to the judgment when elaborating the concept of an international crime by a state[75] and obligations owed to the international community as a whole.[76] The judgment is thus a primary example of the Court shaping international law scholarship and influencing, at the same time, the perception of states about the law.

II. Failure to Identify an Equilibrium – The Fisheries Jurisdiction Cases

Let us now turn to the *Fisheries Jurisdiction* cases,[77] in which the ICJ faced a coordination problem.

1. The Judgment

After the 1958 Geneva Conference on the Law of the Sea failed to agree on exclusive fishery rights for coastal states beyond the territorial sea,

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[73] Certainly, there is some disagreement with regard to the scope of the reactions that are possible if an obligation *erga omnes* has been violated. *See* on this discussion, *e.g.*, Akehurst (note 43), 15; Oellers-Frahm (note 69), 35; Paolo Picone, *Interventi delle nazioni unite e obblighi erga omnes*, in: INTERVENTI DELLE NAZIONI UNITE E DIRITTO INTERNAZIONALE, 517 (Paolo Picone ed., 1995); Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EJIL 889 (2001); VILLALPANDO (note 69); TAMS (note 33), 209-250.

[74] *See*, *e.g.*, RAGAZZI (note 33), 1; TAMS (note 33), 1-4.

[75] Fifth Report on State Responsibility (note 49).

[76] *See* Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the draft articles on State responsibility), by Mr. Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/330, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1980, Pt. 1, 107, 119; Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/517, para. 49 (2001).

[77] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgment of 25 July 1974, ICJ Reports 1974, 3; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Judgment of 25 July 1974, ICJ Reports 1974, 175.

Iceland unilaterally extended its exclusive fishing zone to twelve nautical miles. This was met with protests by the United Kingdom and the Federal Republic of Germany. The three countries negotiated an agreement, according to which Germany and the UK recognized Iceland's twelve-mile exclusive fishing zone. In return, Iceland promised to give six month's notice to the other two states if it intended to extend this exclusive fishing zone further. In 1971, the Icelandic government announced that it would extend the exclusive fishing zone to fifty nautical miles on September 1 of the following year. After protests and negotiations failed, Germany and the UK referred the case to the ICJ in the summer of 1972.

In the judgment, the Court dealt with two concepts. The first one was that of an exclusive fishing zone, the second one the concept of preferential rights for a coastal state.[78] While an exclusive fishing zone grants the coastal state exclusive jurisdiction with regard to the regulation of all fishing activities, preferential rights do not confer jurisdiction, but only certain privileges in the distribution of fishing quotas if the exploitation of fishery resources makes some system of catch-limitation indispensible.[79] Regarding the exclusive fishing zone, the ICJ stated that a twelve-mile limit from the baselines appeared to be accepted among states.[80] But the Court did not find a general rule of customary international law that the exclusive fishing zone could be extended to fifty nautical miles and thus ruled that the extension of the exclusive fishery jurisdiction beyond twelve nautical miles was not opposable to the United Kingdom and Germany.[81]

However, the Court found that a customary concept of preferential rights for coastal states that are especially dependent on coastal fisheries had developed after the 1958 Geneva Conference on the Law of the Sea.[82] This regime comes into play if the extent of the exploitation of the fish stocks makes it imperative to introduce some system of catch-

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[78] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (note 77), para. 52.

[79] Robin Rolf Churchill, *The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 87 (1975).

[80] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (note 77), para. 52.

[81] *Id*., paras 67-68.

[82] *Id*., paras 55-58.

limitation.[83] These preferential rights did not give Iceland the right to exclude other countries from fishing within the fifty-mile zone if they had a vital interest in fishing there. However, the parties have the duty to negotiate in order to apportion an equitable amount of the limited fish stocks to each involved party.[84]

2. The Legal Situation Preceding the Judgment

There was already an intense discussion on the inclusion of an exclusive fishing zone that gives coastal states jurisdiction in fishing matters even beyond their territorial sea during the 1958 Geneva Conference on the Law of the Sea. However, the proposal to establish a six-mile territorial sea and a six-mile exclusive fishing zone failed by one vote. Therefore, the text of the Geneva Convention of 1958 doesn't leave any room for a concept between territorial sea and the high seas.[85] However, soon after the conference, there were several declarations of coastal states claiming a twelve-mile fishing zone.[86] But the development did not stop there. A survey of the U.N. Food and Agricultural Organization (FAO) in 1969 showed that, while a majority of states claimed a twelve-mile exclusive fishing zone or even territorial sea, there were certain states that claim a broader exclusive fishing zone up to 200 nautical miles.[87]

This broadening of the exclusive fishing zone was accelerated in the beginning of the 1970s. In 1970, nine Latin American states adopted the Montevideo Declaration on the Law of the Sea, in which they extended their exclusive rights of jurisdiction to a distance of 200 nautical miles.[88] This claim was reiterated in the 1970 Lima Declaration, which was

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[83] *Id*., para. 60.

[84] *Id*., paras 72-73, 78.

[85] Alexander Proelß, *Ausschließliche Wirtschaftszone*, in: HANDBUCH DES SEERECHTS, 222, 224 (Wolfgang Graf Vitzthum ed., 2006).

[86] LOTHAR GÜNDLING, DIE 200 SEEMEILEN-WIRTSCHAFTSZONE 22 (1983).

[87] FAO, *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf*, 8 INTERNATIONAL LEGAL MATERIALS 516 (1969). These states are Argentina, Ceylon, Chile, Costa Rica, Ecuador, El Salvador, Ghana, Korea, Nicaragua, Pakistan, Panama and Peru.

[88] Montevideo Declaration on the Law of the Sea, 8 May 1970, 64 AJIL 1021 (1970).

signed by fourteen Latin American states.[89] In 1972, fifteen Caribbean states issued the Declaration of Santo Domingo, in which they claimed a 200-mile patrimonial sea, a predecessor of the concept of the exclusive economic zone.[90] However, the extension of the exclusive fishing zone was not limited to Latin American countries. Other countries of the developing world made similar moves. Most notably, the Organization of African Unity declared in 1973 that the African states recognized the right of each costal state to establish an exclusive economic zone beyond their territorial seas not exceeding 200 nautical miles.[91] Although the majority of states still had an exclusive fishing zone not exceeding twelve nautical miles, when the ICJ rendered its judgment in 1974, there was a growing belief that coastal resource jurisdiction should be extended.

The situation for the second concept the ICJ referred to – preferential rights for coastal states – was not much clearer. Coastal states' preferential rights had been recognized in a few international agreements, such as the Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands[92] and the Arrangement on the Regulation of the Fishing of North-East Arctic Cod.[93] Furthermore, the concept had been confirmed by the practice of the International Commission for the Northwest Atlantic Fisheries and the North-East Atlantic Fisheries Commission. However, the agreements and the cited practice concerned only a few states and each institution was limited to a single geographical area, so that it is doubtful whether the conditions for a customary rule of international law were fulfilled when the Court rendered its judgment.[94]

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89 Declaration of Latin American States on the Law of the Sea, 8 August 1970, in: 1 NEW DIRECTIONS IN THE LAW OF THE SEA, 237 (S. Houston Lay, Robin R. Churchill & Myron H. Nordquist eds, 1973).

90 Declaration of Santo Domingo, 9 June 1972, in: 1 NEW DIRECTIONS IN THE LAW OF THE SEA, 247 (S. Houston Lay, Robin R. Churchill & Myron H. Nordquist eds, 1973).

91 Declaration of the Organization of African Unity on the Issues of the Law of the Sea, 19 July 1974, UN Doc. A/CONF.62/33.

92 Signed on 18 December 1973, in: 4 NEW DIRECTIONS IN THE LAW OF THE SEA, 171 (Robin Rolf Churchill & Myron H. Nordquist eds, 1975).

93 Signed on 15 March 1974, United Kingdom Treaty Series No. 35 (1974).

94 Churchill (note 79), 94 -95.

3. Subsequent Developments – From Fishing Zone to Exclusive Economic Zone

The judgment had little effect on the subsequent development of international law.[95] Iceland never complied with the judgment.[96] Instead, it even extended its exclusive fishing zone to 200 nautical miles in July 1975 and concluded limited agreements with Germany and the United Kingdom in order to settle the dispute with these two countries. In 1976, the European Communities adopted a Council Resolution, which asked all Member States to extend their exclusive fishing zone to 200 nautical miles.[97] In 1982, the third U.N. Conference on the Law of the Sea finally adopted the United Nations Convention on the Law of the Sea, which recognizes the right to establish a 200-mile exclusive economic zone to all coastal states.[98] Thus, the twelve-mile concept of the ICJ did not even survive for one decade.

The concept of coastal states' preferential rights has not been more influential either. It has not been included in the 1982 Convention on the Law of the Sea,[99] and there is little evidence that it has developed into a norm of customary international law since the judgment. If one consults contemporaneous treatises and textbooks on the Law of the Sea, the concept of preferential rights is either harshly criticized[100] or not even mentioned.[101] The *Fisheries Jurisdiction* judgments of the ICJ did thus not have any lasting influence on the subsequent development of the international Law of the Sea.

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95 David H. Anderson, *The Icelandic Fisheries Case*, in: LIBER AMICORUM GÜNTHER JAENICKE, 445, 452 (Volkmar Götz, Peter Selmer & Rüdiger Wolfrum eds, 1998).

96 SCHULTE (note 9), 151.

97 European Communities, *Council Resolution on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community with Effect from 1 January 1977*, 3 November 1976, 15 ILM 1425 (1976).

98 United Nations Convention on the Law of the Sea, Art. 57, 10 December 1982, UNTS, vol. 1833, 3.

99 *Id.*

100 *See* Carl August Fleischer, *Fisheries and Biological Resources*, in: A HANDBOOK ON THE NEW LAW OF THE SEA, 1030 (René-Jean Dupuy & David Vignes eds, 1991).

101 *See* ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, THE LAW OF THE SEA (1988).

4. Résumé

The issue of the breadth of the exclusive fishing zone might, at first glance, appear like a rather technical issue. However, at its core, it is a coordination problem with considerable distributive impact. Technological developments had allowed fishing boats to exploit fish stocks at greater distances from the coast. This development favored technologically advanced states, whose fishing boats could travel great distances and fish in the high seas. However, this conduct harmed countries that depended on a local, coastal fishery industry, as fishing in the high seas also diminished coastal fish stocks. Thus, this development was detrimental to technologically less advanced states and those countries which were highly dependent on the coastal fishery industry. Consequently, it is not surprising that the push for a 200-mile exclusive fishing zone originated in the developing world. A narrow fishing zone was not acceptable to them; this concept therefore could not establish an equilibrium. By proclaiming the twelve-mile rule the ICJ was thus unable to provide a solution to the coordination problem that was acceptable to both the developed and the developing countries. It is therefore not surprising that the judgment did not have a sustainable impact on the subsequent legal development in this field.[102]

E. Conclusions

In contrast to domestic courts, the International Court of Justice does not have a central sanction mechanism to enforce its judgments. The Court thus has to persuade states by practicable solutions if it wants to influence the development of international law. The preceding analysis has shown that judgments do not have an impact on the opinion of states about the law solely on the basis of the World Court's authority. Instead, the Court has to find acceptable solutions to problems of coordination or cooperation or propose acceptable ethical norms.

The case studies suggest that the concrete reasoning and the soundness of the legal argument are only of limited relevance in terms of impacting the legal discourse. In the *Barcelona Traction* case, the Court did not even attempt to justify the birth of obligations *erga omnes*. Nevertheless, the judgment had a profound influence on the development of

[102] *See* Churchill (note 79), 101-103, who voiced this suspicion already shortly after the judgment.

the concept of standing in the law of state responsibility. In contrast, the ICJ did cite some state practices for limiting the exclusive fishing zone to twelve nautical miles in the *Fisheries Jurisdiction* case. But this did not save the judgment from being irrelevant.

How do these findings influence the evaluation of the legitimacy of lawmaking by the World Court? Lawmaking by the ICJ is the exercise of public authority and, in principle, requires justification.[103] However, the necessary degree of justification depends on the nature of public authority. The legitimacy of public authority through coercion follows different standards than of public authority through persuasion. The preceding analysis has shown that the ICJ's lawmaking activity impacts states through the legal discourse. Judgments of the World Court are not transformed into constraining standards of behavior per se. The impact of the judgments rather depends on the reception in the legal discourse.

In recent decades, we have observed an increasing shift of norm-making to the international arena. The legislative processes on the international level differ markedly from the traditional model of domestic democratic legislation. This does not imply that this development is illegitimate per se. Rather, we have to analyze each of these processes individually. The lawmaking by the International Court of Justice is to a large extent based on persuasion and controlled through the legal discourse. Therefore, there is considerably less reason to be concerned about the legitimacy of this process than about international courts and tribunals whose judgments have more coercive power.

[103] Bogdandy & Venzke (note 2), section C.II.

The Making of a *Lex Sportiva* by the Court of Arbitration for Sport

*By Lorenzo Casini**

A. Introduction

"Sports law is not just international; it is nongovernmental as well, and this differentiates it from all other forms of law."[1] Sports rules are genuine "global law" because they are applied across the entire world, they involve both international and domestic levels, and they directly affect individuals: This happens, for instance, in the case of the Olympic Charter, a private act of a "constitutional nature" with which all States

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[1] MICHAEL BELOFF, TIM KERR & MARIE DEMETRIOU, SPORTS LAW 5 (1999). According to these authors, the term "sports law" is "a valid description of a system of law governing the practice of sports." They also note that "the public's limitless enthusiasm for sport and its importance to our cultural heritage makes sports law more than mere private law" (*Id.*, 4).

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236, DOI 10.1007/978-3-642-29587-4_14,

comply,[2] or in the case of the World Anti-Doping Code, a document that provides the framework for the harmonization of anti-doping policies, rules, and regulations within sports organizations and among public authorities.[3]

The global dimension of sport is, in the first instance, regulatory, and it embraces the whole complex of norms produced and implemented by regulatory sporting regimes at the international and domestic levels.[4] These rules include not only transnational norms set by the International Olympic Committee (IOC) and by International Federations (IFs) – i.e., "the principles that emerge from the rules and regulations of international sporting federations as a private contractual order"[5] – but also "hybrid" public-private norms approved by the World Anti-Doping Agency (WADA) and international law (such as the UNESCO Convention Against Doping in Sport).

Thus, sports law is now far from being amenable to an exhaustive explanation based on structures of private law alone, but rather presents a mixed nature, in which a regulatory framework based on private autonomy interacts constantly with public law norms. Such a phenomenon takes place at the national level especially, a level at which the sports legal regime has always been characterized by a tight dialectic be-

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2 *See* JEAN-LOUP CHAPPELET & BRENDA KÜBLER-MABBOTT, THE INTERNATIONAL OLYMPIC COMMITTEE AND THE OLYMPIC SYSTEM: THE GOVERNANCE OF SPORT (2008); and ALEXANDRE MIGUEL MESTRE, THE LAW OF THE OLYMPIC GAMES (2009).

3 PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: A FIGHT FOR THE SPIRIT OF SPORT (2008).

4 An overview is in FRANCK LATTY, LA *LEX SPORTIVA*. RECHERCHE SUR LE DROIT TRANSNATIONAL (2007); and in LORENZO CASINI, IL DIRITTO GLOBALE DELLO SPORT (2010).

5 Ken Foster, *Is There a Global Sports Law?*, 2 ENTERTAINMENT AND SPORTS LAW JOURNAL 1, 4 (2003), who describes "global sports law" as a "transnational autonomous legal order created by the private global institutions that govern international sport," "a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federation" and not "governed by national legal systems" (*id.*, 2). This author considers "global sports law" a significant example of spontaneous global law without a State, according to the definition provided by GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); and Gunther Teubner, *Un droit spontané dans la société mondiale*, in: LE DROIT SAISI PAR LA MONDIALISATION, 197 (Charles-Albert Morand ed., 2001).

tween public and private law.[6] On the international level, the Olympic regime, based on private law, has been flanked by other regimes in which States actively participate. On the national level, the role of public law takes on a marked significance, to the point that the domestic sporting bodies are often regulated not only by norms produced by international sporting institution, but also by public law.[7]

Sports law, therefore, is highly heterogeneous, and, above all, it is not simply transnational, but actually "global": It is made of norms enacted not only by States, but also by central sporting institutions (such as IOC, IFs and WADA) and by national sporting bodies (such as National Olympic Committees and National Anti-Doping Organizations); furthermore, sport norms directly address and regulate individuals, such as athletes.

Global sports law operates at different levels and it is produced by several "law-makers." Amongst those, there is one very peculiar body, founded in the 1980s, which has become a key actor in the sport legal system: The Court of Arbitration for Sport (CAS).[8] In the last two decades, the activity of this institution has become extraordinarily important. The number of decisions rendered by the CAS has increased to the point that a set of principles and rules have been created specifically to address sport: This "judge-made sport law" has been called *lex sportiva*.[9] This formula, which recalls well-known labels like *lex mercatoria*

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[6] It is worth noting that private law theory in the sport context has been functionally linked to the necessity of safeguarding the autonomy of sports from interference by public authorities.

[7] From this perspective, the case of doping control measures is highly significant. The establishment of the WADA, by the IOC and by States, and the process of harmonization undertaken with the approval of the World Anti-Doping Code, have in fact led to the creation of a uniform regulatory system, and, at the same time, of a dense network of national bodies, mainly of a public nature.

[8] THE COURT OF ARBITRATION FOR SPORT 1984–2004 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); ANTONIO RIGOZZI, L'ARBITRAGE INTERNATIONAL EN MATIÈRE DE SPORT 132 (2005); ANIELLO MERONE, IL TRIBUNALE ARBITRALE DELLO SPORT (2009); and Simone Stebler, *Court of Arbitration for Sport (CAS)*, in: INSTITUTIONAL ARBITRATION. TASKS AND POWERS OF DIFFERENT ARBITRATION INSTITUTIONS, 255 (Pascale Gola, Claudia Götz Staehelin & Karin Graf eds, 2009).

[9] James A.R. Nafziger, *Lex Sportiva and CAS*, in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 409 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); RIGOZZI (note 8), 628; and Massimo Coccia,

or *lex electronica*,[10] has been readily adopted and, indeed, its meaning has been extended over time: Currently, it can be used to refer more generally to the transnational law produced by sporting institutions.[11] In spite of this success, the existence of a *lex sportiva* is not universally accepted, in so far as some domestic orders have affirmed state law sovereignty over sport norms by contesting the legal nature of these rules: In 2001, for instance, the Frankfurt *Oberlandesgericht* stated that a *lex sportiva* independent from any given state law does not exist *("[E]ine von jedem staatlichen Recht unabhängige lex sportiva gibt es nicht"*);[12]

Fenomenologia della controversia sportiva e dei suoi modi di risoluzione, RIVISTA DI DIRITTO ED ECONOMIA DELLO SPORT 605, 621 (1997), adopt instead a wider definition of the *lex sportiva* (*i.e.,* referred to the large amount of customary private norms developed through international and national sports arbitrations). *See also* Michael Beloff, *Is there a lex sportiva?*, 5 SWEET & MAXWELL'S INTERNATIONAL SPORTS LAW REVIEW 49 (2005); Ken Foster, *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence*, 3 ENTERTAINMENT AND SPORTS LAW JOURNAL (available at: http://go.warwick.ac.uk/eslj/issues/volume3/number2/foster); and SPORTS LAW (LEX SPORTIVA) IN THE WORLD. REGULATIONS AND IMPLEMENTATION (Dimitrios P. Panagiotopoulos ed., 2004).

[10] *See* Sergio M. Carbone, *Il contributo della lex mercatoria alla precisazione della lex sportiva*, in: DIRITTO INTERNAZIONALE DELLO SPORT, 227 (Edoardo Greppi & Michele Vellano eds, 2006); Anne Röthel, *Lex mercatoria, lex sportiva, lex technica – Private Rechtsetzung jenseits des Nationalstaats?*, 62 JURISTENZEITUNG 755 (2007); and DIE PRIVATISIERUNG DES PRIVATRECHTS – RECHTLICHE GESTALTUNG OHNE STAATLICHEN ZWANG (Carl-Heinz Witt, Matthias Casper, Liane Bednarz, Martin Gebauer, Jan Gernoth, Markus Grahn, Jens Haubold, Stefan Huber, Götz Schulze, Christoph Teichmann & Nika Witteborg eds, 2003); and Bryan H. Druzin, *Law Without The State: The Theory of High Engagement and The Emergence of Spontaneous Legal Order Within Commercial Systems*, 42 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 559 (2010).

[11] LATTY (note 4), 31, links the concept of *lex sportiva* to "les règles transnationales opérant dans le domaine du sport" and to the "manière dont elles s'agencent les unes par rapport aux autres," so that it reveals "la présence d'un ordre juridique transnational sportif unitaire" (*id.*, 39). On sports law as "transnational law," also Bruno Simma, *The Court of Arbitration for Sport* (1988), in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 21 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[12] Oberlandesgericht Frankfurt, *D. Baumann / D.L.V.*, 18 April 2001, 8 ZEITSCHRIFT FÜR SPORT UND RECHT 161 (2001); on these aspects, *see* ANDREAS WAX, INTERNATIONALES SPORTRECHT: UNTER BESONDERER BERÜCKSICHTI-

in 2005, the Swiss *Bundesgericht* underlined: "*Die Regeln der (internationalen) Sportverbände können nur im Rahmen einer materiellrechtlichen Verweisung Anwendung finden und daher nur als Parteiabreden anerkannt werden, denen zwingende nationalrechtliche Bestimmungen vorgehen.*"[13]

In this paper, the term *lex sportiva* is used in a broad sense as a synonym of "global sports law." The formula "global sports law" thus covers all definitions so far provided by legal scholarship (such as *lex sportiva* or "international sports law")[14] in order to describe the principles and rules developed and applied by sporting institutions. This approach raises several problems concerning the very concept of such a kind of law and its binding force[15] as well as other problems, including those connected to wider themes such as the emergence of a "global private

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GUNG DES SPORTVÖLKERRECHTS 173 (2009), who deals with the concept of a *lex sportiva internationalis*.

[13] Swiss Federal Court, 20 December 2005, BGE 132 II 285, para. 1.3 ("The rules of (international) sport federations may only be applied by means of a reference to their substantive law and therefore can only be recognized as an agreement between the parties, over which mandatory national laws take precedence.")

[14] According to JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 1 (2004), "international sports law" means a process that includes "a more or less distinctive body of rules, principles, institutions and procedures to govern important consequences of transnational sports activity." For Foster (note 5), 4, international sports law embraces "general principles of law that are automatically applicable to sport." Ola O. Olatawura, *Fundamental Doctrines of International Sport Law*, INTERNATIONAL SPORTS JOURNAL 130 (2008), describes "international sport law" as "the specialized branch of transnational law that globally regulates private and public participants conduct and claims in sport." In French legal scholarship, Alegría Borras, *Existe-il un droit international du sport?*, in: NOVEAUX ITINÉRAIRES EN DROIT. HOMMAGE À FRANÇOIS RIGAUX, 187 (1993); and Jean-Pierre Karaquillo, *Droit international du sport*, 309 RECUEIL DES COURS, 9 (2004). In Germany, WAX (note 12). In Italy, DIRITTO INTERNAZIONALE DELLO SPORT (Edoardo Greppi & Michele Vellano eds, 2006); formerly, Massimo Severo Giannini, *Ancora sugli ordinamenti giuridici sportivi* (1996), in: 9 SCRITTI 1991–96, 441 (Massimo Severo Giannini ed., 2006), who wrote that in sport the term "international" refers to a "diritto superstatale," meaning not the "diritto proprio di un ordinamento giuridico a sé," but "una normativa interstato e superstato" (*id.*, 444).

[15] These issues are widely analyzed by LATTY (note 4), 416, and CASINI (note 4), 226.

law" and the formation of "global private regimes."[16] Within this context, this paper will focus on the actor that is probably most prominent in constructing global sports law: The Court of Arbitration for Sport. The paper will examine the structure and functions of this institution in order to highlight a number of problems concerning judicial activities at the global level more generally. Section B will outline the organization and functions of the CAS, from its inception to the present date. In particular, this section will show how the history of the CAS is reminiscent of a famous German novel based on a biblical saga, "Joseph and his brothers" by Thomas Mann[17]: Born as the "favorite son" of the Olympic movement's founding fathers, the CAS subsequently became the target of its envious "brothers" – i.e., the International Federations and other sporting arbitration institutions – which viewed the CAS as a dangerous enemy; ultimately, the CAS defeated its opponents, gained independence and brought normative harmonization in global sports law. Section C will focus on the role of the CAS in making a *lex sportiva*, and it will take into account three different functions: The development of common legal principles; the interpretation of global norms and the influence on sports law-making; and the harmonization of global sports law. Section D will consider the relationships between the CAS and public authorities (both public administrations and domestic courts) in order to ascertain the extent to which the CAS and its judicial system are self-contained and autonomous from States. Lastly, Section E will address the importance of creating bodies like the CAS in the global arena, and it will identify the main challenges raised by this form of transnational judicial activity. The analysis of the CAS and its role as law-maker, in fact, allows us to shed light on broader global governance trends affecting, for example, the institutional design of global regimes with specific regard to separation of powers and the emergence of judicial activities.

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[16] *See* Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?*, in: PUBLIC GOVERNANCE OF THE AGE OF GLOBALIZATION, 71 (Karl-Heinz Ladeur ed., 2004); and HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS (2005).

[17] JOSEPH UND SEINE BRÜDER, a four-part novel by Thomas Mann, written from 1926 to 1943.

B. The Court of Arbitration for Sport

The CAS plays a crucial role within the sport legal system.[18] It was created in 1983, due in large part to the determination of Juan Antonio Samaranch, at that time President of the International Olympic Committee (IOC), who planned to build a centralized mechanism of international judicial review in sport, namely during the Olympics: The idea was to introduce a sort of "supreme court for world sport."[19] From this point of view, Samaranch followed the path of the father of the IOC, Pierre De Coubertin, who was the first to observe that a sporting institution should, first of all, "*s'organiser judiciairement*," because it must be "*à la fois un Conseil d'Etat, une Cour d'appel et un Tribunal des conflits*."[20]

Nevertheless, the childhood of the CAS was not easy. This was mainly due to three reasons. First, activity at the beginning was not intensive, partially because there were few cases at that time: Doping scandals, for instance, were not a major issue until the late 1980s. Thus, whereas in the 1980s the CAS issued few decisions per year, during the last decade there have been over 800 rulings.[21] Second, in those years the International Federations used to ignore the CAS, and some of them had their own judicial body. The most significant example is the International Association of Athletics Federations (IAAF), which had its own Arbitration Panel during the 1980s and the 1990s; it was only in 2001 that it

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[18] The history of the CAS is illustrated in THE COURT OF ARBITRATION FOR SPORT 1984–2004 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006); *see also* Daniel H. Yi, *Turning Medals Into Medal: Evaluating The Court Of Arbitration of Sport As An International Tribunal*, 6 ASPER REVIEW OF INTERNATIONAL TRADE & BUSINESS LAW 289 (2006); RIGOZZI (note 8), 132.

[19] According to Kéba Mbaye, this formula comes directly from Juan Antonio Samaranch, and it is reported in the Swiss Federal Court decision *A. et B. v. Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport*, 4P.267/2002, 27 May 2003, BGE 129 III 445, 462. That was the famous case *Lazutina/Danilova*, in which the Swiss Court acknowledged that the CAS had gained its independence from the IOC after the 1993–94 reform.

[20] LATTY (note 4), 65; citing François Alaphilippe, *Légitimité et légalité des structures internationales du sport: une toile de fond*, REVUE JURIDIQUE ET ÉCONOMIQUE DU SPORT 15 (1993).

[21] For these data, *see* http://www.tas-cas.org/statistics.

decided to disband the Panel in favor of the CAS's jurisdiction.[22] Third, according to its original institutional design the CAS was a sort of judicial branch within the IOC, with the latter maintaining political and financial control over the former.

After a decade, however, there was a turning point in the history of the CAS. In 1993, the Swiss Federal Court stated that the CAS did not meet all of the standards required for international arbitrations, namely the independence of the arbitral body:[23] This issue would have been problematic had the IOC been a party in a CAS arbitration, for instance.[24] The episode forced the IOC to reform the CAS, which was reorganized along the lines of the current model with the so-called 1994 Paris Agreement.[25]

Nowadays the Court of Arbitration for Sport is a permanent arbitration structure, and its mission is to "settle sports-related disputes through arbitration and mediation."[26] Such disputes "may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (*ordinary arbitration proceedings*) or involve an appeal against a decision rendered by a federation, association or

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[22] The Panel had jurisdiction over all disputes between national athletic federations affiliated to the IAAF, or between national member federation and the IAAF Council or Congress, *see* LAURA TARASTI, LEGAL SOLUTIONS IN THE INTERNATIONAL DOPING CASES – AWARDS BY THE IAAF ARBITRATION PANEL 1985–1999 (2000); and Christoph Vedder, *The Heritage of Two Decades of Arbitration in Doping-Related Disputes*, in: THE COURT OF ARBITRATION FOR SPORT 1984–2004, 266 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[23] Swiss Federal Court, *Gundel v. Fédération Equestre Internationale*, 15 March 1993, BGE 119 II 271.

[24] The Court in fact observed that the IOC "est compétent pour modifier le Statut du TAS; il supporte en outre les frais de fonctionnement de ce tribunal et joue un rôle considérable dans la désignation de ses membres" (*BGE* 119 II 280).

[25] *See* Diane Kane, *Twenty Years On: An Evaluation of the Court of Arbitration for Sport* (2003), in: THE COURT OF ARBITRATION FOR SPORT 1984-2004, 455, 458 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds, 2006).

[26] Art. S1 Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Therefore the CAS can be likened to institutions such as the International Court of Arbitration (ICC), the International Centre for the Settlement of the Investment Disputes (ICSID) or, for the USA, the American Association of Arbitration (AAA).

sports-related body where the statutes or regulations of such bodies or a specific agreement provides for an appeal to the CAS (*appeal arbitration proceedings*)."[27] Sports-related disputes "may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport."[28] Disputes, for instance, can be of a commercial nature (e.g., sponsorship or management contracts or player transfers), or of a disciplinary nature following a decision by a sports organization (e.g., doping cases or the selection of athletes).

Regarding standing, "any individual or legal entity with capacity to act may have recourse to the services of the CAS. These include athletes, clubs, sports federations, organisers of sports events, sponsors or television companies."[29] However, "for a dispute to be submitted to arbitration by the CAS, the parties must agree to this in writing."[30] With respect to the recognition and enforcement of CAS awards, these can be enforced in countries which are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and they can be challenged before the Swiss Federal Tribunal, according to the Swiss Federal Act on Private International Law.

With regard to its structure, the Court of Arbitration for Sport is composed of two distinct bodies, both situated in Lausanne (Switzerland): The International Council of Arbitration for Sport (ICAS) and the CAS itself.[31]

The ICAS was created in 1994 in order to provide the CAS with genuine independence from the IOC. It is a foundation regulated by Swiss civil law; its board is composed of twenty members chosen to represent

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[27] R27 CAS Procedural Rules.

[28] *Id.*

[29] *See* http://www.tas-cas.org/en/20questions.asp/4-3-218-1010-4-1-1/5-0-1010-13-0-0.

[30] And "Such agreement may be on a one-off basis or appear in a contract or the statutes or regulations of a sports organization. Parties may agree in advance to submit any future dispute to arbitration by the CAS, or they can agree to have recourse to the CAS after a dispute has arisen" (http://www.tas-cas.org/en/20questions.asp/4-3-219-1010-4-1-1/5-0-1010-13-0-0).

[31] There are also two field offices, one in New York and the other in Sydney.

the Olympic movement and to ensure its autonomy.[32] The task of the ICAS is to facilitate the settlement of sports-related disputes through arbitration or mediation and to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.[33] Moreover, the ICAS appoints the personalities who are to constitute the list of arbitrators and the list of CAS mediators and can remove them from those lists.[34] There are at least 150

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[32] *See* Art. S4 Statutes of the Bodies Working for the Settlement of Sports-related Disputes: The ICAS is composed of 20 members, namely high-level jurists appointed in the following manner: a. 4 appointed by the International Sports Federations, *viz.* 3 by the Summer Olympic IFs and 1 by the Winter Olympic IFs, chosen from within or from outside their membership; b. 4 appointed by the Association of the National Olympic Committees, chosen from within or from outside its membership; c. 4 appointed by the IOC, chosen from within or from outside its membership; d. 4 appointed by the 12 members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; e. 4 appointed by the 16 members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS. Some say, however, that these mechanisms would give to the Olympic movement even more influence on the CAS than before: on these aspects, Yi (note 18), 316.

[33] According to the Art. S6 Statutes of the Bodies Working for the Settlement of Sports-related Disputes, ICAS adopts and amends its Statute and the Statute of the CAS; it looks after the financing of the CAS; it supervises the activities of the CAS Court Office; if it deems such action appropriate, it sets up regional or local, permanent or *ad hoc* arbitration structures; it may create a legal aid fund to facilitate access to CAS arbitration for natural persons without sufficient financial means; it may take any other action which it deems likely to protect the rights of the parties and, in particular, to best guarantee the total independence of the arbitrators and to promote the settlement of sports-related disputes through arbitration.

[34] Before the 1994 reform, the list included only 60 personalities. The personalities designated by the ICAS appear on the CAS list for a renewable period of four years. The ICAS reviews the complete list every four years; the new list enters into force on 1 January of the following year. In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, in designating the arbitrators the ICAS shall respect, in principle, the following distribution: 1/5th shall be selected from among the persons proposed by the IOC, chosen from within its membership or from outside; 1/5th shall be selected from among the persons proposed by the IFs, chosen from within their membership or outside; 1/5th

arbitrators and at least fifty mediators: The former provide "the arbitral resolution of disputes arising within the field of sport through the intermediary of arbitration provided by panels composed of one or three arbitrators"; the latter provide "the resolution of sports-related disputes through mediation."[35]

The CAS carries out several different activities.[36] It provides mediation,[37] and it can also render nonbinding advisory opinions upon request of the IOC, the International Federations, the National Olympic Committees, WADA and the organizations recognized by the IOC and the Organizing Committees for Olympic Games about any legal issue with respect to the practice or development of sport or any activity related to sport.

Its main task, however, is to settle disputes. To this end, the CAS is composed of two divisions, the *Ordinary Arbitration Division* and the *Appeals Arbitration Division*.[38] The Ordinary Arbitration Division con-

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shall be selected from among the persons proposed by the NOCs, chosen from within their membership or outside; 1/5th shall be chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; 1/5th shall be chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with Art. S14. In appointing the personalities who appear on the list of arbitrators, the ICAS shall, wherever possible, ensure fair representation of the continents and of the different juridical cultures. (Arts S13 *et seq*. Statutes of the Bodies Working for the Settlement of Sports-related Disputes). In 2009, the list of arbitrators included around 300 personalities; some of them appeared also in a special list regarding soccer (http://www.tas-cas.org/arbitrators-genlist).

35 Art. S3 Statutes of the Bodies Working for the Settlement of Sports-related Disputes.

36 The CAS includes a Court Office composed of a Secretary General and one or more Counsel, who replace the Secretary General when required (Art. S22 Statutes of the Bodies Working for the Settlement of Sports-related Disputes). The activities of the CAS Court Office are supervised by the ICAS, which appoints the CAS Secretary General.

37 *See* IAN S. BLACKSHAW, MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES (2009).

38 Art. S20 Statutes of the Bodies Working for the Settlement of Sports-related Disputes. Arts R27-R37 CAS Procedural Rules establish provisions as to Application of Rules, Seat, Language, Representation and Assistance, Notifications and Communications, Time limits, Independence and Qualifications of Arbitrators, Challenge, Removal, Replacement, Provisional and Conservatory Measures.

stitutes Panels, whose task is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the smooth running of the proceedings conferred upon it by the CAS Procedural Rules.[39] The Appeals Arbitration Division constitutes Panels, whose task is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.[40] Arbitration proceedings submitted to the CAS are assigned by the CAS Court Office to one of these two divisions according to their nature.[41] In addition to these two divisions, there are *ad hoc* chambers created for the Olympic Games (from 1996) and for other sports events such as the *Fédération Internationale de Football Association* (FIFA) World Cup.[42]

This variety of tasks produces different models of judicial activities within the CAS, although its proceedings are formally an arbitration (and mediation). The CAS, in fact, resembles a civil court when it deals with commercial law cases (such as player transfers), an administrative court when it has to decide claims against sporting institutions' decisions, a constitutional court when it must resolve conflicts between different institutions of the Olympic movement, and even a criminal court when it has to balance evidence in doping violations.[43] As a matter of fact, the coexistence of different jurisdictional models is common in international courts or tribunals: Take, for instance, the World Trade Organization (WTO) Dispute Settlement System, in which there are both constitutional features (concerning the interpretation of Treaties or the protection of fundamental rights) and administrative law and civil law

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39 *See* Arts R27-R37 and R38-46 CAS Procedural Rules.

40 *See* Arts R27-R37 and R47-59 CAS Procedural Rules.

41 Such assignment may not be contested by the parties or raised by them as a cause of irregularity. *See* THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006 (Antonio Rigozzi & Michele Bernasconi eds, 2007); and MERONE (note 8), 105.

42 The early experiences of the CAS Olympic games *ad hoc* division are analyzed by GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS – ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW (2001).

43 LATTY (note 4), 296.

ones (relating to the review exercised by panels and Appellate Body over decisions and proceedings).[44]

Lastly, the activities of the CAS have expanded in the last fifteen years, so that the growing number of its decisions has led to the formation and consolidation of a set of principles and rules.[45] This complex of norms stems from both the interpretation of sports law and the creation of new principles specific to sport (such as the principle of "fair play," or that of "strict liability" in doping cases). This set of principles and rules has been labeled *lex sportiva*[46] and is often relied upon by CAS panels as well as by other institutions: Even the World Anti-Doping Code refers to CAS awards.

This result is mainly due to the necessity of harmonizing sports regulations (especially anti-doping rules, which were particularly different from jurisdiction to jurisdiction before the adoption of the World Anti-Doping Code) and to the need for protecting fundamental rights of the athletes within the sport legal system (so that they do not have to file a case before domestic courts). In order to ensure the CAS's supremacy, all of the basic legal documents of the sports system contain *ad hoc* clauses. The Olympic Charter has established CAS jurisdiction over IOC decisions and regarding any disputes arising during – or in connection with – the Olympic Games.[47] IFs Statutes and Regulations have introduced specific clauses in which they devolve disputes to the CAS.[48] The World Anti-Doping Code appoints the CAS as a court of last instance in doping cases.[49]

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[44] Barbara Marchetti, *Il sistema di risoluzione delle dispute del WTO: amministrazione, corte o tertium genus?*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 933 (2008).

[45] Nafziger (note 9); 409, and Foster (note 9).

[46] *For instance*, TAS 2007/A/1424, *Federación Española de Bolos (FEB) v. Fédération Internationale des Quilleurs (FIQ) & Federació Catalana de Bitlles i Bowling (FCBB)*, Award of 23 April 2008, para. 17; TAS 2004/A/776, *Federacio Catalana de Patinatge (FCP) v. International Roller Sports Federation (FIRS)*, Award of 15 July 2005, para. 15; or CAS 2002/O/373, *Canadian Olympic Committee (COC) & Beckie Scott / International Olympic Committee (IOC)*, Award of 18 December 2003, para. 14.

[47] *See* Arts 15.4, 45.6 and 59 of the Olympic Charter.

[48] *See*, *for instance*, Art. 62, para. 3 of FIFA Statutes or Art. 36 of Fédération Internationale de Basketball Amateur (FIBA) General Statutes or Arts 74 *et seq.* of Union Cycliste Internationale (UCI) Constitution.

[49] *See*, *for instance*, Art. 13 of the World Anti-Doping Code.

The CAS Novel thus comes to a happy end. Born as the favorite son of the IOC, after an initial period of difficulty, it has constantly widened its jurisdiction due to several factors: Its enhanced legitimacy after the 1994 Reform, functional needs (e.g., the need for harmonization of sports disputes), and increasing economic and commercial interests which favour alternative dispute resolution mechanisms such as arbitration. Thus, the CAS has finally come to be viewed as a supreme court for sport by all sporting institutions: The IOC, WADA, and even IFs. Through its decisions, the CAS has made a crucial contribution to the making of global sports law. It develops common legal principles among sporting bodies; it interprets and harmonizes sports law; it reviews sporting institutions' decisions; and it helps affirm the separation of powers within the sport legal system.[50]

C. The Role of the CAS in Making a *Lex Sportiva*

Among the different activities carried out by the CAS, some are especially relevant to the formation of global sports law. In particular, we can distinguish at least three different functions. Firstly, the CAS has been applying general principles of law to sporting institutions, and it has also been creating specific "*principia sportiva.*" Secondly, the CAS plays a significant role in interpreting sports law, thus influencing and conditioning rulemaking activity by sporting institutions. Thirdly, the CAS greatly contributes to the harmonization of global sports law, not least because it represents a supreme court, the apex of a complex set of review mechanisms spread across the world: For instance, doping case decisions issued by national anti-doping panels can be appealed to the CAS.

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[50] The role of the CAS as the "the more suitable regulator" to supervise the international sport system is argued by Marcus Mazzucco & Hilary Findlay, *The Supervisory Role of the Court of Arbitration for Sport in Regulating the International Sport System*, 1 INTERNATIONAL JOURNAL OF SPORT AND SOCIETY 131 (2010).

I. Development of Common Legal Principles

The first issue relates to the adoption of legal principles by the CAS. From this perspective, one can consider, on the one hand, when awards apply or refer to general principles of law; and, on the other, when awards develop new principles specifically conceived for sport.

As to the first part, the CAS often refers to public international law principles. In the *Dodô case*, for instance, the Brazilian national soccer federation (*Confederação Brasileira de Futebol*) was held responsible for decisions issued by the *Superior Tribunal de Justiça Desportiva do Futebol* (STJD), a body partially independent from the national federation, because of the principle that "States are internationally liable for judgments rendered by their courts, even if under their constitutional law the judiciary is wholly independent of the executive branch."[51] Another example comes directly from the Arbitration Rules for the Olympic Games, which establish that the CAS "shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."[52]

Furthermore, the CAS often adopts public law principles, such as due process, duty to give reasons, and procedural fairness.[53] Therefore, a relevant difference emerges between other forms of global law or transnational law, such as *lex mercatoria*: While *lex mercatoria* adopts principles that are mostly – if not exclusively – based on private law, *lex sportiva*, and in particular CAS awards, have mostly developed using and in accordance with public law principles, particularly those drawn from criminal law and administrative law.[54]

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[51] CAS 2007/A/1370, *FIFA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr. Ricardo Lucas Dodô*; CAS 2007/A/1376, *WADA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr. Ricardo Lucas Dodô*, para. 88.

[52] *See* http://www.tas-cas.org/d2wfiles/document/422/5048/0/rules%20English%20(2008.07.04).pdf.

[53] With regard to the principle of procedural fairness, *for instance*, CAS 2008/O/1455, *Boxing Australia v. AIBA*, Award of 16 April 2008.

[54] LATTY (note 4), 320. In CAS-JO[-TUR] 06/008, *Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano (CONI) & Federazione Italiana Sport Invernali (FISI)*, *for instance*, the activity of Italian National Olympic Committee and Italian National Skiing Federation, which had excluded an athlete from the Olympic team, was judged "arbitrary" and "unfair."

The CAS itself, in fact, highlighted that there is "an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities."[55] This is why the CAS often reviews sporting institutions' actions by comparing them to public administration: In the *Pistorius v. IAAF* case, for instance, the CAS evaluated the decision-making process followed by the IAAF in order to verify whether the decision challenged by the athlete was "procedurally unsound."[56]

The most important example of a public law principle applied by the CAS is probably the principle of due process. The CAS has issued several decisions that have allowed this principle to be introduced as a fundamental right in global sports law.

In 1995, for instance, the CAS stated:

> The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion.[57]

Some years later, the CAS observed that it "has always considered the right to be heard as a general legal principle which has to be respected also during internal proceedings of the federations … . Federations have the obligation to respect the right to be heard as one of the fundamental principles of due process."[58] In 2004, the CAS stated that it "will always have jurisdiction to overrule the Rules of any sport federation if its de-

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[55] CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA*, Award of 20 August 1999, para. 58.

[56] CAS 2008/A/1480, especially para. 56 *et seq*.

[57] CAS 94/129, *USA Shooting & Q. v. Union Internationale de Tir (UIT)*, 23 May 1995, para. 34. *See also*, *ex plurimis*, CAS *ad hoc* Division (O.G. Atlanta) 96/005, *A., W. and L. v. NOC Cape Verde (NOC CV)*, 1 August 1996: "Any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with the elementary rules of natural justice and due process."

[58] CAS 2001/A/317, *A. v. Fédération Internationale de Luttes Associées (FILA)*, 9 July 2001; citing CAS 91/53 *G. v. FEI*, Award of 15 January 1992, Digest, 79, 86.

cision-making bodies conduct themselves with a lack of good faith or not in accordance with due process."[59]

The importance of this jurisprudence is crucial if we consider that the World Anti-Doping Code – which recognizes the right of athletes to a fair hearing in anti-doping proceedings – entered into force only in 2003.[60] From this perspective, the CAS acted as a law-maker, in so far as it introduced into the sports legal system the principle of (procedural) due process.[61] The CAS, in fact, has always affirmed its role in "curing" procedural defects, meaning that such defects can be "cured" before the CAS without necessarily upholding sporting institutions' decisions.[62] However, it is worth noting that amongst the few cases – to date – in which a CAS award has been successfully challenged before the Swiss Federal Court, two of them were based on a violation of due process.[63]

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[59] CAS OG 04/009, *H.O.C. & N. Kaklamanakis v. I.S.A.F.*, 24 August 2004.

[60] On these aspects, Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICKINSON LAW REVIEW 523 (2002); and Dimitrios Panagiotopoulos, *International Sports Rules' Implementation-Decisions' Executability: The Bliamou Case*, 15 MARQUETTE SPORTS LAW REVIEW 1 (2004).

[61] *See* Jeremy Lever, *Why Procedure Is More Important than Substantive Law*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 285 (1999); and JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1986).

[62] "A procedural violation is not enough in and by itself to set aside an appealed decision (*see* CAS 2001/A/345, Digest of CAS Awards III, 240 and the references quoted therein); it must be ascertained that the procedural violation had a bearing on the outcome of the case. Whenever a procedural defect or unfairness in the internal procedure of a sporting body could be cured through the due process accorded by the CAS, and the appealed decision's ruling on the merits was the correct one, CAS panels had no hesitation in confirming the appealed decision" (CAS 2004/A/777, *ARcycling AG v. Union Cycliste Internationale (UCI)*, 31 January 2005, para. 56). *See also* CAS 2006/A/1175, *D. v. International Dance Sport Federation*, Award of 26 June 2007, para. 18: "the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery" (CAS 98/211, *B. v. Fédération Internationale de Natation*, CAS Digest II, 255, 264, citing Swiss doctrine and case law)." *See* Arts R44.2 and R57CAS Procedural Rules, which establish provisions regarding Hearing.

[63] Judgment of 22 March 2007, that annulled CAS 2005/A/951, *Cañas v. ATP*, Award of 23 May, because "le droit d'être entendu du recourant a été mé-

This is different from cases where the CAS not only applies general principles of law, but also develops "new" principles. This happens, for instance, whenever the CAS refers to the so-called "principia sportiva" (i.e., principles developed for sport only, such as "fair play" or the principle of "strict liability" applied to doping cases).[64] This example provides us with an interesting case of judge-made law at the international level and highlights some relevant trends in global regimes.

As a matter of fact, the emergence of global regulatory regimes and global courts leads to the development of autonomous sets of norms, principles and procedures. In this process, two distinct phenomena take place. First, these regimes imitate the machinery of the State, selecting principles and mechanisms that can be adapted to their own contexts, and second, they try to develop their own legal principles, which are binding within the regime that created them. The first phenomenon contributes to the development of principles of public law and administrative law at the global level through a mimetic process. The second is an attempt to build autonomous and complete legal orders. This phenomenon, however, encounters many obstacles, mainly because these

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connu par le TAS. Etant donné la nature formelle de ce droit …, la sentence attaquée doit être annulée, sans égard au sort qui sera réservé aux arguments subsidiaires avancés par le recourant." Following this decision, the CAS has anyhow confirmed its precedent award: CAS 2005/A/951, *Cañas v. ATP*, 23 May 2007, Revised award). *See also* Swiss Federal Tribunal, 4A_400/2008, Judgment of 9 February 2009, 1ère Cour de droit civil: "[L]e TAS a-t-il violé le droit d'être entendu du recourant. Semblable violation a eu une incidence concrète sur la situation juridique de cette partie, puisque celle-ci ne dispose d'aucun moyen pour faire sanctionner par le Tribunal fédéral l'application erronée, voire arbitraire, de la LES [Loi fédérale suisse du 6 octobre 1989 sur le service de l'emploi et la location de services] qui a entraîné le rejet de sa demande pécuniaire" (para. 3.2).

64 "Principles of sports law" or "Principia sportiva" are often referred to by the CAS (*see*, *ex plurimis*, CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA* (note 55), para. 158). The most famous ones are probably the "fairness and integrity of international competitions" and the "fair play." On the "strict liability" principle, *see* JANWILLEM SOEK, THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES (2007). A complete list of such principles is in LATTY (note 4), 305; *see also* Eric Loquin, *L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une Lex sportiva*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 85, 101 (Antonio Rigozzi & Michele Bernasconi eds, 2007); and MERONE (note 8), 233.

regimes often remain in some ways connected to the State. With respect to sports, CAS awards, for example, can be enforced according to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called "New York Convention"), and they can be challenged before the Swiss Federal Court.[65] In this case, the linkage between CAS awards and private international law has strengthened the CAS and it ensures the effectiveness of its decisions. In other words, in order to create an effective international "court" for sports, it was necessary to choose international arbitration anchored in the system based on the 1958 New York Convention.

II. Interpreting Sports Law and Influencing Rulemaking

The second function carried out by the CAS in making a *lex sportiva* is the influence it has on sporting institutions' regulatory activities. This function is connected with the role played by the CAS in interpreting sports law and it leads directly to one key question: What is the weight of CAS jurisprudence? Is there any rule of binding precedent?

Formally, there is no rule of this kind for CAS awards, meaning that no panel is bound by preceding decisions issued by other panels. However, panels demonstrate a consistent deference to CAS jurisprudence; arbitrators often refer to prior CAS decisions. There is an analogy here between the CAS and other international courts or tribunals, such as the WTO tribunals: Although there is no formal principle of stare decisis in the decisions of the WTO Appellate Body or panels, they do tend to follow their own prior "jurisprudence."[66]

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[65] *See* Luigi Fumagalli, *La circolazione internazionale dei lodi sportivi: il caso del Tribunale arbitrale dello sport*, RIVISTA DI DIRITTO ED ECONOMIA DELLO SPORT 364 (1994); and FRANK OSCHÜTZ, SPORTSCHIEDSGERICHTSBARKEIT. DIE SCHIEDSVERFAHREN DES TRIBUNAL ARBITRAL DU SPORT VOR DEM HINTERGRUND DES SCHWEIZERISCHEN UND DEUTSCHEN SCHIEDSVERFAHRENSRECHTS (2005).

[66] On these aspects, *see* the trilogy written by Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1999); and Raj Bhala, *Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 873 (2001). *See also* Ingo Venzke, *Making General Exceptions: The*

Due to this informal but consistent rule of precedent, the CAS exercises a strong influence on sports law-making. The clearest example comes from anti-doping rules. In this case, during the formation process of the World Anti-Doping Code (both the first and the revised versions), CAS decisions were taken in due account, and the commentary to the Code refers to CAS jurisprudence in comments pertaining to specific articles.[67]

Finally, another activity which illustrates the law-making role played by the CAS is the issuance of advisory opinions in response to requests from the IOC, International Federations, WADA or other sporting institutions. Although these opinions are not binding, they have the power of moral suasion and can influence the choices of sporting entities. In this case, the CAS acts like the French *Conseil d'Etat* or the Italian *Consiglio di Stato*, which operate not only as judges, but are also called upon to advise the legislature. This is a fundamental function of these tribunals, which to date remains underdeveloped within sporting institutions.

III. Harmonizing Global Norms Through the Appeals Procedure

Lastly, the third function of the CAS to be considered is that of normative harmonization. This kind of "law-making" is effected through the appeals procedure. The CAS, in fact, represents the apex of a very complex judicial system, made up of two or even three levels. At the first two levels, there are either national sporting tribunals or international sporting federation tribunals or both; at the top level, as the court of last instance, there is the CAS. This kind of system creates a centralized mechanism of review that seems to be very effective: It has been working very well, for instance, in doping matters, where the CAS can now intervene after the other two bodies have already reached a decision concerning a particular case. Through the appeals procedure, therefore, the CAS – acting like a supreme court – plays a significant role in harmonizing global sports law.

Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy, in this issue; and Marc Jacob, *Precedents: Lawmaking Through Adjudication*, in this issue.

[67] Comments to Arts 3.1 (Burdens and Standards of Proofs), 3.2.4 (as to drawing an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation), and 4.2.2 (Specific substances).

In any event, an appeal against the decision[68] of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.[69] The arbitration agreement represents the legal basis and legitimation for a CAS intervention (i.e., the same kind of legitimation of the entire sports legal system and of private law more generally, although it can be argued that professional athletes are not truly free to decide about this once they are affiliated with a sport federation).[70] The CAS has "full power to review the facts and the law,"[71] so that it "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"[72]: The CAS, therefore, can be either an appellate judge or a "*Cour de Cassation*."

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[68] "In order to determine whether there exists a decision or not, the form of a communication has no relevance. … What is decisive is whether there is a ruling – or, in the case of a denial of justice, an absence of ruling where there should have been a ruling – in the communication." (CAS 2004/A/748).

[69] R47 CAS Procedural Rules. *See*, *ex multis*, CAS 2008/A/1583, *Sporting Lisboa e Benfica Futebol SAD v. UEFA, & FC Porto Futebol SAD*; CAS 2008/A/1584, *Vitória Sport Clube de Guimarães v. UEFA, & FC Porto Futebol SAD*, Award of 15 September 2008, para. 5.1: "there must be a 'decision' of a federation, association or another sports-related body"; "the (internal) legal remedies available" must have been exhausted prior to appealing to the CAS; the parties must have agreed to the competence of the CAS; on these aspects, Michele Bernasconi, *When is a "Decision" an Appealable Decision?*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 261 (Antonio Rigozzi & Michele Bernasconi eds, 2007).

[70] Here there is a different legitimacy compared with those international judicial institutions addressed in Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in this issue. This is due to the peculiar nature of the CAS, that is, it is neither a Court or a pure Arbitration body.

[71] Jean-Pierre Karaquillo, *Le rôle du Tribunal du sport en tant qu'instance d'appel externe aux fédérations sportives*, in: THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT, CAS & FSA/SAV Conference Lausanne 2006, 33 (Antonio Rigozzi & Michele Bernasconi eds, 2007).

[72] R57 CAS Procedural Rules. An in-depth analysis of these issues is in RIGOZZI (note 8), 552.

The appeals procedure – based on a review of a decision issued by a sporting body – is another peculiarity of the CAS, in comparison with other forms of international arbitrations, where contracts are usually at stake.[73] Within the sports legal system, this kind of procedure is essential for ensuring the equal treatment of athletes and for avoiding excessive influence of national sporting institutions over cases regarding domestic athletes.[74] Moreover, the appeals procedure may be the first time that a case is brought before a truly impartial body,[75] because it often happens that sporting tribunals are not completely independent from their own federations[76] (even the CAS, however, has been criticized because arbitrators might be biased in favor of the interests of the parties which have nominated them (amongst the list of arbitrators appointed by the ICAS), especially when one of the parties to the dispute is a powerful sporting institution).[77]

In any event, the appeals procedure is an arbitration. It implies that:

> [The Panel] shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.[78]

Moreover, the parties have to accept CAS jurisdiction; that is why sporting institutions' statutes and regulations establish an *ad hoc*

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[73] *See* Richard H. McLaren, *Sports Law Arbitration by CAS: is it the Same as International Arbitration?*, 29 PEPPERDINE LAW REVIEW 101 (2001).

[74] *See* CAS 96/156, *F. v. FINA*, Award of 10 November 1997, in which the need of ensuring an international review of national federations' decisions is underlined.

[75] This point is raised by RIGOZZI (note 8), 552, who observed that the CAS appeal procedure is not a "procédure appellatoire à proprement parler."

[76] CAS 2007/A/1370, *FIFA v. Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodô* (note 51), para. 71.

[77] And this despite of R33 CAS Procedural Rules, according to which "Every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties."

[78] R58 CAS Procedural Rules.

clause.[79] This confirms that the most significant form of legitimacy of sport judicial activity is based upon consensus.[80]

Through the appeals procedure, the CAS connects and harmonizes both transnational and national sports law. This function is thus closely connected to the development of common legal principles,[81] such as legality, fairness and good faith,[82] as well as "general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures."[83] Therefore, the CAS, like an international or *mercatique* judge, is "*amené à déduire d'une comparaison des différent systèmes juridiques nationaux l'existence de règles de droit positif applicables à l'activité dont il est le juge.*"[84]

D. The Relationships Between the CAS and Public Authorities

The CAS is an example of a centralized review mechanism over sporting institutions' activities. It is one of the most experienced among international tribunals, which are continually growing in numbers.[85] The creation of the CAS is also attributable to the necessity of limiting the intervention of domestic courts in sporting matters, of which there have been increasing instances since the end of the 1980s (largely due to the

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[79] And this is what almost all federations did. An exception is in CAS 2006/A/1190, *WADA v. Pakistan Cricket Board & Akhtar & Asif*, Award of 28 June 2006, regarding cricket.

[80] Though it is doubtful that athletes are truly free to decide whether to sign or not these *ad hoc* clauses embodied in sporting institutions' statutes. Sports legal orders, therefore, have developed additional forms of legitimacy than consensus, namely involving public authority, for instance, the hybrid public and private anti-doping regime.

[81] *Supra* section C.I.

[82] Several cases are reported by RIGOZZI (note 8), 644.

[83] CAS 98/200, *AEK Athens & S.K. Slavia Prague v. UEFA* (note 55).

[84] LATTY (note 4), 308.

[85] *See* Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMPORARY PROBLEMS 37 (2008); for some data, *see* the Project on International Courts and Tribunals (http://www.pict-pcti.org/).

rise in doping cases and to the commercialization of sports, such as in the well-known cases of *Reynolds* and *Krabbe*).[86] National courts' intervention was perceived by sporting institutions as posing a "threat" which might undermine the autonomy of sporting institutions and, more generally, of the sports legal system.[87] As a consequence, in order to strengthen the role of the CAS, most IFs have dismissed their own arbitration bodies (e.g., the IAAF), although some of them have retained jurisdiction over specific matters (for instance, FIFA has not devolved to CAS disputes concerning violations of the rules of the game of football).[88] The role of domestic courts within the sports system, however, brings to the fore another crucial issue: The relationships between the CAS and public authorities.

Some of the domestic decisions appealed to the CAS may have been taken by public bodies, or even domestic courts. In these cases, the CAS can be called upon to judge the decisions of public authorities.

Sometimes States themselves leave the last word to the CAS: In Italy, for instance, a specific provision establishes that doping sanctions issued by the national anti-doping tribunal (a public body) can be appealed to the CAS. In other circumstances, the CAS itself has resolved the matter by simply ignoring the domestic decision.[89] In particular, the CAS stated that "the coexistence of national and international authority … is a familiar feature, and it is well established that the national regime does not neutralize the international regime."[90] Therefore, national sovereignty – i.e., in this case, the power to sanction athletes – "*n'a,*

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[86] DAVID (note 3), 36.

[87] Jack Anderson, *'Taking Sports Out Of The Courts': Alternative Dispute Resolution and the International Court of Arbitration for Sport*, 10 JOURNAL OF LEGAL ASPECTS OF SPORT 123 (2000).

[88] *See* Art. 63 FIFA Statutes.

[89] CAS/A/1149 and CAS/A/1211, *World Anti-Doping Agency (WADA) v. Federación Mexicana de Fútbol (FMF) and Mr. José Salvador-Carmona Alvarez*, Award of 16 May 2007; citing CAS 96/156, *F. v. FINA*, Award of 10 November 1997; TAS 98/214, *B. v. Fédération Internazionale de Judo (FIJ)*, Award of 17 March 1999; CAS 2005/A/872, *UCI v. Muñoz and Federación Colombiana de Ciclismo*; TAS 2006/A/1119, *Union Cycliste Internationale (UCI) v. L. & Real Federación Española de Ciclismo (RFEC)*, Award of 19 December 2006; and TAS 2006/A/1120, *Union Cycliste Intertationale (UCI) v. G. & Real Federación Española de Ciclismo (RFEC)*, Award of 19 December 2006.

[90] CAS/A/1149 and CAS/A/1211 *WADA v. FMF and Mr. José Salvador-Carmona Alvarez* (note 89), para. 26.

en principe, vocation à s'appliquer que sur le seul territoire national" and "*la décision nationale peut toutefois être remplacé par une décision de l'autorité internationale – le TAS – pour que soit assurée la nécessaire uniformité du droit.*"[91] In conclusion, it would be possible in theory that one State imposes its own decisions during sports events held in its own territory and against the will of the "*autorité internationale*," such as IFs or the CAS; but were this to happen, that State would not be allowed to host any international sport competition.[92]

In light of the factual review of administrative decisions by the CAS, the question arises whether its practice in this regard may itself amount to an exercise of public authority, even if it rests on a private law basis. The "publicness" of the authority, in this case, can find a legal basis both in the New York 1958 Convention and in the 2005 UNESCO Convention Against Doping in Sport. The New York Convention provides a linkage between CAS awards and private international law and ensures the effectiveness of CAS decisions. The UNESCO Convention mandates that the principles of the World Anti-Doping Code (WADC) be "the basis" for national measures, thus enabling governments to align their domestic policy with the WADC and thereby harmonizing global sports regulation and public legislation in the fight against doping in sport.[93] Furthermore, the WADC appoints the CAS as a court of last instance in doping cases.

It is worth noting, however, that domestic courts have intervened mostly in doping cases. From this perspective, the creation of the World Anti-Doping Agency and the formation of a public-private anti-doping regime, followed by the adoption of the World Anti-Doping Code and the signature of the above-mentioned UNESCO Convention against doping in sport, have minimized the risk of actions being brought before national judges.[94] Furthermore, while looking at the process of

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[91] TAS 2006/A/1119, *UCI v. L. & RFEC* (note 89), para. 30.

[92] *Id.*, para. 30; cited by CAS/A/1149 and CAS/A/1211, *WADA v. FMF and Mr. José Salvador-Carmona Alvarez* (note 89).

[93] *See* Art. 3 UNESCO Convention.

[94] Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in: Symposium on "Global Administrative Law in the Operations of International Organizations, 6 INTERNATIONAL ORGANIZATIONS LAW REVIEW, 411 (Laurence Boisson de Chazournes, Lorenzo Casini, Benedict Kingsbury eds, 2009); and Kathryn Henne, *WADA, the Promises of Law and the Landscapes of Antidoping Regulation*, 33 POLITICAL AND LEGAL ANTHROPOLOGY REVIEW 306 (2010).

"nationalization" that accompanied the formation of the anti-doping regime, some scholars have found a relationship of "international delegation" between States and the CAS.[95] This would offer a further explanation of the high effectiveness of CAS procedures, which during the Olympic Games are also extremely fast (cases are resolved within twenty-four hours).[96] In addition, CAS decisions – such as disqualifying an athlete or changing a result – are often very easily executed.[97] Finally, due to the autonomy granted by States to the sports system and sporting institutions, relationships between CAS activities and regulatory proceedings in domestic jurisdiction are not particularly complicated.[98]

Thus conflicts between public authorities and the CAS are not frequent. Evidence of this can be found in the relatively low number of claims against CAS awards before the Swiss Federal Court.[99] In twenty-five years, with around 1,000 awards decided, around sixty such claims were made against CAS awards, and of those, only a few resulted in the

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95 *See* Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW 241 (2002). On the notion of "international delegation", *see* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMPORARY PROBLEMS 1 (2008).

96 Art. 18 Arbitration rules for the Olympic Games.

97 The effects of such decisions, however, might be particularly devastating in terms of money and reputation. *See* Giulia Mannucci, *La natura dei lodi del Tribunale arbitrale dello sport tra fenomenologia sportiva e ordinamento generale*, DIRITTO AMMINISTRATIVO 229 (2010).

98 The situation may be different with regard to criminal proceedings, especially in doping cases and in countries where doping is regulated not only by sports rules, but also by criminal law (such as in Italy, where an interesting case emerged during the Winter Olympics of Turin 2006, though without any specific dispute: *see* Thomas Schultz, *La lex sportiva se manifeste aux Jeux olympiques de Turin: suprématie du droit non étatique et boucles étranges*, JUSLETTER of 20 February 2006). In any event, CAS jurisdiction refers only to sports aspects, and there is low risk of overlapping with domestic criminal proceedings.

99 *See* Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 9 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL 51 (2009); and RIGOZZI (note 8), 655. As to the USA, Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 99 (2009).

annulment of the award in question, though there has been an increase in the last two years.[100] From this point of view, the Swiss Federal Court is the "closing gate" of the whole system, and it may be called upon to decide on an award issued in any part of the world,[101] according to the Swiss Federal Act on Private International Law.[102]

In conclusion, the case of sport shows some divergences in comparison to the general trends of international law. Some scholars have observed that globalization and the rise of international institutions and their activities produce reactions from national courts. The latter, due to a lack of review mechanisms at the global level, have begun to act like review bodies over international organizations.[103] The sport legal system does not fit this paradigm, but, in a certain way, it confirms the hypothesis. In the past, in fact, national judges sought to fill the gaps in global sports law, particularly in doping matters. Once both a global anti-doping regime and a complex judicial system had been created, the weight of domestic courts diminished. However, there are still issues where national law applies and national judges play a crucial role in the

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[100] Amongst the most recent cases, *see* the following decisions issued by the Swiss Bundesgericht I. zivilrechtliche Abteilung, 4A_456/2009, Decision of 3 May 2010; 4A_490/2009, Decision of 13 April 2010; 4A_358/2009, Decision of 6 November 2009; 4A_400/2008, Decision of 9 February 2009. This increase is due to the growing number of cases decided by the CAS, and also by the rising importance of sports disputes, which produce significant legal and economic effects.

[101] This is why the New South Wales Court of Appeal, *Raguz v. Sullivan* [2000] NSWCA 240, dismissed an appeal filed against a CAS award issued in Sydney, observing that the CAS arbitration rules are "transnational, universal, global," and their application "is not dependent on a territorial nexus, nor is restricted territorially": *see* Damian Sturzaker & Kate Godhard, *The Olympic Legal Legacy*, 2 MELBOURNE JOURNAL OF INTERNATIONAL LAW 245 (2001).

[102] Art. 190, ann. 2, Loi fédérale du 18 décembre 1987 sur le droit international privé. See RIGOZZI (note 8), 684; and MERONE (note 8), 155.

[103] *See* Eyal Benvenisti & George Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EJIL 59 (2009); and Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, ACTA JURIDICA 90 (2009). More generally, as to the relationships between courts, YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003); YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007); and SABINO CASSESE, I TRIBUNALI DI BABELE. I GIUDICI ALLA RICERCA DI UN NUOVO ORDINE GLOBALE (2009).

sports system, such as for TV licenses or when a "decision" adopted by a given sporting institution has no chance of appeal before the CAS.

Therefore, there are still gray areas in the sports judicial system. It has reached a high level of maturity in doping cases (yet there are still significant controversial disputes, as the *Pechstein* case demonstrates),[104] but not in other fields such as the selection process for the Olympic Games or the review of IOC decisions more generally.[105] In addition, in some States, particularly developing countries, national judicial bodies might be influenced by the most powerful IFs.[106]

In any event, the sports legal system is equipped with judicial machinery that is more advanced than in any other *private* regime, including that of the internet.[107] At the same time, this system is even more effective than other *public* international law mechanisms (the CAS has been

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[104] Claudia Pechstein is a famous German speed skater and winner of many Olympic medals. In 2009, she was banned from all competitions for two years after high levels of reticulocytes were found in her blood (no forbidden substances were actually found, therefore this was a case of doping based on "circumstantial evidence"). Pechstein appealed the ban before the CAS, which dismissed her appeal (CAS 2009/A/1912, *Claudia Pechstein v. International Skating Union*; and CAS 2009/A/1913, *Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union*, Award of 25 November 2009; *see also* CAS *ad hoc* Division OG 10/04, *Claudia Pechstein v. DOSB & IOC*, Award of 18 February 2010); she also appealed the CAS award and filed a complaint against the International Skate Union before the Swiss Federal Court, in both cases unsuccessfully at least to date (*see* Swiss Bundesgericht I. zivilrechtliche Abteilung, 4A_612/2009, Decision of 10 February 2010).

[105] Most recently, *see* the 2009 decisions issued in Canada, by the Supreme Court of British Columbia and the British Columbia Court of Appeal, regarding the Vancouver Organizing Committee. On these aspects, *see* Mazzucco & Findlay (note 50).

[106] *See* Migai Akech, *The Maurice Odumbe Investigation and Judicial Review of the Power of International Sports Organizations*, 6 ENTERTAINMENT AND SPORTS LAW JOURNAL (2008), available at: http://go.warwick.ac.uk/eslj/issues/volume6/number2/akech.

[107] The Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by ICANN, for instance, refers to a different arbitration body, such as the WIPO Arbitration and Mediation Center), but does not exclude the right to bring the dispute "to a court of competent jurisdiction for independent resolution" (Art. 4(k) UDRP): *see* DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW. ICANN AND THE UDRP 95 (2007).

likened to the ECJ)[108] because States do not easily accept the delegation of powers to an international court.[109] In sport, however, this risk is not present because States are not parties to the disputes.[110]

E. Towards a Sporting "Judicial Branch"?

Judicial activity plays a crucial role in sport and exhibits peculiar features in this field, as can be seen from the formation of the complex system governed by the CAS.

First, this system has both review and dispute settlement functions, which can be carried out by the same institution (i.e., the CAS). Second, the high degree of effectiveness of CAS proceedings and decisions confirms the importance of granting independence to tribunals and courts as well as the usefulness of creating multi-level judicial systems. Third, the sport judicial system illustrates the integration between the supranational and national levels, often realized by involving public administrative authorities instead of domestic courts, thus blurring the dividing line between the judiciary and the administration. Similarly, the adoption of arbitration proceedings by public bodies blurs the distinctions between public law and private law.[111] Fourth, the formation of a sports "judicial branch" provides evidence of the strategic role played by courts and tribunals in global law-making.[112]

The case of the CAS and its system, therefore, allows us to draw some comparisons between sport and other international regimes.

A first similarity concerns the functions carried out by these kinds of bodies. In the sports system, as in other international contexts, courts

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[108] LATTY (note 4), 308.

[109] Alter (note 85), 38; Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009); and CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).

[110] Ravjani (note 95), 244, who refers to a "low visibility delegation" made by States.

[111] This point emerges in several CAS decisions, and it is more generally discussed by Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INTERNATIONAL COMPARATIVE LAW QUARTERLY 371 (2007).

[112] *See* SABINO CASSESE, IL DIRITTO GLOBALE 137 (2009).

are created both to settle disputes and to review and control the exercise of powers by international organizations: this happens in traditional treaty-based institutions (e.g., the ILO)[113] and in private regimes (e.g., the internet).[114] At the same time there is an increasing need to ensure the observance of minimum standards and to protect fundamental rights (such as in the anti-doping regime).[115] A second analogy comes from the strategic role played by courts at the global level. In many regulatory regimes, judges, panels or tribunals contribute, as does the CAS, to the development of common rules and principles: Take, for instance, the case of WTO tribunals, which has been conceived of by some scholars as an example of global "constitutionalism."[116] Furthermore, international courts and tribunals increase connections between regimes.[117] From this perspective, the CAS has certainly developed many links between different sports regimes (such as the Olympic regime, the Anti-Doping regimes, and those of the several International Federations), although – at least, to date – it does not "dialogue" very much with other international courts and tribunals.[118]

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[113] Arts 26, 27, 28 and 33 ILO Constitution.

[114] Art. IV on "Accountability and Review" of the ICANN Bylaws.

[115] *See* MAURO CAPPELLETTI, DIMENSIONI DELLA GIUSTIZIA NELLE SOCIETÀ CONTEMPORANEE: STUDI DI DIRITTO GIUDIZIARIO COMPARATO 39 (1994), who observed an extraordinary expansion of constitutional and transnational justice, due to the need to control political power and to protect fundamental rights.

[116] Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39 (2001); *see also* Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in: THE POLITICS OF GLOBAL REGULATION, 211, 227 (Walter Mattli & Ngaire Woods eds, 2009).

[117] CASSESE (note 103).

[118] This is mostly due to the "specificity" of sport. However, it is most likely that there will soon be a more intensive dialogue between the CAS and other courts, such as the European Court of Justice or the European Court for Human Rights: the number of sports cases that may affect antitrust regulation or fundamental rights of the athletes, in fact, has been increasing. The increasing economic and commercial relevance of sport could also involve the WTO system in a more significant way than what happened to date (e.g., in the dispute *U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO DS285, regarding the cross-border supply of gambling and betting services).

Global sports law shows that the effectiveness of an international judicial system also depends on the variety of judicial models that it adopts and the variety of remedies that it can offer. However, decisions issued by international courts or tribunals must often be executed or are subject to review by domestic courts: This happens with CAS awards, which are enforceable pursuant to the 1958 New York Convention and can be challenged before the Swiss Federal Court. Nevertheless, once the sports legal system had developed a complex and formalized global judiciary, independent from the executive, the number of cases reviewed by domestic courts was reduced. Extrapolating from this, one can see that the more global regulatory regimes imitate State systems, the less they will require States' intervention. A peculiarity of global sports law emerges here, in comparison with other private or hybrid regimes: Sports judicial mechanisms display many more similarities with public international law regimes than with private ones. This is a further confirmation of the theory that the more complex private regimes become, the more they will come to resemble public law regimes.[119]

[119] Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 605, 629 (2008); and Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 513, 516 (2008).

V. Strategies in Response:

Concluding Considerations and Outlook

On the Democratic Legitimation of International Judicial Lawmaking

*By Armin von Bogdandy & Ingo Venzke**

A. The Relevance of Democratic Legitimation

While the introductory contribution addressed the questions and definitions of our research into judicial lawmaking, this concluding chapter discusses strategies regarding the justification of international judicial lawmaking that our introduction sought to capture and that the volume set out to present. How can one square such lawmaking with the principle of democracy? A first response could be to negate the phenomenon. If there were no such thing as judicial lawmaking, there would evidently be no need for its justification. This response, though unconvincing, merits attention all the same because, according to the traditional and still widespread view of international dispute settlement, international decisions flow from the consent of the state parties to the dispute, both from the consensual basis of the applicable law and from consent-based jurisdiction. If state parties are democratic, then the presence of their consent should solve any legitimate question as long as the courts only fulfill their task of dispute settlement properly. This

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explains the emphasis that traditional schools of thought place on the cognitive paradigm and on the principle that judges are limited to applying the law to the dispute at hand.

But, as we pointed out in our introduction, these understandings are difficult to maintain, both as descriptions of international judicial practice and as normative constructions. It is therefore not surprising that alternative narratives of justification have surfaced in response. Most important among these are functional accounts suggesting that international decisions promote values, goals or community interests, above all international peace. By this token they may even attempt to justify lawmaking, precisely because international politico-legislative mechanisms are unable to achieve outcomes in the collective interest.[1] If this were so, a second response to questions regarding the democratic legitimation of international judicial lawmaking could be to argue that it strengthens democratic governance in a broader sense, rather than detracting from it.

It is true that the function of successfully settling disputes in the name of peace remains most relevant, not least for the promotion of democratic governance; after all democracy flourishes better in a peaceful world.[2] At the same time many international courts with a particular thematic outlook are justified on similar functional lines due to their contribution to effectively implementing specific goals that have come to complement the maintenance of international peace.[3] The international criminal tribunals and the International Criminal Court (ICC), for instance, are supposed to gain legitimacy by way of ending impu-

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[1] HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 165 (1942).

[2] Apart from this, international courts can, for instance, foster democratization through a democracy oriented human rights jurisprudence. *See* Eur. Court H.R., *Matthews v. Great Britain*, Case No. 24833/94, Judgment of 18 February 1999. *Cf.* Georg Ress, *Das Europäische Parlament als Gesetzgeber: Der Blickpunkt der EMRK*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 219, 226 (1999); Jenny Martinez, *Towards an International Judicial System*, 56 STANFORD LAW REVIEW 429, 461 (2003) (seeing this as the main function of international jurisprudence).

[3] Karin Oellers-Frahm, *Nowhere to Go? The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction*, in: A WISER CENTURY?, 435, 440 (Thomas Giegerich ed., 2009); Carmen Thiele, *Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft*, 46 ARCHIV DES VÖLKERRECHTS 1, 13 (2008).

nity for international crimes,[4] the WTO functions inter alia to increase economic welfare,[5] and arbitration in investment disputes should foster economic development by inducing foreign investments.[6]

Still, as important as a certain goal may be, it cannot fully settle the justification of public authority. The aim cannot offer a sufficient basis for concrete decisions that inevitably entail normative questions and redistributions of power. Moreover, functional arguments offer no solution for the unavoidable competition between different goals. At times, it may be that international adjudication achieves what everyone wants and yet still fails to deliver.[7] But even those may be lucky hits. History cautions that not too much confidence should be placed even in the benevolent and enlightened ruler. This is particularly true in light of the growing autonomy of some courts as well as the breadth of controversial fields in which such courts have been involved: there are now many constellations in which this functional goal can no longer convincingly settle legitimatory concerns. In short, our conviction is that all aspects of judicial activity need a convincing justification in light of the principle of democracy. Democratic justification is ineluctable for the exercise of any public authority.

Some might suspect that our investigation into the democratic legitimation of judicial lawmaking aims at bringing the noise of popular assemblies to the quiet halls of learnt justice. But we do not challenge the

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4 In detail, *see* Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 369, 373 (2006).

5 Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 221 (2006–07); PAOLO PICONE & ALDO LIGUSTRO, DIRITTO DELL'ORGANIZZAZIONE MONDIALE DEL COMMERCIO 26 (2002).

6 DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 149 (2008); Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 JOURNAL OF WORLD INVESTMENT & TRADE 183 (2005).

7 Robert Howse & Susan Esserman, *The Appellate Body, the WTO Dispute Settlement System, and the Politics of Multilateralism*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 61 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (pointing to a number of instances in which adjudication in the WTO overcame deadlocks in processes of political negotiation).

premise that the reasoning, the institution, the procedure of adjudication need to follow a specific logic, which is different from the reasoning, the institution, the procedure in the "true" and "primary" arena of politics.[8] Asking about democratic justification leads us to study how judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs. Each of the following broad elements in response will lay out how its topic is connected with the principle of democracy.

The first element concentrates on judicial reasoning and starts by showing the democratic importance of the standard forms of arguments, not because they reveal the true consent of states, but because they permit judicial decisions to be discursively embedded and to be critiqued before the court of public opinion (B.I). Given our starting point that the distance to politics is one of the core problems of international judicial lawmaking, we note how international judges often justify their lawmaking by referring to what is sometimes called "soft law" and discuss the relevance of such acts of international institutions (B.II). The last step in the part on reasoning discusses whether systematic interpretation might serve as a strategy to counter the effects that fragmentation has on democratic legitimation (B.III). The second part examines the main actors, the judges. In light of the principle of democracy, it looks at the two main standards of legitimate adjudication, namely independence and impartiality (C.I), and then investigates possible improvements in the process of appointing judges (C.II). The third part concerns trends in the judicial procedure that aim at strengthening the democratic legitimation of international judicial lawmaking by enhancing publicness and transparency (D.I), by lowering the thresholds for third party intervention (D.II) and by easing the access of amici curiae (D.III). The contribution closes by highlighting the crucial role of domestic organs (E).

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[8] For a brilliant description of what happens if the difference between courts and politics collapses, *see* Marcelo Neves, *La concepción del Estado de derecho y su vigencia prática en Suramérica*, in: INTEGRACIÓN SURAMERICANA A TRAVÉS DEL DERECHO?, 51 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009).

B. The Reasoning

I. The Democratic Dimension of Judicial Reasoning

One of the first and foremost elements that contribute to the democratic legitimation of judicial lawmaking is nested in the established forms of legal argument – in the discursive treatment of the legal material. Any government and parliament ratifying an international agreement expects and requires that norms be interpreted and developed in accordance with the argumentative tools laid down in Articles 31 and 32 VCLT. The rules of interpretation prescribe how legal decisions can be justified; in the practice of international adjudication, such a justification is a straightforward legal requirement. Statutes of international courts and tribunals contain provisions that are akin to the example of Art. 56(1) Statute of the International Court of Justice: "The judgment shall state the reasons on which it is based."[9] The alternatives, refraining from justifying decisions or from making them public, might weaken the lawmaking effect of judicial decisions. This would violate the statute as well as the rules of the court and it would threaten the legitimacy of the decision. Parties to the dispute would feel neither vindicated nor respected, the larger legal discourse could no longer function as a mechanism of control and critique, and legal certainty would be sacrificed.[10] All of this points to the legitimatory significance of justifying legal decisions in a way that lives up to the standards of the profession and that meets expectations of participants in legal discourse.

Many contributions for the present research project stress this point as a core element for justifying not only the final decision concerning the parties of the dispute, but also the lawmaking that affects third parties.[11] As lawmaking is an inevitable aspect of judicial interpretation, it is warranted that the reasoning should not only focus on the case at hand, but

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[9] Failure to state reasons is also one of the few possible grounds for annulment in the ICSID system (Art. 52(1)(e) ICSID-Convention). *See* further Art. 41 Rules of Procedure of the European Nuclear Energy Tribunal (5 September 1965). *See* also ALF ROSS, THEORIE DER RECHTSQUELLEN 283 (1929); MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG 167–71 (1976).

[10] The function of this discourse for the democratic legitimation of a decision is discussed below, *see* infra section B.I.

[11] Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in this issue; Karin Oellers-Frahm, *Lawmaking Through Advisory Opinions?*, in this issue.

also look beyond it. Marking this lawmaking momentum vested in the justification of legal decisions as an undue expansion of competences or even as a usurpation of power on the part of politicized courts would be plainly wrongheaded. Reasoning in the established forms that justifies a legal decision is part of judicial legitimation and required by the principle of democracy as it establishes the link with the formal sources that carry the democratic legitimacy of the norm-setting process. Sure enough, these forms of argument do not determine any outcome. Yet, one should not underestimate their constraining function. The creative lawmaking element is not only enhanced, but also tamed by the fact that judges are tied to past practices by the prospective reception of their interpretations. The semantic pragmatism we follow in view of the linguistic turn does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[12] In order to be convincing, a justification along the lines of Articles 31 and 32 VCLT is of great importance.[13]

Lawmaking is an intrinsic element of adjudication and it is not as such ultra vires. At the same time, not all lawmaking falls within a court's competence. It is interesting to note that there have been long and difficult efforts to isolate judicial lawmaking that is beyond the competence of the court. Consider, for example, a recent decision of the German Federal Constitutional Court (FCC). On the one hand, it confirms that judicial lawmaking (or "judicial development of the law," as the court puts it) is part of the competence of supranational and international courts.[14] It sees judicial lawmaking particularly warranted when it

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[12] Robert B. Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 EUROPEAN JOURNAL OF PHILOSOPHY 164, 181 (1999) ("[t]he current judge is held accountable to the tradition she inherits by the judges yet to come."). *See* in illuminating detail JASPER LIPTOW, REGEL UND INTERPRETATION. EINE UNTERSUCHUNG ZUR SOZIALEN STRUKTUR SPRACHLICHER PRAXIS 220–26 (2004). *See* also Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue.

[13] Although it is, at least empirically seen, a necessary element. Some important lawmaking decisions are supported by very little reasoning, for example the introduction of the erga-omnes rule by the ICJ, *see* Niels Petersen, *Lawmaking by the International Court of Justice – Factors of Success*, in this issue.

[14] Bundesverfassungsgericht (Federal Constitutional Court, FCC), 6 July 2010, 2 BvR 2661/06, for an English translation, *see* http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html. The judgment deals with the

"concretizes programs" (in the sense that it implements the normative project of a treaty), when it fills in legal gaps and when it solves contradictions.[15] On the other hand, the FCC considers judicial lawmaking likely to be ultra vires when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law. Judicial lawmaking is in particular illegal, according to the German court, if a supranational or international court lays new normative foundations or structurally alters the fundamental balance of power.[16]

Two clarifications are called for. First, legitimatory concerns do not only set in when a court acts ultra vires but also when it engages in lawmaking that might be deemed within its competence. Second, the standards that the FCC develops to distinguish one from the other are sketched only in the vaguest of terms and they are themselves in need of justification. The only certain element is that the court justifies them with the principle of democracy.[17]

One attempt to give more substance to these standards can be found in discourse theory, which understands the separation of powers as a "distribution of the possibilities for access to different sorts of reasons."[18]

European Court of Justice (ECJ), but the FCC – engaging in general lawmaking – formulates a general point applicable not just to the ECJ as a supranational court, but also to international courts in general. In fact, the lawmaking by the European Court of Human Rights is at least as relevant for the FCC as that of the ECJ.

15 *Id.*, para. 64 ("There is particular reason for further development of the law by judges where programmes are fleshed out, gaps are closed, contradistinctions of evaluation are resolved").

16 *Id.* ("Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence.").

17 *See*, still more clearly in this line of argument, FCC, 12 October 1993, 89 BVerfGE 155.

18 Jürgen Habermas, Faktizität und Geltung 192 (1992). *Cf.* Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 Zeitschrift für ausländisches öffentliches Recht

Jürgen Habermas maintains that only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons while the judiciary has to stay within the narrower bounds of what is permitted in legal discourse.[19] According to this approach, law is a source of legitimation and not just a medium for the exercise of political authority. Law soaks up communicatively generated power and carries it into the rule of law – a kind of "transmission belt," in Habermas' terms.[20] This takes place in discourses that justify a norm, and their potential of legitimation hinges on the quality of democratic processes of political will formation.[21] At this stage and juncture, participants may draw on the whole spectrum of reasons. The administration and judiciary live on the communicatively generated power that was fed into the law at the moment of its legislative creation. Habermas argues that for this reason, "the judiciary must be separated from the legislature and prevented from programming itself."[22] This resonates well with the position taken by the Federal Constitutional Court.

With respect to judicial lawmaking, Habermas writes that:

> [T]o the extent that legal programs are in need of further specification by the courts … juristic discourses of application must be visibly supplemented by elements taken from discourses of justification. Naturally, these elements of a quasi-legislative opinion and will-formation require another kind of legitimation than does adjudication proper. The additional burden of legitimation could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.[23]

He does not elaborate on the consequences of this proposition and how it can be operationalized. However, a close analysis of a judicial decision might indicate the degree of legal innovation and hence the magni-

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UND VÖLKERRECHT 1, 14 (2010); Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, in this issue.

19 HABERMAS (note 18), 192–93, 229–37.

20 *Id*., 188–91; Klaus Günther, *Communicative Freedom, Communicative Power, and Jurisgenesis*, 17 CARDOZO LAW REVIEW 1035 (1996).

21 HABERMAS (note 18), 150.

22 *Id*., 172.

23 Habermas (note 18), 439–40. TOBIAS LIEBER, DISKURSIVE VERNUNFT UND FORMELLE GLEICHHEIT. ZU DEMOKRATIE, GEWALTENTEILUNG UND RECHTSANWENDUNG IN DER RECHTSTHEORIE VON JÜRGEN HABERMAS 222 (2007).

tude of lawmaking. If one sets out to look for good reasons in support of important judgments of international courts, it appears quite evident when standard arguments in judicial discourses are not sufficient to convincingly justify a legal decision to the indubitable exclusion of all rival interpretations. The arguments given then tend to look like they mask the reasoning that really carries the judgment. Unsurprisingly, the scholarly and political discussions with regard to those judgments usually involve kinds of reasons that are grounded in discourses of norm justification. The question, for example, whether international trade law permits placing trade restrictions on products produced in a way that is excessively detrimental to the climate can hardly be convincingly justified by interpreting Arts III, XI and XX GATT within the confines of the standard modes of the legal discourse.[24] They would rather need to be opened up to include arguments that are on discourse theory's terms only available in norm justification which is usually reserved to processes of politico-legislative lawmaking.

It merits attention that Habermas develops his argument for the domestic setting where, at least in democratic states, parliaments and public opinion can generate communicative power that is channeled through legislative lawmaking into administrative and judicial adjudication. And with the exception of constitutional adjudication, the normal legislative process can override the judiciary.[25] For international law, the situation is different.[26] One conclusion might be that judicial lawmaking in the international realm should not be under the same constraints as in the domestic setting. In other words, the deficiencies of the international political system would provide a specific justification for judicial lawmaking. Kelsen's plea for a strong international judiciary is based on this view, considering the international legal order as a primitive legal order which – as any primitive legal order – receives its momentum of development from the courts.[27] Yet, it is hard to argue that international law today is primitive in the sense Kelsen saw it in 1944. It is also noteworthy in this regard that Hersch Lauterpacht, writing in 1933, explicitly linked his advocacy for the development of international law by ju-

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[24] See Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue (suggesting that convincingness in legal argumentation in general is about more than just sources and their "correct" application).

[25] On the reasons why the international judiciary should not be understood as constitutional adjudication, *see* von Bogdandy & Venzke (note 18).

[26] Von Bogdandy & Venzke (note 12), section C.I.

[27] HANS KELSEN, PEACE THROUGH LAW (1944).

dicial means to the fact that the law of his time was confined to a static and narrow set of international relations.[28] The conditions for his argument have changed.

We acknowledge that a court might be faced with a situation of crisis. For example, one might consider the ECtHR pilot judgment a response to its unbearable caseload.[29] A court might further be presented with a small window of historic opportunity, as in the prohibition of amnesties by the IACtHR after the fall of the dictators in Latin America.[30] The extraordinary quality of such situations needs to be taken into account when evaluating judicial lawmaking. But necessities or opportunities cannot substitute a principled argument. The forms of legal argument are as essential for the democratic legitimation of an international court as they are for a domestic one. Any decision needs to be embedded in the relevant sources and precedents. But that will oftentimes not fully carry a decision, particularly if such a decision has a strong lawmaking dimension.

The question remains how a court should deal with its discretion in lawmaking; in particular, whether and how it should justify the exercise of this discretion. Kelsen, clearly recognizing creative and discretionary elements in adjudication, has remarkably little to say on this issue and seems to suggest that the judge simply decides without further ado.[31] On the other end of the broad spectrum of theoretical views, Ronald Dworkin but also Hans-Joachim Koch and Helmut Rüßmann demand more elaborate justifications.[32]

Our pragmatic and discourse oriented approach to the issues of democratic legitimation pushes towards the second direction, and is in many respects similar to the proposal of Milan Kuhli and Klaus Günther on this issue.[33] A more fully argued decision can be better placed within

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[28] Hersch Lauterpacht, The Function of Law in the International Community 249–50 (1933).

[29] Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, in this issue.

[30] *See* Binder (note 11).

[31] Hans Kelsen, General Theory of Law and State 145-46 (1945).

[32] Ronald Dworkin, Justice in Robes (2006); Hans-Joachim Koch & Helmut Rüßmann, Juristische Begründungslehre 5, 69, 221 (1982). *See also* Hersch Lauterpacht, The Development of International Law by the International Court 39 (1958).

[33] Kuhli & Günther (note 18), section D.

the general context of debating the exercise of public authority. The open discussion of interests and competing positions is part of the social basis of democracy that sustains a democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potential if they are embedded in normative discourses of a certain quality. Accordingly, judges should make explicit the principles they pursue with a certain decision. Such a decision is more intelligible for most citizens than purely "legal-technical" reasoning phrased in hermetic language and possibly obscuring the real choices that the court does indeed make. This also militates against decisions whose reasoning is so long and complex that even most experts are unable to criticize it with any depth, not least for time constraints. The WTO provides a number of examples for lengthy reports that are for that reason hard to understand and to critique.

Moreover, in many cases it would be a good start if judges were more open about the policies they pursue and what kind of social effects they intend to promote with a judgment. When those social effects do not set in, this would diminish the precedential effect of such decisions in later discourse. Please note that we do not suggest shedding the "camouflage" of legal reasoning to talk politics instead.[34] There is ample space in legal analysis to make policy choices explicit without falling for blunt and perhaps hegemonic instrumentalism that reduces law to a handmaiden of power.[35] Considerations of policy and social effects can enter the legal reasoning in the form of teleological or purposive arguments.[36] They would contribute to a meaningful politicization of the legal discourse which should be welcomed in light of the principle of democracy. Politicization in this sense may advance the public discourse on judicial decisions and can inform and guide future practice.[37] We are

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[34] *Cf.* Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 453, 462 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (asking whether it is not better "to shed the camouflage" if the true reasons are hidden by technical legal reasoning).

[35] Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN LAW REVIEW 1 (2007).

[36] Art. 31(1) VCLT; cf. GERTRUDE LÜBBE-WOLFF, RECHTSFOLGEN UND REALFOLGEN 139 et seq. (1981).

[37] Douglas A. Irwin & Joseph H.H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE

aware that these are demanding standards, not least because almost any international decision is the product of a college of judges.

II. Referring to Political Outcomes Beyond Formal Sources

In addition to tending to policy considerations in judicial reasoning with greater attention, adjudicators may relate their practice to political processes in international institutional settings. In fact, the political discourse in such settings frequently yields outcomes that can and do play a role in the reasoning of international courts. Judges justify their decisions not only through formal sources of law. They also invoke other policy documents whose precise legal standing is rather murky.[38] Within the context of this project, Markus Fyrnys, for example, meticulously shows the close relationship between decisions within the political institutions of the Council of Europe and decisions of the European Court of Human Rights.[39]

Given our starting point that the distance to parliamentary politics is one of the core problems of international judicial lawmaking,[40] the justificatory relevance of such political outcomes requires attention. With respect to the democratic legitimation of international judicial lawmaking, we find of particular interest the question whether the reference to non-binding acts of international organizations can be supportive of the democratic legitimation of judicial lawmaking, although the act in question is neither binding nor the result of a parliamentary decision.[41] Such considerations may also extend to documented reac-

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REVIEW 71 (2008) (criticizing the 'textual fetish and policy phobia' of the Appellate Body).

[38] Consider, for example, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998, paras 154 & 168. *Cf*. Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EJIL 605 (2010).

[39] Fyrnys (note 29).

[40] Von Bogdandy & Venzke (note 12), section C.I.

[41] The study of such outcomes and an attempt of their doctrinal classification has been the focus of an earlier research, *see* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2008); Matthias Goldmann, *Inside Relative Normativity:*

tions with regard to previous jurisprudence on a certain issue area, above all by relevant political bodies.[42]

Under a discourse oriented concept of democracy, such international acts might indeed justify a judicial decision if the process leading to that act fulfils certain requirements. At this point, it might be helpful to distinguish two different conceptions of politics. A first conception stands in the tradition of realism. Politics accordingly refers to the exercise of power.[43] If the act in question is seen to be the imposition of the will of one state or a few states on a larger group of states, the reference to such an act cannot support the democratic legitimacy of a judicial decision.[44] Politics according to this understanding is plainly ill-suited for responding to problems of justification.

However, the international settings might also institutionalize processes of arguing.[45] They might provide multilateral spaces for the development of outcomes that are representative,[46] or fair, as Thomas Franck puts it.[47] In the light of discourse theory, such outcomes can be of significance to support the democratic legitimation of judicial lawmaking which refers to such outcomes.[48] However, the court needs to ascertain

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From Sources to Standard Instruments for the Exercise of International Public Authority, 9 GERMAN LAW JOURNAL 1865 (2008).

[42] Note, for example, how state representatives do invest considerable time in discussing judicial reports in the WTO's Dispute Settlement Body. On further elements of politicization in this context, *see* TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 335–44 (2004); Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests*, 20 EJIL 615 (2009).

[43] Max Weber, *Wissenschaft als Beruf*, in: 17 MAX WEBER GESAMTAUSGABE, 506 (Wolfgang J. Mommsen & Wolfgang Schluchter eds, 1992).

[44] On the issue of hegemony, *see* Eyal Benvenisti & George Downs, *Prospects for the Increased Independence of International Tribunals*, in this issue.

[45] RAINER FORST, DAS RECHT AUF RECHTFERTIGUNG 7 (2007); HANS KELSEN, ALLGEMEINE STAATSLEHRE 27 *et seq*. (1925) (differentiating between "politics as ethics" and "politics as technique").

[46] Ingo Venzke, *International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law*, 9 GERMAN LAW JOURNAL 1401, 1425 (2008).

[47] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[48] In more detail, Kuhli & Günther (note 18), section D.

the inclusive quality of the process leading to the outcome that it plans to use.[49]

III. Systematic Interpretation as Democratic Strategy?

In our first contribution, we argued that processes of fragmentation in international law threaten its democratic legitimation in general and the justification of international courts' public authority in particular. Some judicial institutions tend to develop the law in a way that is imbued with the functional logic of their respective regime.[50] In response, we now wonder whether systematic interpretation can be a strategy to curb those detrimental effects of fragmentation and hence to possibly foster the democratic legitimation of international adjudication. Art. 31(3)(c) VCLT demands that in treaty interpretation "there shall be taken into account, together with the context: … any relevant rules of international law applicable in the relations between the parties."[51] The

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[49] It would conversely be problematic to give legal effect to international standards in relation to parties that have not consented to such standards, as has arguably happened weith Appellate Body Report, *EC – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002. *Cf*. Robert Howse, A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards', in: CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION, 383 (Christian Joerges and Ernst-Ulrich Petersmann eds, 2006).

[50] *See* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002). While this is debatable as a general and timeless claim, examples are not hard to come by. The jurisprudence under the GATT, at least in its early years, testifies to this proposition just as well as instances of investment arbitration. *See* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in: INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, 678 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds, 2009); Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in this issue.

[51] At least since the 2001 ILC Fragmentation Report, a vivid discussion concerning the scope of this rule of interpretation has emerged, *see* International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, UN Doc. A/CN.4/L.682. *Cf.* the special issue 17 FINNISH YEARBOOK OF IN-

ILC Report on fragmentation understands this rule of interpretation as an expression of the principle of systematic integration. In the words of the report, rule and principle of systemic integration:

> [C]all upon a dispute-settlement body – or a lawyer seeking to find out "what the law is" – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background."[52]

The decisive point is that the interpretation of a norm "refers back to the wider legal environment, indeed the 'system' of international law as a whole."[53]

Sure enough, the idea of a legal system is fraught with difficulties and tends to be overburdened with philosophical aspirations. Not so long ago, a legal system was thought to be inherent in the law in a kind of crypto-idealistic fashion. In this mode of thinking, the idea of a system indeed faces severe problems. In the 19th century, legal science and its concern with the legal system was closely connected to the idea of a national legal order that in turn figured as an expression of the unitary will of the state and as an object of scientific investigation. In comparison with such a demanding project, international law could not possibly constitute a system and was, as we already mentioned above, understood as a primitive legal order.[54] If the exaggerated hopes for what the idea of a system can really achieve are relaxed and freed from its etatistic shackles, then it appears as an external instrument for ordering and

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TERNATIONAL LAW (2006); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 279 (2005); Duncan French, Treaty Interpretation and the Incorporation of Extraneous Legal Rules, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 300 (2006).

52 ILC, Fragmentation Report (note 51), para. 479.

53 *Id.*

54 Still in this line of reasoning, HERBERT L.A. HART, THE CONCEPT OF LAW 92, 156, 214, (1997 [1961]). *Cf.* David Kennedy, *Primitive Legal Scholarship*, 27 HARVARD INTERNATIONAL LAW JOURNAL 1 (1986); Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 14 FINNISH YEARBOOK OF INTERNATIONAL LAW 3, 9 (2005).

handling the law. Today, the idea of a system features as an objective in the practice of interpretation.[55]

There are good arguments that speak in favor of supposing that there is a system of international law.[56] In the communicative practice – on the level of interpretation, that is – the idea of a system can perform a significant role, especially under the impact of fragmentation. It is not a bygone topic in legal theory but rather reverberates in the thought that the meaning of a norm is inescapably contextual and relational. Also, the extensive discussion about the fragmentation of international law and the protracted dominance of this topic is a strong testimony for the fixation of legal scholars and practitioners with the notion of a legal system. At issue is precisely the fragmentation of sectoral parts of the law that conceptually have to belong to a whole.[57] Finally, the demand to relate interpretations to the system of the law is part of positive law and of the prevailing legal ethos. In sum, it is every interpreter's task to aim at the system, not least because it serves legal equality.

But how could systematic interpretation work in the practice of adjudication more precisely? Thomas Kleinlein points out that the ILC report on the issue of fragmentation leaves open a number of institutional as well as methodological questions.[58] In particular it remains unclear how conflicts between different values or policy aims that are embedded in distinct regimes could be dealt with. He proposes considering the techniques of balancing and proportionality analysis to do the job of handling trade-offs between regimes, additionally illuminating what the ILC still considers a "legal black hole."[59] In shaping the borders be-

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55 Ralph Christensen & Hans Kudlich, Gesetzesbindung. Vom vertikalen zum horizontalen Verständnis 139 (2008); Stefan Oeter, *Vielfalt der Gerichte – Einheit des Prozessrechts?*, in: Die Rechtskontrolle von Organen der Staatengemeinschaft, 149, 158 (Rainer Hofmann, August Reinisch, Thomas Pfeiffer, Stefan Oeter & Astrid Stadler eds, 2007); Simma & Kill (note 50), 686.

56 Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EJIL 483 (2006); Pierre-Marie Dupuy, *L'unité de l'ordre juridique international*, 297 Recueil des Cours 12, 89 (2002).

57 Georg Wilhelm Friedrich Hegel, 1 Wissenschaft der Logik 59 (1932 [1812]).

58 Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, in this issue.

59 ILC, Fragmentation Report (note 51), para. 493.

tween legal regimes, these techniques might allow for restraint on the part of the courts in the sense that they may hold off from projecting their interpretations onto the law while respecting the authority of other judicial institutions. The course of practice may build up a set of precedents that might further stabilize these inter-regime relations. Much of the legitimating effect that balancing and proportionality analysis can have, Kleinlein maintains, hinges on the extent to which they rationalize decisions made at the borders between regimes. Ultimately this potential seems limited. Formal considerations that relate to procedural qualities in decision-making and interpretative processes may play a role. But for the time being, international judicial institutions enjoy considerable freedom in making decisions over inter-regime trade-offs. Time will tell whether they entrench or counter processes of fragmentation.[60]

As a matter of practice, the principle of systematic integration does pervade a number of judicial decisions even though courts only seldom invoke Art. 31(3)(c) VCLT explicitly.[61] The ICJ already held in 1971 that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."[62] Also, the WTO Appellate Body prominently found in its very first case that the GATT should not be read in "clinical isolation from public international law."[63] International trade law in the context of the WTO, among the most thoroughly judicialized parts of universal international law, thus clearly presents itself as a part of the whole of international law. In stark contrast to European Union law, it has not formed an independent legal order.[64] Struggles for independence

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[60] Cf. SABINO CASSESE, WHEN LEGAL ORDERS COLLIDE: THE ROLE OF COURTS 111–19 (2010) (suggesting that the latter effect will dominate).

[61] ILC, Fragmentation Report (note 51), para. 410.

[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para. 53.

[63] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 17.

[64] WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT (1990) (critically on the early tendencies to understand the GATT as an independent legal order).

or isolation that have come under the heading of self-contained regimes do not take away from the effectiveness of systemic integration.[65]

Concerns about practical feasibility, in the sense that no interpreter and no international judge could be expected to take into account all of international law, are not compelling. Systematic interpretation does not demand an ideal judge like Dworkin's superhuman Hercules who is able to find the one and only right interpretation of a norm at issue in light of all the legal practice of the system.[66] Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.[67] In the course of fragmentation it is also possible that different understandings compete in a dialogue between courts.[68] In the open process of interpretation between functionally specialized courts, perspectives might compete and may possibly be approximated by way of the common language of international law. Such processes may shape the techniques employed at the borders between regimes that Kleinlein proposes.[69] Of course, this requires international courts to open up to such a dialogue. Some voices from the benches indicate that they would be inclined to follow this path.[70] This way of dealing with the consequences of frag-

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[65] *Cf*. Bruno Simma, *Self-Contained Regimes*, 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 111 (1985); JOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 37 (2003); ILC, Fragmentation Report (note 55), para. 174.

[66] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[67] HABERMAS (note 18), 224.

[68] Ruit G. Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 959 (2009); Oeter (note 55); YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 272 (2003); HEIKO SAUER, JURISDIKTIONSKONFLIKTE IN MEHREBENENSYSTEMEN 107 (2008); Paolo Picone, *I conflitti tra metodi diversi di coordinamento tra ordinamenti*, 82 RIVISTA DI DIRITTO INTERNAZIONALE 325 (1999); Lidia Sandrini, *La concorrenza tra il Comitato per i diritti umani e la Corte europea dei diritti dell'uomo nell'esame di istanze individuali: brevi note sulle clausole di coordinamento*, in: LIBER FAUSTO POCAR, DIRITTI INDIVIDUALI E GIUSTIZIA INTERNAZIONALE, 837 (Gabriella Venturini & Stefania Bariatti eds, 2009).

[69] Kleinlein (note 58).

[70] Tullio Treves, *Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?*, in: DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, 587

mentation is also preferable when compared with proposals that would introduce a hierarchy between judicial institutions, for example by installing the ICJ as a higher authority that can receive preliminary or advisory proceedings.[71] It does not spoil the benefits gained by functional fragmentation.

It may be the case, however, that the strategy of systematic integration in and between judicial decisions builds on excessive trust in international judges. If judges are understood to form an "epistemic community"[72] or if they are viewed as an "invisible college"[73] together with legal scholars, then it could even be that the strategy ends up advocating an autocratic rule of courts. The "community" must not be closed and the "college" must not be invisible; a point also Kuhli and Günther stress.[74] These are minimal safeguards, and any genuine effect of legitimation could only set in when minimal preconditions for a legitimatory juridical discourse are met – above all, publicness, transparency and adequate participation. Judicial proceedings on the whole hinge on a critical general public that transcends functional differentiations. Precondition for all of this is a sensibility for the problems of legitimating international judicial authority; not at the least, our contribution intends to contribute to such sensibility.

(Rüdiger Wolfrum & Volker Röben eds, 2005). Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 791 (2006); Bruno Simma, *Fragmentation in a Positive Light*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 845 (2004).

71 Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 67 (2001); Oeter (note 55), 167–70.

72 DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INQUIRY INTO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 64 (2007).

73 Oscar Schachter, *The Invisible College of International Lawyers*, 72 NORTHWESTERN UNIVERSITY LAW REVIEW 217 (1977). David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUROPEAN HUMAN RIGHTS LAW REVIEW 463 (2001) (unfolding a pointed critique of the apologetic sides to the idea of an invisible college).

74 Kuhli & Günther (note 18), section D.

C. The Judges

I. The Importance of Independence and Impartiality

Judicial lawmaking is part of the regular mandate of international courts and tribunals. But such mandate comes with strings attached. After discussing those flowing from the argumentative tools that are permissible in legal discourse, we now look at those concerning the acting individuals. Here, the requirements of independence and impartiality stand out. We reconsidered them in light of the principle of democracy. Eyal Benvenisti's and George Down's contribution develops the importance of these two standards for the democratic legitimation of international judicial lawmaking and shows how they are wanting in the current set-up.[75]

Independence and impartiality are essential legal requirements. Indeed, the second article of the ICJ Statute specifies that "[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices."[76] The statutes of all other courts and tribunals contain similar provisions. However, as Benvenisti and Downs explain, there are various elements that might structurally jeopardize the independence and impartiality.

For improving independence and impartiality, some propose to introduce longer singular terms of office and to rule out the possibility of reelection. This might decrease judges' dependence on their governments, whose support they would otherwise need in a campaign for reelection.[77] Striving for greater scrutiny in the assessment of candidates is another possibility for reform. The ICC Statute for example requires that member states must justify candidacies, thus providing minimal

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[75] Benvenisti & Downs (note 44).

[76] Art. 2 Statute of the ICJ.

[77] Ruth Mackenzie & Philippe Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, in: APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, 213, 223 (Katie Malleson & Peter Russell eds, 2006); Robert D. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INTERNATIONAL ORGANIZATION 457, 476 (2000).

conditions for a meaningful debate.[78] And the Caribbean Court of Justice, operative since 2005, is the first international court that entirely entrusts the appointment of judges to the international Regional Judicial and Legal Services Commission.[79]

Statutes of international courts usually give instructions on the exercise of office – for instance, on a judge's secondary employment or the conditions under which she would have to recuse herself. These provisions have gained prominence in the course of recent cases on the matter.[80] Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundzija* case. On that occasion, it carved out a number of criteria according to which an actual, or, under further conditions, a probable partiality of a judge leads to the exclusion from the proceedings.[81] Some courts, whose statutes provide insufficient clarity on this issue or do not speak of it at all, have adopted directives on their own initiative that spell out certain codes of conduct in considerable detail.[82]

II. Reconsidering the Process of Appointment

The imperatives of independence and impartiality of international judges, good judicial qualifications, and ethical integrity on the bench are all very important. Accordingly, they are two commanding tenets in the process of appointment, to which we turn now. In fact, the appointment procedure is largely studied in this light. Nonetheless, looking at the lawmaking function of international courts, one needs to go further in order to understand the full importance of the appointment

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78 Art. 36 (4) Statute of the ICC. See Mackenzie & Sands (note 77), 228.

79 Dennis Byron & Christopher Malcolm, *Caribbean Court of Justice (CCJ)*, in: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL) (Rüdiger Wolfrum ed., 2009).

80 Art. 40 (2) Statute of the ICC; Art. 7 (1) Statute of the ITLOS; Yuval Shany & Sigall Horovitz, *Judicial Independence in The Hague and Freetown: A Tale of Two Cities*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 113 (2008).

81 *Prosecutor v. Furundzija*, Judgment of 21 July 2010, Case No. IT-95-17/1 A, para. 189.

82 Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activites*, 2 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 127 (2003).

procedure in light of the principle of democracy. For example, it makes a great difference whether an international judge considers state sovereignty as the most basic principle of international law or rather looks at the state as an agent of the international community in general and international human rights in particular.[83] It is above all when courts engage in judicial lawmaking on thoroughly contested subject matters that the political leanings of judges are of primary significance. Under democratic premises, it is impossible to justify the path of lawmaking only with reference to the "high moral character" (Art. 2 ICJ Statute) of the office holder.

Within the domestic system, the democratic element of the appointment procedure is well-studied, in particular with respect to judges of constitutional courts. Their appointment is not left to the executive alone and parliaments usually play some role in that procedure.[84] The role of executive institutions is far stronger with respect to international judges. Overall, the various procedures display a lot of similarities. Usually, the U.N. Secretary General or the secretariats of sectoral organizations invite member states to submit nominations. Candidates are then selected by the plenary body of the organization or by the assembly of all states. The example of the ICJ is paradigmatic. The General Assembly and Security Council elect judges with an absolute majority and in secret ballot for a term of nine years with the possibility of reelection. Not more than one of the fifteen judges may have the nationality of the same state and, furthermore, the bench shall represent "the principal legal systems of the world."[85] The latter condition may be understood as recognition of the fact that (judicial) socialization bears on

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[83] For an elaboration of these visions, *see* Armin von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ Working Paper (2008/3), available at: http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp.

[84] *Cf*. Art. II 2(2) U.S. Constitution; Art. 94 German Basic Law; Art. 150 Constitution of Estonia; Art. 135 Constitution of Italy; Art. 58 Constitution of Latvia; Art. 103 Constitution of Lithuania; Art. 147 Constitution of Austria; Art. 149 Constitution of Poland; Art. 159 Constitution of Spain. *See also* Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World (Kate Malleson & Peter Russell eds, 2006); C. Neal Tate & Torbjörn Vallinder, The Global Expansion of Judicial Power (1995).

[85] Arts 3, 4, 9, 10 and 13 Statute of the ICJ.

legal interpretation.[86] It stands in some tension to the idea of judicial independence that disputing parties who do not have a judge of their nationality on the bench may choose a judge ad hoc, but this may also be traced back to the same idea of representing diversity.[87]

Analyses of the practice of judicial elections have highlighted the dominance of executives in the process. A state's political position and its leverage in bargaining in an international regime are often decisive for its opportunities to fill a vacancy on an international bench. Only if a decent chance exists does the executive look for a suitable candidate. In most cases, candidates need heavy support of their respective governments, which have to invest considerable political capital in the election campaign.[88] Is this dominant role of the domestic governments a problem in light of the principle of democracy? This leads us to consider the vanishing point of democratic justification.

In whose name do international courts speak the law and which forum is called upon to elect international judges? With regard to domestic constitutional adjudication there are good reasons to involve the representation of the democratic sovereign in the election of judges. This usually translates into requirements of parliamentary participation, supplemented in light of discourse theoretical considerations with demands for publicness. But which institutions and fora should elect international judges as long as the states that are subject to a court's jurisdiction do not constitute a single nation? Three answers may be distinguished.[89]

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[86] LYNDEL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE (1979).

[87] Art. 31(2–3) ICJ-Statute. Cf. Iain Scobbie, *Une hérésie en matière judiciaire? The Role of the Judge ad hoc in the International Court*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 421 (2005). The far younger ITLOS also provides for judges ad hoc, Art. 17 ITLOS Statute.

[88] Philippe Sands, *The Independence of the International Judiciary: Some Introductory Thoughts*, in: LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO, 313, 319 (Steve Charnovitz, Debora Steger & Peter van den Bossche eds, 2005); TERRIS, ROMANO & SWIGART (note 72), 23.

[89] *Cf.* Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 247, 253 (2006) (sketching these competing constituencies with regard to the accountability of international bureaucracies); *see also* Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial*

The traditional intergovernmental approach traces the authority of international courts to the will of the legal entities which created them – states. State governments then figure prominently as representatives in international law (consider only Art. 7(2) VCLT). Viewed from this angle, the selection of judges forms a genuine part of foreign politics and remains a prerogative of the executive. This approach indeed informs most of the procedures for electing judges. Some even suggest that judges should be responsive to the input of their governments.[90]

The liberal or domestic approach does not accept the division of domestic and foreign politics that characterizes the traditional intergovernmental approach. A categorical distinction is indeed increasingly less plausible in the wake of the globalization of many spheres of life. The liberal approach then pleads in favor of aligning the procedures for choosing senior domestic and international judges. This points towards a prominent role for domestic parliaments to play.[91]

The cosmopolitan approach, in contrast, looks at new supranational fora. It takes the individual citizen to be the ultimate reference point in the justification of public authority, and invests it with a national as well as a cosmopolitan identity. The latter relates the citizen to supranational or international institutions, and on this basis, supranational or international parliamentary fora can generate democratic legitimacy in the election of judges.[92] This approach finds cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.[93] Ever since 1998, interviews with candidates by a sub-committee also bear the potential of nourishing the development of a public that further increases the legitimatory momentum. This procedural element has, for example, triggered a positive politicization of the

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Oversight Mechanisms and Judicial Review, 11 GERMAN LAW JOURNAL 1987, 1989 (2008).

90 Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIFORNIA LAW REVIEW 1 (2005).

91 In line with this, the German parliament will have a say on the selection of Future German ECJ judges, see Richterwahlgesetz in der Fassung des Gesetzes über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, 22 September 2009, paras. 1 and 3.

92 *See* Felix Arndt, *Parliamentary Assemblies, International*, in: MPEPIL (Rüdiger Wolfrum ed., 2006).

93 Art. 22 ECHR. See Jochen Abr. Frowein, *Art. 22*, in: EMRK-KOMMENTAR (Jochen Abr. Frowein & Wolfgang Peukert, 2009), para. 2.

election process when the assembly rejected a member state's list of candidates because it did not include any female candidate.[94]

How much justification can the cosmopolitan approach actually shoulder? Can the election of international judges by international bodies generate democratic legitimacy, or does the cosmopolitan approach lead to the wrong track? Discourse theory once more is of help. Habermas has worked towards loosening the close ties of the concepts of democracy, constitution, and law with the idea of the state; and explores questions of democratic legitimation in a politically organized world society, while neither assuming that this political organization has the attributes of a state, nor suggesting that this is a goal to be desired.[95] Habermas builds here on his theory of inter-subjectivity, paving the way for imagining democracy without implying that there is a unitary people. At the same time, he underlines that domestic constitutional orders have created democratic processes for forming public opinion and political will that are hard to reproduce at the supranational level.[96] Legitimating new forms of public authority in the post-national constellation therefore has to connect to the threads of legitimation that passes through democratic states and should further be complemented by an additional cosmopolitan basis of legitimation.[97]

Accordingly, the participation of international bodies in the election of judges may already offer a certain degree of cosmopolitan justification. For this purpose it is crucial that the election of judges is embedded in a global public. This is not sheer aspiration. It may be recalled that the

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[94] *See*, however, ECtHR Grand Chamber, Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008 (holding that such a list should not be rejected if a state has indeed taken all steps to find at least one female candidate). This was the court's first ever advisory opinion. Also note that some statutes explicitly try to address the disproportionately weak representation of women, *see*, e.g., Art. 36 (8)(a)(iii) ICC-Statute.

[95] JÜRGEN HABERMAS, DIE POSTNATIONALE KONSTELLATION 165 (1998).

[96] Jürgen Habermas, *Does the Constitutionalization of International Law Still have a Chance?*, in: THE DIVIDED WEST, 113, 141 (Ciaran Cronin trans., 2006).

[97] Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft*, in: RECHTSPILOSOPHIE IM 21. JAHRHUNDERT, 360, 362 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008).

election of Christopher Greenwood to the ICJ stirred some global criticism and discussion because of his legal opinions with regard to the war in Iraq.[98] Be it noted, however, that the degree of cosmopolitan justification hinges on the discursive quality of participation. In any event, the mechanism of judicial election as it is practiced in the context of the ECtHR turns out to be truly forward-looking from the point of view of democratic theory.

D. The Procedure

After having looked at courts' reasoning and judicial appointments in light of the principle of democracy, we now turn to procedural law. The first question is how judicial procedures can be understood as spaces in which democratic legitimacy may be generated, while neither calling into doubt the judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes. In the tradition of pragmatics and discourse theory, two features appear by way of which judicial procedures could strengthen the democratic legitimation of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in how the case is handled and the court is required to deal with the arguments that they introduce. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but – against the widespread understanding of the principle of *iura novit curia* – also extends to questions of law. The other element, more central to the focus of our study, is the way in which the procedure allows the wider public to take part in the process of judicial will formation, embedding the judges in the general discourses on a given topic.

This way of looking at the procedures of international adjudication is certainly not very common and the relevant law is underdeveloped in this respect. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for and what it actually does. So far that has almost exclusively been the settlement of the dispute at hand. The more the generation of legal normativity in the practice of international adju-

[98] See http://opiniojuris.org/2008/11/03/will-the-icj-have-a-us-style-nomination-fight-we-can-only-hope/.

dication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations.[99] The more judicial lawmaking becomes palpable, the more procedural law will start to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.

This section highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in mounting demands for transparency, publicness and participation in international proceedings. It investigates comparatively how the procedural law of international courts and tribunals copes with similar problems, in particular regarding legitimatory concerns that are triggered by the phenomenon of judicial lawmaking. At the same time, trends in procedural law give evidence to shifting ideas about international dispute settlement that inform even larger debates about the nature of the international legal order and its deep social structure.

It is worth noting that the procedural law of international judicial institutions is largely a product of their own making.[100] As Jean-Marc Sorel put it, "self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers."[101] We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of in-

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[99] Christine Chinkin, *Art. 62*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 1331, 1366 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); Paolo Palchetti, *Opening the International Court of Justice to Third States Intervention and Beyond*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 139 (2002); Rüdiger Wolfrum, *Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea*, in: LIBER AMICORUM GÜNTHER JAENICKE – ZUM 85. GEBURTSTAG, 427 (Volkmar Götz, Peter Selmer & Rüdiger Wolfrum eds, 1998).

[100] The notion of procedural law describes the body of requirements that govern how a judicial process has to be conducted. No uniform procedural law for all courts is thereby postulated. Robert Kolb, *General Principles of Procedural Law*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 793, 795 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 6 (2007).

[101] Jean-Marc Sorel, *International Courts and Tribunals, Procedure*, in: MPEPIL (Rüdiger Wolfrum ed., 2009), margin number 1.

ternational decisions and as part of attempts that aim at strengthening the capacity of democratic legitimation that is nested in the judicial process itself. Three dimensions are of particular relevance.[102]

I. Publicness and Transparency

A crucial element for publicness and transparency – and hence democracy – are the oral proceedings that some court statutes explicitly provide for.[103] In other contexts like the WTO and much of investment arbitration, confidentiality is the rule. But even here procedures have opened up in practice to some prerequisites of publicness and transparency.[104] The Sutherland Report of 2004 reinforced this trend by stating that "the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution" and by suggesting that oral proceedings should be public.[105] Of course, it remains critically important to pay due respect to the interests of the parties. Also, sensitive trade secrets must be kept. Often, proceedings

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[102] Other dimensions include the establishment of facts and rules of evidence, both may be relevant for the legitimation of international adjudication, possibly less so, however, with regard to international judicial lawmaking. *See Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, 20 April 2010, para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the court should have either appointed its own experts or had party-appointed experts subjected to cross-examination); MARKUS BENZING, DAS BEWEISRECHT VOR INTERNATIONALEN GERICHTEN UND SCHIEDSGERICHTEN IN ZWISCHENSTAATLICHEN STREITIGKEITEN (2010).

[103] Art. 46 ICJ-Statute; Art. 59 ICJ Rules of Court; Art. 26(2) ITLOS-Statute; Art. 74 Rules of ITLOS; Art. 40 ECHR; Art. 63(2) Rules of ECtHR; Arts 67, 68(2) ICC-Statute. *See* Sorel (note 101), margin number 18; Sabine von Schorlemer, *Art. 46*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 1063, 1070 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[104] Arts 14(1), 18(2) & 17(10) DSU provide that procedures and written submissions are confidential. Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1021 (2008).

[105] Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium ("Sutherland Report") (2004), paras 261 et seq.

do remain behind closed doors, in particular in cases before the panels that are, in comparison to the Appellate Body, as an institution as well as in their nature, composition and ethos closer to the arbitration model.[106]

And yet there is room for improvement. The position taken by the panel in *Canada – Continued Suspension* is remarkable. The panel held hearings in public and justified this step inter alia with the innovative argument that the provisions about confidentiality of proceedings only relate to the internal deliberations of the panel but not the exchange of arguments between the parties.[107] And the Appellate Body maintained on another occasion that "[i]n practice, the confidentiality requirement in Article 17.10 has its limits. … Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound."[108]

Procedures in the ICSID framework fall short of those of the WTO on this point. But first cracks are starting to show that may soon widen so as to accommodate growing demands for more transparency.[109] In June

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[106] Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191 (2001); Peter van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 289 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006); Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 605 (2002).

[107] Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, 31 March 2008, para. 7.47.

[108] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, Annex III, para. 4.

[109] Charles N. Brower, Charles H. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARBITRATION INTERNATIONAL 415 (2003); Carl-Sebastian Zoellner, *Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings*, in: THE INTERNATIONAL CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID), 179 (Rainer Hofmann & Christian Tams eds, 2007); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES 57 (2007).

2005, the OECD Investment Committee threw its authority behind the argument when it maintained that:

> There is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence.[110]

Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[111]

II. Third Party Intervention

Further avenues for responding to problems in the justification of international courts' exercise of public authority may be found in an expansion of possibilities for intervention and participation. In a straightforward fashion, Art. 63 ICJ Statute gives every party to a convention a right to intervene if the interpretation of that convention is at issue. Beyond this clear provision, it is noteworthy that in the seminal *Pulau Ligitan* case the ICJ in principle allowed that a party may intervene even if it cannot itself show a jurisdictional link to any of the parties.[112] The trend towards wider participation in judicial proceedings is a testament to an increasing recognition of the effects that judgments create

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[110] OECD, Transparency and Third Party Participation, in: INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES: STATEMENT BY THE OECD INVESTMENT COMMITTEE, 1 (2005).

[111] Rule 32 (2) ICSID Rules of Procedure (10 April 2006). From legal practice, *see*, for instance, *Aguas Argentinas, S.A., Suez Sociedad General de Aguas de Barcelona, S.A. and Vivendi Unviersal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005, para. 6. *See also* MCLACHLAN, SHORE & WEINIGER (note 109), 57.

[112] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Application by the Philippines for Permission to Intervene, Judgment of 23 October 2001, ICJ Reports 575, para. 35.

beyond those who are immediately involved in the particular dispute. This is yet another indication showing that understanding judicial decisions as acts of simply finding the law, and as acts that are binding only inter partes, is inadequate.[113]

In the procedures of the WTO, members that are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[114] In contrast to the ICJ and also to ITLOS, however, the black letter procedural law does not grant intervening parties the right to attend hearings. Whether and how often hearings are opened up to third parties largely lies within the discretion of the panels.[115] In *EC–Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties – a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective states attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[116] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are a number of salient reasons for this approach that are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete individual case, sensitive concessions and compromises that may only be reached in

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[113] Andreas Zimmermann, *International Courts and Tribunals, Intervention in Proceedings*, in: MPEPIL (Rüdiger Wolfrum ed., 2006).

[114] Arts 4(11), 10, 17(4) & 21 DSU. *Cf.* Meinhard Hilf, *Das Streitbeilegungssystem der WTO*, in: WTO-RECHT. RECHTSORDNUNG DES WELTHANDELS, 505, 521 (Meinhard Hilf & Stefan Oeter eds, 2005); Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 2 (2004).

[115] Art. 10 & Appendix 3(6) DSU. *Cf.* Katrin Arend, *Article 10 DSU*, in: 2 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 373 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds, 2006).

[116] *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 279 (2008).

confidential settings, and protection of business secrets.[117] And yet, even in this field of adjudication there are trends to expand the proceedings. They may be better discussed with regard to the role of amici curiae.

III. Amici Curiae

Usually, amici curiae are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[118] Above all, NGO participation may open up legitimatory potential. This may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalisation that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[119]

The procedural law of the ICJ and ITLOS do not provide for submissions by amici curiae.[120] In one of the ICJ's first cases ever, its registrar

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[117] Joachim Delaney & Daniel B. Magraw, *Procedural Transparency*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 721, 775 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2009).

[118] Philippe Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, in: MPEPIL (Rüdiger Wolfrum ed., 2009), margin number 2; Zimmermann (note 113), margin number 1. Terminology is by no means used consistently. *See* Luisa Vierucci, *NGOs before International Courts and Tribunals*, in: NGOS IN INTERNATIONAL LAW. EFFICIENCY IN FLEXIBILITY?, 155, 156 (Pierre-Marie Dupuy & Luisa Vierucci eds, 2008); Hervé Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 REVUE GENÉRALE DE DROIT INTERNATIONAL PUBLIC 897 (2001).

[119] HABERMAS (note 18), 303, 382; Patrizia Nanz & Jens Steffek, *Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens*, in: ANARCHIE DER KOMMUNIKATIVEN FREIHEIT. JÜRGEN HABERMAS UND DIE THEORIE DER INTERNATIONALEN POLITIK, 87 (Peter Niesen & Benjamin Herborth eds, 2007); Jochen von Bernstorff, *Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?*, in: DEMOKRATIE IN DER WELTGESELLSCHAFT, 18 SOZIALE WELT SONDERBAND 277 (Hauke Brunkhorst ed., 2009).

[120] In detail, *see* Wolfrum (note 99).

rejected the motion on the part of an NGO that sought to submit its opinion in writing and to present its view orally.[121] This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.[122] Only, a little later, the same NGO received a positive response from the registrar and was allowed to appear as amicus curiae in the advisory proceedings concerning the Status of South-West Africa.[123] Ever since the *Gabcíkovo–Nagymaros* case, it is also clear that amicus curiae briefs may be introduced as part of the submissions of the disputing parties.[124] Beyond this minimal common denominator, there remains considerable disagreement within the ICJ on how to deal with amicus curiae briefs. Opposing opinions have so far impeded developments like they have taken place in other judicial institutions.[125] Former President Gilbert Guillaume stated bluntly that states and intergovernmental institutions should be protected against "powerful pressure groups which besiege them today with the support of the mass media." For that reason, he argued, that the ICJ should better ward off unwanted amicus curiae submissions.[126]

Neither treaty law within the WTO context makes any provision on how to deal with amicus curiae briefs. But here, legal practice has warmed up to the idea that maybe amici curiae should have a role to play. Developments in this regard have been paralleled by a significant

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[121] The answer was an easy one because the NGO had tried to base its claim on Art. 34 ICJ-Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed. *See* Pierre-Marie Dupuy, *Article 34*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 545, 548 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 303 (2005); Eduardo Valencia-Ospina, Non-Governmental Organizations and the International Court of Justice, in: CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, 277 (Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea & Chiara Ragni eds, 2005).

[122] Art. 66 ICJ-Statute.

[123] LINDBLOM (note 121).

[124] *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 7.

[125] *See* ICJ Practice Direction XII (2004).

[126] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Separate Opinion of Judge Guillaume, ICJ Reports 1996, 287.

discussion among practitioners and scholars on the issue.[127] As early as the *US–Gasoline* case, NGOs pushed to present their views but were simply ignored by the panels. In the path-breaking *US–Shrimp* case, the panel explicitly rejected amicus curiae submissions but was corrected by the higher level of jurisdiction. The Appellate Body argued that:

> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.[128]

ICSID proceedings have for long been sealed off from any possibility of participation beyond the parties to the case. And yet, even in this context, legal practice has changed and opened up avenues for amici curiae.[129] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle prevent third parties from stating their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[130] Similarly, the OECD Investment Committee elaborated in the report mentioned above that, "Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participa-

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[127] Robert Howse, *Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUROPEAN LAW JOURNAL 496 (2003); Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in: EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION. STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN, 317 (Armin von Bogdandy, Yves Mény & Petros C. Mavroidis eds, 2002); McRae (note 114), 2.

[128] Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 106. The EC-Asbestos Case was also of great importance, see especially WTO Appellate Body Communication, WTO Doc. WT/DS135/9, 8 November 2000; and Minutes of the Meeting of the General Council Held on 22 November 2000, WTO Doc. WT/GC/M/60, 23 January 2001.

[129] *See* Delaney & Magraw (note 117).

[130] NAFTA Free Trade Commission, Recommendation on Non-disputing Party Participation, 7 October 2004.

tion, subject however to clear and specific regulations."[131] The new ICSID Arbitration Rules of 2006 responded to shifts in practice as well as political commentary and introduced a new Art. 37 that speaks of the possibility of submissions by third parties and amici curiae.[132]

E. The Role of Domestic Organs

Our introductory piece has identified problems in the democratic legitimation of international judicial lawmaking. Our concluding contribution shows that there are promising strategies to respond, but that no solutions are readily available to ease all concerns. Moreover, such strategies must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimatory effect they will actually be able to achieve.

Our conviction is that the increasing authority of international courts constitutes a grand achievement. Even if the international judiciary does not fulfill all aspirations of global justice,[133] its lawmaking has significantly contributed to legalization and hence a transformation of international discourses. Although one should not see international legalization as a value per se irrespective of content, the overall process should be welcomed.[134] Yet, these achievements are accompanied by a sense of discomfort springing from the insight that, as of now, international courts may not always satisfy well-founded expectations of legitimation.

The resulting tension may be relaxed by holding up the political and legal responsibility that municipal constitutional organs retain in deciding about the effect of international decisions and by bearing in mind how

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131 OECD, Transparency and Third Party Participation (note 110).

132 Art. 37(2) Arbitration Rules. *Cf*. Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper, 22 October 2004.

133 *See* Benvenisti & Downs (note 44) (sharpening the understanding of how powerful states and sectoral interests strategically use international judicial institutions).

134 Esther Brimmer, *International Politics Needs International Law*, in: REGARDS D'UNE GÉNÉRATION SUR LE DROIT INTERNATIONAL, 113 (Emmanuelle Jouannet, Hélène Ruiz Fabri & Jean-Marc Sorel eds, 2008); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 494 (2001).

they, in turn, can feed back into developments at the international level.[135] This speaks in favor of the view that the effect of international law and international decisions, including the precedential effect for domestic courts, is determined by constitutional law. Their normativity in the domestic realm is mediated by the municipal legal system.[136] This mediation frees international judicial lawmaking from legitimatory burdens that it may not always be in a position to shoulder. Such interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This constellation does not provide an obstacle to further develop international adjudication. Quite to the contrary, relieving such adjudication from some of the burdens of legitimation may actually serve its development. For that purpose, it is important that the consequences of non-compliance are made clear. Unmistakably then, the mere disregard of an international decision cannot justify military sanctions, unless it amounted to a threat to international peace and security and was sanctioned by the U.N. Security Council.[137]

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they exercise their control function with explicit reasons. They can thus formulate standards and may inspire further developments in the international legal order.[138] It should be stressed that domestic non-compliance triggers heavy ar-

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[135] Robert Howse & Kalypso Nicolaïdis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY, 163 (Tomer Broude & Yuval Shany eds, 2008).

[136] In detail, see Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 397 (2008).

[137] Art. 50 Articles on Responsibility of States for Internationally Wrongful Acts.

[138] Case C-93/02 P, *Établissements Biret et Cie SA v. Council of the EU*, 2003 E.C.R. I-10497; Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat v. Council of the EU & EC Commission*, 2008 E.C.R. I-6351 (also following this logic).

gumentative burdens.[139] In the present state of the world, the smooth operation of international law is of critical importance and domestic organs must consider the consequences of any non-compliance for the international legal order in general and for the authority of the international court in question in particular. That too should be beyond dispute.

[139] Bundesverfassungsgericht (Federal Constitutional Court), 14 October 2004, 2 BvR1481/04, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307, for an English translation, see http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html. *Cf.* Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MODERN LAW REVIEW 183 (2008); on the role of domestic courts, Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

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