Panel IV: International Courts as Lawmakers

International Courts as Lawmakers

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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 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 relate to international judicial decisions when they devise or justify their actions, in ways similar to legal bases recognized as formal sources of international law.[3]

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. We suggest that the inevitable generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and hence as an exercise of public authority. Equipped with this understanding, we hope to draw attention to the legitimatory implications of international judicial lawmaking, placing the project 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 <http://www.pict-pcti.org> (26 May 2011) (adopting an equally broad understanding of 'court'); cf. C. Romano 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU JILP 709.

2 The creation and stabilization of normative expectations is considered by many, otherwise diverging, contemporary theories as the core function of law, see J. Habermas *Between Facts and Norms* (1st edn. Blackwell Publishers Oxford 1997) 427; N. Luhmann *Das Recht der Gesellschaft* (Suhrkamp Frankfurt 1995) 151.

3 Note that Art. 38 of the ICJ Statute refers to judicial decisions as 'subsidiary means for the determination of rules of law', we discuss this qualification in *infra* section I.3 (notes 59–61).

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

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.

The phenomenon of international judicial lawmaking is omnipresent but most visible in legal regimes in which courts have compulsory jurisdiction and decide with sufficient frequency to allow for a *jurisprudence constante* to develop. Important examples include 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]

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[5] It follows the study by A. von Bogdandy et al. (eds) 'The Exercise of Public Authority by International Organizations' (2008) 9 GLJ Issue 11; *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer Heidelberg 2010). See further I. Venzke *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP Oxford 2012).

[6] See respectively the contributions in A. von Bogdandy and I. Venzke (eds) 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 GLJ Issue 5 by: S. Schill 'System-Building in Investment Treaty Arbitration and Lawmaking' 1081–1110; I. Venzke 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' 1111–40; M. Ioannidis 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law' 1175–1202; T. Kleinlein 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law' 1141–74; C. Binder 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' 1203–30; M. Kuhli and K. Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' 1261–78; K. Oellers-Frahm 'Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function' 1279–94; M. Fyrnys 'Expanding Competences by Judicial Lawmaking – The Pilot Judgment Procedure of the European Court of Human Rights' 1231–60; M. Jacob 'Precedents: Lawmaking Through International Adjudication' 1005–32.

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 the issue, shaping and hardening the standard.[7] International arbitral tribunals have decisively regulated the relationship between investors and host states and have developed and stabilized their reciprocal expectations.[8]

Such judicial lawmaking is not just a collateral side effect of adjudicatory practice. Corroborating evidence for this comes from former *General Counsel* of the World Bank Aron Broches, who pushed for creation of 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 so 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 felt the painful squeeze and had to realize how narrow the judicially built body of law had left its room of manoeuvre for maintaining 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, simply as mechanisms to settle

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[7] S. Schill 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in S. Schill (ed.) *International Investment Law and Comparative Public Law* (OUP Oxford 2010) 151.

[8] Schill (note 6).

[9] R. Dolzer and C. Schreuer *Principles of International Investment Law* (OUP Oxford 2008) 18.

[10] M. Hirsch 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law* (Hart Oxford 2008) 323 (344).

disputes, together in the same chapter with mediation and good offices.[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 interest 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 condition.[12] We are not out to categorically mark international judicial lawmaking as illegitimate, let alone as illegal.[13]

It should be stressed 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 differs widely between its *Kosovo* opinion and its *Wall* opinion.[14] We discuss degrees of

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[11] See e.g., M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 1010; P. Daillier et al. (eds) *Droit international public* (8th edn. Librairie Générale de Droit et de Jurisprudence Paris 2009) 923.

[12] J. Habermas (ed.) *The Postnational Constellation: Political Essays* (Polity Press Cambridge 2001); S. Leibfried and M. Zürn 'Von der nationalen zur postnationalen Konstellation' in S. Leibfried and M. Zürn (eds) *Transformationen des Staates?* (Suhrkamp Frankfurt 2006) 19; A. von Bogdandy 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 EJIL 885; Venzke (note 5).

[13] For a fierce and unconvincing argument on the illegitimacy, or, at best, plain futility of international adjudication, see E.A. Posner *The Perils of Global Legalism* (University of Chicago Press Chicago 2009).

[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010)* ICJ Doc. 2010 General List No. 141; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136. For pointed commentary on the direction of impact of each opinion, see R. Howse

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 no less problematic than 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 do 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 in fact become significant lawmakers, their actions require an elaborate justification that lives up to basic democratic premises and that feeds into the development of doctrinal *acquis*. Traditional approaches miss large chunks of reality and are no longer sufficient.

I. The Phenomenon of Lawmaking by Adjudication

1. (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'.[15] And yet, there is still

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and R. Teitel 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?' (2010) 11 GLJ 841; L.F. Damrosch and B.H. Oxman 'Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory' (2005) 99 AJIL 1.

[15] See J. Lege 'Was Juristen wirklich tun. Jurisprudential Realism' in W. Brugger, U. Neumann and S. Kirste (eds) *Rechtsphilosophie im 21. Jahrhundert* (Suhrkamp Frankfurt 2008) 207 (216); R. Christensen and H. Kudlich *Theorie richterlichen Begründens* (Duncker & Humblodt Berlin 2001) 26.

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.[16]

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.[17] But the obvious gap between the outward show and the actual activity should be overcome by more appropriate theory and doctrine that give a convincing account, both descriptive just 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 nothing but applying given abstract norms to concrete cases at hand has been 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.[18] It is one of the main issues of legal scholarship 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

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16 See International Law Commission 'Third Report on the Law of Treaties' (1964) 2 ILC Yb 5 (53) (assembling testimony for such a view on interpretation). A. Bianchi 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning' in P.H.F. Bekker, R. Dolzer and M. Waibel (eds) *Making Transnational Law Work in the Global Economy* (CUP Cambridge 2010) 34.

17 J.N. Shklar *Legalism* (Harvard University Press Cambridge Mass. 1964) 12–13. Consider the ICJ's emblematic pronouncements in *Fisheries Jurisdiction (Great Britain and Northern Ireland v. Iceland) (Judgement)* [1974] ICJ Rep. 3 para. 53; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 18.

18 I. Kant *Critique of Pure Reason* A 131–48 (Scientia 1982 [1781]); M. Koskenniemi 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 Theoretical Inquiries in Law 9.

law-creation and law-application.[19] More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.[20] 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, which is the same, interpretation of a concept contributes to the making of its content. The discretionary as well as creative element in the application of the law makes the law.[21] 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.[22] This might allow for a discoursive embedding of adjudication which can be an important element in the democratic legitimation of judicial lawmaking.[23]

This strand of thinking does not detract from the deductive model of legal reasoning. The deductive mode of reasoning, 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

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[19] H. Kelsen *Law and Peace in International Relations* (Harvard University Press Cambridge Mass. 1942) 163; H. Kelsen *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Deuticke Leipzig 1934) 82–83.

[20] See R. Rorty (ed.) *The Linguistic Turn: Essays in Philosophical Method* (University of Chicago Press Chicago 1967) (giving the name to this shift in philosophy); R. Rorty 'Wittgenstein, Heidegger, and the Reification of Language' in R. Rorty (ed.) *Essays on Heidegger and Others* (CUP Cambridge 1991) 50 (offering an accessible overview on what it is about).

[21] 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"'. R.B. Brandom 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 European Journal of Philosophy 164 (180).

[22] Brandom (note 21) 181 ('[t]he current judge is held accountable to the tradition she inherits by the judges yet to come'). Cf. J. Liptow *Regel und Interpretation. Eine Untersuchung zur sozialen Struktur sprachlicher Praxis* (Velbrück Baden-Baden 2004) 220–26.

[23] A. von Bogdandy and I. Venzke 'On the Democratic Legitimation of International Judicial Lawmaking' (2011) 5 GLJ 1341.

justified. The reasoning in support of a decision does not serve 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.[24] 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.[25] 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* decisions.[26]

2. 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.[27] A judgment, its decisions as well as its justification can amount to signifi-

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[24] H.-J. Koch and H. Rüßmann *Juristische Begründungslehre* (Beck München 1982) 5 and 69. See specifically on the lawmaking dimension of judicial decisions, Ibid. 248.

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

[26] U. Neumann 'Theorie der juristischen Argumentation' in Brugger, Neumann and Kirste (note 15) 233 (241). 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*.

[27] W.S. Dodge 'Res Judicata' (2006) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com> (26 May 2011).

cant legal arguments in later disputes about what the law means.[28] 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*).[29] For good reasons, actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court to decide alike if a similar case arises; and, moreover, they will develop their expectations along generalizations based on elements of the decision. Actors in Latin America will expect the Inter-American Court of Human Rights to declare amnesties for generals who ordered torture null and void,[30] a party requesting a provisional measure by the ICJ will expect the court to declare it as binding,[31] and foreign investors as well as a host state will expect any investment tribunal to consider arbitrary, discriminatory, or a lack of due process as breach of fair and equitable treatment.[32] Some domestic constitutional courts even require domestic institutions, in particular domestic courts, to heed the authority of international decisions as precedent.[33] In addition, it seems that as a matter of fact many

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[28] C. Kirchner 'Zur konsequentialistischen Interpretationsmethode' in T. Eger et al. (eds) *Internationalisierung des Rechts und seine ökonomische Analyse* (Gabler Wiesbaden 2008) 37 (39).

[29] M. Shahabuddeen *Precedent in the World Court* (1st edn. Grotius Cambridge 1996) 76 (209); I. Scobbie 'Res Judicata, Precedent, and the International Court: A Preliminary Sketch' (1999) 20 AustralianYbIL 299; S. Schill *The Multilateralization of International Investment Law* (CUP Cambridge 2009) 321.

[30] Binder (note 6).

[31] Oellers-Frahm (note 6).

[32] 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).

[33] Bundesverfassungsgericht [Federal Constitutional Court] (14 October 2004) 2 BvR 1481/04, 111 (2004) Entscheidungen des Bundesverfassungsgerichts 307, for an English translation see <http://www.bverfg.de/entscheidun

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).[34] 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 holds true for the concept of dynamic interpretation as well that also tends to overdo what states would have had to know in the moment they entered into legal obligations.[35] In the German speaking world, the concept of *richterliche Rechtsfortbildung* is much used,[36] it 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 marks the difference with legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both these aspects are well expressed in the concept of judicial lawmaking, which is, in addition, well introduced in the Anglo-American legal terminology.[37] For these reasons we opt for lawmaking as our leading concept to mark

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gen/rs20041014_2bvr148104en.html> (26 May 2011) para. 68 (referring to a domestic court's duty to take a decision of the ECtHR into account).

[34] See Binder (note 6).

[35] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment) (2009)* ICJ Rep. 213 para. 64. Cf. J. Arato 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 LPICT 443.

[36] See Hochschullehrer der Juristischen Fakultät der Universität Heidelberg (eds) *Richterliche Rechtsfortbildung. Erscheinungsformen, Auftrag und Grenzen: Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (Müller Heidelberg 1986).

[37] 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 U.S. 205, 221 (1917) (Justice Holmes, dissenting); L. Reid 'The Judge as Law Maker' (1972) 12 Journal of the Society of Public Teachers of Law 22.

our object of inquiry, i.e. the generation of general 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.[38] 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 hardly convince. Speaking of judicial lawmaking is far less precarious than also using the term legislation for the activity of courts.[39] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

3. International Judicial Lawmaking as an Exercise of Public Authority

International adjudication would not require an elaborate justification of its own under the principle of democracy if it did not amount to an exercise of public authority: the very term *kratos* implies that link.[40] 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) of the UN Charter, the Security Council could take coercive measures if disregard

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[38] K. Oellers-Frahm 'Lawmaking through Advisory opinions?' (2011) 5 GLJ 1033 (1052–54).

[39] H. Lauterpacht *The Development of International Law by the International Court* (2nd edn. Stevens London 1958) 155–223 (speaking of 'judicial legislation').

[40] See W. Conze 'Demokratie' in O. Brunner, W. Conze and R. Koselleck (eds) *Geschichtliche Grundbegriffe vol. 1* (Klett Stuttgart 1972) 848.

for decisions of the ICJ threatened international peace and security.[41] 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 on part of international institutions, be it bureaucracies or courts, 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.[42] The activity of most international institutions, including judicial lawmaking, would then 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.[43] 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.[44] 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.[45] Even if international judicial decisions are usually not backed by coercive mechanisms, they still condition

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41 See H. Mosler and K. Oellers-Frahm 'Article 94' in B. Simma (ed.) *The Charter of the United Nations: A Commentary* (2nd edn. OUP Oxford 2002) 1174 (1176).

42 R.A. Dahl 'The Concept of Power' (1957) 2 Behavioral Science 201 (202); R. Dahrendorf *Über den Ursprung der Ungleichheit unter den Menschen* (Mohr Tübingen 1961) 20.

43 Cf. M. Barnett and R. Duvall 'Power in Global Governance' in M. Barnett and R. Duvall (eds) *Power in Global Governance* (CUP Cambridge 2007) 1 (offering a nuanced conception of power that suits present purposes).

44 See I. Venzke 'International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law' (2008) 9 GLJ 1401.

45 A. von Bogdandy, P. Dann and M. Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 GLJ 1375 (1381).

parties to the dispute as well as other subjects of the legal order in the exercise of their freedom.[46]

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 Ministerial Committee of the Council of Europe oversees the implementation of decisions of the ECtHR,[47] member states of the ICC cooperate with the court in the execution of sentences and are obliged to implement its decisions,[48] in the framework of the WTO members may resort to countermeasures once their claims have succeeded in adjudication,[49] 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.[50] 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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[46] Reputational costs are relevant even for such weighty and mighty actors as the United States. In a *rational choice* perspective, see A. Guzman *How International Law Works* (OUP Oxford 2008) 71.

[47] Art. 46 (2) of the European Convention on Human Rights.

[48] Arts 93 et seq. of the Rome Statute of the International Criminal Court.

[49] Art. 22 of the Dispute Settlement Understanding.

[50] Art. 54 of the ICSID Convention.

International decisions enjoy an exceptional standing in semantic struggles about what the law means.[51] Judicial precedents redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape.[52] In many judgments, precedents figure 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 to counter that claim with other arguments, distinguishing the case referred to, or using it in a different way. Many contributions in this volume analyzed this dynamic in closer detail.[53]

The Appellate Body of the WTO has for example relied on Art. 3 (2) of the 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'.[54] Recently it raised its tone a notch and even suggested that a failure to do so on part of a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.[55] Panel and Ap-

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[51] On the akin concept of 'semantic fights', see R. Christensen and M. Sokolowski 'Recht als Einsatz im semantischen Kampf' in E. Felder (ed.) *Semantische Kämpfe: Macht und Sprache in den Wissenschaften* (De Gruyter Berlin 2006) 353. For a yet more drastic understanding, see R.M. Cover 'Violence and the Word' (1986) 95 YaleLJ 1601.

[52] A.E. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 272–311. Cf. P. Bourdieu 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings Law Journal 814 (838).

[53] See, in particular, the contributions by Jacob (note 6); Schill (note 6); Venzke (note 6); Oellers-Frahm (note 40).

[54] WTO *Japan – Taxes on Alcoholic Beverages* (4 October 1996) WT/DS 8, 10 and 11/AB/R 14–15.

[55] This is a reference to Art. 11 of the DSU. See WTO *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) WT/DS344/AB/R para. 162.

pellate Body reports plainly do create legitimate expectations that must be considered in subsequent adjudication.[56] This is usually seen clearly in legal scholarship and it is evident to anyone involved in the operation of the system. The Brazilian representative in the WTO Dispute Settlement Body illustratively stated in the discussions pertaining to the *US – Shrimp* report 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'.[57]

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.[58] 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 exercise 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) of the 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 rec-

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56 See Venzke (note 6).

57 WTO *Dispute Settlement Body – Minutes of Meeting Held in the Centre William Rappard on 6 November 1998* (12 December 1998) WT/DSB/M/50, 12 (the meeting concerned the adoption of the Appellate Body Report in *US–Shrimp*).

58 On the concept of reputation, see Guzman (note 46) 71.

ognizing the law but not a source of law.[59] 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.[60] 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.[61] 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.

II. On the Legitimacy of International Judicial Lawmaking

1. The Decoupling of Law from Parliamentary Politics

The lawmaking effect of adjudication is a common feature of judicial activity in any legal order.[62] However, the lawmaking effect of international adjudication displays specific features that make it structurally more problematic when compared to the domestic context. One of the

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[59] A. Pellet 'Article 38' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *Statute of the International Court of Justice. A Commentary* (1st edn. OUP Oxford 2006) 677 paras 301–19; G.J.H. van Hoof *Rethinking the Sources of International Law* (Kluwer Utrecht 1983) 169.

[60] See e.g., G. Abi-Saab 'Les sources du droit international: Essai de déconstruction' in M. Rama-Montaldo (ed.) *El derecho internacional en un mundo en transformación vol. 1* (Fundación de Cultura Univ. Montevideo 1994) 29.

[61] Ibid. 266–72; more cautious and openly flagging his common law bias, R. Howse 'Moving the WTO Forward - One Case at a Time' (2009) 42 CornellILJ 223.

[62] See already M.O. Hudson *Progress in International Organization* (2nd edn. Rothman Littleton 1981) 80; Lauterpacht (note 39) 155 ('judicial lawmaking is a permanent feature of administration of justice in every society').

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.[63] 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.[64] Years of quarrel and learning have also established that law means *positive law*, at least in modern constitutional states.[65] The hallmark of positivity is that the legislature is responsible for this law.[66] In democratic societies, the majority (usually understood as the elected government) can intervene in the legal order by way of legislative procedures and can thus change the law.[67]

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.[68] But the phenomenon of international judicial lawmaking pri-

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[63] See E.-W. Böckenförde 'Entstehung und Wandel des Rechtsstaatsbegriffs' in E.-W. Böckenförde (ed.) *Recht, Staat, Freiheit* (Suhrkamp Frankfurt 1991) 143; M. Loughlin *Public Law and Political Theory* (OUP Oxford 1992) 138.

[64] J. Locke *The Second Treatise of Government* (Liberal Arts Press New York 1952) ch. XII; G. de Vergottini *Diritto costituzionale comparato* (CEDAM Padova 1999) 346 *et seq.*

[65] For an early use of such a conception of positivity, see G.W.F. Hegel *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* in G.W.F. Hegel *Werke in 20 Bänden* (Suhrkamp 1970) Bd. 7 § 3.

[66] E.-W. Böckenförde 'Demokratie als Verfassungsprinzip' in E.-W. Böckenförde (ed.) *Recht, Staat, Freiheit* (Suhrkamp Frankfurt 1991) 289 (322); With regard to the situation in a common law context: P. Atiyah and R. Summers *Form and Substance in Anglo-American Law* (OUP Oxford 1991) 141.

[67] A. von Bogdandy *Gubernative Rechtsetzung* (Mohr Siebeck Tübingen 2000) 35. We do not think that international courts can draw sufficient legitimacy from the fact that they check the power exercized by other institutions. Such argument is made by S. Cassese *When Legal Orders Collide: The Role of Courts* (Global Law Press Sevilla 2010) 122–24.

[68] 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 R. Wolfrum 'Die Kontrolle der auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler 38.

marily directs attention to a *dynamic perspective*.[69] 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.[70] This strategy is particularly incisive when it comes to regimes that are characterized by relatively strong mechanisms of adjudication because such regimes 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 favour of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of domestic public authority.[71] 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.[72]

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 Charter 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

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[69] J. Klabbers 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 NordicJIL 405; L. Bartels 'The Separation of Powers in the WTO: How to Avoid Judicial Activism?' (2004) 53 ICLQ 861.

[70] K. Abbott and D. Snidal 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421 (429); J. Goldstein et al. 'Introduction: Legalization and World Politics' 54 (2000) International Organization 385 (understanding this to be a general political strategy).

[71] Art. 13 (2) of the Universal Declaration of Human Rights (UNGA Res. 217 A (III) 'Universal Declaration of Human Rights' [10 December 1948] GAOR 3rd Session Part I Resolutions 71); Art. 12 (2) of the International Covenant on Civil and Political Rights ([adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171); Art. 2 (2) of the Additional Protocol 4 to the European Convention on Human Rights (ETS No. 46).

[72] 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' (2007) 46 ILM 973.

and on the shape of the respective legal regimes.[73] 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.[74] 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, via a number of other international judicial institutions, 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.[75] The European Court of Human Rights has also contributed to a remarkable innovation in its procedures with the instigation of so-called *pilot judgments*.[76]

A number of qualifications would be in order and a more detailed picture may well offer instances in the institutions' 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 make

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[73] See respectively the contributions by Binder (note 6), Venzke (note 6), Schill (note 6), Oellers-Frahm (note 38). Compare this with the ambivalent track record explained by N. Petersen 'Lawmaking by the International Court of Justice – Factors of Success' (2011) 5 GLJ 1925.

[74] On developments in procedural law that form part of strategies responding to problems in the justification if international judicial lawmaking, see von Bogdandy and Venzke (note 23).

[75] Oellers-Frahm (note 6).

[76] Fyrnys (note 6).

precisely the argument that the absence of consent among subjects of the law may increase the chances of judicial lawmaking.[77]

2. 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 production and legitimation.[78] 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.[79] Subject matters should precisely 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.[80]

Due to the functional differentiation of distinct areas of politics on the international level, the chances of meeting this imperative of democratic

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[77] E. Benvenisti and G. Downs 'Prospects for the Increased Independence of International Tribunals' (2011) 5 GLJ 1057.

[78] T. Lieber *Diskursive Vernunft und formelle Gleichheit: Zu Demokratie, Gewaltenteilung und Rechtsanwendung in der Rechtstheorie von Jürgen Habermas* (Mohr Siebeck Tübingen 2007) 226–29.

[79] We take this point from J. Bast 'Das Demokratiedefizit fragmentierter Internationalisierung' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft* (Nomos Baden-Baden 2009) 177.

[80] A.L. Paulus 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing Oxford 2008) 193 (210).

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 is an already prevalent particular set of preferences and concerns.[81] This undermines the requirement of generality as a critical element of democratic legitimation.[82] A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.

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.[83] 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.

3. The Relevance of Democratic Legitimation

How can one square judicial 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

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[81] M. Koskenniemi and P. Leino 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; T. Treves 'Fragmentation of International Law, The Judicial Perspective' (2007) 23 Comunicazione e studi 821.

[82] 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.

[83] Paulus (note 80) 210.

consent should solve any legitimatory question as long as the courts only fulfil their task of dispute settlement properly. This explains the emphasis that the traditional school of thought places on the cognitive paradigm and on the principle that judges are limited to applying the law to the dispute at hand.

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.[84] 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.[85] 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.[86] The international criminal tribunals and the International Criminal Court (ICC), for instance, are supposed to gain legitimacy by way of ending impunity for international crimes,[87] the WTO functions *inter alia* to increase

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[84] Kelsen (note 19) 165.

[85] Apart from this, international courts can, for instance, foster democratization through a democracy-oriented human rights jurisprudence. See *Matthews v. The United Kingdom (Judgment of 18 February 1999)* ECtHR App. No. 24833/94 <http://echr.coe.int/echr/en/hudoc> (11 June 2011).

[86] K. Oellers-Frahm 'Nowhere to Go? - The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction' in T. Giegerich (ed.) *A Wiser Century?* (Duncker & Humblot Berlin 2009) 435 (440).

[87] In detail, see M. Benzing 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369 (373).

economic welfare and arbitration in investment disputes should foster economic development by inducing foreign investments.[88]

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.[89] 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. However, we do not challenge the 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.[90] But 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

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[88] T. Broude 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO' (2006/07) 45 Columbia Journal of Transnational Law 221.

[89] R. Howse and S. Esserman 'The Appellate Body, the WTO Dispute Settlement System, and the Politics of Multilateralism' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 61.

[90] For a brilliant description of what happens if the difference between courts and politics collapses, see M. Neves 'La concepción del Estado de derecho y su vigencia prática en Suramerica' in A. von Bogdandy, C. Landa Arroyo and M. Morales Antoniazzi (eds) *Integración suramericana a través del Derecho?* (Centro de estudios Políticos y Constitucionales Madrid 2009) 51.

response will lay out how its topic is connected with the principle of democracy.

III. The Reasoning

1. 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 respective 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 Arts 31 and 32 of the 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) of the Statute of the International Court of Justice: 'The judgment shall state the reasons on which it is based.'[91] The alternatives, refraining from justifying decisions or from making them public, might weaken the lawmaking effect of judicial decisions. However, this would not only violate the statute and rules of the court, but it would also 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.[92] 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 scholars stress this point as a core element for justifying not only the final decision concerning the parties of the dispute, but also the

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[91] Failure to state reasons is also one of the few possible grounds for annulment in the ICSID system (Art. 52 (1) (e) of the ICSID Convention). See further Art. 41 of the Rules of Procedure of the European Nuclear Energy Tribunal (5 September 1965). See also A. Ross *Theorie der Rechtsquellen* (Deuticke Leipzig 1929) 283.

[92] The function of this discourse for the democratic legitimation of a decision is discussed below, section V. The Procedure.

lawmaking that affects third parties.[93] 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 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 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; for that acceptance, a justification along the lines of Arts 31 and 32 of the VCLT is of great importance.[94] 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.[95]

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 the recent decision of the German Federal Constitutional Court (FCC). On the one hand, the decision 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.[96] It sees judicial lawmaking particularly warranted

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93 Binder (note 6); Oellers-Frahm (note 6).

94 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 Petersen (note 73).

95 Brandom (note 21) 181 ('[t]he current judge is held accountable to the tradition she inherits by the judges yet to come').

96 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> (28 May 2011). The judgment deals with the 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

when it '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.[97] 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.[98]

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.

One attempt to give more substance to these standards can be found in discourse theory, understanding the separation of powers as a 'distribution of the possibilities for access to different sorts of reasons'.[99] 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.[100] According to this approach, law is a source of legitimation

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lawmaking by the European Court of Human Rights is at least as relevant for the FCC as that of the ECJ.

97 Ibid. 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'.

98 Ibid.: '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'.

99 J. Habermas *Faktizität und Geltung* (Suhrkamp Frankfurt 1992) 192. Cf. A. von Bogdandy and I. Venzke 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung' (2010) 70 ZaöRV 1 (14); Kuhli and Günther (note 6).

100 Habermas (note 99) 192–93, 229–37.

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.[101] 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.[102] 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'.[103] This resonates well with the position taken by the Federal Constitutional Court.[104]

With respect to judicial lawmaking Habermas writes that 'to 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.'[105] He does not elaborate on the consequences of this proposition and how it can be operationalized. However, a close analysis of a judicial decision often indicates the degree of legal innovation and hence the magnitude 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 possible 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

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[101] Ibid. 188–91; K. Günther 'Communicative Freedom, Communicative Power, and Jurisgenesis' (1996) 17 CardozoLRev 1035.

[102] Habermas (note 99) 150.

[103] Ibid. 172.

[104] Cf. Oellers-Frahm (note 38) 1036–37.

[105] Habermas (note 99) 439–40; Lieber (note 78) 222.

excessively detrimental to the climate can hardly be convincingly justified by interpreting Arts III, XI und XX of the GATT within the confines of the standard modes of the legal discourse.[106] 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 political-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 which with the exception of constitutional adjudication the normal legislative process can override the judiciary. For international law, the situation is different. 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.[107] 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 judicial means to the fact that the law of his time was confined to a static and narrow set of international relations.[108]

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.[109] 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.[110] That needs to be considered when evaluating judicial lawmaking in such extraordinary situations. But such necessities or opportunities cannot

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[106] See Jacob (note 6).

[107] H. Kelsen *Peace through Law* (University of North Carolina Press Chapel Hill N.C. 1944).

[108] H. Lauterpacht *The Function of Law in the International Community* (Clarendon Oxford 1933) 249 et seq.

[109] Fyrnys (note 6).

[110] See Binder (note 6).

substitute a principled argument. Hence, 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, in particular if such a decision has a strong lawmaking dimension.

The question is how a court should deal with its discretion: in particular, whether it should justify the exercise of this discretion. For Kelsen, the judge only has to mark the outer limits that define the field of possible interpretations, but then he or she is not burdened with justifying any specific choice within these bounds.[111] 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.[112]

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.[113] A more fully argued decision can be better placed within 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, which obscures 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.

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[111] This brings Kelsen close to realist conceptions of the law. See H. Dagan 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 607.

[112] R. Dworkin *Justice in Robes* (Harvard University Press Cambridge Mass. 2006); H.-J. Koch and H. Rüßmann *Juristische Begründungslehre* (Beck München 1982) 5, 69, 221. See also Lauterpracht (note 39) 39.

[113] Kuhli and Günther (note 6) section D.

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: we do not suggest shedding the 'camouflage' of legal reasoning to talk politics instead.[114] 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.[115] Considerations of policy and social effects can enter the legal reasoning in the form of teleological or purposive arguments.[116] They would contribute to a meaningful politizisation 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.[117] We are aware that these are demanding standards, not least because almost any international decision is the product of a college of judges.

2. Referring to Political Outcomes Beyond Formal Sources

In addition to tending to policy considerations in judicial reasoning with greater attention, politicization may relate 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

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[114] Cf. G. Abi-Saab 'The Appellate Body and Treaty Interpretation' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 453 (462) (asking whether it is not better 'to shed the camouflage' if the true reasons are hidden by technical legal reasoning).

[115] M. Koskenniemi 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1.

[116] Art. 31 (1) of the VCLT; G. Lübbe-Wolff *Rechtsfolgen und Realfolgen* (Alber Freiburg 1981) 139 et seq.

[117] D.A. Irwin and J.H.H. Weiler 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World Trade Review 71 (criticizing the 'textual fetish and policy phobia' of the Appellate Body).

documents whose precise legal standing is rather murky.[118] 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.[119]

Given our starting point that the distance to parliamentary politics is one of the core problems of international judicial lawmaking, the justificatory relevance of such 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.[120] Such considerations may also extend to documented reactions with regard to previous jurisprudence on a certain issue area, above all by relevant political bodies.[121]

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.[122] If the act in question is seen to be the imposition of the will of

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[118] Consider for example WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R paras 154 and 168. Cf. I. Van Damme 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 605.

[119] Fyrnys (note 6).

[120] The study of such outcomes and an attempt of their doctrinal classification has been the focus of an earlier research, see A. von Bogdandy, P. Dann and M. Goldmann 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 GLJ 1375; M. Goldmann 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 GLJ 1865.

[121] Note for example how State representatives frequently invest considerable time in discussing judicial reports in the WTO's Dispute Settlement Body. On further elements of politicization in this context, see I. Feichtner 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests' (2009) 20 EJIL 615.

[122] M. Weber 'Wissenschaft als Beruf' in W. J. Mommsen and W. Schluchter (eds) *Max Weber Gesamtausgabe* (Mohr Siebeck Tübingen 1992) 506.

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.[123] 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.[124] They might provide multilateral spaces for the development of outcomes that are representative,[125] or fair, as Thomas Franck puts it.[126] 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. It supports the democratic legitimacy of international judicial lawmaking.[127] However, the court needs to ascertain the inclusive quality of the process leading to the outcome that it plans to use.[128]

3. Systematic Interpretation as Democratic Strategy?

We have 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; judicial lawmaking potentially

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[123] On the issue of hegemony, see Benvenisti and Downs (note 77).

[124] R. Forst *Das Recht auf Rechtfertigung* (Suhrkamp Frankfurt 2007) 7; H. Kelsen *Allgemeine Staatslehre* (Springer Berlin 1925) 27 et seq. (differentiating between 'politics as ethics' and 'politics as technique').

[125] Venzke (note 44) 1425.

[126] T. Franck *Fairness in International Law and Institutions* (OUP Oxford 1995).

[127] In more detail Kuhli and Günther (note 6) 1267–74.

[128] It might similarly be problematic to give legal effect to international standards in relation to parties that have not consented to such standards, as may arguably on the basis of Appellate Body Report, WTO *ECs – Trade Description of Sardines: Report of the Appellate Body* (26 September 2002) WT/DS231/AB/R. Cf. R. Howse 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and International Standards' in C. Joerges and E.-U. Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Oxford 2006) 383.

aggravates the problem.[129] 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) of the 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.'[130] The 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 'call 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".'[131] 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.'[132]

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 understood as a primitive legal order.[133]

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[129] See Koskenniemi and Leino (note 81). 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 Venzke (note 6).

[130] At least since the 2001 ILC Fragmentation Report, a vivid discussion concerning the scope of this rule of interpretation has emerged, 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 [herafter *ILC Fragmentation Report*].

[131] ILC Fragmentation Report (note 130) para. 479.

[132] Ibid.

[133] Still in this line of reasoning, H. Hart *The Concept of Law* (2nd edn. OUP Oxford 1997) 92, 156, 214. Cf. D. Kennedy 'Primitive Legal Scholarship'(1986)

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 handling the law. Today the idea of a system features as an objective in the practice of interpretation.[134]

There are then good arguments that speak in favour of supposing that there is a system of international law.[135] 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.[136] 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.

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) of the VCLT explicitly.[137] 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

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27 HarvardILJ 1; M. Craven 'Unity, Diversity and the Fragmentation of International Law' (2005) 14 FinnishYbIL 3 (9).

134 S. Oeter 'Vielfalt der Gerichte – Einheit des Prozessrechts?' in R. Hofmann et al. (eds) *Die Rechtskontrolle von Organen der Staatengemeinschaft* (Müller Heidelberg 2007) 149 (158); B. Simma and T. Kill 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C. Binder et al. (eds) *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (OUP Oxford 2009) 678 (686).

135 B. Simma and D. Pulkowski 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483; P.-M. Dupuy 'L'unité de l'ordre juridique international' (2002) 297 RdC 12 (89).

136 G.W.F. Hegel *Wissenschaft der Logik vol. 1* (2nd edn. Meiner Leipzig 1934 [1812]) 59.

137 ILC Fragmentation Report (note 130) para. 410.

of the interpretation.'[138] 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.'[139] 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.[140] Struggles for independence or isolation that have come under the heading of *self-contained regimes* do not take away from the effectiveness of systemic integration.[141]

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.[142] Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.[143] In the course of fragmentation it is also possible that different understandings compete in a dialogue *between* courts.[144] 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. Some voices from the benches indicate that

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[138] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 para. 53.

[139] *WTO United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R 17.

[140] W. Benedek *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer Berlin 1990) (critically on the early tendencies to understand the GATT as an independent legal order).

[141] Cf. B. Simma 'Self-Contained Regimes' 16 (1985) NetherlandsYbIL 111; J. Pauwelyn *Conflict of Norms in Public International Law* (CUP Cambridge 2003) 37; ILC Fragmentation Report (note 130) para. 174.

[142] R. Dworkin *Taking Rights Seriously* (1st edn. Harvard University Press Cambridge Mass. 1977).

[143] Habermas (note 99) 224.

[144] R.G. Teitel and R. Howse 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 NYU JILP 959; Y. Shany *The Competing Jurisdictions of International Courts and Tribunals* (OUP Oxford 2003) 272.

they would be inclined to follow this path.[145] This way of dealing with the consequences of fragmentation 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.[146] 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'[147] or if they are viewed as an 'invisible college'[148] 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.[149] 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 least, our contribution intends to contribute to such sensibility.

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145 T. Treves 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in R. Wolfrum and V. Röben (eds) *Developments of International Law in Treaty Making* (Springer Berlin 2005) 587; R. Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791.

146 K. Oellers-Frahm 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67.

147 D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Inquiry into the Men and Women Who Decide the World's Cases* (Brandeis University Press Waltham 2007) 64.

148 O. Schachter 'The Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review 217; D. Kennedy 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 European Human Rights Law Review 463 (unfolding a pointed critique of the apologetic sides to the idea of an invisible college).

149 Kuhli and Günther (note 6) 1267–74.

IV. The Judges

1. The Democratic Importance of Independence and Impartiality

Judicial lawmaking is part of the regular mandate of international courts and tribunals. But the mandate comes with strings attached. After discussing those flowing from the allowed argumentative tools, we now look at those concerning the acting individuals. Here, the requirement of independence and impartiality stand out, hence these standards can be reconsidered in light of the principle of democracy. Eyal Benvenisti and George Downs show the importance of these two standards for the democratic legitimation of international judicial lawmaking and how these standards are wanting in the current set-up.[150]

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'.[151] The statutes of all other courts and tribunals contain similar provisions. However, as Eyal Benvenisti and George 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 re-election. This might decrease judges' dependence on their governments, whose support they would otherwise need in a campaign for re-election.[152] 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 conditions for a meaningful debate.[153] And the Caribbean Court of Jus-

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[150] Benvenisti and Downs (note 77).

[151] Art. 2 Statute of the ICJ corresponds to Art. 36 (3) Statute of the ICC.

[152] R. Mackenzie and P. Sands 'Judicial Selection for International Courts: Towards Common Principles and Practices' in K. Malleson and P. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press Toronto 2006) 213 (223); R.D. Keohane, A. Moravcsik and A.-M. Slaughter 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 International Organization 457 (476).

[153] Art. 36 (4) of the Statute of the ICC. See Mackenzie and Sands (note 152) 228.

tice, operative since 2005, is the first international court that entirely entrusts the appointment of judges to the international Regional Judicial and Legal Services Commission.[154]

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.[155] Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundžija* 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.[156] 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.[157]

2. 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 beyond this in order to understand the full importance of the appointment 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 conceives the state as an agent of the international community in gen-

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154 D. Byron and C. Malcolm 'Caribbean Court of Justice (CCJ)' (2009) in Wolfrum (note 27).

155 Art. 40 (2) of the Statute of the ICC; Art. 7 (1) of the Statute of the ITLOS; Y. Shany and S. Horovitz 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities' 21 (2008) LJIL 113.

156 *Prosecutor v. Furundžija (Judgment)* Case No. IT-95-17/1 A (21 July 2000) para. 189.

157 S. Shetreet 'Standards of Conduct of International Judges: Outside Activites' (2003) 2 LPICT 127.

eral and international human rights in particular.[158] It is above all when courts engage in judicial lawmaking on subject matters that are thoroughly contested, 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 of the 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, parliaments usually play some role in that procedure.[159] The role of executive institutions is far stronger with respect to international judges. Overall, the various procedures display a lot of similarities. Usually the UN 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 re-election. Not more than one of the 15 judges may have the nationality of the same state and, furthermore, the bench shall represent 'the principal legal systems of the world'.[160] The latter condition may be understood as recognition of the fact that (judicial) socialization bears on legal interpretation.[161] It stands in some tension to the idea of judicial independence that disputing parties who do not have a judge of their na-

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[158] For an elaboration of these visions, see A. von Bogdandy and S. Dellavalle 'Universalism and Particularism as Paradigms of International Law' IILJ Working Paper (2008/3) <http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp> (29 May 2011).

[159] Cf. Art. II 2 (2) of the U.S. Constitution; Art. 94 of the German Basic Law; Art. 150 of the Constitution of Estonia; Art. 135 of the Constitution of Italy; Art. 58 of the Constitution of Latvia; Art. 103 of the Constitution of Lithuania; Art. 147 of the Constitution of Austria; Art. 149 of the Constitution of Poland; Art. 159 of the Constitution of Spain. See also Malleson and Russell (note 152).

[160] Arts 3, 4, 9, 10 and 13 of the Statute of the ICJ.

[161] L.V. Prott *The Latent Power of Culture and the International Judge* (Professional Books Abingdon 1979).

tionality on the bench may choose a judge *ad hoc*, but this may also be traced back to the same idea of representing diversity.[162]

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 is 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.[163] 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.[164]

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) of the VCLT). Viewed from this angle, the selection of judges forms a genuine part of foreign poli-

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[162] Art. 31 (2–3) of the ICJ Statute. Cf. I. Scobbie 'Une hérésie en matière judiciaire? The Role of the Judge *ad hoc* in the International Court' (2005) 4 LPICT 421. The far younger ITLOS also provides for judges *ad hoc*, Art. 17 of the ITLOS Statute.

[163] P. Sands 'The Independence of the International Judiciary: Some Introductory Thoughts' in S. Charnovitz, D. Steger and P. van den Bossche (eds) *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano* (CUP Cambridge 2005) 313 (319).

[164] N. Krisch 'The Pluralism of Global Administrative Law' (2006) 17 EJIL 247 (253) (sketching these competing constituencies with regard to the accountability of international bureaucracies); E. de Wet 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' (2008) 11 GLJ 1987 (1989).

tics 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.[165]

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 favour of aligning the procedures for choosing senior domestic and international judges. This points towards a prominent role for domestic parliaments to play.[166]

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.[167] This approach finds cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.[168] 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 election process when the assembly rejected a member state's list of candidates because it did not include any female candidate.[169]

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165 E. Posner and J. Yoo 'Judicial Independence in International Tribunals' (2005) 93 California Law Review 1.

166 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.

167 See F. Arndt 'Parliamentary Assemblies, International' in Wolfrum (note 27).

168 Art. 22 of the ECHR. See J.A. Frowein 'Art. 22' in J.A. Frowein and W. Peukert (eds) *EMRK-Kommentar* (3rd edn. Engel Kehl am Rhein 2009) para. 2.

169 See, however, ECtHR *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* (Grand Chamber, 12 February 2008). Also note that some statutes explicitly try to address the disproportionately weak representation of women, see, e.g., Art. 36 (8) (a) (iii) of the ICC Statute.

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.[170] Habermas builds here on his theory of intersubjectivity, 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.[171] Legitimating new forms of public authority in the postnational 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.[172]

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 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.[173] 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.

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[170] J. Habermas *Die postnationale Konstellation* (Suhrkamp Frankfurt 1998) 165.

[171] J. Habermas 'Does the Constitutionalization of International Law Still Have a Chance?' in J. Habermas (ed.) *The Divided West* (Polity Press Cambridge 2006) 113 (141).

[172] J. Habermas 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft' in Brugger, Neumann and Kirste (note 15) 360 (362).

[173] See J. Ku 'Will the ICJ Have a U.S.-Style Nomination Fight? (We Can Only Hope)' (3 November 2008) <http://opiniojuris.org/2008/11/03/will-the-icj-have-a-us-style-nomination-fight-we-can-only-hope/> (29 May 2011).

V. 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 adjudication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations.[174] 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

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[174] C. Chinkin 'Art. 62' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 1331 (1366); R. Wolfrum 'Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber amicorum Günther Jaenicke – zum 85. Geburtstag* (Springer Berlin 1999) 427.

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.[175] 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'.[176] We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of international 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.[177]

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[175] 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. R. Kolb 'General Principles of Procedural Law' in Zimmermann, Tomuschat and Oellers-Frahm (note 59); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

[176] J.-M. Sorel 'International Courts and Tribunals, Procedure' (2009) in Wolfrum (note 27) para. 1.

[177] 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*) [2010] ICJ General List No. 135 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); M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Berlin 2010).

1. Publicness and Transparency

A crucial element for publicness and transparency and hence democracy are the oral proceedings that some court statutes explicitly provide for.[178] 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.[179] 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.[180] 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 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.[181]

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.[182] And the Appellate Body maintained

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[178] Art. 46 of the ICJ Statute; Art. 59 of the ICJ Rules of Court; Art. 26 (2) of the ITLOS Statute; Art. 74 of the Rules of ITLOS; Art. 40 of the ECHR; Art. 63 (2) of the Rules of ECtHR; Arts 67, 68 (2) of the ICC Statute. See Sorel (note 176) para. 18; S. von Schorlemer 'Art. 46' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 1063 (1070).

[179] Arts 14 (1), 18 (2) and 17 (10) of the DSU provide that procedures and written submissions are confidential. L. Ehring 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11 JIEL 1021.

[180] P. Sutherland et al. 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ('Sutherland Report', 2004)' <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> (18 June 2011) paras 261 et seq.

[181] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; C.-D. 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' (2002) 36 JWT 605.

[182] *WTO Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Panel* (31 March 2008) WT/DS321/R para. 7.47.

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.'[183]

Procedures in the ICSID framework fall short of those of the WTO on this point. But also here first cracks are starting to show that may soon widen so as to accommodate growing demands for more transparency.[184] In June 2005, the OECD Investment Committee threw its authority behind the argument when it maintained that '[t]here 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.'[185] 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.[186]

2. 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 straight-

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[183] *WTO United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R Annex III para. 4.

[184] C.N. Brower, C.H. Brower II and J.K. Sharpe 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration International 415.

[185] OECD 'Transparency and Third Party Participation' in: Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee (2005) 1.

[186] Rule 32 (2) of the ICSID Rules of Procedure (10 April 2006). From legal practice, see, for instance, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic (Order of 19 May 2005)* ICSID Case No. ARB/03/19 para. 6.

forward fashion, Art. 63 of the 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.[187] The trend towards wider participation in judicial proceedings is a testament to an increasing recognition of the effects that judgments create 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.[188]

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).[189] 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.[190] 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.[191] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

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[187] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Judgment)* [2001] ICJ Rep. 575 para. 35.

[188] A. Zimmermann 'International Courts and Tribunals, Intervention in Proceedings' (2006) in Wolfrum (note 27).

[189] Arts 4 (11), 10, 17 (4) and 21 of the DSU. Cf. M. Hilf 'Das Streitbeilegungssystem der WTO' in M. Hilf and S. Oeter (eds) *WTO-Recht: Rechtsordnung des Welthandels* (Nomos Baden-Baden 2005) 505 (521).

[190] Art. 10 and Appendix 3 (6) of the DSU. Cf. K. Arend 'Article 10 DSU' in R. Wolfrum, P.-T. Stoll and K. Kaiser *Max Planck Commentaries on World Trade Law* vol. 2 (Nijhoff Leiden 2006) 373.

[191] See P. van den Bossche *The Law and Policy of the World Trade Organization* (CUP Cambridge 2008) 279.

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 confidential settings, and protection of business secrets.[192] 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*.

3. *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.[193] 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.[194]

The procedural law of the ICJ and ITLOS does not provide for submissions by *amici curiae*.[195] In one of the ICJ's first cases ever, its registrar rejected the motion on the part of an NGO that sought to submit its

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[192] J. Delaney and D.B. Magraw 'Procedural Transparency' in P. Muchlinski, F. Ortino and C. Schreuer (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 200) 721 (775).

[193] P. Sands and R. Mackenzie 'International Courts and Tribunals, Amicus Curiae' (2009) in Wolfrum (note 27) margin number 2; H. Ascensio 'L'amicus curiae devant les juridictions internationales' (2001) 105 RGDIP 897.

[194] Habermas (note 99) 303, 382; J. von Bernstorff 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft: Soziale Welt Sonderband vol. 18* (Nomos Baden-Baden 2009) 277.

[195] In detail, see Wolfrum (note 174).

opinion in writing and to present its view orally.[196] This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.[197] 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*.[198] 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.[199] 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.[200] Former President Gilbert Guillaume stated bluntly that nowadays 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.[201]

Neither treaty law within the WTO context makes any provisions 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. Legal practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[202] As early as the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case, the panel explicitly rejected *amicus curiae* submissions but was corrected by the

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196 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the 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 P.-M. Dupuy 'Article 34' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 545 (548).

197 Art. 66 ICJ of the Statute.

198 A.-K. Lindblom *Non-Governmental Organisations in International Law* (CUP Cambridge 2005) 303.

199 *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia) (Judgment)* [1997] ICJ Rep. 7.

200 See ICJ Practice Direction XII (2004).

201 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Separate Opinion of Judge Guillaume)* [1996] ICJ Rep. 287.

202 R. Howse 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 ELJ 496.

higher level of jurisdiction. The Appellate Body argued that '[t]he thrust of Arts 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.'[203]

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*.[204] 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.[205] 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 participation, subject however to clear and specific regulations.'[206] 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*.[207]

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[203] WTO *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para. 106. The *EC-Asbestos* Case was also of great importance, see especially WTO *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appallate Body* (8 November 2000) WT/DS135/9 and *General Council - Minutes of Meeting - Held in the Centre William Rappard on 22 November 2000* (23 January 2001) WT/GC/M/60.

[204] See Delaney and Magraw (note 192).

[205] NAFTA 'Statement of the Free Trade Commission on Non-disputing Party Participation' <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf> (11 June 2011).

[206] OECD *Transparency and Third Party Participation* (note 185).

[207] Art. 37 (2) of the Arbitration Rules. ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14> (12 February 2011).

VI. The Role of Domestic Organs

Our piece has identified problems in the democratic legitimation of international judicial lawmaking and has shown 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. On its own, it is hard to see how it is possible to fully square international judicial lawmaking with the principle of democracy.

So we see a dilemma: our conviction is that the increasing authority of international courts constitutes a grand achievement. Even if the international judiciary does not fulfil all aspirations of global justice,[208] 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.[209] 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 they, in turn, can feed back into developments at the international level.[210] From a legal point of view, this means 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 sys-

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[208] See Benvenisti and Downs (note 77) (sharpening the understanding of how powerful states and sectoral interests strategically use international judicial institutions).

[209] E. Brimmer 'International Politics Needs International Law' in E. Jouannet, H.R. Fabri and J.-M. Sorel (eds) *Regards d'une Génération sur le Droit International* (Pedone Paris 2008) 113; M. Koskenniemi *The Gentle Civilizer of Nations* (CUP Cambridge 2001) 494.

[210] R. Howse and K. Nicolaïdis 'Democracy Without Sovereignty: The Global Vocation of Political Ethics' in T. Broude and Y. Shany (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Oxford 2008) 163.

tem.[211] 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 UN Security Council.[212]

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.[213] It should be stressed that domestic non-compliance triggers heavy argumentative burdens.[214] 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.

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[211] In detail see A. von Bogdandy 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397.

[212] Art. 50 of the Articles on Responsibility of States for Internationally Wrongful Acts.

[213] 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 and 415/05 P, *Kadi and Al Barakaat v. Council of the EU and EC Commission*, 2008 E.C.R. I-6351 (also following this logic).

[214] 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> (31 May 2011). Cf. on the role of domestic courts, E. Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

*Comment by Abdul G. Koroma**

An Investigation of International Courts, Public Authority and its Democratic Justification

As is to be expected of any paper by Armin von Bogdandy and his associate, the paper 'International Courts as Lawmakers' is well researched and draws on many points of view, with some of which even the authors themselves do not agree. Some sections of the paper could stand on their own if the authors had chosen to advance their own theories on the exercise of public authority by courts.

In my view, the paper deals appropriately with the exercise of public authority through international adjudication when it states: 'International adjudication would not require an elaborate justification of its own under the principle of democracy if it did not amount to an exercise of public authority'.[1] The paper recalls that *Justitia* wields a sword, which shows that a democratic society governed by the rule of law puts in place coercive mechanisms to ensure effective implementation of domestic court decisions. This is evidently not the case when it comes to decisions of international courts. Under Art. 94 (2) of the UN Charter, the UN Security Council should take coercive measures if disregard for an ICJ decision threatens international peace and security. In practice, however, according to the paper, non-compliance with judgments of the ICJ or most other courts rarely draws coercive measures in response.

They also observe that it is an empirical fact today that the power of many international institutions is similar in significance and in its potential to shape and constrain freedom as that of domestic institutions. In this regard the authors understand authority as the legal capacity to direct others and to influence their freedom, i.e., to shape their legal or factual situation; even if international judicial decisions are usually not backed by coercive mechanisms, they still constrain parties to the dispute as well as other subjects of the legal order in their actions.

The authors contend that adjudicatory practice on the part of any court that has some reputation should be qualified as an exercise of public authority that demands justification. They point out that the relatively

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* Judge at the International Court of Justice.

1 At p. 172 above.

broad conception of authority stems from a principal consideration that, 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.

According to the authors, this position leads to the central problem in the justification of international courts: According to them, in the domestic context of functioning democracies, judicial lawmaking is embedded in a responsive political system, whereas the international level is marked by the absence of a functionally equivalent system. In my view, while it is normal to take such a theoretical stance, the problem remains, however, as to why such a theoretical stance should be applied to all international law.

In a discussion of the role of the International Centre for Settlement of Investment Disputes (ICSID) reference is made to the occasion when General Counsel of the World Bank, faced with failed international negotiations about the applicable material law, advanced the programmatic formula 'procedure before substance'. The substance, he argued, would follow the practice of adjudication. And so it did, as judge-made law and deeply imbued with the functional logic pervading the investment protection regime. This observation is both striking and insightful.

As I stated earlier on, some sections of this paper could stand on their own if the authors had chosen to advance their own theories on the exercise of public authority functions by the court. This is well illustrated by the first sentence of the first paragraph of concluding Section VI: 'Our piece has identified problems in the democratic legitimation of international judicial lawmaking and has shown that there are promising strategies to respond, but that no solutions are readily available to ease all concerns'. This may well be true, but it does not get us very far. It might have been better to focus on specific aspects of the matter rather than on the subject as a whole.

In the opinion of the authors, 'public law [should be] seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination'. This statement is problematic in itself, as it is not made clear why this point of view should be preferred over others or why it should apply to international law at all. (For instance: Is the 'preservation of liberty' point fully applicable to states? Does it apply to individuals and the way general international law still treats them?) But, in any case, after this statement the paper

goes on to explain that domestic parliaments are not in full command of international legislative processes – but should be more involved –, that constitutionalist readings of the function of international courts are unconvincing, and that fragmentation is a problem for democracy.

The discussion on the absence of international legislatures could have benefited from more attention to actual experience than the authors give. Thus, for instance, it is well known that the *Lotus*[2] holdings on jurisdiction over collisions at sea were later reversed by some states through a special convention. Likewise, the Court's 1966 decision in the *South West Africa*[3] cases came under heavy criticism by states, including through the United Nations fora. It later led the Court itself to reverse its holdings – or so say some – in *Barcelona Traction*[4] and, to some extent, in the *Namibia* Advisory Opinion[5], which was more in line with the pre-1966 case law of the Court. By the same token, the decision in *Nicaragua*[6] was criticized by the United States, but it led to a change in the law of the use of force and to acceptance of the jurisdiction of the Court. Thus, although no parliamentary process exists in international law, that law does have some equivalents to what parliaments do in municipal systems to redress – or not to redress – excessive exercises of judicial authority, in this context engaged in by states.

'Constitutionalism' is rejected too summarily in the paper. First, the analogy drawn between domestic constitutional law and international law is problematic. International law may be without a written constitution, say, and thus without notions of 'constitutional law' or 'constitutional organs' or 'constitution', but this is not the end of the matter. Many constitutional systems apply different techniques in protecting even written rules. In the United Kingdom constitutional law, the situation is similar. Although no written constitution exists, there are statutes and conventions that 'speak to "constitutional values"'. Thus, for

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2 *The 'Lotus' (France v. Turkey)* PCIJ Series A No. 10.

3 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase)* [1966] ICJ Rep. 6.

4 *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain) (Second Phase)* [1970] ICJ Rep. 3.

5 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16.

6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14.

example, monarchical succession is regulated by the Bill of Rights (1689). British law protects such acts with interpretative restrictions: *lex posteriori* or *lex specialis* may only derogate from these constitutional statutes expressly. Interpretations implicitly introducing derogations hold no traction before courts. Therefore, these statutes apply in all cases to situations arising under them unless purposely excluded by parliament. One should wonder whether international law does not have similar rules that 'speak to' what in municipal law would be called 'constitutional issues' (for example: that all wrongful acts entail responsibility; all responsibility entails reparation; the definition of 'state' covers all its organs – principle of the unity of the state; states are free to enter into treaties; states are not free to derogate from certain norms; and so on).

Second, while they state that constitutionalists like Habermas have the burden of proving the correctness of their approach, I think the authors also should have explained their own approach. The paper used legal theory to inform the article and, as we all know, different theories can be used to justify different points of view. But if this is done, it might be good to explain how the theory is relevant to positive law, or, at least, to explain why present-day positive law or some aspects of it would benefit from this theory. Although it is not strictly necessary to do this, forgoing such an analysis raises the risk of positing a theory that does not address the real problems to be grappled with by the law.

Finally, it is unlikely that the courts would have 'constitutional' functions in international law. As we know, courts and some international organizations are created through treaties or similar instruments (for example, UN Security Council resolutions, practice under certain regimes, etc.) rather than through general customary international law or general principles of law. And thus it cannot be said that there are constitutional provisions in 'international law' (as opposed to conventional international law) defining the roles of courts in the same way as there are provisions on the roles of courts in, say, Art. 3 of the United States Constitution, applicable throughout the nation. The few customary rules that exist about tribunals (for example, exhaustion of local remedies, nationality of claims) do not rise to the same level. Thus, there are many regimes with their own degrees of cohesion, logic (cf. 'the functional logic that pervades the investment protection regime', p. 164) and so on. This is why, even though the ICJ, ITLOS, ICSID tribunals, and the World Trade Organization (WTO) panels are all 'courts', a comparison between the roles of these tribunals is a suitable topic for discussion. The WTO panels, for example, do not have to concern them-

selves with the problem of consensual jurisdiction dealt with by the ICJ; their broad treatment of third-party intervention as a party and the ICJ's traditional reluctance to do the same are formally the same exercise, but they answer to very different expectations, roles, considerations, etc.

Thus, the influence of the 'liberal' approach, which, I take it, is subscribed to by the authors in respect of the process for selecting judges, is discussed too briefly. Although it raises truly interesting points, such as the lack of intrinsic difference between selecting senior judges for international and municipal tribunals or how international and national politics are not different, those claims are very sweeping and they can be points for discussion as well. Again, the selection of judges and its legitimacy – or not – the relevant process of the court in question, could be the subject of an article on its own. It is possible to speculate why the liberal approach points towards a prominent role for domestic parliament, but that is all that can be done with the material in the paper.

Regarding 'the trend towards wider participation in judicial proceedings', this testifies to an increasing recognition of the effects that judgments create beyond those which are immediately involved in the particular case. When discussing intervention before the WTO, the authors recall the *EC-Bananas* case.[7] *EC-Bananas* has been widely criticized for allowing the United States to intervene as a party in a dispute concerning European Union tariffs on bananas despite the fact that the United States produced – but did not export – bananas. Therefore, arguably, no United States' benefit was nullified by the tariffs in question. More discussion of the reactions to this very interesting point, including those in opposition to it, and any negative connotation that intervention in these circumstances would have been welcome here.

The insights into control by domestic parliaments of treaties once concluded are excellent, but need further development. It is true that a treaty, once approved, escapes control of parliament. Treaty practice, within the meaning of Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties (VCLT), for instance, would more often than not be undertaken by the executive rather than the legislature. So would authoritative interpretations like the one issued in respect of *Pope & Talbot*[8] by the NAFTA parties. These observations apply even more force-

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[7] WTO *EC – Regime for the Importation, Sale and Distribution of Bananas* (9 September 1997) WT/DS27/AB/R.

[8] *Pope & Talbot Inc v. Canada (Award on the Merits of Phase 2 of 10 April 2001)* (2005) 7 ICSID Rep. 102.

fully to customary law, which is beyond the remit of any one parliament individually considered, and arguably beyond that of governments unaware of customary rights and obligations. Something more could have been said on Art. 31 (3) (b) VCLT practice, which is one of the more obvious angles of this problem.

Finally, let me give you my views on the topic 'Does the Court Make Law?'. After all my years in the Court, I do not think so. The function of the Court is to apply international law in deciding cases. In doing so, the Court has always applied the existing sources of law specified in Art. 38 of the ICJ Statute. In so doing, the Court has interpreted and applied treaties, and determined whether customary law exists or is imagined. The Court has applied general principles such as *res judicata* or what appears to be much like it. Despite the prohibition in Art. 59 of the ICJ Statute, the Court has not been able to resist citing its decided cases. Presently, there is a matter before the Court regarding requests for permission to intervene under Art. 62 of the ICJ Statute. Art. 62 of the ICJ Statute allows the Court to interpret a multilateral treaty and a decision in such a case is binding on third parties who have chosen to intervene. Lawmaking by the Court therefore, in my view, does not take place. The Court would rather declare a *non-liquet* than make the law.

Notwithstanding the foregoing comments, I have to agree with the authors that the real problem of lawmaking by international courts is one of legitimation, as courts may not always satisfy well-founded expectations and the effect this may have on the domestic legal order.

There is no doubt that the paper has brought to the fore very interesting ideas and issues which I am confident will continue to be discussed here in this forum and beyond.

Discussion

P.-M. Dupuy: I would like to refer to Theodor Eisenberg, a famous German physician. He said there is nothing more practical than a good theory. And I think that Armin von Bogdandy provided us with an excellent theory in the sense that he gives us a framework which helps very much in going a bit further. In the exercise of public authority, I think he insisted very well on the necessity of maintaining at least an element of communication between individual lawmaking and general lawmaking, which could be also called *jurisdictio*. And I think that this is a very important point that we already touched this morning. That being said, the two contributors insisted on the legitimate expectations and one should perhaps add to that – it has been already alluded to – the number of expectations is growing more and more important and it emanates from different groups of people. There are the States, of course, but there are also other international courts – I'm referring for instance to the Appellate Body, request or quests for the legal nature of the precautionary principle for instance – and there are also supreme national courts, not only constitutional courts, which would like very much in a number of cases to be enlightened about complex issues. And in that respect, the role of the court and the ICJ in particular is becoming more and more important. The problem with it is that States will remain the main clients and are not always keen at the same level on receiving developments of the law by the Court itself. But that's another issue. Thank you very much.

M. Villiger: I am a judge at the European Court of Human Rights. May I make some personal remarks on the Strasburg Court (ECtHR) as a legislator. There can be no question of the judgment of the ECtHR having some fixed position in domestic law. The judgment is one step towards, possibly, new legislation or any other means whereby the authorities take over the judgment into their legal order. One cannot speak here of legislation for different reasons. First, judgments always arise in individual applications, an individual is filing a complaint against the State. There is not much room for legislation there. The fact that inter-State applications are envisaged by the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, European Convention on Human Rights) does not change this

conclusion fundamentally. Second, Art. 41 of the Convention, which provides that the ECtHR may, if it has found a violation, award the applicant just satisfaction. However, in the very first place the State should provide for *restitutio in integrum* and resort to the situation as it was before the violation occurred, i.e., if property was expropriated it should be returned. If *restitutio* is not possible, then material and immaterial damages may be called for. Nowhere is legislation mentioned. Third, Art. 1 of the Convention obliges States to comply in their legislation with the European Convention on Human Rights. Art. 1 is a 'sleeping beauty' as regards the potential role of the ECtHR as a legislator which does indeed exist. I believe that this sleeping beauty can still be woken. Fourth, the *travaux préparatoires* to the Convention are clear when they explain that the ECtHR will never be able to quash domestic decisions. Its judgments always have a declaratory function; they will state whether or not there has been a breach of the Convention and will give the reasons herefor. Still, there have been certain developments in this respect. In the first ten or so years, the ECtHR was very reticent about stating anything on the effects of the judgments. Then it started making some remarks *obiter*. In *Marckx v. Belgium* for example, it said very timidly that it was inevitable that the judgments would have some other effect in the domestic sphere than just between the applicant and the government. Then came the case of *Papamichalopoulos v. Greece*, where the ECtHR said that States, if necessary, may have to change the situation and resort to the situation before the breach occurred in their system. And in an Italian case, *Scozzari*, the ECtHR stated that it is up to the State to choose the means, general or individual, in order to comply with the judgment. If the State chooses general means, the ECtHR continued, then this must occur under the supervision of the Committee of Ministers. I think that is more or less the standard as it applies today. The State is free to choose general or individual means. The most important general means would be legislation. However, there have been other developments of which I shall mention two. First, the so-called pilot judgments, whereby, because of a legislative defect in domestic law, thousands of applications are being filed with the ECtHR. The ECtHR then issues a pilot judgment which leads to changes in the domestic legislation. Subsequently, the many other applications are dealt with in the same way. In this way the ECtHR can more or less directly influence the law in order to remedy the situation. The other development is the increasing authority of the judgments of the ECtHR. The Protocol No. 11 to the Convention of 1998 set up a Grand Chamber within the ECtHR with 17 judges ad-

judging its most difficult cases, and it is clear that, if the Grand Chamber issues a judgment, all States in Europe will read it carefully in order to see whether and to what extent it should be transposed into domestic law. To give you one example, *Salduz vs. Turkey* concerning the so-called 'lawyer of the first hour'. The judgment explains from when on after a person's arrest he or she shall have contact with a lawyer (*avocat*). There can be no doubt that the principles enunciated in *Salduz* will have a strong impact in the domestic law. Interestingly enough, *Salduz* concerned criminal proceedings against a 17 year old boy. It would have been very easy for the ECtHR to state that a 17 year old boy always need legal representation. But the ECtHR went beyond that, thereby enhancing the authority of the judgment, by generally stating the principles which the fairness of a criminal procedure require when a person has been arrested. Thus, the *Salduz* judgment is not a substitute for legislation, but will have a strong impact on it. To close the circle, whenever there are such legislative influences, of course, they will only concern a very limited issue, because the starting point is always the individual complaint by an applicant against a government. Thank you very much.

E. Brown Weiss: I want to start by congratulating Armin von Bogdandy on an exciting presentation and on his theoretical work. I also want to thank Abdul Koroma for his comments from the perspective of a judge of the International Court of Justice who links practice and theory. First, an observation and then two questions. As many of you know, in the international legal literature there is lots of discussion about a democratic deficit in international law. The argument is that customary international law suffers from a democratic deficit and thus cannot be a source of international law. The argument is used to strike at the legitimacy of international law. The argument about a democratic deficit also appears in other aspects of international law. What I am struck by in the presentation today is that the concept of deliberative democracy is being applied and developed in a way that is intended to increase the legitimacy of international law. The paper offers constructive suggestions for how one can implement and carry out more deliberative democracy in the international field. Two questions arise. In the framework presented, could you elaborate in more detail about the classical relationship between law as process and law as substance? In some of the discussion about the *Shrimp-Turtle* dispute before the WTO, the focus seemed to be on law as process. Does the framework mainly assume law as process? A more significant question relates to

the concept of a cosmopolitan citizen in today's context. We have a world in which increasingly many people everywhere communicate by Twitter, Facebook, internet and cell phones. Instant coalitions form and disband; people find information from many different sources or sometimes only the same source; blogs are common; and people share their views and mobilize others in support of them. It is a very different world than in the last century, in terms of the participation of the individual in the international system. What are the implications of this for the framework you present? Does it enhance participation in procedures? What are the limitations and problems that it may pose in implementing your theory? What are the implications for what happens after a judicial decision is made? Does a cosmopolitan citizen make it easier to implement decisions or to hold the Court accountable?

C. Tomuschat: First of all, I would like to thank the two speakers for their fascinating presentations. They do not seem to agree completely on all points, I understand. Now, let me just raise one issue. It's the *gouvernement des juges*. To what extent are we prepared to accept a *gouvernement des juges*? In that regard, international tribunals are different. In the case of the European Convention of Human Rights, we accept the traditional function of international and national tribunals to explain and apply human rights. This is something which is really genuine for judges. But when it comes to more technical matters, like in the case of European Union law, where you deal with economic and financial matters, you are faced with the dilemma that the jurisprudence of the Court in Luxemburg has always the last word. You cannot change it. You can't change anything. There exists as a matter of principle a structural deficit in the institutional framework. Every institution needs a countervailing power, some checks and balances. But regarding the European Court of Human Rights, and this morning we heard about WTO jurisprudence, there is no one who can change a single word. These bodies are the masters of their legal frameworks. Let me use a very bad word: How do we protect those international treaties from being hijacked by their supervisory bodies? What kind of countervailing power is there? There are indeed many powers, but there are obviously no parliamentary bodies. Normally, in a domestic setting, you have a parliamentary body which, if something goes wrong, can change the law. This is always possible. But in an international setting, because of the *pacta sunt servanda* principle, everyone has to agree, you can't do anything alone and not even by a majority vote. It's all left to the judges, the wisdom of the judges. Are they always wise? Do we want to

commit our future to judges in all fields? And in particular in economic fields where sometimes quick and fast decisions will have to be made? If something goes wrong in the international sphere, let me just refer to the famous *Mangold* judgment of the Luxemburg Court, which certainly was not a very good judgment. What can you do about it? Nothing, or very little. Accordingly, we have to explore much more attentively the system of countervailing powers. Let me just mention the conversation between judges where also domestic supreme courts intervene, and also the legal doctrine, which has a crucial role to play. We have seen that the Lisbon judgment of the German Constitutional Court was implicitly amended by its *Honeywell* judgment, certainly under the influence of the legal doctrine. In conclusion, it seems to me that we have to develop the mechanisms of countervailing powers.

A. Koroma: Thank you very much. May I apologize to all of you and beg your indulgence. I would simply like to pick up on what Christian Tomuschat just said; I think that will summarize my position. Should we – or do we want to – commit our future to judges? No! Absolutely not. I don't think we should allow that to happen. But then we do have some choices to make: on certain issues, we obviously can put our future in the hands of judges. But, in general, I don't think we should. And with the experience of many years as a member of the Court, I say that I don't think it would be wise to do so. I regret to have to say that I just don't think it would be a judicious thing to do. And, of course, the determination as to which decisions, which issues, will be entrusted to judges, to the courts, must not be arbitrary and unconsidered, but should, I think, be informed by theory. That, in my view, is where the theoretical underpinnings which Armin von Bogdandy has been endeavouring to elaborate should come in handy. So if we are skilful enough to match the two, then of course certain issues could be left in the hands of judges, but I don't think all issues should be. One other point which I should have made – but of which I am sure you are all aware – is that the Court, I'm talking about the International Court of Justice now, does not pronounce *ex cathedra*; the Court is not the Vatican. The Court has to justify its judgment; that is required by the Statute. We have to do that regardless of universal or not agreement with the judgment. While the Pope is infallible, the Court has to justify its judgment in detail on the basis of law. Of course, as I said, whether the Court gets it right or wrong is another matter. But I must now thank you for this most stimulating exchange. Please accept my apologies.

J. d'Aspremont: My question will be a very brief question because it's turning quite late. Actually, I'm raising a very elementary question, and it rather is a question of clarification pertaining to what we mean by international lawmaking by international courts and tribunals. Indeed, I have the impression that what we mean by 'lawmaking by international courts' directly impinges on how we devise our frameworks of legitimacy. And that brings me to the fascinating paper which has just been presented by Armin von Bogdandy. I think that lawmaking by international courts and tribunals is a very heterogeneous and multifold phenomenon. It is my impression that most of the time we focus on the making or the progressive development by international courts and tribunals of primary rules, i.e. rules of behaviour: those rules that have an effect on the behaviour of addressees. And I think these are precisely the rules which fall within Armin von Bogdandy's definition of exercise of public authority. This sort of lawmaking by international courts and tribunals boils down to a progressive development of primary norms. However, as we all know, international courts and tribunals also play a huge role and are very instrumental in the development of the rules of the system, i.e. 'secondary rules' according to British analytical jurisprudence. This is what I have tried to describe in my paper. Against the backdrop of this 'other' lawmaking role of international courts and tribunals, my question is the following: I am not sure that the development of secondary rules by international courts really fits with Armin von Bogdandy's definition of exercise of public authority. Or at least this constitutes a different kind of exercise of public authority. And so the question is the following: Do we need to legitimize the development of secondary rules by international courts to the same extent as primary norms? And if so, does Armin von Bogdandy's model or blueprint of legitimacy apply to the contribution of international courts and tribunals to the development of the rules of the legal system, i.e. secondary rules of international law?

D. Halberstam: Thank you for an excellent and informative panel on an important topic. I wanted to raise three quick points that amount to both cheering you on, on the one hand, and raising a very basic scepticism, on the other. I should make clear at the outset that, in many ways, what I say to you would apply to things that I've written myself on this topic. So this is a good deal of self-criticism and self-directed scepticism as well.

The first point is that when you talk about decoupling law from parliamentary politics, we must recognize that, in some ways, national sys-

tems have a similar decoupling problem. We are often far too generous with national systems regarding how we present the relationship between the courts and the parliament. Yes, we understand there to be a certain exception for constitutional decisions on the part of the courts by virtue of the dynamic that interpretive decisions of the court are difficult to overturn via constitutional amendment. But even in non-constitutional decision-making (i.e. in the case of judicial interpretation of statutes), it isn't all that easy to overturn judicial decisions either. And, indeed, some of this (independence and lack of accountability) holds true for the actions and interpretations of domestic administrative agencies as well.

Courts, administrative agencies, and other actors who have what you would call 'public power' in the domestic sphere also frequently operate at a certain level of removal from the threat of immediate quashing by what you might call the *volonté générale*. So we have some of the problems you identify at the domestic level as well.

Now what in part makes up for the lack of close parliamentary checks at the domestic level (and this is perhaps the bigger issue) is a connection to a broad-based public sphere. And so the concern in the international arena may be less a decoupling from any parliament than a decoupling from a broad-based public discourse and publicly shared culture and from commonly shared political understandings.

This brings me to my second point, which concerns your strategies of procedure, that is, the politicization of decision-making and the election of judges. You seem to be suggesting that we should be bringing in NGOs and non-State actors. But this, of course, is a huge question and one that involves controversies of which you yourself are quite aware. The big question is: Can we bring those actors into the conversation productively and should we be bringing those particular actors into the conversation at the present time?

That leads me to my third and final point, which concerns your suggestion that we are talking about the world citizen after all. All I offer here is a very basic point of scepticism or caution. In some ways we are certainly talking about the world citizen. But how thick is this concept today and how rich can it become? One elementary scepticism is that we don't have the rich public discourse, we don't have the rich institutionalization of the public discourse at the world level that would be necessary for the kind of politicization you advocate to be productive. And the sceptics' response is that in the absence of such a rich public sphere, paying attention to NGOs and the world citizen might make matters worse. This means that paying heed to the world citizen, to NGO's and

the like under conditions of a highly impoverished global public sphere may not just be a little bit of a good thing, it might be a little bit (or even a lot) of a very bad thing. And that is the core of the sceptics' reply: ought we to seek a gradual incorporation of the world citizen or ought we to proceed in a mode where, until we have a rich broad public discourse, we stick to the more State-centred system. That's not my own position (as you well know). But that, I think, is the basic scepticism that the paper, in its current form, does not address.

Y. Chen: I have a few comments on the interesting presentation 'International Courts as Lawmakers' by Armin von Bogdandy.

First, I think that to characterize the delivery of judgments by international courts as an exercise of public international authority in general legal discourse beyond the particular case between the disputing parties is probably to make an overstatement. It might be arguable that a particular judgment can legislate for the particular parties to a dispute in the sense that the judgment demarcates specific rights and duties or obligations for those parties. Such specific lawmaking may be justified by the consents of parties to submit their dispute to the court for a judicial decision. However, it is harder to assert an outside effect of judgments beyond the particular case. Unlike the practice within common law countries, there is no such doctrine of precedent in the international society that would affirm that a judgment delivered by a qualified court would later also bind other courts in similar cases. Nothing is clearer than Art. 59 of the Statute of the International Court of Justice stating: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. Considering that 'international courts are frequently embedded in contexts that may lever considerable coercive mechanisms in support of judicial decisions' may strengthen the argument that international courts exercise authority over particular parties, but it does not aid the argument that the international courts are exercising general international public authority. Of course, it can be observed that some judgments of international courts are cross-referenced to judgments or to judicial opinions expressed in judgments of other courts. Due consideration is sometimes given to the legal reasoning employed in prior judgments. However, default deference is in no sense equal to a legal obligation upon international courts to follow prior judgments. Default deference is simply a consideration of policy, convenience or comity. The choice between a decision of deference or defiance to the judgments of other international courts is more or less conditioned by the institutional politics of current interna-

tional courts. A reference to a precedent may be made simply to clothe another international court with greater legitimacy; while a deviation from a prior judgment of another court may involve a self-empowerment strategy within the market of institutional judicial competition. In short, the authority of the precedent may not be inherent in the content of the precedent itself. The precedent has acquired an authoritative face simply because the current court makes it so look via reference to it in the current judgment. Precedent is created by the followers who have the power to sanctify the precedent.

In critical understanding, the identification of and the reference to a precedent is a real exercise of power by international courts, since there is much room available to the judiciary in selecting and defining the precedent. Rules that are general and vague proclaimed in prior cases allow room for different or even conflicting application in subsequent cases. It is not rare to discover contradictory pronouncements about rules by different international courts especially in view of the proliferation of adjudicative bodies in international society nowadays. By referring to prior cases, international courts pick and choose, using those which help to justify themselves, while ignoring whichever cases do not favour their own lines of reasoning. So probably there is not necessarily much of value here on the generation of legal normativity. The contrary is equally possibly true: with the growing number of cases, the normative pull of a precedent fades.

Having said that, I would like to concede that when an international court exercises the interpretative function over a particular treaty as a supervising body, as does the European Court of Human Rights, in relation to its own judgments we may presume a doctrine of precedent may exist or develop. We can admit that such a court exercises a certain form of public authority beyond the particular case. However, in this instance, the public authority exercised does not seem to need such justifications as are proposed by the presentation.

Second, even if we suppose that international courts do exercise public authority in a few limited cases, the suggested strategies in response may still beg questions. The history of international law reveals that international judicial entities are established with the primary aim to resolve disputes among parties in a peaceful way. As is suggested by the presentation, the idea of international adjudication closely links to the pursuit of world peace. However, redefining international courts as public authorities and asking for broader public participation, including public transparency and third party intervention, may impair the very function and aim of the international judiciaries to achieve dispute set-

tlement. Generally practice shows that the State parties to disputes tend to privatize their dispute. They often hope to resolve the dispute confidentially, and maybe promptly. In particular, they are usually reluctant to lower the thresholds to accept third parties' intervention. And it is conceivable, should the international courts overly publicize the dispute resolution procedure, it would simply push the States to adopt an alternative more private mechanism of dispute resolution. The new interpretation of the roles of international courts as suggested by the presentation may impair their functions as fora for dispute resolution. I see some unresolvable tension here between the two different functions we assign to international courts, deriving from different understanding of international courts and conflicting policy goals that are to be pursued. What lies deeper may be the potential tension of the rationale of peace and democracy behind international adjudication.

And finally, the presentation proposed to legitimize the exercise of public authority by international courts in arguing that international adjudication should be guided by the idea of 'world citizenship'. But if we characterize international courts as institutions exercising public authority, then there arises not only the question of justification, but also the matter of ensuring proper restraints on the exercise of authority, since it is equally possible for international courts to pursue their own programme and consolidate their privileged roles as global actors under the slogan of developing something like a 'world citizenship'. Viewed from the perspective of ensuring the proper exercise of public authority by international courts, the specific exercise of authority by international courts in their relationships with the parties to the dispute may be even more significant in practice and relevant to legal scholarship than what has been conceived by the presentation. Thus the presentation has merit in drawing our attention to the fact of a growing powerful sector of judiciaries existing and active in international society, while the normative element of the project is however unfortunately weak. Thank you.

N. Sagüés: The title of this part of the session is 'International Courts as Lawmakers'. So, the discussion is not about the legitimation of international courts in general terms. We are in a second and special step: the legitimation of international courts as lawmakers. In this question I think we must distinguish two levels, one is formal, the other is about substance. The question about the formal level: I remember one phrase of Armin von Bogdandy. I agree completely with him, when he said, this evening, that in some questions, in some moments, it is impossible

to divide, it's impossible to split, for a tribunal, the process of performing the law and the process of creating the law. So, if in one case it is necessary to develop the law or to create the law, in order to practice, in order to perform the law, I think the question is over. It is not necessary to go to democratic arguments. It's only a question of necessity. This is not a new idea, it is very old. In 1803, Marshall said in *Marbury v. Madison* that when there is a conflict between a superior norm (the Constitution), and other inferior norm that violate the superior one, it is necessary to create a judicial review in order to protect the Constitution. So, I think that the argument of the necessity is enough to solve the problem of the ability or the capacity of international courts in order to develop or create the law. The second question is about substance: the problem of essential legitimation about the rule or the law created by the international court. It's a question that depends on philosophical ideas, and the ideological position of each one. I think that, in general terms, we may consider that the law created or developed by one international court, has legitimation if it is according to the current points of view about justice of international community.

P. Sands: I didn't want to take the floor but I am prompted by Christian Tomuschat's intervention. I believe that there is an important distinction between procedure and substance that has to be addressed. We find examples, for example in the ICSID case law and in investment treaty arbitration case law, on the issue for example of most favoured nation and its interpretation. I doubt many States imagined that when they were putting that provision into treaties that they might be expanding the basis of jurisdiction. If States are unhappy with an award, they can renegotiate their treaties to put in clearer terms the language that they thought they intended to do. But that doesn't always apply. And I'd like to inject into this discussion some reflections on the legitimacy issue, and refer to one case that hasn't been mentioned, that's the case of *CMS v. Argentina*. I must declare an interest, as I was counsel in the annulment process. You ended up with a situation in which a distinguished *ad hoc* committee, including James Crawford and Gilbert Guillaume, ruled that the award in the underlying arbitration was manifestly erroneous as a matter of law on numerous issues, but they did not have the power to do anything about it. That left a situation in which a State was required as a matter of ICSID law to make a payment of a couple of hundred million dollars off the back of an award that has been found by a distinguished panel to be wrong as a matter of law. And the question then arises: What does the State do? That issue fell

into my inbox in the sense of linking your panel with a previous panel. The lawyer then gets asked: What do we do? And this raises an issue as to the relationship between legality and legitimacy. As a matter of law, a State has to pay. But which State's treasury is going to write a cheque for US$ 200 million off the back of an award that has been found to be manifestly wrong as a matter of law. I doubt many national treasuries will authorize such a payment, notwithstanding the fact that it is required as a matter of law. And that raises the fundamental question: in the context of a legal system that is disaggregated, that is fragmented, in which there is no legislature that can step in and correct a perceived wrong in the circumstances, what is to be done?

A. von Bogdandy: Thank you for your interest and critique. I'm particularly grateful to Abdul Koroma. He has invested so much time into reading and developing forward-looking comments. I agree with those who found my statements a bit sweeping. But my presentation is based on a detailed analysis of courts: the ICJ, the Inter-American Court and the European Court of Human Rights, ITLOS, investiment tribunals, the WTO Appellate Body and so on and so forth. For some, each institution needs a specific discourse attuned to its specific regime. But at the same time there is a need for general arguments. It must be possible to speak of the international judiciary in general. Sure enough, at that level of abstraction one cannot determine the legitimacy or legality of individual decisions. In fact, you won't find any such determination in my paper.

Abdul Koroma criticized the use of the 'domestic analogy'. What use do I make of it? Its role is not to find solutions. The role is rather to better see the problems. The domestic analogy tells us that there might be a problem if judges operate without a corresponding parliament. That does not suggest the same answer as in the domestic realm. Global governance works differently, so it is likely that convincing solutions will also be different.

Then there was the question if it is possible to speak of a global or international constitution. I do not deny that constitutionalism is a powerful paradigm. But the constitutional argument at some point needs to address the body of thought on the *pouvoir constituant*, the 'We the people' as we find it in the American Constitution. For most international courts, I'm not convinced that they exercise a constitutional function.

On the cosmopolitan citizenship. Cosmopolitan citizenship is less a concept of eggheads than many think. President Obama mentions it regularly. There are certainly limits and problems in the concept, but I think it's a meaningful as has been the concept of European citizenship in the seventies and eighties, before it became a concept of positive law.

The last point, on Christian Tomuschat: who has the last word? In my understanding, the very point and charm of our current situation is that there is no last word. Any domestic constitutional court (like the Federal Constitutional Court) has to face that its decision can be reviewed by the European Court of Human Rights and that this court might find its decision wanting. At the same time, every international court will face the situation that its decision will not be followed by domestic courts. This is the core of our pluralist constellation. I suggest to see it as a new mode of checks and balances for the 21st century.

Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law

*Paper submitted by Ingo Venzke**

I. Introduction

Institutions for the settlement of international disputes are products of competing interests and aspirations. They testify to rivalling and changing ideas about international order and bear witness to incremental shifts in the antinomies that underlie their concrete shape. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for

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and what it actually does. While international adjudication could for long plausibly be understood as a sporadic affair concerned exclusively with the successful resolution of disputes between immediate parties, the quantitative increase in international adjudicators and in international decisions over the past two decades has gone hand in hand with a shift in quality. Even if the demand for the pacific settlement of disputes has not lost its force or salience, it has become more and more evident that international courts and tribunals do much more than this. Notably, they have developed international norms in their practice, shaped legal regimes and conditioned the legal situation of all those who are subject to the law. The more such systemic effects of international judicial decisions are recognized, the more traditionally prevailing requirements for judicial procedures are supplemented by new demands. The successful settlement of disputes as the overarching goal and respect for the will of the immediate parties then no longer dictates what the procedures look like. Instead, procedural law starts to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.[1]

At their early modern stages, mechanisms for the settlement of international disputes by judicial means were very flexible and bent so as to accommodate the interests and concerns of the parties. Arbitration was for a long time the only modus of settling disputes, very much prone to the vernacular and ethos of diplomacy rather than to ideas connected with the somehow distinctly judicial resolution of conflicts. The First Hague Peace Conference of 1899 for example produced very rudimentary procedural rules for the Permanent Court of Arbitration, subjecting crucial decisions about the form of the proceedings and selection of arbitrators to the agreement of the parties.[2] Léon Bourgeois, a French

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[1] In this article I build on A. von Bogdandy and I. Venzke 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 EJIL 7 (forthcoming). On the tensions between understanding adjudication as a matter between the parties alone and its actual effects on third parties, see M. Jacob 'Precedents: Lawmaking Through International Adjudication' (2011) 13 GLJ 1005; R. Wolfrum 'Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V. Götz, P. Selmer and R. Wolfrum (eds) *Liber amicorum Günther Jaenicke* (Springer Heidelberg 1998) 427. Also see A. von Bogdany and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

[2] D.D. Caron 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 AJIL 4; R.P. Anand *International Courts and Con-*

lawyer and member of the court since 1903, argued at the Second Peace Conference in 1907 that it was absolutely indispensable to pay utmost respect to the will of the parties in order to ensure that they submit their disputes to adjudication in the first place. Next to political expedience there have also been elements of justice and prudence embedded in this idea: the will of State parties constitutes the almost exclusive building block for legitimate international order and all international action needs to be based on their will, so the argument goes.

Such a conception remains vital but institutional developments over time give evidence to alternative views just as well. Already at the time of the Second Peace Conference in The Hague, US Secretary of State Elihu Root argued that only independent permanent judges could gain the confidence of the parties. The only promising avenue for the resolution of international disputes, he maintained, was to resort to standing impartial judicial mechanisms. Root argued at the 1907 national peace congress in New York: 'What we need for the future development of arbitration is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility'.[3] The establishment of the Permanent International Court of Justice (PCIJ) in 1920 was a large step into that direction, hailed by many at the time as a grand achievement and the beginning of a new era.[4] Some viewed it as the central organ of the international

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temporary Conflicts (Asia Pub. House New York 1974) 28. According to James Brown Scott, the Court was not worthy of its name. In his view, it was not a court because it was made up of diplomats, not judges, and neither was it permanent but constituted anew with every case. See the statement by J. Brown Scott reproduced in Anand (Ibid.) 33. The Permanent Court of Arbitration, to be clear, has not lost its appeal and continues to offer important avenues for dispute resolution.

[3] Quoted in H. Wehberg *Das Problem eines internationalen Staatengerichtshofes* (Duncker & Humblot München 1912) 55.

[4] J.B. Scott 'A Permanent Court of International Justice (Editorial Comment)' (1921) 15 AJIL 53 (stating that 'we should […] fall upon our knees and thank God that the hope of ages is in process of realization'); N. Politis *La justice internationale* (Hachette Paris 1924) 182 (understanding the court as 'l'avènement d'une ère nouvelle dans la civilisation mondiale'). Cf. M. Koskenniemi 'The Ideology of International Adjudication and the 1907 Hague Conference' in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Nijhoff Leiden 2008) 127.

community and projected their hopes for international peace and human betterment onto this new institution.[5]

The debates at these informative times centred on the balance between the will of the parties, on the one hand, and the autonomy of the judicial proceedings as well as the powers of the adjudicators, on the other. Many commentators advanced the argument that beyond the settlement of the concrete disputes, international courts should rise to the occasion of developing international law in their practice. Even if the PCIJ could certainly not live up to all expectations, it did contribute to international legal developments and helped form the legal order. It not only did so as a matter of fact, but shifts in its argumentative practice indicate that it increasingly embraced the ethos of an actor who partakes in dynamic development of international law.[6] Be it with or without such a self-understanding or intention, international judicial institutions have by now become significant actors in the making of international law. They shape legal regimes and develop international law in a way that escapes the doctrine of sources in international law and that largely exceeds the reach of States.[7]

This contribution aims at elucidating the antinomies and changes in international dispute settlement by examining trends in the procedural law of a number of prominent international judicial institutions. It highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in demands for transparency, publicness and participation in international proceedings. It investigates by way of comparison, how the procedural law of international courts and tribunals copes with similar problems, in particular with 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 yet broader debates about the nature of the international legal order and its deep social structure.

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[5] See with further references O. Spiermann *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP Cambridge 2005) 14.

[6] Spiermann (note 5). Also see the early contribution by H. Lauterpacht *The Development of International Law by the Permanent Court of International Justice* (Longmans Green London 1934).

[7] See in detail A. von Bogdandy and I. Venzke 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 13 GLJ 979.

With this focus, the article does not touch on the jurisdictional relations between courts and tribunals.[8] It further limits itself to a more detailed discussion of a number of procedural aspects that may best respond to legitimatory problems of judicial lawmaking.[9] Lastly, the article focuses on those institutions in which at least one party is a State and it marginalizes the fields of international human rights protection and international criminal law. While those fields might be connected to a thicker notion of dispute settlement and to rich accounts of international peace, they ultimately show elements of a different paradigm and therefore recede into the background for the present purposes.[10] Within these confines, the article first exposes multiple antinomies underlying procedural law, drawing attention to how they are embedded in larger frameworks. It also briefly discusses the making of procedural law and highlights the considerable discretion of many international courts and tribunals over their own procedures (II). The main task will then be the comparative study of recent trends in the procedural law of international judicial institutions in light of legitimatory problems stemming from the systemic effects of international adjudication. Issues of transparency and publicness, third party intervention and *amicus curiae* submissions, as well as avenues of judicial review are most significant in this regard (III). These trends harbour valuable potentials for improvement but also considerable perils. The article concludes with a sketch of possible future dynamics (IV).

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[8] For a discussion of issues of *lis pendens* and judicial comity under the rubric of international procedural law, see B. Simma 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265. In further detail see Y. Shany *The Competing Jurisdictions of International Courts and Tribunals* (OUP Oxford 2003).

[9] It largely excludes, for example, the very rich and no less intriguing law pertaining to issues of evidence and standards of proof, recognizing however that developments in these fields also respond to shifting ideas about the nature and function of international adjudication. See in detail M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Heidelberg 2010).

[10] This is less of a loss in view of the study undertaken by F. Mégret '"Beyond Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. Also see M. Kuhli and K. Günther 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' (2011) 13 GLJ 1261.

II. Multiple Antinomies and the Making of Procedural Law

The procedural law of international judicial institutions is largely a product of their own making.[11] 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'.[12] International procedural law mirrors the historiography of international adjudication more generally – it is a sound expression of competing conceptions of the functions of international courts and of the expectations raised with regard to their work.

The interplay of three antinomies has left its mark. First, and of little concern from the present perspective, the procedural law of international judicial institutions oftentimes strikes a compromise between different national legal traditions – in particular between adversarial legal systems of the common law and the inquisitorial process of civil law systems.[13] Second, the traditional conception of international arbitration battles with ideas closer connected with permanent courts. While the former ties the judicial process to the will of the disputing parties, the latter tend to uphold a stronger autonomy on part of the court.[14] The juxtaposition of ideas endorsed by Léon Bourgeois and Elihu Root are illustrative of a deep conflict about the potentials and functions of international dispute settlement and, yet more fundamentally, of diverg-

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[11] 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. R. Kolb 'General Principles of Procedural Law' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 793 (795); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

[12] J.–M. Sorel 'International Courts and Tribunals, Procedure' (2007) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (12 February 2011) para. 1.

[13] See in particular the prominent debates in international criminal law, above all in the ICC. A. Cassese *International Criminal Law* (2nd edn. OUP Oxford 2008) 353; C. Kress 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603.

[14] S. Rosenne *The Law and Practice of the International Court 1920–2005* (4th edn. Nijhoff Leiden 2006) vol. I 9.

ing views on the relationship between law and politics.[15] Closely intertwined is a third main antinomy, which is of elevated interest. Understandings of the international legal order that stand in close analogy to private law thinking compete with views in which international courts act as parts and organs of an international public order.[16] In the former understanding, the judicial process builds on maxims of negotiation between the disputing parties; in the latter, adjudicating bodies are predisposed to act in pursuit of public interests. They may then act on their own motion and with different, broader powers. Not the negotiations of the parties characterize the proceedings, but maxims of investigation by the court or tribunal.[17]

The procedural law of the PCIJ, setting the precedent for the International Court of Justice (ICJ) and influencing younger courts and tribunals, offers an illustrative example of the interplay between these antinomies. It also serves as a fitting case in point with regard to the large discretion that the PCIJ had in forming its own procedures. Art. 30 of the PCIJ Statue enabled the court to adopt its own rules of procedures, within the bounds of its Statute, to be sure, but those bounds were so loose that they hardly amounted to significant constraints. It was thus also a crucial and enormously influential decision by the judges themselves not to categorically subject the judicial process to the will of the disputing parties but to retain a firm grip and ultimate authority over the proceedings. Should the parties come to unanimous agreement and push for changes in the procedures, and should such changes be justified by the particularities of the case, it would still be up to the Court to

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[15] Consider the strong and eloquent positions taken by the Russian delegate Friedrich von Martens and the German delegate Philipp Zorn, both arguing for a preservation of political elements in arbitration. H. Wehberg 'Friedrich von Martens und die Haager Friedenskonferenzen' (1910) 20 Zeitschrift für internationales Recht 343; P. Zorn *Die beiden Haager Friedenskonferenzen von 1899 und 1907* (Kohlhammer Stuttgart 1914). A bit later Manley O. Hudson and Hans Kelsen offered excellent arguments to the contrary, building on the qualities of a distinct judicial process. M.O. Hudson 'The Permanent Court of International Justice – An Indispensable First Step' (1923) 108 American Academy of Political and Social Science, Annals 188; H. Kelsen *Law and Peace in International Relations* (Hein Buffalo New York 1942).

[16] Compare C.H. Brower II 'The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law' (2008) 18 DukeJComp&IL 259.

[17] Kolb (note 11) 809–10 paras 27–30.

accept and implement these changes.[18] The parties are left with rather minimal possibilities of influencing the procedural law. It is precisely not subject to their will, but in the hands of the Court as an autonomous actor.[19] Also Art. 30 of the ICJ Statute vests the Court with the power to 'frame rules for carrying out its functions. In particular, it shall lay down rules of procedure'.

The procedural law of international courts and tribunals is first and most straightforwardly the product of formal legislation on part of the judges. Beyond this formal act of lawmaking, procedural law is shaped in the practice of adjudication. Its making can also show how international courts and tribunals influence each other in their practice.[20] The international judicial institutions created ever since the first feeble steps of the PCIJ usually enjoy the competence to decide about the concrete form of the judicial process.[21] They certainly need to comply with the provisions of their foundational treaties, but these provisions are, with some due qualifications and nuances, rather vague. The framework set up by the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) offers more detail and amendments are only loosely tied to the agreement of Members.[22] Changes in the procedural

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[18] Rule 32 of the Rules of the Court. Cf. J. Kolasa 'Origins and Sources of Procedural Law of International Courts: ubi jus, ibi remedium' in V. Epping, H. Fischer and W. Heintschel von Heinegg (eds) *Brücken bauen und begehen: Festschrift für Knut Ipsen zum 65. Geburtstag* (Beck München 2000) 185 (190).

[19] This stands in contrast to the law of the Permanent Court of Arbitration whose default procedures yield to any agreement between the parties. See Art. 41 of the Convention for the Pacific Settlement of International Disputes ([adopted 18 October 1907, entered into force 26 January 1910] [1907] 205 CTS 233).

[20] Consider, for instance, the history of provisional measures that tells the intriguing story of a vivid dynamic between international courts and tribunals, K. Oellers-Frahm 'Expanding Competence to Issue Provisional Measures – Strengthening the International Judicial Function' (2011) 13 GLJ 1279.

[21] Art. 16 of the ITLOS Statute; Art. 17 (9) of the DSU; Art. 26 (d) of the ECHR; Art. 15 of the ICTY Statute; Art. 14 of the ICTR Statute.

[22] Annex 3 to the DSU contains the panels' working procedures. Noteworthy is also Art. 12 (2) of the DSU stipulating that the 'Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'. The Appellate Body formulates its working procedures in consultation with the Chairman of the DSB and with the Director-General. According to Art. 17 (9) of the DSU it suffices, however, that it only informs the Members about the procedures it adopts.

law of the International Centre for Settlement of Investment Disputes (ICSID), in contrast, may only be introduced by a two-thirds majority in the Administrative Council, composed of one member from each contracting party. In addition, parties bringing their case before the ICSID can agree to adapt the procedural law for their concrete case.[23] This is not particularly surprising in view of the tradition of arbitration. Also changes in the rules of procedure and evidence of the International Criminal Court (ICC) require the affirmative vote of two-thirds of the Assembly of State Parties.[24]

In spite of notable differences, it generally holds true that the procedural law significantly develops in the practice of adjudication and under the tutelage of the respective courts and tribunals. Not only can most international judicial institutions decide autonomously about the rules of procedures, but beyond this avenue they can adopt directions to guide their work whenever the statutory basis does not regulate an issue in sufficient detail or when it is simple mute on certain aspects of the judicial process.[25] Such practice directions, sometimes also termed guidelines,[26] are not binding but they do have a remarkable influence on the proceedings.[27] Even with regard to the rather specific and meticulously detailed provisions of the DSU has the practice of adjudication set procedures in place, which arguably deviate from the treaty provisions.[28] It remains questionable and rather doubtful, however, whether international judicial practice has generated general principles, which

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[23] Rule 20 (2) of the ICSID Arbitration Rules.

[24] Art. 51 of the Rome Statute of the International Criminal Court.

[25] Neither the ICJ Statute nor the Rules of the Court make any mention of directives. This has not kept the Court from using directives in the shaping of its work and procedures. Cf. S. Rosenne 'The International Court of Justice – New Practice Directions' (2009) 8 LPICT 171.

[26] Art. 50 of the ITLOS Rules.

[27] For example, international courts and tribunals have adopted directives on the issue of judicial independence or pronounced on this issue in their decisions. See R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271; Y. Shany and S. Horovitz 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities' (2008) 21 LJIL 113.

[28] Consider for instance the take on confidentiality by the Appellate Body, p. 247 et seq. below.

may amount to a source of procedural law.[29] But even if one does not wish to elevate practice to such prominence, this doubt does not take away from the discretion and authority that international courts and tribunals enjoy in making their procedural law.

Their relative autonomy opens up avenues for mutual influence, possibly for processes of learning between institutions, and it allows for adaptations that tend to assimilate procedural laws of specific international judicial institutions, while marked differences do remain. It would be inadequate to speak of one singular international procedural law that applied across the board but, nevertheless, it is possible to note converging trends in the explicit provisions and even more so in the practice of adjudication.[30] Also propositions for reforms are oftentimes formulated in a comparative perspective. The discussion about possibilities for appellate review on the international investment arbitration, for example, is characterized by jealous leers towards the WTO context.[31]

Change and flexibility of the procedural law of international courts and tribunals long for orientation. It is decisive that legal and political propositions are backed by convincing normative arguments that are embedded in ideas about international order. International courts and tribunals exercise authority over the proceedings. At the same time, procedural law is part of the justification of judicial authority. This article understands trends in the changing procedural law as expressions of the insight that it is increasingly insufficient to only view international dispute settlement as the successful resolution of concrete cases. Instead, the systemic repercussions of international adjudication and le-

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[29] Robert Kolb therefore speaks of 'general principles' not as a source of law in the sense of Art. 38 (1) (c) of the ICJ Staute but aptly as 'general normative proposition considered to be expressive of the ration of a series of more detailed rules' or as 'hallmark of a legal idea that permeates different questions of law', Kolb (note 11) 793 (794) para. 2. He further leaves open the question whether his observations in the context of the ICJ may be generalized. Ibid. 797 para. 6. Less reluctant and in the end not convincing in this regard is Chester Brown who carves out general principles as sources of law from the practice of adjudication, Brown (note 11) 53. Cf. A. von Bogdandy 'General Principles of International Public Authority: Sketching a Research Field' (2008) 11 GLJ 1909 (on the different uses and functions of general principles in international law).

[30] See the rich material gathered in Brown (note 11). With nuances also compare Benzing (note 9).

[31] See *infra* notes 131–133.

gitimatory concerns with regard to international judicial authority have come to inform the procedures of international judicial institutions.

III. Manifestations of Change

There are a number of fields of procedural law that express antinomies and change in international dispute settlement. For example, international courts and tribunals may resort to their own mechanisms of fact-finding or they may call on their own experts rather than relying on the submissions of the parties alone.[32] It is also intriguing that provisional measures have commonly been understood as serving to avert an irredeemable loss of one of the parties, and that lately also community interests, such as the protection of the environment, appear as targets of such measures.[33] The present article focuses on the repercussions triggered by judicial lawmaking and international judicial authority.[34] Avenues for participation and increased publicness, introducing different interests and opening up possibilities for public scrutiny and deliberation, are taken to be of primary importance in this regard. When international judicial practice has systemic effects beyond the disputing parties and when it conditions others in the exercise of their freedom, it seems only plausible to give those others a meaningful say in the making of judicial decisions. Trends in the procedural law of international courts and tribunals give evidence to an increasing recognition of such systemic effects and partake in offering responses to problems of legitimation.

There remains a fundamental question. How may judicial procedures be understood as spaces in which the legitimacy of international judicial practice may be strengthened in a way that would also live up to fundamental democratic premises, while neither calling into doubt the

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[32] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma) (20 April 2010)* <http://www.icj-cij.org> (12 February 2011) 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).

[33] M. Benzing 'Community Interests in the Procedure of International Courts and Tribunals' (2006) 5 LPICT 369.

[34] See in further detail von A. von Bogdandy and I. Venzke 'International Courts as Lawmakers' p. 161 et seq. above.

judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes? Two features come to mind by way of which judicial procedures could strengthen the legitimacy 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 a debate about the case and the court is required to address their arguments in a reasonable manner. 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 *jura novit curia* – also extends to questions of law. The second feature places the judicial decision within the general context of justifying public authority. The open discussion of interests and competing positions is part of the social basis that is necessary for democratic legitimation. Judgments of courts form part of this basis and may contribute to legitimacy if only they are embedded in normative discourses of a certain quality. Both features raise very similar demand for judicial institutions' procedural law.

1. Publicness and Transparency

a. Oral Proceedings and Public Hearings

A crucial link for publicness and transparency are the oral proceedings. Some court statutes such as Art. of the 46 ICJ Statute explicitly provide that '[t]he hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted'.[35] The detail of the Rules of Court (Arts 54–72) on this issue shows the reluctance on the part of State parties to submit to the force of arguments in public oral proceedings.[36] In the practice of the Court, it is almost always the case that the oral proceedings are public and the Rules of Court allow to exclude the public only from parts of the proceedings. Such is the exception that is in need of justification.[37] In addi-

[35] See Art. 46 of the ICJ Statute; Rule 59 of the ICJ Rules of Court; Art. 26 (2) of the ITLOS Statute; Rule 74 of the ITLOS Rules of the Tribunal; Art. 40 of the ECHR; Rule 63 (2) of the ECtHR Rules of Court; Arts 67 and 68 (2) of the ICC Statute.

[36] Sorel (note 12) para. 18.

[37] von Schorlemer 'Article 46' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1063 (1065) para. 5.

tion to the fact that the proceedings are in principle public, the ICJ introduced in 2004 live transmissions on the internet, of oral hearings and of the announcement of its judgments. With this move, the Court says, it responds to the considerable interest of the general public.[38] As anybody interested in its Advisory Opinion on Kosovo's Declaration of Independence knows, demand for this service was so high that the Court's website collapsed – indication of the demand for publicness and room for improvement.

Art. 26 of the ITLOS Statute is modelled in close analogy to the example of the ICJ. The procedural law of both institutions is in significant parts plainly identical. Also Art. 40 of the ECHR provides that '[h]earings shall be in public unless the Court in exceptional circumstances decides otherwise'.[39] Until now, the court has never decided that hearings should not be public.[40] In addition, the documents in the possession of the Registrar of the Court are accessible by the public, as long as the President of the Court does not decide otherwise.[41] The same qualifications apply here as in the case of the hearings.[42]

In other contexts like the WTO, confidentiality is the rule. But even here procedures have opened up in practice to meet some demands for publicness and transparency.[43] 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 better be public.[44] Of course it remains critically important to pay due respect

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38 UNGA 'Report of the International Court of Justice' (2 September 2004) UN Doc. A/59/4 para. 266.

39 The specific circumstances are further specified in Art. 63 (2) of the ECtHR Rules of Court.

40 J. Frowein and W. Peukert *Europäische Menschenrechtskonvention: EMRK-Kommentar* (3rd edn. Engel Kehl am Rhein 2009) 534.

41 Art. 40 (2) of the ECHR.

42 Art. 33 of the ECtHR Rules. See Frowein and Peukert (note 40) 535.

43 Arts 14 (1), 18 (2) and 17 (10) of the DSU provide that procedures and written submissions are confidential. Cf. L. Ehring 'Public Access to Dispute Settlement Hearings in the World Trade Organization' (2008) 11 JIEL 1021.

44 P. Sutherland et al. 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ('Sutherland Report', 2004)' <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> (18 June 2011) paras 261 et seq.

to the interests of the parties. Also sensitive trade secrets must be kept. Proceedings do often remain behind closed doors, in particular proceedings at the stage of panels, which are, in comparison to the Appellate Body, both as an institution as well as in their personal membership closer to the ethos of arbitration.[45]

And yet there is room for manoeuvre. For instance, the parties and the panel in *EC – Bananas III (Article 21.5 – US)* agreed to open the doors to the public.[46] In *Brazil – Retreaded Tyres*, the Centre for International Environmental Law advanced with the initiative to transmit the first session of the panel live on the Internet but was met with rejection on the part of the panel, deciding in consultation with the parties that the session should be confidential in accordance with the Working Procedures.[47] But this is not generally the case. The position taken by the panel in *Canada – Continued Suspension* is most remarkable. It held public hearings and backed this decision with the witty argument that the rules providing for confidentiality only pertained to the internal deliberations of the panels, but not to the exchange of arguments between the parties – a truly innovative interpretation of the rules of procedure.[48] Lately, the parties and the panel in *Measures Affecting the Im-*

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[45] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP Cambridge 2006) 289; C. 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' (2002) 36 JWT 605.

[46] WTO 2007 News Items 'WTO Hearings on Banana Dispute Opened to the Public' (29 October 2007) <http://www.wto.org/english/news_e/news07_e/dispu_banana_7nov07_e.htm> (12 February 2011); P. van den Bossche *The Law and Policy of the World Trade Organization* (2nd edn. CUP Cambridge 2008) 212.

[47] WTO *Brazil – Measures Affecting Imports of Retreaded Tyres* (12 June 2007) WT/DS332/R para. 1.9. See further L. Johnson and E. Tuerk 'CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View' in T. Treves et al. (eds) *Civil Society, International Courts and Compliance Bodies* (Asser Press The Hague 2005) 243.

[48] WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (31 March 2008) WT/DS321/R para. 7.47.

portation of Apples from New Zealand[49] agreed to open the meeting of experts and the further proceedings up to the public.[50]

When it comes to the Appellate Body, whose members tend to understand themselves more as judges of an ordinary court, maybe even of the 'World Trade Court', public proceedings are rather common.[51] In 2009 the Appellate Body asserted self-confidently that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rulesbased system of adjudication. Consequently, under the DSU, confidentiality is relative and timebound'.[52] It is also noteworthy that it is due to the initiative of the Appellate Body that there are oral proceedings at all, something not provided for in the DSU.[53]

Procedures in the ICSID framework fall short of those in the WTO on the point of publicness and transparency. But first cracks start to show that may soon widen so as to accommodate growing demands for better possibilities of participation and public scrutiny.[54] The understanding

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[49] WTO *Australia – Measures Affecting the Importation of Apples from New Zealand* (9 August 2010) WT/DS367/R paras 1.18–1.19.

[50] WTO 2007 News Items 'WTO Hearings on Apple Dispute Opened to the Public' (16 June 2009) <http://www.wto.org/english/news_e/news09_e/hear_ds367_16jun09_e.htm> (12 February 2011).

[51] Ehlermann (note 45); G. Abi-Saab 'The Appellate Body and Treaty Interpretation' in Sacerdoti, Yanovich and Bohanes (note 45) 453.

[52] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III, Procedural Ruling para. 4; WTO *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute – Report of the Appellate Body* (16 October 2008) WT/DS321/AB/R, Annex IV *Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing* paras 3–6.

[53] WTO *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R, Annex III Procedural Ruling para. 6.

[54] A.J. Menaker 'Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Invester-State Arbitration' in K. Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (OUP Oxford 2010) 129; C.N. Brower, C.H. Brower II and J.K.

that tribunals have come to increasingly touch on issues of public interest has pushed such demands to increasing relevance when compared to imperatives stemming from the confidentiality of the proceedings.[55] In June 2005, the OECD Investment Committee threw its authority into the discussion when it maintained that '[t]here 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'.[56] 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.[57]

Many decisions with regard to the procedural law in ICSID remain subject to the agreement of disputing parties. Rule 32 (2) of the new Rules of Procedure for Arbitration now provides that a tribunal may, in consultation with the Secretary-General, allow interested individuals to

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Sharpe 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration International 415; C. Zoellner 'Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings' in R. Hofmann and C.J. Tams (eds) *The International Convention for the Settlement of Investment Disputes (ICSID) – Taking Stock After 40 Years* (Nomos Baden-Baden 2007) 179; C. McLachlan, L. Shore and M. Weiniger *International Investment Arbitration: Substantive Principles* (OUP Oxford 2007) 57 para. 3.40.

[55] See S. Schill 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 13 GLJ 1083.

[56] OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

[57] Rule 32 (2) of the ICSID Arbitration Rules (10 April 2006). For an example from legal practice see for instance *Aguas Argentinas SA Suez v. The Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* ICSID Case No. ARB/03/19 para. 6 ('While the *Methanex and UPS* cases […] cited by Petitioners did indeed involve public hearings, both claimants and respondents in those cases specifically consented to allowing the public to attend the hearings. The crucial element of consent by both parties to the dispute is absent in this case').

attend and observe the oral proceedings, if neither party objects. This has turned out to be a sensible compromise in practice.[58] It also merits emphasis that Rule 48 (4) provides that '[t]he Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal'. This appears to indicate that the publication of excerpts is not subject to the agreement of the parties.[59]

The procedural law of international criminal courts and tribunals deviates from the general rule of publicness of proceedings for quite distinct reasons. Criminal proceedings need to respond to different demands and imperatives. Art. 79 of the ICTY Rules on Procedure and Evidence stipulate for example that sessions may be closed in order to effectively protect witnesses. Should a chamber decide to hold confidential sessions, it needs to make the reasons for this decision public, which again underscores the exceptional character of such a decision.[60]

b. Judicial Deliberations and Individual Opinions

Next to oral proceedings, the deliberations of the judges may themselves be tested against demands for publicness and transparency. On first sight this thought evidently runs counter to the explicit provisions of almost all international courts and tribunals and also counter to the common view upheld in legal doctrine. Art. 54 (3) of the ICJ Statue states clearly in an exemplary fashion: 'The deliberations of the Court shall take place in private and remain secret'. At no time has this been subject to discussion in practice.[61] Shortly before the decision on preliminary measures in the *Nucelar Test Case* between Australia and France in June 1973 some pieces of information were leaked to the Australian press. The Court strongly condemned this fact and in a biting

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[58] J. Delaney and D. Barstow Magraw 'Procedural Transparency' in P. Muchlinski, F. Ortino and C. Schreuer (eds) *The Oxford Handbook of International Investment Law* (OUP Oxford 2009) 721 (774).

[59] Rule 48 (4) of the ICSID Arbitration Rules.

[60] Von Schorlemer (note 37) 1070–71 para. 28. Also compare for example the clear provisions of Arts 67 and 68 (2) of the ICC Statute.

[61] Art. 54 was reproduced from the PCIJ Statute and is equal to Arts 77 and 78 of the Convention for the Pacific Settlement of International Disputes (1907). See B. Fassbender 'Article 54' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1171 para. 1.

resolution it reiterated its view that 'the making, circulation or publication of such statements is incompatible with the fundamental principles governing the good administration of justice'.[62] For the case of the ICJ, the conclusive summary by Bardo Fassbender is largely unchallenged: 'the secrecy of proceedings', he maintains, 'is essential for the continued trust that the Court enjoys among States and international organizations'.[63]

This view has a lot in its favour. But it is not categorically without alternative. When it comes to very important issues, the Swiss *Bundesgericht* for example deliberates in public.[64] It might merit second thoughts to explore which consequences such a working mode would have for certain international courts and tribunals. At this point, it appears adequate to discuss a general concern pertaining to the implementation of demands for transparency: it might very well be suggested that, once certain areas and parts of judicial proceedings become more transparent, it is likely that new processes of (informal) decision-making emerge that again lead behind closed doors. While this may indeed be correct, it is too short sighted. New procedural requirements could still influence behaviour and could still create new requirements of justification. In addition, public and confidential proceedings are not two different kinds, but publicness and transparency are qualifications that may be pursued in degrees and in parts.

The example of international dispute settlement in the context of the WTO provides for the notable practice of interim review in which panels present to the disputing parties excerpts of their draft, containing both findings of fact and descriptive conclusions. In a second step, the panel then gives to the disputing parties an interim report, which extends beyond questions of fact to findings of law and to the overall conclusions of the panel. The disputing parties may suggest that certain parts be revisited before the report is distributed to all members of the WTO. If need be, the panel holds a further meeting with the disputing parties to present its revisions.[65] This remarkable procedure contributes

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62 (1973–1974) 28 ICJ Yearbook 126.

63 Fassbender (note 61) 1175 para. 16.

64 Art. 59 of the Bundesgesetz über das Bundesgericht.

65 Art. 17 (2) of the DSU. On this issue see M. Hilf '§ 27. Das Streitbeilegungssystem der WTO' in M. Hilf and S. Oeter (eds) *WTO-Recht: Rechtsordnung des Welthandels* (Nomos Baden-Baden 2005) 505–35 (518) para. 31; P. Stoll and K. Arend 'Article 15 DSU' in R. Wolfrum, P. Stoll and K. Kaiser (eds)

to a higher quality of the decisions and it partakes in ensuring its legitimacy. At the appellate stage, such a process is not provided for, but the Appellate Body can of course build on the findings that the panel has already made. At least formally it is in any event confined to reviewing questions of law, not of fact.[66] At this stage of the proceedings, another practice is quite remarkable; namely, a high degree of collegiality. The rules of procedure provide that according to mechanism of rotation, three of the total seven members of the Appellate Body deal with any case.[67] In drafting their reports, the members in charge of a certain dispute still exchange their views with all other members who receive all the relevant documents as a basis for deliberations.[68] This is hardly compatible with strong notions of confidentiality, but it helps avoid contradictory judgments, which would otherwise give rise to serious concerns of legitimacy.[69]

Apart from the deliberations of the courts and tribunals, the possibility of dissenting or separate opinions remains to be discussed. The positive procedural law of international judicial institutions diverges on this issue. Art. 57 of the ICJ Statute provides that 'if the 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'.[70] This is regularly practiced and well known. Most other international courts and tribunals have a similar provision on this issue.[71] In the context of the WTO, in contrast, every effort shall be made to achieve consensus; should this not be possible, the majority decides.[72] Art. 17 (11) of the DSU stipulates that 'opinions expressed in the Appellate Body report by individu-

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Max Planck Commentaries on World Trade Law (Nijhoff Leiden 2006) *Vol. 2* 435.

66 Art. 17 (6) of the DSU.

67 Art. 17 (1) of the DSU.

68 WTO *Working Procedure for Appellate Review – Report of the Appellate Body* (4 January 2005) WT/AB/WP/5, Rule 4.3 of the Working Procedures.

69 This alternative has occurred in investment treaty arbitration.

70 Further specified in Rule 95 (2) of the Rules of Court.

71 Art. 30 (3) of the ITLOS Statute; Rule 125 (3) of the ITLOS Rules; Art. 48 (4) of the ICSID Convention; Art. 45 (2) of the ECHR; Rule 74 (2) of the ECtHR Rules.

72 WTO (note 68) Rule 3.2 of the Working Procedures.

als serving on the Appellate Body shall be anonymous'.[73] The Appellate Body has interpreted this to mean that it is possible to formulate separate opinions.[74] In practice this remains the rare exception. Among the more important courts and tribunals discussed in this contribution, none requires unanimity absolutely. It is interesting to see that the ILC Draft for the Statute of the ICC first explicitly prohibited the formulation of separate or dissenting opinions, but was modified on this point in the treaty negotiations.[75] One of the factors conducive to this change was the opinion of judges who had experience serving on the ICTY and ICTR.[76]

Judges frequently make use of the possibility to formulate separate or dissenting opinions. As a matter of fact, it is truly rare that the ICJ takes a decision without dissent.[77] Some have argued that this practice undermines the authority of the Court.[78] But such voices are few and praise of this practice prevails for good reasons.[79] It may be helpful to support this praise by way of juxtaposing the practice of the ECJ, whose procedural rules explicitly prohibit individual opinions.[80] In this

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[73] Art. 17 (11) of the DSU ('Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous').

[74] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products– Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R paras 149–54.

[75] Art. 45 of the Draft Statute for an International Criminal Court, in UNGA 'Report of the ILC on the Work of its Forty-Sixth Session' (1 September 1994) UN Doc. A/49/355, 22.

[76] Compare the statements by Judge Gabrielle Kirk McDonald, President of the ICTY, in front of the preparation committee for the establishment of the ICC, ICTY Press Release No. CC/PTO/234-E (14 August 1997) (maintaining *inter alia* that individual opinions may be very helpful in developing the case law). Cf. L. Fisler Damrosch 'Article 56' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1183 (1196–97) paras 42–44.

[77] The 90 judgments, 25 advisory opinions and 128 decisions that the court has rendered until 15 November 2005 have been accompanied by a total of 1017 personal opinions (262 declarations, 206 separate opinions and 349 dissenting opinions). See R. Hofmann and T. Laubner 'Article 57' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1199 (1208–09) para. 35.

[78] Ibid.

[79] Ibid. 1215 para. 57.

[80] Art. 36 of the ECJ Statute. Cf. V. Perju 'Reason and Authority in the European Court of Justice' (2009) 49 VJIL 307. The debate about effects and normative assessments of separate opinions is far developed with a view on do-

comparison it becomes evident that authority does not primarily depend on unanimity.

First of all, it speaks in favour of individual opinions that the decisions of the court gain in lucidity. There would be no necessity to compromise on rather vague formulations. The majority must meet the expectation of clear judgments and the contrast of diverging views offers additional clarity.[81] Furthermore, the psychological effect is important. The losing party to the dispute may see a certain satisfaction in the fact that it could at least convince part of the bench with its reasoning. It might gain the support of others in its view that some individual opinion did indeed provide the better resolution of the case. This is of particular importance in the context of the international legal order where the enforcement of judgments oftentimes leans on discoursive processes.[82] The practice of individual opinions highlights the plurality of opinions and feeds into the general legal discourse in which the judgment, including its dissenting or separate opinions, is negotiated, praised and critiqued. This is a very important element of the legitimation of international judicial authority. Lastly, in the development of international law there are a number of examples in which a position that was once in the minority advanced in the discoursive reception and informed later judicial practice or legislative projects.[83]

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mestic courts, with regard to the international legal order the contributions are few and invite to further comparative research on this issue. See D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Introduction into the Men and Women Who Decide the World's Cases* (OUP Oxford 2007) 123; A. Oraison 'Quelques réflexions générales sur les opinions séparées individuelles et dissidentes des Juges de la Cour Internationale de Justice' (2000) 78 Revue de Droit International, de Sciences Diplomatiques et Politiques 167; R.P. Anand 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 ICLQ 788; I. Hussain *Dissenting and Separate Opinions at the World Court* (Nijhoff Dordrecht 1984); E. Hambro 'Dissenting and Individual Opinions in the International Court of Justice' (1956) 17 ZaöRV 229 (offering intriguing insights into the debates at the time of the making of the PCIJ Statute).

[81] See the position by Max Humber reproduced in Hambro (note 80) 238. See further Hofmann and Laubner (note 77) 1212 para. 48 (arguing that this is one of separate opinions' most important functions).

[82] Compare von Bogdandy and Venzke (note 7) (on the authority of judicial interpretations and how it is embedded in legal discourse).

[83] Hofmann and Laubner (note 77) 1213–15 paras 55–56.

2. Standing and Participation

a. Third Party Intervention

Further manifestations of changes in the conception of international dispute settlement and responses to problems of legitimation may be found in an expansion of possibilities for intervention and participation. In spite of its vagueness in this matter, the ICJ Statue is again archetypical and influential with regard to the procedural law of other institutions.[84] According to Art. 62 of the ICJ Statute, States may seek permission from the Court to intervene in pending cases. The Court alone decides about such requests.[85] Principally, State parties can intervene when they can show an interest of a legal nature that would be affected by a decision in the case at issue.[86] Only such actors may intervene who also have standing as parties. The possibility of third party intervention is generally understood as a mechanism for combining similar cases.[87] When it comes to the interpretation of multilateral agreements, a legal interest is not expressly necessary when a third treaty party wants to intervene, but it is simply presumed. In such cases every party to the treaty at issue is notified by the Court according to Art. 63 of its Statute and may intervene. Since 2005, also international organizations are notified and submissions by its secretariats are allowed to the extent that their respective statute is at issue in the proceedings before the Court.[88]

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[84] C.M. Chinkin 'Article 62' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1331 (1365–66) para. 94.

[85] Cf. S. Torres Bernárdez 'L'intervention dans la procédure de la Cour internationale de Justice' (1995) 256 RdC 197; C.M. Chinkin *Third Parties in International Law* (Clarendon Press Oxford 1993); K. Oellers-Frahm 'Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs' (1985) 41 ZaöRV 579.

[86] Chinkin (note 84) 1346–51 paras 41–49 (offering an overview of the use of this qualification in the practice of international adjudication). According to Art. 81 (2) (b) of the ICJ Rules, the party applying to intervene 'precise object of the intervention', even if the procedural law does not limit intervention to particular objects, neither has the object of intervention ever been tested in practice.

[87] Chinkin (note 84) 1334–39 paras 7–19.

[88] Rule 43 of the ICJ Rules. Cf. A. Koroma 'International Court of Justice, Rules and Practice Directions' (2006) in R. Wolfrum (ed.) Max Planck Encyclopedia of Public International Law <www.mpepil.com> (12 February 2011) para. 2.

The ICJ Statute makes no determination on the issue whether an intervening party needs to show a jurisdictional link to the disputing parties. The Court clarified the issue in the seminal *Pulau Ligitan* case in which it allowed an intervention even if such a link to any of the disputing parties was not established.[89] This take on the issue has also been adopted in the ITLOS Statute, whose Art. 31, in combination with Rule 99 (3) of the Rules of the Tribunal, explicitly allows for the intervention of parties who have not submitted themselves to its jurisdiction – yet another manifestation of a trend towards wider participation in judicial proceedings, testifying to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. A trend towards lowering the threshold for third party intervention further indicates that it is largely inadequate to understand judicial decisions as acts of simply finding the law and as acts that are binding only *inter partes*. The tension between systemic repercussions of international adjudicatory practice, on the one hand, and ideas of *res judicata* that is binding only between the parties, on the other, has not yet been treated in a wholly satisfactory manner and discussions on this issue still seem to be in their rather embryonic stages. In the *Pulau Ligitan Case*, Judge Christopher Weeramantry wrote a separate opinion with the intention to rekindle debates on this issue of procedural law. Until now, such debates have in his view only been 'cramped and ineffectual'.[90]

In the procedures of the WTO, members who 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).[91] According to Art. 10 (2) of the DSU, every party having a substantial interest in the matter dealt with in front of the panel should enjoy the opportunity to be heard by the panel. It may also file written submissions that are made available to the disputing parties and that should be addressed in the panel report. The Working Procedures detail further that the first meeting of the panel should be

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[89] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene)* [2001] ICJ Rep. 575 para. 35.

[90] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Application to Intervene) (Separate Opinion by Judge Weeramantry)* [2001] ICJ Rep. 630 para. 13. Cf. P. Palchetti 'Opening the International Court of Justice to Third States Intervention and Beyond' (2002) 6 Max Planck UNYB 139.

[91] Arts 4 (11), 10, 17 (4) and 21 of the DSU. See further Hilf (note 65) 521; D. McRae 'What is the Future of WTO Dispute Settlement?' (2004) 7 JIEL 2.

used in order to hear the views of third parties.[92] In contrast to the ICJ and also to ITLOS, the black letter procedural law of the WTO does not grant intervening parties the right to attend the hearings. Whether and how often hearings are opened up to third parties, largely lies within the discretion of the panels.[93] 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.[94] 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 good reasons for this which are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete case, sensitive concessions and compromises that may only be reached in confidential settings, and keeping business secrets.[95] Accordingly, until 2006 no provision of the ICSID Rules of Procedure in Arbitration spoke on the possibility of third party intervention. 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*.

b. 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.[96] Above all, NGO participation may open up legitimatory poten-

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92 Appendix 3 (Working Procedures) DSU para. 6.

93 Art. 10 and Appendix 3 para. 6 of the DSU. Cf. K. Arend 'Article 10 DSU' in Wolfrum, Stoll and Kaiser (note 65) 373.

94 See van den Bossche (note 46) 279.

95 Delaney and Barstow Magraw (note 58) 721 (775).

96 P. Sands and R. Mackenzie 'International Courts and Tribunals, Amicus Curiae' in Wolfrum (note 12) para. 2; A. Zimmermann 'International Courts and Tribunals, Intervention in Proceedings' in Wolfrum (note 12) para. 1. Ter-

tials. They 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 scandalization 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.[97] In contrast to intervening third parties who themselves would usually have standing in front of the respective international court or tribunal, it is not necessary that *amici curiae* have standing or a protected legal interest. They commonly offer their views as experts.[98]

The procedural law of the ICJ and ITLOS does not provide for submissions by an *amicus curiae*.[99] In one of the ICJ's first cases ever, its registrar rejected the motion on part of an NGO to submit its opinion in writing and to present its view orally.[100] This decision holds for conten-

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minology is by no means consistent. See L. Vierucci 'NGOs Before International Courts and Tribunals' in P.-M. Dupuy and L. Vierucci (eds) *NGOs In International Law: Efficiency in Flexibility?* (Elgar Cheltenham 2008) 155 (156); H. Ascensio 'L' amicus curiae devant les juridictions internationales' (2001) 105 RGDIP 897.

97 J. Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press Cambridge 2008) 303, 382; P. Nanz and J. Steffek 'Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens' in P. Niesen and B. Herborth (eds) *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp Frankfurt am Main 2007) 87; J. von Bernstorff 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?' in H. Brunkhorst (ed.) *Demokratie in der Weltgesellschaft* (Nomos Baden-Baden 2009) 277.

98 It is worth noting that in some courts, like the ECtHR, NGOs and private individuals themselves have a right to initiate proceedings; conversely, also States, who usually act as parties may also function as *amici curiae* in such contexts as international investment arbitration. The meaning of each notions is thus evidently not all that clear-cut.

99 In detail see Wolfrum (note 1) 427.

100 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the 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.

tious cases but not when the ICJ acts in an advisory capacity.[101] 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*.[102] Ever since the *Gabčíkovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[103] Beyond this minimal common denominator there prevails considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposite opinions have so far impeded developments as they have taken place in other judicial institutions. The lowest common denominator is expressed in Practice Direction XII of 2004, stating that '[w]here an international non-governmental organization submits a written statement […], such statement and/or document is not to be considered as part of the case file. [It] may […] be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain [and it] will be placed in a designated location in the Peace Palace'.[104] Former President Gilbert Guillaume expressed candidly that nowadays 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.[105]

Also treaty law within the WTO context does not contain any provision on how to deal with *amicus curiae* briefs. In contrast to the ICJ, here legal practice has warmed up to the idea that maybe *amici curiae* should have a word to say. Practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[106] Already in

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[101] Art. 66 of the ICJ Statute.

[102] Cf. A.K. Lindblom *Non-Governmental Organisations in International Law* (CUP Cambridge 2005) 303.

[103] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep. 7.

[104] See ICJ Practice Direction XII (2004).

[105] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Guillaume)* [1996] ICJ Rep. 287.

[106] R. Howse 'Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy' (2003) 9 ELJ 496; P.C. Mavroidis 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing' in A. von Bogdandy, Y. Mény and P.C. Mavroidis (eds) *European Integration and International Co-Ordination: Studies In Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer The Hague 2002) 317.

the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case the panel then explicitly rejected *amicus curiae* submissions but was corrected by the Appellate Body. The Appellate Body argued that '[t]he 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'.[107] It is also worthy to point out that the Appellate Body successfully claimed the authority to decide whether to accept *amicus curiae* briefs or not.[108]

The practice on this issue varies and in particular in *EC – Asbestos* the unusually high number of briefs raised critiques on part of the members. In this case the Appellate Body even set up additional procedures for the submission of *amicus curiae* briefs according to Rule 16 (1) of its Working Procedures, a move that triggered notable protest in the Dispute Settlement Body.[109] Many State delegates argued that the Appellate Body had surpassed its competences by adopting such guiding principles, going beyond its adjudicatory function and unduly acting as a quasi-legislator.[110] The delegate of the United States was one of the very

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[107] WTO *United States – Import Prohibition of Certain Shrimp and Shrimp Products –Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para. 106. The *EC – Asbestos* case was also of great importance; see especially WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 and WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

[108] WTO *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom – Report of the Appellate Body* (10 May 2000) WT/DS138/AB/R paras 38–39, with reference to Art. 17 (9) of the DSU.

[109] WTO *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Communication from the Appellate Body* (8 November 2000) WT/DS135/9 (the Appellate Body informs the Chairman of the DSB about additional rules of procedure according to Rule 16 (1) of the Working Procedures). See WTO *European Communities – Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R para. 51.

[110] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

few who backed the actions of the Appellate Body on this issue and supported the new principles.[111] The Appellate Body eventually rejected all submissions with the reason that they did not meet the rules for their submission – in the eyes of many this was a response to the overwhelming criticism in the DSB with negative implications for the independence of the adjudicating bodies.[112] Ever since the Appellate Body has accepted *amicus curiae* briefs in some sporadic cases, hope rests on a formal revision of the procedural law to clarify this issue. While it still remains unlikely that such a reform is soon to come, the practice of adjudication will continue to shape the rules on the submission of *amicus curiae* briefs.

ICSID proceedings have for long been sealed off from any possibility of participation. But also here legal practice has changed and opened up avenues for *amici curiae*.[113] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle contradict allowing third parties to state 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.[114] Similarly, the OECD Investment Committee elaborated in the report mentioned above states 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 participation, subject however to clear and specific regulations'.[115] The new ICSID Rules of Procedure for Arbitra-

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111 Ibid.; Cf. R. Mackenzie and P. Sands 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 HarvardILJ 271 (284).

112 S. Charnovitz 'Judicial Independence in the World Trade Organization' in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds) *International Organization and International Dispute Settlement: Trends and Prospects* (Transnational Publishers New York 2002) 219. On the critical issue of judicial independence generally see E. Benvenisti and G. Downs 'Prospects for the Increased Independence of International Tribunals' (2011) 13 GLJ 1057.

113 See Delaney and Barstow Magraw (note 58) 721.

114 NAFTA 'Statement of the Free Trade Commission on Non-disputing Party Participation' (7 October 2004) <http://www.sice.oas.org/tpd/nafta/Commission/Nondispute_e.pdf> (14 February 2011).

115 OECD 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (12 February 2011).

tion of 2006 responded to such observations and introduced a new Art. 37, which speaks on the possibility of submissions by third parties and *amici curiae*.[116] This development in the positive procedural rules was again foreshadowed in the practice of adjudication. In *Vivendi Universal v. Argentine Republic* the tribunal acknowledged that *amici curiae* had a public interest in the case – namely the maintenance of a functioning water and sewage system in Buenos Aires and its surroundings – and thus allowed for *amicus curiae* briefs.[117] On the basis of the new rules of procedure for arbitration, for example, the ICSID tribunal in *Biwater Gauff* accepted *amicus curiae* submissions from a number of interested actors.[118] Such a shift in the conception of what such kind of dispute settlement is about further expresses itself in the practice of treaty making. Increasingly, bilateral investment treaties improve the possibilities for non-parties to participate in the proceedings.

In the case of the ECtHR, Art. 44 of the Rules of the Court provides a solid basis for NGOs and other interested persons to intervene in the proceedings. The court habitually takes up the arguments of *amici curiae* or intervening third parties and discusses them directly. The role of NGOs in human rights litigation also exceeds their functions as third participants in the proceedings and extends to the active support of individual applicants.[119] With regard to the ICC Rules of Procedure and Evidence, the chambers of the court enjoy the explicit competence to deal with third party submissions autonomously.[120] In this context, *amici curiae* are understood as offering impartial support in dealing with rather technical questions. Likewise, the Statutes of the ICTY and the ICTR leave it to the chambers to decide about submissions.[121] It is

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[116] Rule 37 (2) of the ICSID Arbitration Rules. See also ICSID Discussion Paper 'Possible Improvements of the Framework for ICSID Arbitration' (22 October 2004) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Archive_%20Announcement14> (12 February 2011).

[117] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal v. Argentine Republic (Order of 19 May 2005)* ICSID Case No. ARB/03/19.

[118] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Order of 2 February 2007)* ICSID Case No. ARB/05/22.

[119] Compare E. Valencia-Ospina 'Non-Governmental Organizations and the International Court of Justice' in Treves et al. (note 47) 227.

[120] Rules 103 and 149 ICC Rules of Procedure and Evidence.

[121] Rule 74 of the respective Rules of Procedure and Evidence.

interesting to note that the ICTY stretched its competence to adopt rules of procedure and evidence under Art. 15 of its Statute and further adopted a number of internal rules that would *inter alia* specify how to deal with *amicus curiae* briefs. On this basis, the court has occasionally allowed statements by NGOs and by private persons such as experts in international (criminal) law.

3. Avenues of Review

Expectations with regard to the legitimation of international judicial authority are particularly strong when it comes to mechanisms of review by another, higher judicial body. The provisions across international courts and tribunals and views *lege ferenda* differ widely on this issue. Avenues of review harbour numerous potentials, some of which are not immediately related to antinomies and change in international dispute settlement. They seem to stand separate from these issues as categorical demands. First of all, review may simply correct mistakes, aiming at justice in the individual case and building on the greater professional competence of the members of appellate bodies. Second, avenues of review contribute to consistency in judicial practice, significant for the development of the legal order generally. If one understands justice in contrast to arbitrariness, then this second aspect is also important for pursuing justice in individual cases.[122] Both aspects are important, but are not of prime interest for present purposes. There is a third aspect to appellate review, which merits further attention: it improves the conditions and possibilities for linkages with a general public. Avenues of review are valuable because they combine important cases and stoke attention. In this way, they increase the possibilities of a meaningful discourse about the quality of reasons offered for and against a decision.

On a preliminary note, it may help to bear in mind that the relationships between international courts and tribunals are hardly ordered.[123] The discussion of avenues of review thus pertains to particular legal regimes and to proceedings within separate institutional settings, nothing

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[122] See R. Forst *Das Recht auf Rechtfertigung: Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Frankfurt am Main 2007) 9.

[123] Shany (note 8). On a theoretical note prone to systems theory see A. Fischer-Lescano and G. Teubner 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 MichiganJIL 999.

more.[124] In the case of the ICJ, the issue is abundantly clear. Art. 60 of the ICJ Statue stipulates that its judgments are 'final and without appeal'. A State could at a later stage request an interpretation of a judgment, but this does certainly not open up avenues of review.[125] ITLOS again follows the example of the ICJ on this issue.[126] Some newer judicial institutions have, in contrast, opted for different kinds of appeal and review. Above all international criminal courts and tribunals offer fully-fledged appellate proceedings very much akin to those in domestic legal orders. They respond to Art. 14 (5) of the ICCPR, providing that '[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. Also the procedures of the ECtHR allow that a case is referred to the Grand Chamber 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance'.

The WTO Appellate Body contributes significantly to meeting expectations of 'security and predictability' (Art. 3 (2) of the DSU) within the multilateral trading system. In the negotiations leading to the 1995 Marrakesh Agreement, many State parties linked their agreement to a quasi-automatic adoption of panel reports (reports are adopted unless there is a consensus against their adoption, something which, unsurprisingly, has never happened) to the possibilities of appellate review.[127] The ex-

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[124] It might be debated whether the ICJ should eventually play a coordinating role. As a matter of fact this is not likely to happen. For an affirmative argument in this regard see K. Oellers-Frahm 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions' (2001) 5 Max Planck UNYB 67; S. Oeter 'Vielfalt der Gerichte – Einheit des Prozessrechts?' in R. Hofmann et al. (eds) *Die Rechtskontrolle von Organen der Staatengemeinschaft: Vielfalt der Gerichte – Einheit des Prozessrechts? Berichte der Deutschen Gesellschaft für Völkerrecht* vol. 42 (Müller Heidelberg 2007), 149 (offering a well-balanced discussion of the advantages and disadvantages of such a move).

[125] See A. Zimmermann and T. Thienel 'Article 60' in Zimmermann, Tomuschat and Oellers-Frahm (note 11) 1275 (1282–84) paras 25–28.

[126] Art. 33 of the ITLOS Statute.

[127] P. van den Bossche 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System' in Sacerdoti, Yanovich and Bohanes (note 45) 289 (294–300). The Appellate Body is confined to revisit questions of law according to Art. 17 (6) of the DSU. Cf. Hilf (note 65) 519 para. 34. Compare I. Venzke 'Making General Exceptions:

pectations of the future members of the WTO was that the Appellate Body would come to act on rare occasion in order to correct straightforward mistakes of law on the part of the panels.[128] As a matter of fact, the large majority of all cases (about 70%) has been appealed since 1995. And at issue were not only the findings in the concrete case but also the systemic effects of international judicial practice.[129] It is illustrative in this regard that in *Japan – Alcoholic Beverages* the US agreed with the results reached by the panel, it had practically won the case, but still appealed because it thought the panel's reasoning to be flawed. In clear recognition of the effects that the report creates as a matter of fact beyond the immediate parties, the US did not want to leave a bad precedent unchallenged.[130]

ICSID knows no avenues of review, but debates about institutional reform have given prime attention to such a mechanism.[131] In part, they have been triggered by investment tribunals reaching contradicting conclusions on the same or very similar matters.[132] More recent contradictions between cases stemming from the Argentinean economic crisis have further fuelled such demands. One of the central issues in these cases has been whether Argentina could rely on the justification of necessity as part of the customary law on State responsibility. Argentina

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The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 13 GLJ 1111.

[128] Van den Bossche (note 127) 294–300.

[129] See Venzke (note 127).

[130] WTO *Japan – Taxes on Alcoholic Beverages – Report of the Panel* (11 July 1996) WT/DS8/R, WT/DS10/R and WT/DS11/R; WTO *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

[131] Cf. G. Sacerdoti 'Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review' in E. Petersmann (ed.) *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer London 1997) 245; J.E. Alvarez 'Implications for the Future of International Investment Law' in K.P. Sauvant (ed.) *Appeals Mechanism in International Investment Disputes* (OUP New York 2008) 29 (stating that 'the WTO still inspires the envy of investment lawyers').

[132] Cf. *Lauder v. Czech Republic (UNCITRAL, Award of 3 September 2001)* (2006) 9 ICSID Rep. 66 para. 313; *CME v. Czech Republic (UNCITRAL, Partial Award of 13 September 2001)* (2006) 9 ICSID Rep. 121 para. 575; *CME v. Czech Republic (UNCITRAL, Final Award of 14 March 2003)* (2006) 9 ICSID Rep. 264 paras 446–47.

filed a request for annulment against the first award on the issue, which had found in the negative (*CMS Gas Transmission Co. v Argentine Republic*). According to Art. 52 ICSID, an annulment committee is strongly confined in what it can actually do. It may annul an award only for a number of very limited reasons, for example, when the panel 'manifestly exceeded its powers' or if it 'failed to state the reasons' on which the award is based. The annulment committee in *CMS Gas Transmission Co. v Argentine Republic* thus strongly critiqued the legal reasoning of the tribunal, but, with an unmistakable sense of discomfort and dismay, it found itself incapable of annulling the award. This stark decision has gained immense prominence, not least for the authority of its authors Gilbert Guillaume, Nabil Elaraby and James R. Crawford. It pushed the topic of new avenues of review in international investment arbitration to the top of the reform agenda.[133]

IV. Promises, Perils and Future Dynamics

Recent trends in the procedural law of a number of significant international courts and tribunals illustrate antinomies in what international dispute settlement is for and what it is about. The comparative study of procedural law helps to see and to understand changes in the conception of international adjudication. In growing recognition of the systemic effects of international judicial practice – its jurisgenerative dimension that comes to influence the law in general and that conditions other actors – procedural law responds to demands for increasing possibilities of participation and public scrutiny.

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[133] *CMS v. Argentina (Decision on Annulment of 25 September 2007)* ICSID Case No. ARB/01/8. Also consider the recent decisions in *Sempra Energy International v. Argentine Republic (Decision on the Application for Annulment of 29 June 2010)* ICSID Case No. ARB/02/16 and *Enron Corp. v. Argentine Republic (Decision on the Application for Annulment of 30 July 2010)* ICSID Case No. ARB/01/3. In some cases, annulment committees have significantly stretched the confines of their limited mandate, see for instances the cases pertaining to what amounts to an investment in the sense of Art. 25 (1) of the ICSID Convention, e.g. *Mitchell v. Democratic Republic of the Congo (Decision on Annulment of 1 November 2006)* ICSID Case No. ARB/99/7; in detail see J.D. Mortenson 'The Meaning of "Investment": ICSID's Traveaux and the Domain of International Investment Law' (2010) 51 HarvardILJ 257.

These developments are indicative of a deeper change in the thinking about international adjudication. The traditional function of successfully resolving disputes in concrete cases is supplemented, certainly not replaced, by the simple fact that international courts and tribunals develop international law through the practice of interpretation. International courts and tribunals are weighty actors in disputes about what certain provisions mean and their judgments frequently amount to authoritative reference points in legal argument. In this way, they exercise public authority and contribute to the creation of legal normativity.[134] Improved mechanisms for transparency and participation, minimal preconditions for meaningful deliberations and public scrutiny, may help curb concerns about the legitimacy of such exercises of power. These trends in the procedural law of international judicial institutions harbour a legitimating potential that is slowly set free. In their concrete effects, however, they need to be tested on an empirical basis and in view of a number of possible downsides and alternatives.

One of the principal disadvantages of the recent trends discussed in the preceding sections might be the overrepresentation of particular interests at the expense of others, which are not backed by the clout of equally powerful actors or which cannot raise similar economic resources in their support. This is a well-recognized and very real danger. It is noteworthy in this regard that in the context of the WTO above all representatives of developing countries have opposed the possibility of *amicus curiae* submissions.[135] Another concern relates to the distinctive characteristics and comparative advantages of the judicial process of adjudication over the political-legislative process. It seems that judicial processes can only accommodate specific forms and degrees of participation without losing advantages that rest on judicial modes of dealing with dispute. An alternative might open up with improved mechanisms of politicization of the regimes in which international courts and tribunals are embedded. International institutional law then comes into focus next to the procedural law of international courts and tribunals.

In conclusion, the future dynamics of institutional developments might be shaped in the interplay between mechanisms of international dispute settlement, on the one hand, and domestic courts, on the other. It is interesting in this regard to observe how domestic courts treat international decisions. In particular there are relatively frequent points of

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[134] Von Bogdandy and Venzke (note 7); Jacob (note 1).

[135] See WTO *Minutes of the Meeting of the General Council held on 22 November 2000* (23 January 2001) WT/GC/M/60.

contact in the field of investment arbitration. In view of concerns about legitimacy, domestic courts may come to act as instances of review; not only enforcing awards as they are supposed to, but questioning their quality and sometimes even formulating procedural demands for the international judicial process.[136] The authority of mechanisms for the settlement of disputes will be negotiated at this juncture and actors will continue to shape their self-understanding in this practice. In reflexive awareness of their authority over the respective other, they will need to come to terms with the repercussions of their actions in the grand normative pluriverse.

[136] E. Baldwin, M. Kantor and M. Nolan 'Limits to Enforcement of ICSID Awards' (2006) 23 JIntlArb 1. It is true, however, that so far domestic courts have shown a high degree of deference to international awards. See K. Hobér and N. Eliasson 'Review of Investment Treaty Awards by Municipal Courts' in Yannaca-Small (note 54) 635.

The Non-Monopolistic Role of International Courts and Tribunals in Designing the Rules of Recognition of the International Legal System

*Paper submitted by Jean d'Aspremont**

Abstract

This paper argues that international courts and tribunals, although they have not always been successful in that endeavor, are very instrumental in developing meaningful law-ascertainment criteria necessary to distinguish law from non-law. Indeed, if one espouses a Hartian conception of international law, international courts and tribunals, in their capacity as law-applying bodies, generate the social practice necessary to give a meaning to the rule of recognition of the international legal system. Yet, this paper simultaneously shows that this role of the international courts and tribunals is not exclusive in that international courts and tribunal cannot be deemed to have a monopoly on the elaboration of law-ascertainment vocabulary. Nowadays, a new string of actors also participate in the emergence of the necessary semantics to distinguish law from non-law. International court and tribunals' contribution to the clarification of the rules of recognition of the international legal system is supplemented by the social practice of other international actors. It is submitted, however, that this role of international courts and tribunals, although being not exclusive, should be preserved and remain central. This nonetheless requires a greater

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awareness by international courts and tribunals of the necessity of a consistent use of those formal indicators allowing the distinction between law and non-law.

I. Introduction

When settling international disputes submitted to them or assessing the international criminal responsibility of individuals, international courts and tribunals apply and interpret international legal rules. In doing so, they accordingly not only determine the content the rules they are entitled to apply but also delineate which rules are proper legal rules. When identifying which norms can be considered rules of international law, international courts and tribunals generate what is construed, from a Hartian perspective, as a social practice, thereby generating meaning – in the form of communitarian semantics – to the otherwise indeterminate rules of recognition of the international legal order. This central role of international courts and tribunals ought not to be underestimated. It is not far from being equally important as the settlement of the disputes or the punishment of individual internationally criminal behaviors. While being of an overarching importance for the international legal system as a whole, the contribution of international courts and tribunals to the elaboration of meaningful rules of recognition does not rest on any kind of monopoly. Indeed, it is submitted here that a wide array of different actors nowadays contribute to the communitarian semantics necessary for meaningful law-identification criteria. It could even be argued that the extent of social practice nowadays generated by these actors is not far from putting into question the traditional primary importance of international courts and tribunals in designing the rules of recognition of the international legal system. This paper argues that, although not endowed with any monopoly in the elaboration of the vocabulary of

law-ascertainment, international courts and tribunals should keep the upper hand in providing meaningful criteria for the distinction between law and non-law. This however requires a greater awareness by these judicial bodies of the degree in which they impact on the determination of law-ascertainment yardsticks as well as more rigor and consistency in their elaboration.

After spelling out the Hartian conception of international law by virtue of which international courts and tribunals should be seen as the main source of the social practice in which law-identification is rooted (1), this brief contribution explains how this law-ascertaining role of international courts and tribunals is growingly overshadowed by the social practice generated by other (mostly non-State) actors (2). Eventually, this paper will formulate some thoughts on how international courts and tribunals can preserve their central role in defining the law-identification criteria of the international legal system (3).

1. A (Post-Modern) Hartian Conception of International Law: the Determination of Law-Ascertainment Criteria through Communitarian Semantics

The following paragraphs expound on the conception of international law which bestows a central role on international courts and tribunals when it comes to define and clarify the criteria by virtue of which law is distinguished from non-law. The dominant positivist overtones of the following conception of the international legal system and especially the Hartian perspective which it espouses are obvious. However, it will be shown that the positivist (and Hartian) conception of law in which the argument made here clearly originates has undergone some inevitable adjustments which allow for positivism to accommodate some of the most sweeping contemporary changes in the practice of international relations.

It should be preliminarily indicated that legal positivism in legal theory or in the international legal scholarship is associated with so many different, if not conflicting, meanings – even among legal positivists themselves[1] – that the debate about the value of legal positivism

[1] Compare e.g. the five meanings of positivism by H.L.A. Hart in 'Positivism and the Separation of Law and Morals' (1958) 71 HarvardLRev 593 with the three meanings of positivism of N. Bobbio in *Essais de théorie du droit* (LGDJ Paris 1998) 24. See the understanding of positivism of L. Oppenheim

sometimes is unintelligible.[2] Yet, for this short contribution, positivism is associated with a conception of law that rests on two fundamental concepts: the *source thesis* and the *social thesis*. The conception of legal positivism which I espouse here is thus primarily grounded in formalism,[3] i.e. the use of formal-law identification criteria whose meaning is derived from social practice.[4] Legal positivism, in a broader sense, probably encapsulates other theories than the source and social thesis in that the source and social thesis are only two of the main tenets of classical legal positivism.[5] Yet, I here stick to this restrictive conception of positivism,[6] which I have called elsewhere 'postmodern legal positivism' to emphasize its continued relevance.[7]

This restrictive conception of positivism primarily refers to the use of *formal standards* to identify rules of international law. According to that blueprint, any norm that meets such pre-defined standards is a rule of international law. These standards constitute the *pedigree* of international legal rules. The idea that law is identified by virtue of a

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'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313 (326 and 333). See also the definition of positivism provided by N. Onuf 'Global Law-Making and Legal Thought' in N. Onuf (ed.) *Law-Making in the Global Community* (Durham Carolina Academic Press 1982) 1.

2 W. Twining *General Jurisprudence: Understanding Law from a Global Perspective* (CUP Cambridge 2009) 25; G. Pino 'The Place of Legal Positivism in Contemporary Constitutional States' (1999) 18 Law and Philosophy 513–36; See also F. Chevrette and H. Cyr 'De Quel Positivisme Parlez-vous?' in L. Rolland and P. Noreau (eds) *Mélanges Andrée Lajoie* (Themis Montreal 2008) 33; See also M. Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (CUP Cambridge 2005) 131, note 258.

3 On the need to distinguish formalism and positivism see also B. Simma and A. Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302 (307).

4 This is the conception I have espoused in J. d'Aspremont *Formalism in International Law – A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011).

5 On the difference between formalism and legal positivism see A.J. Sebok 'Misunderstanding Positivism' (1994–1995) 93 MichiganLRev 2054.

6 For similar conflations between positivism and formalism see G.J.H. Van Hoof *Rethinking the Sources of International Law* (Kluwer The Hague 1983) 283. He construes positivism as an 'analytical approach' to the sources of international law.

7 J. d'Aspremont 'Hart et le Positivisme Postmoderne' (2009) 113 RGDIP 635.

standardized pedigree of rules constitutes, what is referred to in the literature as, the *source thesis*. The so-called source thesis provides that law is determined by its pedigree and that identifying the law boils down to a pedigree test.[8] Because this pedigree is the object of a prior standardization, the source thesis is thus synonymous with formal law-ascertainment. The source thesis is often contrasted with models of law-ascertainment based on substantive criteria, like that defended by the classical natural law school. It also is sometimes conceptualized as a *rule-approach* to law,[9] in contrast to effect-based[10] or process-based[11] definitions of law.

The source thesis found in positivism inevitably brings about some indeterminacy.[12] Indeed, because of the indeterminacy of the language with which the standard pedigree of the rules is defined, formalism as a set of standardized criteria of law-identification inevitably fails to produce an autonomous and self-contained linguistic convention for the sake of law-identification. Herbert Hart himself recognized that law-ascertainment criteria – in his words the 'rule of recognition' – are vague and open-textured.[13]

Although this is often overlooked in the literature, positivists have devised several conceptual strategies to overcome the non self-sufficiency of the source thesis and rein in, to the extent possible, the inevitable indeterminacy of the formal standards of law-ascertainment. One of them is the use of social practice to stem the indeterminacy stirred by the source thesis. Such a particular conception of the foun-

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8 On the source thesis see generally J. Raz 'Legal Positivism and the Sources of Law' in J. Raz (ed.) *The Authority of Law: Essays on Law and Morality* (Clarendon Oxford 1983) 37.

9 N. Purvis 'Critical Legal Studies in Public International Law' (1991) 32 Harvard Journal of International Law 81 (84).

10 J.E. Alvarez *International Organizations as Law-makers* (OUP New York 2005), esp. x-xi; D.J. Bederman 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 VJIL 275 (372); N. White 'Separate but Connected: Inter-Governmental Organizations and International Law' (2008) 5 International Organizations Law Review 175 (181–86).

11 This is classically construed as the New Haven approach.

12 See Raz (note 8) esp. 41–52. See more generally L. Murphy 'The Political Question of the Concept of Law' in J. Coleman (ed.) *Hart's Postcript: Essays on the Postscript to 'The Concept of Law'* (OUP Oxford 2001) 393.

13 H.L.A. Hart *The Concept of Law* (2nd edn. OUP Oxford 1997) 144–50.

dations of the source thesis has been designated in the literature as the *social thesis*. The archetype social thesis purports to supplement the classical positivist source-based criteria of identification of international law ('the source thesis'), with a view to endowing it with some limited autonomy, by inferring the meaning of the standard pedigree of rules derived from the practice of law-applying authorities.[14] While the social thesis does not completely eliminate indeterminacy or provide autonomy from the source thesis, it still constitutes, a useful framework within which the indeterminacy of formal standards of law-ascertainment can be domesticated without falling into naive objectivism. In that sense, and thanks to its definitional advantages, the social thesis remains a good starting point for the modernization of formalism envisaged here. This is true even if the peculiarities of international law – and the unique configuration of its law-making processes – have always impeded a mechanical and full transposition of the social thesis into the theory of international law. This understanding of legal positivism is certainly not new. It corresponds with the well-known conception defended by Herbert Hart in the *Concept of Law*.[15]

While Hart's theory can prove significantly helpful in sharpening formalism in the context of international law, it can be argued that Hart's insights do not suffice to appraise the place of non-State actors from the perspective of international legal positivism, especially when it comes to the conceptualization of the law-applying authority capable of generating a meaningful social practice for the sake of law-ascertainment. Indeed, as will be explained below, Hart adopts a very restrictive conception of law-applying authority, which is exclusive of non-State actors. A convincing adjustment of that aspect of Hart's thesis is found in the endeavours of Brian Tamanaha,[16] as well as William Twining,[17] to modernize Hart's theory in order to accommodate a wider range of contemporary phenomena. In particular, these authors advocate a

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[14] It has also been referred to as the 'exclusive internal point of view'. See G.P. Fletcher 'Law as a Discourse' (1991–1992) 13 CardozoLRev 1631 (1634).

[15] Hart (note 13) 108–09. For a recent re-appraisal of Hart's relevance in international legal scholarship see d'Aspremont (note 7).

[16] See B. Tamahana *A General Jurisprudence of Law and Society* (OUP Oxford 2001); see also B. Tamanaha 'The Contemporary Relevance of Legal Positivism' St John's University School of Law Legal Studies Research Paper Series Paper No. 07-0065 (January 2007).

[17] Twining acknowledges that he has himself been very widely influenced by Tamanaha. See Twining (note 2) 94–95.

broader conception of law-applying authorities at the origin of the social practice, in which formal law-ascertainment is grounded, in order to embrace a wide range of social actors.[18] As is explained in this chapter, this expanded social thesis is precisely the reason why, in the positivistic perspective defended here, non-State actors still play a very important role that ought to be taken into account by international lawyers.

2. International Courts and Tribunals Confronted with the Production of Communitarian Semantics by Non-State Actors

While international courts and tribunals, according to the above-mentioned Hartian conception of law, are to play the exclusive role when it comes to providing a meaning to law-ascertainment criteria, contemporary practice weathers an increasing corresponding role played by a wide array of actors, and mostly non-State actors. The following paragraphs elaborate on the contemporary law-ascertaining role of non-State actors, thereby showing that international courts and tribunals can no longer be seen as being endowed with any kind of monopoly on the definition of the law-ascertainment criteria of the international legal system.

Although non-State actors, subject to a few exceptions, do not usually qualify for any of the formal status prescribed by international law, it is argued here that this does not mean that international legal scholars ought to turn a blind eye to these actors. On the contrary, this chapter, drawing on the conceptualization of positivism described above, contends that non-State actors are very instrumental in the communitarian semantics necessary to give meaning to law-ascertainment criteria, that is the meaning of the secondary rules of recognition.

According to the conception of positivism that is put forward here, the source thesis – that is the idea that law is identified by virtue of its source – is not self-sufficient, for it does not provide any indications as to the foundations of such formal criteria for the identification of international rules. Indeed, any set of formal yardsticks of law-ascertainment shaped through ordinary language would remain inextricably beset by the indeterminacy of language if these criteria were not grounded in the social practice of those who apply them. This

[18] See e.g. Tamanaha (note 16) 142.

is why the criteria of law-identification (i.e. the rule of recognition) cannot be severed from the social practice of law-applying authorities and the practice of law-applying authorities is thus a necessary constitutive element of any formal blueprint of law-identification.

The social practice that is conducive to gauging the communitarian semantics necessary to provide meaning to law-ascertainment criteria is that of the law-applying authorities. As was alluded to above, in line with Hart's view, the concept of 'law-applying authorities' has been narrowly construed, for Hart devised his social thesis exclusively in the context of domestic law. The restricted concept of law-applying authorities makes its transposition in international law problematic. For the sake of determining those who provide the social foundations to the formal ascertainment of international legal rules, the concept of law-applying authorities must be refreshed with a view to accommodating the specificities of the application of international law.

As was indicated earlier, a refinement of the concept of law-applying authorities has been advocated by Brian Tamanaha. According to the modernization proposed by Tamanaha, a law-applying authority is 'whomever, as a matter of social practice, members of the group (including legal officials themselves) identify and treat as "legal officials"'.[19] The social practice on which the rule of recognition is based must accordingly not be restricted to strictly-defined law-applying officials but must include all social actors.[20] This expansion of the concept of law-applying authority is undoubtedly of great relevance in a legal order – like the international legal order – which lacks any vertical nomenclature or institutional hierarchy. Tamanaha's definition, although proving somewhat all-embracing to a certain extent, can help capture the practice necessary for the establishment of the criteria for the ascertainment of international rules. It surely points to the insufficiency of a too narrow construction of the concept of law-applying authority as well as to the necessity not to limit the induction of the communitarian semantics from the practice of formal judicial authorities only. In the reality of international law, it can hardly be contested that other 'social actors' participate in the practice of law-ascertainment and should be taken into account in the determination of the communitarian semantics constitutive of the meaning of law-ascertainment criteria. The following paragraphs, accordingly, mention

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[19] Ibid. 142.

[20] Ibid. 159–66.

those social actors whose practice must be deemed relevant by virtue of the social thesis. It will be shown that among these various social actors, non-State actors play a significant role when it comes to providing meaning to the rules of recognition of the international legal system.

It must, as a preliminary point, be made very clear that being a 'social actor' whose practice of law-ascertainment is instrumental to the meaning of the formal criteria of the identification of law does not necessarily elevate that actor into a formal international lawmaker. It is true that some of the actors mentioned here may well wield some undeniable law-creating powers – as is illustrated by judges whose role in the development of international law is almost uncontested[21] – or some influence on the making of international law – as exemplified by the influence of non-State actors.[22] However, the potential law-creating/law-making role of these actors as regards the (progressive) development of substantive international legal rules is of no relevance here. Indeed, although law-determination by international courts may sometimes come close to law-creation and even if law-identification and law-creation

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[21] H. Kelsen 'La Théorie Pure dans la Pensée Juridique' in C. Leben et R. Kolb (eds) *Controverses sur la Théorie Pure du Droit* (LGDJ Paris 2005) 173; Hart (note 13) 136; See also H.L.A. Hart and A.M. Honore *Causation in the Law* (OUP Oxford 1985) 5 or Bobbio (note 1) 10 and 38; Raz (note 8) 41–52. As regards international law more specifically see R. Jennings 'What is International Law and How Do We Tell it When We See it' (1981) 37 Annuaire Suisse de Droit international 77; H. Thirlway 'The Sources of International Law' in M. Evans (ed.) *International Law* (2nd edn. OUP Oxford 2006) 129–30; H. Lauterpacht *The Development of International Law by the International Court* (2nd edn. Praeger 1958); M. Lachs 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law' (1983) 10 Syracuse Journal of International Law and Commerce 239; R. Higgins *Problems and Process: International Law and How We Use It* (OUP Oxford 1995) 202; A. Boyle and C. Chinkin *The Making of International Law* (OUP Oxford 2007) 266–69 and 310–11. See however the statement of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 237 para. 18 (according to which the Court 'states the existing law and does not legislate' and this is so 'even if in stating and applying the law the Court necessarily has to specify its scope and sometimes not is general trend'). Art. 38 of the ICJ Statute also seems to lend support to a strictly cognitivistic task of international courts.

[22] See gen. J. d'Aspremont (ed.) *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (Routledge London 2011).

may be carried out simultaneously,[23] the practice relevant for the sake of law-ascertainment is alien to any question of a law-making power properly so-called. The communitarian semantics that they generate by identifying international legal rules do not constitute a substantive law-making exercise. The actors mentioned below simply partake in the semantics of the formal criteria of law-ascertainment, which – although they are often captured through the Hartian concept of the rule of recognition – do not constitute legal rules in the same sense as the substantive rules of international law.

There is no doubt that the central law-applying authority whose behaviour is the most instrumental in defining the standard of law-ascertainment is the International Court of Justice. Yet, the International Court of Justice is not the only law-applying authority in the international legal order. Arbitral tribunals have also applied international legal rules and thus participated in the elaboration of the linguistic indicators of law-ascertainment.[24] Moreover, and despite the International Court of Justice occasionally still believing in its natural monopoly to set the tone in the international judicial arena,[25] a growing number of international tribunals have been applying international law, thereby participating in the elaboration of the criteria for the ascertainment of international legal rules. Furthermore, all these various tribunals are engaged in

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[23] See R. Jennings 'General Course on Principles of International Law' (1967-II) 121 RdC 341.

[24] For a recent example see the final award in *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration) (Final Award)* PCA (22 July 2009) <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf> (20 April 2011) paras 425–35.

[25] See the famous rebuke of the ICTY by the ICJ in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) (26 February 2007)* ICJ Doc. 2007 General List No. 91 paras 402–07; See also UNGA 'Agenda Item 13: Report of the International Court of Justice' (26 October 1999) UN Doc. A/54/PV.39 at 3–4; 'Report of Gilbert Guillaume President of the International Court of Justice' (26 October 2000) UN GAOR 55th Sess. Agenda Item 13 UN Doc. A/55/PV.42 at 7; See also G. Guillaume 'The Future of International Judicial Institutions' (1995) 44 ILCQ 848 (860–02); G. Guillaume 'La Cour Internationale de Justice. Quelques propositions concrètes à l'occasion du cinquantenaire' (1996) 100 RGDIP 323 (331); S. Oda 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 ILCQ 863 (864).

a uncontested 'cross-fertilization' which further shores up the importance of the social practice which they generate.[26]

Even though the contribution of the International Court of Justice in this respect has not always been consistent and fully satisfying – as is illustrated by the fluctuations in its case-law regarding the formal evidence of custom, the law-ascertainment criteria of unilateral promises or the evidence of intent to make law for the sake of the identification of international agreements[27] – the practice of the International Court of Justice has nonetheless proved more indicative than that of other tribunals. Indeed, the International Court of Justice has long carried a lot of clout over international judicial proceedings, making its contribution to the practice of law-ascertainment naturally dominant. Whatever the varying weight of each of these tribunals, it is uncontested that the practice of law-ascertainment in the international arena, now emerging from a greater variety of tribunals, is thus far the most generative of communitarian semantics for the sake of law-ascertainment criteria in international law.

International courts and tribunals are not the only judicial authorities which generate communitarian semantics of law-ascertainment. Indeed, international law has long ceased to exclusively govern inter-State relations and has become more regulatory of internal matters and issues affecting individuals. Compliance with international law has accordingly incrementally required the adoption of domestic rules, thereby

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[26] See e.g. F. Jacobs 'Judicial Dialogue and the Cross-Fertilization of Legal System: The European Court of Human Rights' (2008) 38 TexasILJ 547; C. Koh 'Judicial Dialogue for Legal Multiculturalism' (2004) 25 MichiganJIL 979; P. Tavernier 'L'interaction des jurisprudences des tribunaux pénaux internationaux et des cours européennes et interaméricaines des droits de l'homme' in P. Tavernier (ed.) *Actualité de la jurisprudence internationale: à l'heure de la mise en place de la Cour pénale internationale* (Bruylant Brussels 2004) 251–61.

[27] See e.g. as regards the identification of international treaties *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep. 3 paras 95–107: emphasis is put on the actual terms and circumstances. Compare *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)* [2001] ICJ Rep. 40. Regarding the identification of unilateral promise see *Nuclear Tests (Australia v. France)* [1974] ICJ Rep. 253 para. 43. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14. See *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep. 554. This case-law is analyzed in d'Aspremont (note 4) chapter 7.1.

increasing the application of international law by domestic courts.[28] Even rules regulating inter-State relations have required domestic implementation. This infiltration by international law into domestic systems is thus a natural consequence of the extension *ratione materiae* of its object.[29] That international law now regulates objects previously deemed of domestic relevance is insufficient, however, to explain the growing application of international law by domestic courts. Because international law only enters domestic legal orders if so allowed, the greater presence of international law in the domestic legal orders of States is also the direct consequence of the growing amenability of States towards international law.[30] In this respect, it is not disputed that States are proving less reluctant to let international law pervade and enter their own legal order. Incorporation is not the only means by which international law has been applied by domestic courts. Indeed, most States in the world instruct their courts to construe domestic law in a manner that is consistent with the international obligations of that State. If international law is not the 'law of the land' because it has not been incorporated, it may still yield effects in the domestic legal order if domestic judges interpret national law in accordance with international law.[31] The growing effect of international law in the domestic legal

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[28] For an analysis of some significant decisions of domestic courts applying international law see A. Nollkaemper *National Courts and the International Rule of Law* (OUP Oxford 2011).

[29] According to Provost and Conforti 'The truly legal function of international law essentially is found in the internal legal system of States'. See R. Provost and B. Conforti *International Law and the Role of Domestic Legal Systems* (Nijhoff Dordrecht 1993) 8; J.H.H. Weiler 'The Geology of International Law: Governance Democracy and Legitimacy' (2004) 64 ZaöRV 547 (559–661); See also A. von Bogdandy 'Globalization and Europe: How to Square Democracy Globalization and International Law' (2004) 15 EJIL 885 (889); M. Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 917; See contra G. Arangio-Ruiz 'Le domaine reservé. L'organisation internationale et le rapport entre le droit international et le droit interne'. Cours général de droit international public' (1990-VI) 225 RdC 29 (435–79).

[30] See gen. J. Niman and A.Nollkaemper 'Beyond the Divide' in J. Nijman and A. Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (OUP Oxford 2007) 341–60.

[31] This principle of *consistent interpretation* of domestic law is also known as the 'Charming Betsy' principle. See US Supreme Court *Murray v. The Schooner Charming Betsy* 6 U.S. (2 Cranch) 64 (1804); see also *Restatement (Third) of Foreign Relations Law* § 114 (1987). On the charming Betsy principle

order through incorporation and consistent interpretation has been accompanied by a general amenability of domestic judges towards international law as a whole, irrespective of whether it is incorporated into national law and binding upon the State.[32] Whether the entry of international law into domestic legal orders takes the path of incorporation, consistent interpretation or simple persuasiveness and to whomever this entry can be traced back, it is uncontested that international law is becoming more and more present in domestic legal orders and is relentlessly applied by domestic courts. In applying international law, these domestic courts are thus called upon to ascertain its rules, thereby participating in the general practice of international law-ascertainment. It has thus become undeniable that domestic courts count as actors participating in the generation of the communitarian semantics of law-ascertainment as well.[33]

It goes without saying that, despite the multiplicity of international and domestic judicial authorities engaged in the ascertainment of international legal rules, their practice has remained too scarce to generate sufficient communitarian semantics. After all, these law-applying authori-

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see gen. R.G. Steinhardt 'The Role of International Law as a Canon of Domestic Statutory Construction' (1990) 43 Vanderbilt Law Review 1103 or J. Turley 'Dualistic Values in an Age of International Legisprudence' (1993) 44 Hastings Law Journal 185. A similar principle is found in regional legal orders as is illustrated by the European legal order where European Law ought to be interpreted in conformity with international law. See Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337; see also *Poulsen and Diva Corp* [1992] ECR-I 6019.

[32] See generally Y. Shany 'National Courts as International Actors: Jurisdictional Implications' (October 2008) *Hebrew University International Law Research Paper* No. 22-08. See also the remarks by E. Benvenisti and G.W. Downs 'National Courts Domestic Democracy and the Evolution of International Law' (2009) 20 EJIL 59–72; G. Betlem and A. Nollkaemper 'Giving effect to Public International Law' (2003) 14 EJIL 569; see also J. d'Aspremont 'Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in A. Nollkaemper and O.K. Fauchald (eds) *Unity or Fragmentation of International Law: The Role of International and National Tribunals* (OUP forthcoming 2011).

[33] On the application of international law by domestic courts see generally See K. Knop 'Here and There: International Law in Domestic Courts' (2000) 32 NYU JILP 501; A. von Bogdandy 'Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) International Journal of Constitutional Law 1.

ties are of a limited number and their case-law is proportionally modest, especially if compared to the practice of law-ascertainment of domestic legal rules generated by domestic courts. This is precisely why, in line with Tamanaha's proposition, the practice of other actors engaged in the application of international law should be included in the social practice necessary to establish the social practice at the heart of formal law-ascertainment in international law.

It must be acknowledged that the practice of law-ascertainment generated by States is not so central anymore, for international law has nowadays grown beyond its original strictly inter-State configuration. It cannot be denied that some non-State actors also provide some interesting insights as to the meaning of law-ascertainment criteria. Particular mention should be made here of the International Committee of the Red Cross (ICRC). It is true that the recent study produced by the ICRC on customary international law[34] stirs some severe reservations in terms of the consistency of its methodology in the establishment of customary international law[35]– a large part of which can be traced back to the non-formal character of custom-ascertainment for which the ICRC cannot be blamed. Yet, it cannot be denied that the determination of what is law and what is non-law by the ICRC – as is illustrated by the extent to which States took pains to react to it – constitutes a practice of law-ascertainment that is to be reckoned with. A few other non-State actors are probably also instrumental in the consolidation of a practice of law-ascertainment.[36] It is not my intention to list them all

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[34] J.M. Henckaerts 'Study on Customary International Humanitarian Law: a Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 International Review of the Red Cross 175.

[35] See the critique of Boyle and Chinkin (note 21) 36. See also the critique expressed by J.B. Bellinger and W.J. Haynes 'A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study' (2007) 46 ILM 514. See the reaction of J.M. Henckaerts 'Customary International Humanitarian Law – A Response to US Comments' (2007) International Review of the Red Cross 473.

[36] See e.g. The 2004 Report of the UN Secretary General's High Level Panel 'A More Secure World: Our Shared Responsibility' (2004) <http://www.un.org/secureworld/> (20 April 2011). See also the Report of the International Commission on Intervention and State Sovereignty 'Responsibility to Protect' (2001) <http://www.iciss.ca/report-en.asp> (20 April 2011): The Commission was established by the Government of Canada in September 2000.

here.[37] It must simply be recalled once again that recognizing that law-ascertainment by non-States actors like the ICRC constitutes relevant practice from the standpoint of the social thesis does not amount to saying that these bodies or entities are endowed with law-making authority.[38]

It is tempting to include the International Law Commission among those non-State bodies which engage in a practice of ascertainment of international legal rules. Certainly, the International Law Commission ascertains international legal rules when it codifies international law. In this respect, the codification undertakings of the International Law Commission could potentially yield some relevant social practice for the sake of law-ascertainment. Yet, the International Law Commission is also endowed with the responsibility to propose progressive developments of international law. Whilst these two tasks ought to be clearly distinguished according to its Statute,[39] the practice shows that the Commission carries them out simultaneously and does not deem it necessary to make any distinction in this regard. [40] The final outcome of

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[37] On the role of non-State actors in the international legal order see gen. d'Aspremont (note 22).

[38] Such a perception often permeates the legal scholarship. See generally C. Thomas 'International Financial Institutions and Social and Economic Rights: An Exploration' in T. Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (MUP Manchester 1998) 161 (163); for a mild approach see I.R. Gunning 'Modernizing Customary International Law: The Challenge of Human Rights' (1990–1991) 31 VirginiaJIL 211; A.M. Slaughter is not far from recognizing such a law-making role to individuals 'The Real New World Order' (1997) 76 Foreign Affairs 183. See also E. Beigzadeh 'L'évolution du droit international public' in E. Jouannet, H. Ruiz-Fabri and J.M. Sorel (eds) *Regards d'une génération sur le droit international public* (Pedone Paris 2008) 78. For a criticism of that perception see J. d'Aspremont 'The Doctrinal Illusion of Heterogenity of International Lawmaking Processes' in H. Ruiz Fabri, R. Wolfrum and J. Gogolin (eds) *Select Proceedings of the European Society of International Law* (Hart Oxford 2010) vol 2, 297.

[39] See e.g. Arts 16–18 of the ILC Statute ('Statute of the International Law Commission' [21 November 1947] UNGA Res. 174 [II]). The Statute as was subsequently amended is available at <http://www.un.org/law/ilc/> (20 April 2011).

[40] This is why the Commission suggested that such a distinction be abolished. See the UN ILC 'Report of the International Law Commission on the Work of its Forty-eighth Session) (6 May–26 July 1996) UN Doc. A/51/10 para. 147 (a) and paras 156–59. On that aspect of the ILC Statute see J.

the work of the International Law Commission, whatever form it may take, will generally fall short of making any distinction between those rules that have been codified and those that originate in a progressive development. It is usually the commentary that will indicate whether a rule must be considered the mere codification of an existing rule or whether it constitutes a progressive development of international law. But such indications do not always suffice and rules meant by the Commission to be progressive development of international law are sometimes subsequently elevated to rules have been the object of a codification by the judicial bodies applying them.[41] The almost impossibility to distinguish between progressive development and codification explains why the contribution of the International Law Commission to the practice of law-ascertainment ought to be seen as very modest. The same is probably true with respect to the Institut de Droit international.[42]

Finally mention must be made of the secondary role played by international legal scholars in the ascertainment of international legal rules. It is argued here that international legal scholars, although they are not at the origin of a practice of law-ascertainment generative of communitarian semantics, undoubtedly participate in the fine-tuning and streamlining of the formal criteria of law-ascertainment which, in turn, are picked up by the social actors involved in the application of international legal rules. In other words, it is submitted here that legal scholars come to play the role of grammarians of formal law-ascertainment who systematize the standards of distinction between law and non-law.

It is undeniable that scholars may occasionally be instrumental in the progressive development of primary norms. Indeed, while they cer-

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d'Aspremont 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats' (2005) 109 RGDIP 163.

[41] See the famous contention of the ICJ that Art. 16 of the Articles on Responsibility of States for Internationally Wrongful Acts corresponds with a rule of customary international law a position contrasting with that of the Special Rapporteur of the ILC. Compare ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (note 25) para. 420 and J. Crawford *The International Law Commission's Articles on State Responsibility Introduction Text and Commentaries* (Cambridge CUP 2005) 148.

[42] On the Institut de Droit international see e.g. F. Rigaux 'Non-State Actors from the Perspective of the Institut de Droit international' in d'Aspremont (note 22).

tainly are not lawmakers,[43] international legal scholars often play a public role or participate in public affairs.[44] Although international legal scholars themselves may be tempted to see their offerings as more influential than they really are[45] and even though their contribution is more modest today than it used to be a century ago – for States have grown weary of the influence that scholars can have[46]– their writings, their opinions and their decisions also influence law-making and international legal adjudication.[47] Article 38 of the Statute of the Inter-

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[43] J. d'Aspremont 'Softness in International Law: A Self-serving Quest for New Legal Materials' (2008) 19 EJIL 1075; A. Bianchi 'Une generation de "communautaristes"' in Jouannet, Ruiz-Fabri and Sorel (note 38) 105; J. Kammerhofer 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal "Methodology"' in J. Crawford et al (eds) *Selected Proceedings of the European Society of International Law* (Hart Oxford forthcoming) vol 3.

[44] For an illustration of the public role that scholars may play according to the conception submitted here see M. Craven et al. 'We Are Teachers of International Law' (2004) 17 LJIL 363; See also the letter published in the Guardian 'War Would be Illegal' (7 March 2003) <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq/print> (20 April 2011). See also the 'appel de juristes de droit international concernant le recours à la force contre l'Irak' initiated by the Centre de droit international of the Free University of Brussels (ULB) in January 2003 <http://www.ridi.org/adi/special/index.htm> (20 April 2011). On the idea that international legal scholars are not immune from the political debates in which they have been claiming a say see L. Mälksoo 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855-1985' (2005) 76 BYIL 383 (499).

[45] For a classical example of this belief see O. Schachter 'The Invisible College of International Lawyers' (1977-1978) 72 Northwestern University Law Review 217 (217): 'We should be mindful however that international lawyers both individually and as a group play a role in the process of creative new law and in extending existing law to meet emerging needs. This legislative role is carried out principally through multilateral treaties but it may also be accomplished through the evolution of customary international the use of general principles […]. In all of these processes the professional community may perform a significant function'.

[46] M. Virally 'A Propos de la "Lex Ferenda"' in D. Bardonnet (ed.) *Mélanges Reuter* (Pedone Paris 1981) 520.

[47] See the famous statement of Justice Gray in the case of *The Paquete Habana* and the *Lola* in 1920: '[…] where there is not treaty and no controlling executive or legislative act or judicial decision resort must be made to the customs and usages of civilized nations; and as evidence of these to the works of

national Court of Justice has long shrouded the influence of scholars and judges upon law-making in a formal veil by elevating them to a 'subsidiary means for the determination of rules of law'. Nothing could be more illusory than the formalization of their influence on law-making which – albeit recognized as secondary – in the making of international law is not tangible and can hardly be captured in formal terms. The role of legal scholars in the making of substantive rules of international law falls outside the ambit of our inquiry. All that matters is to shed light on their contribution to the practice of law-ascertainment and their corresponding contribution to communitarian semantics.

Clearly legal scholars do not constitute law-applying authorities *sensu stricto*. Nor are they social actors as was understood by Tamanaha. Indeed, strictly speaking they do not apply the law but interpret and comment upon it. However, it cannot be denied that international legal scholars have always constituted grammarians of the language of international law.[48] By contrast to domestic law,[49] the systematization of

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jurists and commentators who by years of labor research and experience have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is' (cited by R. Jennings 'International Law Reform and Progressive Development' in G. Hafner et al. [eds] *Liber Amicorum Professor Seidl-Hohenveldern* [Kluwer The Hague 1998] 325 [333]). See also Mälksoo (note 44).

48 See P.-M. Dupuy 'L'unité de l'ordre juridique international. Cours général de droit international public' (2002) 297 RdC 4 (205): 'un internationaliste ne devrait jamais prétendre à autre chose que d'être un bon grammarien du language normatif du droit international'. P. Reuter 'Principes de droit international public' (1961-II) 103 RdC 425 (459): 'Le droit n'est pas seulement un produit de la vie sociale il est également le fruit d'un effort de pensée s'efforçant d'agencer les données ainsi recueillies dans un ensemble cohérent et aussi logique que possible. C'est l'aspect systématique du droit international il est à la fois plus important et plus délicat que celui des droits nationaux. Il est plus important parce que les sociétés nationales du fait qu'elles sont profondément centralisées par l'autorité étatique engendrent un droit déjà systématisé par ses conditions d'élaboration. Au contraire la "décentralisation du pouvoir politique" qui règne dans la société internationale rejette sur le juriste un fardeau plus lourd. Il est plus délicat parce que le désordre de la société internationale n'est pas tant désordre de la pensée que désordre du pouvoir; certes le juriste peut se laisser aller à la systématisation mais s'agit-il de systématiser seulement ses pensées ou de systématiser aussi la réalité? Certes de

international law has primarily been an achievement of legal scholarship rather than of legal practice.[50] International law would not have reached its current level of systemacity without the input of international legal scholarship. One of the paramount tasks undertaken as grammarians has been the systematization and the streamlining of the criteria for the distinction between law and non-law.[51] While their work in this respect does not constitute, strictly speaking practice of law-applying authorities, the law-ascertainment criteria carved out and polished by legal scholars have been very conducive to shaping the practice of law-applying authorities. *That means that international legal scholars do not themselves yield social practice*. Yet, they clearly *impact* on that practice by contributing to the elaboration of the communitarian semantics of law-ascertainment in international law.

The foregoing has thus attempted to show that the practice of law-ascertainment generating the communitarian semantics necessary to ensure the meaning of the formal criteria of law-ascertainment is made by a multifold practice generated by a diverse set of social actors, among which a few non-State actors may potentially play a paramount role. All these actors, although they are not necessarily endowed with a formal status can be very instrumental in providing meaning to the secondary rules of the international legal system. International legal scholars, while they do not themselves directly yield a practice of law-ascertainment, undoubtedly partake in the shaping of the communitarian semantics necessary to ensure the meaningfulness of formal law-ascertainment criteria. The role played in this regard by domestic courts and non-State actors in generating social practice for the sake of the meaning of the law-ascertainment criteria of the international legal

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par sa nature même le droit est avide d'ordre mais à quoi servirait-il par excès de rigueur dans la pensée de poursuivre une systématisation en dehors du cadre des solutions admises'. See also Van Hoof (note 8) 291 or J. von Bernstorff and T. Dunlap *The Public International Law Theory of Hans Kelsen – Believing in Universal Law* (CUP Cambridge 2010) 266.

[49] In this regard, the Code Napoléon has been particular instrumental in the systematization of continental European domestic orders.

[50] For some general thoughts on the contribution of legal scholars to the systematization of law see N. MacCormick *Institutions of Law: An Essay in Legal Theory* (OUP Oxford 2008) 6.

[51] A. D'Amato 'What "Counts" as Law?' in N.G. Onuf (ed.) *Law-Making in the Global Community* (Carolina Academic Press Durham 1982) 106–07; See also Virally (note 46) 532.

system participates in the reinforcement of the ability of the international legal system to produce a vocabulary enabling the delineation of the rules of which it is composed. This is another reason why, according to the modernized positivist account presented here, non-State actors can hardly be ignored by international lawyers, who should take them very seriously.

3. Concluding Remarks: The Necessity to Preserve the Central Role of International Courts and Tribunals in Defining the Law-Ascertainment Criteria of the International Legal System

The abovementioned role played by non-State actors in generating social practice for the sake of the meaning of the law-ascertainment criteria of the international legal system should certainly not be bemoaned. Indeed, it undoubtedly participates to the reinforcement of the ability of the international legal system to produce a vocabulary enabling the delineation of the rules of which it is composed. It is true that the plurality of the sources of the communitarian semantics necessary for the meaningfulness of law-ascertainment criteria accentuates the risk of conflicting social practice. This is why the law-ascertaining role of international courts and tribunals should be kept central. Yet, ensuring the centrality of their law-ascertaining role requires them to be more aware of their law-ascertainment responsibilities and exercice their law-identification powers with greater care. However, the practice of international courts and tribunals of the two last decades weathers a great deal of oscillations and inconsistencies. It is not only that some courts and tribunals, as is illustrated by the International Tribunal for the former Yugoslavia, have ventured into some atavist use of naturalist law-ascertainment criteria.[52] More seriously, the International Court of Justice – on which much of the spotlight is turned when it comes to determining law-ascertainment criteria of the international legal system – has itself been incapable of designing some consistent criteria as to – to give just one example – how international legal treaties could be distinguished from mere political instruments.

In particular, in its strive to devise something of a methodology for ascertaining the intent of the parties,[53] the International Court of Justice

[52] See e.g. ICTY Case No. IT-95-16-T (14 January 2000) para. 527.

[53] As regards the identification of international treaties see *Aegean Sea Continental Shelf* (note 27) paras 95–107: emphasis is put on the actual terms

has fallen short of defusing controversies and providing sufficient guidance to enable a consistent practice of law-ascertainment to emerge.[54] The methodology used by the Court, on top of lacking clear consistency, has failed to alleviate the problems inherent to the establishment of intent. This is why we have been left in bind when it comes to establish the intent with a view to distinguish law from non-law.[55] The difficulty to systematize intent probably explains why, more recently, the Court seems to have backed away from attempting to offer a clear methodology in this respect as is illustrated by its decisions in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*[56] and the case of *Pulp Mills on the River Uruguay*.[57] Such silence fuelled little controversy, as if judges, like scholars, had come to terms with the impossibility to formally evidence intent.

The reason of the abovementioned lack of clear indications as to how distinguish legal instrument from non-legal instruments are complex. I have explained elsewhere that they are, to a large extent, to be traced back to the ultimate use of non-formal criteria to identify law and non-law – although these law-ascertainment yardsticks are often portrayed

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and circumstances. Compare *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (note 27). Regarding the identification of unilateral promise see *Nuclear Tests* (note 27) para. 43. *Military and Paramilitary Activities in and against Nicaragua* (note 27); *Frontier Dispute* (note 27).

54 Compare *Aegean Sea Continental Shelf* (note 27) paras 95 et seq. and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (note 27) paras 26 et seq.

55 See gen. J. Klabbers *The Concept of Treaty in International Law* (Kluwer The Hague 1996) 245–50.

56 See the laconic consideration of the Court regarding the nature of the Maroua Declaration adopted by Cameroon and Nigeria in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* [2002] ICJ Rep. 303 para. 263 ('The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2 para. 1) to which Nigeria has been a party since 1969 and Cameroon since 1991 and which in any case reflects customary international law in this respect').

57 *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) (20 April 2010)* ICJ Doc. 2010 General List No. 135 para. 138.

as formal.[58] It certainly is not the place to discuss this issue. It suffices here to stress that the lack of consistency in the guidelines provided by international courts and tribunals originates in an overly limited awareness of these law-applying bodies of their overarching importance when it comes to generate the social practice necessary for the emergence of meaningful law-ascertainment criteria. It is argued here that international courts and tribunals should be more mindful of their responsibilities in designing the indicators to distinguish law and non-law and should carry out that role with greater diligence.

Surely, at a time where the existence of multiple foras of dispute settlement based on the use of international legal rules has grown more common, the production of consistent indicators by international courts and tribunals simultaneously requires them to be mutually attentive to their respective work. It could even be defended that the consistency of the social practice yielding by international courts and tribunals calls for a greater – even informal – collaboration among them. Yet, the question of dialogue between law-applying authorities is not new and does not need to be taken on here.[59] The foregoing only provides another motive for ensuring a better coordination of international courts and tribunals when it comes to clarifying the law-ascertainment criteria of the international legal system. Failing to do so, international courts and tribunals could quickly be demoted to a secondary source of social practice necessary, in a Hartian perspective, to the emergence of meaningful indicators to distinguish law from non-law. If international courts and tribunals are stripped of their central law-ascertaining role, the risk is significant that the plurality of actors nowadays participating in the definition of the law-identification yardsticks brings about a great cacophony synonymous of an impossibility to correctly distinguish law from non-law, thereby depriving international courts and tribunals from one of their most important *raisons d'être*.

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[58] This is the object of my book *Formalism and the Sources of International Law – A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011).

[59] See gen. A.M. Slaughter 'A Global Community of Courts' (2003) 44 HarvardILJ 191.

Preconditions for *Stare Decisis* – What International Law Can Learn from Comparative Constitutional Law

*Paper submitted by Marjan Ajevski**

I. Introduction[1]

The question of whether there is or there is not a *stare decisis* system in international law has ebbed and flowed for the past decade and half. For instance, Judge Shahabuddeen in his seminal work *Precedent at the World Court*[2] concluded, that there is no system of *stare decisis*,[3] at least

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1 Some parts of this paper have drawn inspiration from a paper presented at the 4th Biannual ESIL Review Conference 2-4 September 2010, Ajevski Marjan 'Judicial Law-making in International Criminal Law: the Legitimacy Conundrum'.

2 M. Shahabuddeen *Precedent in the World Court: Hersch Lauterpacht Memorial Lectures* (CUP Cambridge 1996).

when it comes to the ICJ, that even if there is no system of *stare decisis* this does not mean that international courts, or at least the ICJ, do not make law[4] and that even though there is no system of *stare decisis* it does not mean that the judgments of the court do not represent precedents,[5] albeit in as much as they espouse the 'principles and rules of international law [that] were found to be applicable as between the parties'.[6]

Another author has criticized judge Shahabuddeen's claims of the non-existence of a *stare decisis* system in international law, more specifically, international trade law.[7] For him, the notion of the word precedent includes the notion of its bindingness; there is no such thing as a non-binding i.e. authoritative precedent.[8] He also, later in his article, talks about *de facto stare decisis* and *de jure stare decisis* and says that:

> 'My definition of de facto *stare decisis* sets a higher threshold for the meaning of past decisions and the institutional role of the adjudicator. It says the adjudicator has an institutional memory and puts it to work at every, or almost every, opportunity. A "de facto" precedent is, in other words, far more potent than a "non-binding" precedent. It provides greater certainty and predictability than does a "non-binding" precedent, though not quite as much as a "de jure" precedent'.[9]

Other authors have tried to discern whether a *stare decisis* system operates within different branches/regimes in international law. For instance, the *Oxford Companion to International Criminal Justice*[10] when talking about the sources of international criminal law says that it seems that a *stare decisis* system is in operation within the UN *ad hoc* tribu-

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3 Shahabuddeen (note 2) 97–105.

4 Ibid. 105–07.

5 Ibid. 107–09.

6 Ibid. 109.

7 R. Bhala 'The Myth About *Stare Decisis* and International Trade Law (Part One of a Trilogy)' (1999) 14 AmUIntlLRev 845 (924–36).

8 Ibid. 924–26.

9 Ibid. 940–41.

10 A. Cassese et al. (eds) *The Oxford Companion to International Criminal Justice* (OUP Oxford 2009).

nals.[11] It finds the evidence for such a claim in the *Aleksovski* Appeals Chamber judgment and the rules that it sets regarding the bindingness of Appeals Chamber judgments on the tribunals' Trail Chambers.[12] The Appeals Chamber itself is also bound by previous Appeals Chamber judgments save 'for cogent reasons in the interest of justice'.[13] Other authors have seen the possibility of whether other branches/regimes of international law follow the doctrine of *stare decisis*, namely the WTO, the ECtHR or the ICC.[14]

This renewed discussion begs the answer of several basic questions: what actually is *stare decisis*; how do we recognize it; are there certain preconditions that must be met for a *stare decisis* doctrine to evolve and how can that be applied to international law? I will answer these questions by looking at what *stare decisis* means in different constitutional systems, how it is distinguished from the practice of following previous judgments and whether it can have any relevance to international law.

Before I go into the discussion, one short note on the terminology I use in the paper. I make a distinction between *binding* and *non-binding* or *persuasive precedent*. I borrow this terminology from a study of different constitutional systems and their use of previous judgments in courts' reasoning titled *Interpreting Precedent*.[15] The aim of the terminology was to present a uniformed notion of whether there are certain provisions within the specific constitutional system that regulate the way that courts can use previously decided cases. However, I must stress that, when it comes to common law countries that are featured in this study, the provisions themselves can only be found in the highest court judgments and not in statutory law.

I will present my arguments in three parts. In part II, I will deal with the definition of *stare decisis* as it is understood by the US and UK con-

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[11] D. Akade 'Sources of International Criminal Law' in Cassese (note 10) 53.

[12] *Prosecutor v. Zlatko Aleksovski (Judgment)* IT-95-14/1 (24 March 2000) para. 113.

[13] Ibid. para. 107; but also see *Prosecutor v. Zoran Zugic (Declaration of Judge Shahabuddeen)* IT-98-30/1-A (26 June 2006) para. 2.

[14] G. Acquaviva and F. Pocar 'Stare Decisis' (2007) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (12 Feburary 2011).

[15] D.N. MacCormick and R.S. Summers (eds) *Interpreting Precedents: A Comparative Study* (Ashgate Dartmouth 1997).

stitutional systems. I will present the basic rules and the basic rational behind these rules. In part III, I will go into the preconditions that are needed for a doctrine of *stare decisis* to even be contemplated. In part IV, I will see whether these preconditions are or can be met in international law and explain why we can talk about a doctrine of *stare decisis* within specific branches of international law but not as within general international law.

II. What is *Stare Decisis*?

It seems only natural that before I can examine the question of *stare decisis* in international law, I should lay out the basic ground rules as to what exactly do I mean when I say *stare decisis*. Let me then start with the dictionary meaning of the phrase *stare decisis* as understood in the *Oxford English Dictionary*. Under the phrase *stare decisis* we can find that it is understood as '[t]he legal principle of determining points in litigation according to precedent; properly as *v.* (*phr.*), to be bound by precedents'.[16] However, this is only a definition found in a dictionary, something that we can and should use as a heuristic tool and not at face value. Therefore, we would need to look at what different legal systems understand under the terms *stare decisis* and the word precedent in order to see how this can be applicable to international law.

In the United States the meaning of the phrase *stare decisis* has a specific connotation. *Stare decisis* is seen as 'the principle that courts are to follow similar previous judicial decisions when deciding legal questions'.[17] The doctrine of *stare decisis* applies to both the traditional Common law, i.e. torts, contracts, property, wills and trust and also to statutory and constitutional interpretation.[18] *Stare decisis* is a judicial doctrine, a doctrine 'which involves a court's choice to stand by a precedent notwithstanding suspicions (or worse) about its wrongness'.[19] In short, 'the doctrine of *stare decisis* is the judicial policy of (sometimes) adhering to

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16 J. Simpson and E. Weiner (eds) *The Oxford English Dictionary* (2nd edn. OUP Oxford 1989).

17 R.S. Summers 'Precedent in the United States (New York State)' in MacCormick and Summers (note 15) 355.

18 Ibid.

19 R.J. Kozel '*Stare Decisis* as Judicial Doctrine' (2010) 67 Washington & Lee Law Review 411 (412).

prior decision irrespective of the prior decision's legal correctness according to other interpretative criteria'.[20]

In the US, the United States Supreme Court has even developed a set of rules as to the precise meaning of what does it mean to follow *stare decisis*, when does it compel courts to adhere to a previously decided precedent, and what conditions need to be fulfilled in order for the Supreme Court to overrule a previously set precedent. The rules of the doctrine of *stare decisis* have been finally clearly put in the US Supreme Court's judgment in the case of *Planned Parenthood v. Casey*[21] which is better summarized in Justice Scalia's dissent in *Lawrence*,[22] which said that:

> 'Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) if: (1) its foundations have been "eroded" by subsequent decisions, ante, at 15; (2) it has been subject to "substantial and continuing" criticism, ibid.; and (3) it has not induced "individual or societal reliance"'.[23]

In the UK, the doctrine of *stare decisis* is seen as the rigid or narrow meaning of the word precedent, more specifically, the relevant case that is binding and even only then the relevant part of the case that is binding.[24] It seems that in the UK, much like in the US, scholars have a nuanced view of the doctrine of *stare decisis* as related to the notion of precedents. Specifically,

> 'the doctrine of precedent is, broadly speaking, variable in its "strictness" across different jurisdictions, and historically, within the same jurisdiction. It is fair to say that the English doctrine of *stare decisis* (keep to what has been decided previously) is at the "stricter"

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[20] M.S. Paulsen 'Does the Supreme Court's Current Doctrine of *Stare Decisis* Require Adherence to the Supreme Court's Current Doctrine of *Stare Decisis*?' 86 (2008) North Carolina LRev 1165 (1171).

[21] *Planned Parenthood of South Eastern Pennsylvania v. Robert P. Casey* 505 U.S. 833 (1992).

[22] *Lawrence v. Texas* 539 U.S. 558 (2003).

[23] Ibid. 587.

[24] Z. Bankowski, D.N. MacCormick and G. Marshall 'Precedent in the United Kingdom' in MacCormick and Summers (note 15) 315 (323–24).

> end of this continuum. A significant feature of the English doctrine has been its coercive nature. (footnote omitted)'.[25]

The UK doctrine of *stare decisis* has been developed by the House of Lords through a series of cases. It started with the judgment in the case of *London Street Tramways v. LCC*[26] where it decided in 1898 that it would be strictly bound to follow its own precedents.[27] This does not mean that the House of Lords slavishly followed its own previous judgments, but rather found innovative ways to distinguish them. Finally in 1966 it issued a practice statement that allowed for overruling of previous precedents by saying that:

> '[...] the use of precedent [...] [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
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> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
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> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law'.[28]

Consequently, it seems that the doctrine of *stare decisis* is intrinsically linked with the notion of precedent, and a specific narrow notion of precedent at that – a vertically formally binding precedent. For instance, in New York State the strictest notion, but also the most widely used notion, of precedent involves the concept that the lower courts[29] are

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[25] T. Buck 'Precedent in Tribunals and the Development of Principles' (2005) 25 Civil Justice Quarterly 458.

[26] *London Street Tramways v. LCC* A.C 37 (1898).

[27] Bankowski, MacCormick and Marshall (note 24) 326.

[28] Practice Statement issued by the House of Lords [1966] 1 WLR 1234.

[29] The names of the New York court hierarchy is somewhat strange in US terms with the highest court in the state called New York Court of Appeals, followed by the courts of the Appellate Division, which are allocated geographically throughout New York State, and New York Supreme Courts which

bound by the decisions of the higher courts of the same jurisdiction (usually meant territorial jurisdiction) as well as the higher courts being bound by their own decisions.[30] The level of bindingness is formal, in the terms that if a lower court does not respect a precedent's bindingness then its decision is not lawful and so is subject to reversal on appeal.[31]

Furthermore, the lower courts are only bound by the judgments of their directly vertical superiors covering the same territory, i.e. a Supreme Court is bound by the precedents set by Appellate Division that covers the territory of the Supreme Court and there is a strong presumption that it is bound by the precedents set by the other Appellate Divisions.[32] An Appellate Division is only formally bound by the Court of Appeals, while not bound by the precedents set by other Appellate Divisions covering different geographical areas.[33] The Court of Appeals, however, is not formally bound by its previous judgments since there is no higher court that can overrule it and is free to depart from them. This does not mean, however, that it does not follow its previous decisions as a rule, and departs from them as an exception. [34]

It is also important to note that the doctrine of *stare decisis*, i.e. the bindingness of precedent, is only applicable within a court system. For instance, a Court of Appeals decision is not a precedent for courts of other states, in terms of its formal bindingness. Such a judgment can only have persuasive value.[35] It can be said that the US has 51 separate legal systems, each for every state plus the US federal system. Each system comes with its own court system hierarchy and its own vertical binding precedent system.[36] Furthermore, in certain cases state courts of general jurisdiction can have concurrent jurisdiction with federal courts

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are the trial courts of general jurisdiction, and can be several within the territorial jurisdiction of a Appellate Division court, see MacCormick and Summers (note 15) 356–59.

30 MacCormick and Summers (note 15) 364.

31 Ibid. 368.

32 Ibid. 369.

33 Ibid.

34 Ibid.

35 Ibid. 355.

36 Ibid.

of general jurisdiction[37] at which point they are bound by the precedents set by the federal Court of Appeal for that specific district and ultimately by the Supreme Court.[38]

Before I go into how the *stare decisis* system was built in the US, there is one more point that I would like to emphasize. As you may have noticed, I have used several words to describe the notion of *stare decisis* – system, doctrine and policy. All of these words are in a way pertinent to the notion of *stare decisis*. The word system emphasizes the fact that *stare decisis* is only present in hierarchical judicial systems.

On the other hand, the words doctrine and policy emphasises the fact that even though I have been talking about formal bindingness of precedents, the doctrine of *stare decisis* is not set down in statutory law, but can only be found as a judicial doctrine or the policy of courts.[39] It is doctrine or policy of the highest court to decide to follow its previous decisions throughout change in its composition, even when the current composition disagrees with those same decisions.[40] Moreover, this policy is policed, to the best of their ability, by the highest courts themselves in regards to the lower courts through the possibility of reversal of the lover courts' decision.[41] So far in my limited research, I have only found one statutory mandated *stare decisis* system, that of the state of Georgia in the US.[42] The act was passed, according to one author, because the 'doctrine of stare decisis had obtained such firm allegiance in public opinion, as personified by the legislature, that it was imposed as a rule on the court'.[43]

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37 The US Federal Court system is divided into districts with each district having several Federal District Courts of general jurisdiction with a federal Court of Appeals as an appellate court for that specific district (e.g. the federal appellate court for New York State which also covers the territory of other states is called Court of Appeals for the Second Circuit) and a Supreme Court sitting at the top, MacCormick and Summers (note 15) 359.

38 Ibid. 355–59.

39 Paulsen (note 20); Kozel (note 19) 411; R.A. Sedler 'The Michigan Supreme Court, *Stare Decisis*, and Overruling the Overrulings' (2009) 55 Wayne Law Review 1911.

40 F.G. Kempin Jr. 'Precedent and *Stare Decisis*: The Critical Years, 1800 to 1850' (1959) 3 American Journal of Legal History 28 (28–29).

41 Ibid. 28–29.

42 Ibid. 42.

43 Ibid. 43.

Furthermore, since this is, in almost all cases, a judicially constructed and perpetuated doctrine, the 'rules of the roads', in terms of when to overrule and when to stick to a previously decided but not well liked judgment, are also judicially constructed. This can, as evidenced by the discussions in the US Supreme Court itself, lead to some heated debates between the justices themselves regarding the proper test for overruling and whether the case at hand satisfies the same test.[44] This, however, should not be construed that courts would negate the binding nature of precedents set by higher courts, or that of one's own previous precedents, regardless how messy the doctrine can be in practice. Quite the contrary, the discussions between the Supreme Court justices are an affirmation of the doctrine of *stare decisis*, even though they might disagree regarding the details of its application.

III. Pre-conditions for *Stare Decisis*

Saying that the doctrine of *stare decisis* is a judicial doctrine and that it is, in almost all cases constructed by the courts, does not mean that *stare decisis* can exist in any system at any time. The fact that a court uses and quotes its own or a superior court's previous decisions does not mean that a system of *stare decisis* is in operation. *Stare decisis* can best be understood as:

> 'a peculiar and legal adaptation of the common practice of relying on past experience. It is based on the idea that a series of precedents should not be departed from. This natural and perhaps unavoidable tendency approaches legal usage when precedents are deemed to be authority. It reaches its apogee when a single precedent is considered to be a "binding" authority. But the concepts of the value of prior experience, respect for precedents, and *stare decisis*, must be kept distinct'.[45]

To understand the fact that *stare decisis* is but one way that precedents, i.e. previous judgments are used, one would have to keep in mind that

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[44] For instance see the discussion that is present in *Planned Parenthood of South Eastern Pennsylvania v. Robert P. Casey* 505 U.S. 833 (1992) and *Lawrence v. Texas* 539 U.S. 558 (2003); also Paulsen (note 20), talking about the messy application of the doctrine of *stare decisis* by the US Supreme Court itself.

[45] Kempin Jr. (note 40) 29.

the use of previous judgments in the reasoning of courts is not an aberration of Common Law systems. Courts in different Continental Law systems use previous judgments in a myriad of different ways. In the Italian legal system, for instance, a discussion of the previous judgment of the *Corte di Cassazione* and the Constitutional Court at length in either court judgments or scholarly writings is not an unusual occurrence.[46] This practice is not only followed by judges and scholars, but by practicing lawyers while arguing before the Italian courts as well.[47]

This does not mean, however, that a doctrine of *stare decisis* is present in the Italian legal system. For instance, prior judicial decisions, even though they are called precedents, are not formally binding,[48] the use of precedents is 'not an alternative to reference to codes, statutes or constitution. On the contrary, precedent is very often a sort of *medium* for the references to codes, statutory provisions and constitution'.[49] Consequently, precedents in Italian law have an authoritative value, they are not part of the sources of law, and consequently, '[e]vry Italian precedent is [...] a *de facto* or *persuasive* precedent, lacking in any formal biding effect'.[50]

Similar uses of previous judgments can be found in other countries as well, Germany being the other prime example. The only formally binding precedent in Germany is the judgments handed down by the Federal Constitutional Court (FCC), although there is a discussion as to whether the legislature is also bound to follow a judgment of the FCC.[51] The judgments of other courts have only persuasive value, even though they are regularly used in part of the judges reasoning albeit without having a detailed discussion on the cases themselves.[52]

France can be said to be on one of the far ends of the scale when it comes to the use of previous judicial decisions. In France, for instance, a number of formal legislative provisions exist that specifically forbids

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46 M. Taruffo and M.L. Torre 'Precedent in Italy' in MacCormick and Summers (note 15) 141 (151–53).

47 Ibid. 152.

48 Ibid. 151, 154–57.

49 Ibid. 152.

50 Ibid. 154.

51 R. Alexy and R. Dreier 'Precedent in the Federal Republic of Germany' in MacCormick and Summers (note 15) 17 (26–31).

52 Ibid. 23–24.

the use of cases to decide a controversy before the courts.[53] Judgments in France are only meant to display the 'true meaning of the statute or the previous existence of a principle. The ideological assumption is that the legal system is complete'.[54] This does not mean that courts do not adhere to previously settled cases, or that they do not look at the courts' previous practice. For one thing, there is a notion of *jurisprudence constante* (persisting jurisprudence) in France that indicates a rule that has been solidified by the constant reliance of courts.[55] However, French courts avoid the open citation of previously decided cases, especially if the appearance of deciding a case based on judicially constructed general rules.[56]

As we can see the use of precedents, i.e. previously decided cases, is not only the privilege of Common Law legal systems. Continental Law systems have no qualms about using prior judicial experience in their deliberations. As the quote from Kempin points out, it is 'a natural and perhaps unavoidable tendency'[57] to use the wisdom accrued through the ages in the form of jurisprudence. However, it is a completely different thing to do so as part of mandatory system, judicially constructed or not. Moreover, a court cannot construct a doctrine of *stare decisis* without the necessary preconditions.

In his paper, Kempin explores whether the preconditions that were germane for the adoption of the doctrine of *stare decisis* in the UK were present in the US at the time when most state courts decided to follow that doctrine.[58] He says:

> 'The reason for the late development of *stare decisis* in England lies in the fact that there were certain conditions precedent to its full development. To put the matter another way, *stare decisis* did not de-

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53 M. Lasser 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 YaleLJ 1325 (1134–40).

54 M. Troper and C. Grzegorczyk 'Precedent in France' in MacCormick and Summers (note 15) 103 (115).

55 Ibid. 122.

56 Lasser (note 53) 1336–38; Lasser has devoted a monograph to the different ways that previous judgments, from the point of legitimacy and transparency, are used in judicial deliberations in the US, France and the ECJ and has described the reasons for this, see M. Lasser *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP Oxford 2004).

57 Kempin Jr. (note 40) 29.

58 Ibid. 30–32.

> velop in England because of conditions which prevented its full development. These conditions, as far as English law is concerned, were suggested in a 1934 article in the Law Quarterly Review by W. S. Holdsworth. The reasons given were somewhat as follows:
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> 1. English law has classically operated on the theory that cases are not law, but rather only the best evidence of what law is.
>
> 2. The authority of the reporters of cases, not being officially appointed by the courts, was such that the reported cases could be discounted by judges on the basis of inaccuracy, inadequacy, or unintelligibility.
>
> 3. The English court system to the middle of the nineteenth century was such that conflicting decisions could and did exist side by side.
>
> 4. That law is not precedents, but general principles.
>
> The fourth reason may be disregarded for, as Goodhart pointed out in his article, it is virtually indistinguishable from the first. The other three reasons, however, require examination. (footnotes omitted)'.[59]

As we can see, if we were to look at any constitutional system and see whether that system follows a *stare decisis* doctrine, we would first have to look whether that system fulfils the two structural and the one theoretical/ideological preconditions for a *stare decisis* system. As Kempin points out, regardless of the fact that most US states had a hierarchical court system since their independence, it was impossible to talk of a *stare decisis* system without having reliable case reporting practices.[60] Those case reporting practices were only set firmly in place by the mid nineteen century, when most of the states adopted a *stare decisis* doctrine.[61]

The theoretical/ideological barrier is somewhat more persistent and nuanced than the other two structural preconditions. The theoretical line of thinking in US law for example, arguing that judges did nothing more than just merely apply the law was already under severe attack by the middle of the nineteenth century.[62] Moreover, by the middle of the second half to the end of the nineteen century, the theoretical doctrine that judges did something more than just discover and apply the law that was objectively out there became the mainstream among both

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[59] Ibid. 31.

[60] Ibid. 32–36.

[61] Ibid. 36.

[62] Ibid.

scholars and practitioners.[63] This does not mean, however, that the 'judges as umpires'[64] line of theoretical thought is not still firm in the US judicial and scholarly community. These two lines of thought have ebbed and flowed throughout different periods in US legal scholarly thought.[65]

What I have attempted to convey with the discussion presented in the two preceding parts is the notion that the phrase *stare decisis* has a specific meaning, one of vertically binding precedent where only the highest court in the land, in theory, can overrule its own previously set precedent. Furthermore, I have tried to convey the idea that just because constitutional systems follow previously decided cases, i.e. precedents (whether openly or behind closed doors) does not mean that a doctrine of *stare decisis* is in place. There are a large number of ways in which courts from different national judicial systems can use the previous experience accrued through cases, only one of which is the doctrine of *stare decisis*. Moreover, there are certain structural and theoretical preconditions/barriers that need to be in place/absent in order for a doctrine of *stare decisis* to be plausible. I will now use these insights to see whether a *stare decisis* system is and can be in operation in international law.

IV. *Stare Decisis* in International Law?

My first line of inquiry on whether there is a possibility for a *stare decisis* system in international law will start with the question of whether international courts use the past accrued wisdom of courts through case-law? This question is in fact pretty easy to answer, if we decide to gloss over the details a bit. International courts do not shy away from discussing and quoting their own or even other courts' previous judg-

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[63] B.Z. Tamanha *Beyond the Realist-Formalist Divide; the Role of Politics in Judging* (Princeton University Press Princeton 2010) 27–43 accounting for the misreading of the early realists of the scholarly and practitioners insights into the proper role of judges.

[64] C. Babington and J. Becker '"Judges Are Not Politicians", Roberts Says' (13 September 2005) The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642_pf.html> (12 February 2011).

[65] Tamanha (note 63).

ments. International criminal tribunals are probably the most notorious example of this, but there is hardly an international court that does not rely on its or other courts' previous case-law.

However, as I have said previously, this in itself does not mean that these courts follow a doctrine of *stare decisis*. I have given examples of constitutional systems where the use of previous judgments is prolific without following a doctrine of *stare decisis*. Consequently, we cannot say that a *stare decisis* system exists within general international law or within a specific courts system merely on the evidence that courts use previously decided cases, their own or other courts' regardless.

Consequently, it is time to see whether the preconditions/barriers for *stare decisis* are present in general international law and within certain branches/regimes. I will start with the easiest one, a case reporting system. In the age of the internet and electronic sources, it is hard to say that there is a major deficiency in case reporting of international courts. Almost all international court judgments and decisions are available either in an online database[66] or through their published reports (for earlier judgments). Not only that, but certain publishers and international journals have stared or have had dedicated reports and case notes as part of their publication practices.[67] Consequently, reliable information regarding the proper state of case law of any give tribunal are more than available, and consequently, easily exploitable by international judges.

The other two preconditions/barriers are a little bit more complicated than they appear. For instance, the precondition of a hierarchical court system will depend on one's specific view point. We can for a certainty say that there is a hierarchical system within the UN *ad hoc* criminal tribunals,[68] as well as the SCSL[69] and the ICC[70] which are structured

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[66] For instance see the websites of the ICJ which also holds the reports of the PCIJ, the ICTY and ICTR, the ICC, the SCSL, the ECJ, the ECtHR, the IACtHR, the WTO panels and Appellate body and the published reports of their judgments.

[67] For instance see the International Law Reports <http://www.justis.com/data-coverage/international-law-reports.aspx> (12 February 2011); Oxford Reports on International Law <http://www.oup.com/online/us/law/oril/> (12 February); AJIL which regularly publishes case notes of different jurisdictions connected to international law, see AJIL 'International Legal Materials' <http://www.asil.org/ilm/ilmindx.htm> (12 February).

[68] Art. 11 of the Statute of the ICTY in UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc. S/25704.

around separate Trial Chambers and an Appeals Chamber at the top. The ECtHR also has a somewhat hierarchical structure, with Sections and a Grand Chamber where the Grand Chamber acts as an appellate instance.[71] Similarly with the WTO, where there are DSU panels and an Appellate body.[72]

However, if we look at the international system as a whole, we can, with a high degree of certainty, say that there is no hierarchical court structure, neither one established by treaty or custom, nor one established by the courts themselves.[73] One just has to recall the disagreement that the sparked between the ICJ and the ICTY over the issue of State responsibility for actions of paramilitary groups.[74]

The theoretical precondition/barrier is somewhat more complicated. As we are all painfully aware so far, Art. 38 of the ICJ Statute puts international judgments in the realm of subsidiary sources of law as evidence of what the law is. As in most Continental Law systems, courts (should) share the same normative ladder with the opinions of scholars.[75] For instance, almost no text book puts international judgments as

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[69] Art. 11 of the Statute of the SCSL <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> (12 February).

[70] Art. 34 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[71] The ECtHR is comprised of five sections and a Grand Chamber, more information available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/The+Sections/> (12 February).

[72] Panel and Appellate Body reports available at <http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm> (12 February).

[73] Generally see C.P.R. Romano 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41 NYU JILP 755; R. Teitel and R. Howse 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 NYU JILP 959; S. Linton and F.K. Tiba 'The International Judge in an Age of Multiple International Courts and Tribunals' (2009) 9 ChicagoJIL 407.

[74] *Prosecutor v. Tadić (Judgment)* IT-94-1-A (15 July 1999) paras 102–45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep. 43 paras 398–407; A. Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649.

[75] M.A. Glendon, M.W. Gordon and C. Osakwe *Comparative Legal Traditions: Texts Materials and Cases on the Civil and Common Law Traditions, with Special Reference to French, German, English and European Law* (2nd edn.

sources of law, which one would have to if they were more than just law discoverers.[76]

However, the notion that courts are mere law discoverers and not law shapers has been put into doubt in the past decade and a half. As I said earlier, Judge Shahabuddeen in his book has already acknowledged the law shaping character of the ICJ judgments.[77] Other authors have mentioned in passing that it is almost unsupportable in the current state of international law to say that international tribunals are mere law discoverers, but that they have a considerable normative power.[78] Furthermore, if I may go back to the article of Kempin, in order for a *stare decisis* doctrine to emerge, it is not necessary to refute the concept that courts are mere law discoverers, but for it to be under serious attack.[79]

Consequently, I can say with some conviction that the barriers that would suggest against the adoption of a *stare decisis* doctrine or policy are somewhat blurred and somewhat under strain. It is because of the case reporting system, the hierarchy in certain international court systems and the questioning of the age old wisdom of international judgments as subsidiary sources of law that a doctrine of *stare decisis* can and does exist in certain branches of international law, like within the UN *ad hoc* criminal tribunals. However, this also means that, because of the lack of hierarchy in between the court systems in international law, we cannot talk of a doctrine of *stare decisis* in general international law.

Furthermore, we should not forget probably the most important factor in creating a doctrine of *stare decisis*, and that is the courts themselves. As I have said, *stare decisis* is a judicial doctrine or policy. In almost all of its occurrences, it has been created by the courts themselves. Even within the UN *ad hoc* system, it was the Appeals Chamber that con-

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West Publishing Co. St. Paul Minnesota 1994) 192–10; also see Lasser [2004] (note 56) 190–200.

[76] R.M.M. Wallace *International Law* (4th edn. Sweet & Maxwell London 2002) 3–7; V. Lawe *International Law* (OUP Oxford 2007) having no discussion about courts in his text-book when discussing the issue of the sources of law; M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 109–12.

[77] Shahabuddeen (note 2) 105–07.

[78] D. Terris, C.P.R. Romano and L. Swigart *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (OUP Oxford 2007) 102–30.

[79] Kempin Jr. (note 40) 32–36.

structed the doctrine of *stare decisis* that is applicable within the ICTY and the ICTR in the *Aleksovski* Appeals Chamber judgment,[80] and not the UN Security Council through the adoption of their Statutes. Consequently, even if the preconditions/barriers are present/lifted in a specific system of international law, a doctrine of *stare decisis* most certainly will have to be established by the courts themselves. Absent expressly stated rules of formal bindingness by the highest courts within a certain international law branch/regime we could not talk of a *stare decisis* doctrine operating within that branch. Another scenario would be for the States themselves to modify the current structure of the international system, establish a hierarchical order and allow or require of courts to follow a doctrine of *stare decisis*. I, however, will not be holding my breath for this scenario to happen.

[80] *Prosecutor v. Zlatko Aleksovski (Judgment)* (note 12) paras 92–115.

Unacknowledged Legislators: Some Preliminary Reflections on the Limits of Judicial Lawmaking

*Paper submitted by Hugh Thirlway**

It was Shelley, himself a poet, who memorably declared in 1821 that 'Poets are the unacknowledged legislators of the world'.[1] It is to be feared that in almost two centuries they have not yet received the acknowledgment of that role that he felt was their due. In our day, this is an appellation which could perhaps be applied with more accuracy to international courts and tribunals.

It is a cardinal and well-known principle that tribunals do not make law: they only apply it. It is also an open secret that in practice this is simply not true: when a court settles a dispute by the application of international law, there is inevitably an element of added value: something is clarified or declared that had not been clarified or declared before. The International Court of Justice, for its part, has asserted that 'it states the existing law and does not legislate', and that '[t]his is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend'.[2] Inevitably however, the specification of the scope of existing law involves law-making, even if not always in any great or evident degree; and to note the general trend of the law implies ascertaining what that trend is, not always an impartial operation of recording, and may, deliberately or otherwise, involve

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1 Percy Bysshe Shelley *The Defence of Poetry* (1821).

2 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 18.

directing that trend. The conclusion of the most thorough and authoritative survey of the question in recent years is categorical:

> 'International courts and tribunals do more than apply the law […] they are also part of the process for making it. In some cases this involves affirming the law-making effect of multilateral agreements, UN resolutions, ILC codifications or other products of […] law-making processes […]. In other cases judges have drawn upon a rather broader legal basis for their decisions, and articulated rules and principles of law that can only be described as novel and are not necessarily supported by evidence of general practice or *opinio juris*'.[3]

The question posed in the present paper is this: given that international courts and tribunals make law for States, and that this, being unacknowledged, involves no specific regulation, what control do States have over the process, and what (if anything) can they do to prevent a tribunal diverging, consciously or otherwise, from law as expressing the individual or collective will of States, or to remedy such a divergence once committed? The views offered are no more than tentative; a complete survey of the instances in which international tribunals, particularly the International Court of Justice, have broken new ground in declaring the law, and of any detectable international reaction to these cases, would be needed for any more confident assertions or predictions.

As background, to demonstrate the rigorously classical approach here adopted, some elementary answers to the elementary question: how is international law made? The answer is of course found in the theory of sources: as students we learn that Art. 38 of the Statute of the International Court of Justice declares that its 'function is to decide in accordance with international law', and that it is to apply in the first place 'international conventions, whether general or particular' and 'international custom, as evidence of a general practice accepted as law'. The evident common factor here is input by States. States that draw up a treaty include in it the rights and obligations that they choose to take upon themselves; when it is a multilateral convention that is being drafted, there may be a multiplicity of mutual accommodations, not to say horse-trading, but the end-product is, theoretically at least, acceptable to all; and there remains the possibility of non-ratification, or

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[3] A. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 310–11.

(where permitted) ratification with reservations. Custom by definition is made by States, and a general custom[4] is recognized as binding on all States, not merely those who took part in its creation (subject to the doctrine, not much heard of nowadays, of the 'persistent objector'[5]). The 'general principles of law' are less easily definable or discoverable, and have in fact not proved useful in the work of the ICJ at least; but these have to be 'recognized by civilized nations',[6] which means all recognized States, so that some evidence of such recognition in State practice or domestic jurisprudence would seem to be required.

Once we move, in Art. 38, from the State-related sources to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations', the product is down-graded: these are not sources, but 'subsidiary means for the determination of rules of law'. Thus a decision of the ICJ itself has 'binding force […] between the parties and in respect of that particular case', and no other binding force, but may still rank as a 'subsidiary means' leading, in effect, to its application between other litigating States. Since it is generally agreed that the sources defined in Art. 38 are valid also for other international tribunals, a finding in one case could theoretically be bandied about among different tribunals with no more support in the practice of States than was discerned, perhaps optimistically, by the original tribunal.[7] Certainly the original

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[4] Local or special custom may be left aside for present purposes: but note the ICJ decision in *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep. 554 paras 20–26 (itself perhaps a questionable one) that the principle of *uti possidetis*, developed in Latin America, was or had become a general principle of world-wide application.

[5] An exception is the lucid treatment by M. Byers *Custom, Power and the Power of Rules* (CUP Cambridge 1999) 102–05.

[6] A term which at one time provoked some resentment among lawyers from the developing world, who felt that their countries were aimed at: *cf.* the separate opinion of Judge Ammoun in the *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany /Netherlands) (Separate Opinion of Judge Fouad Ammoun)* [1969] ICJ Rep. 101 (132–35).

[7] That this will not necessarily be the case is however exemplified by the criticism by the ICTY, in the case *Prosecutor v. Tadić (Judgment)* IT-94-1-A (15 July 1999), of the ICJ decision in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] ICJ Rep. 14 (and the response of the ICJ in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos-*

tribunal, if it is a standing body, will regard it as the normal process to follow its established jurisprudence, as is demonstrated by the number of examples in the *ICJ Reports* of a finding being buttressed by a whole string of references to previous consistent findings on the same point. As to the 'most highly qualified publicists of the various nations', whether they can be relied on to state the *lex lata*, or at least in their teachings to distinguish clearly between *lex lata* and *lex* which the author, probably with good reason, considers eminently *ferenda*, is another matter.[8]

The ICJ may serve as a paradigm, in the sense that the mission entrusted to other standing tribunals, in terms of finding and applying the law, is analogous if not identical;[9] and arbitration bodies, and counsel pleading before them, tend to assume the existence of a standard approach to law-finding best expressed in the terms of Art. 38.

If the situation of international tribunals in the international legal system is compared with that of courts in a national legal system, it is clear that there is an element missing. If the national courts lay down as a rule of law something which does not correspond to the wishes and intentions of the community that they serve (normally to be identified with the State, as represented by the national government), then apart from the possibility of appeal,[10] which may merely displace the prob-

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nia and Herzegovina v. Serbia and Montenegro) (Judgment) [2007] ICJ Rep. 209 paras 402–03.

[8] As a cautionary tale, we may recall the persistent attempt attributed to the late Roberto Ago to re-establish, in his successive ILC Reports on State Responsibility, a thesis of which he had endeavoured unsuccessfully to convince the Permanent Court many years before: see J. Crawford *The International Law Commission's Articles on State Responsibility* (CUP Cambridge 2002) Introduction 23.

[9] For example, Art. 293 of the UNCLOS, to which Art. 23 of the ITLOS Statute refers, requires the application of the Convention 'and other rules of international law not incompatible with' the Convention.; no further definition is offered, leaving Art. 38 of the ICJ Statute as the recognized yardstick. For a perhaps excessive assumption by an arbitral tribunal that what applies to the ICJ applies to such a tribunal, see *Victor Pey Casado v. Chile (Decision of 25 September 2001)* ICSID Case No. ARB/98/2.

[10] The ICC and other international criminal courts of course include appeal structures, but these are not here to our purpose. For an almost unique example of appeal being provided for from one international body, sitting judicially, to another, see Art. 84 of the Chicago Convention on International Civil Aviation ([signed 7 December 1944, entered into force 4 April 1947] 15 UNTS 295), ap-

lem, legislation can be introduced to cancel out the ruling for the future, or to re-establish what had previously been regarded as the *status quo*. Whether this may involve cancelling the effect of the specific judgment in its direct effect on the litigants, depriving one of them of the benefit obtained, is a more complex question; but we are here more interested in the possibility of general adjustment of law in its future reach.

Against that background, what is the situation if an international tribunal, in particular the International Court, gives a ruling which is regarded (let us reserve for the moment the question, by whom?) not merely as a development, in that it does not correspond to an existing rule or principle, but furthermore as an unwelcome development? That such development does occur we may take, on the basis of the study cited above, as established; that it may be sometimes an unwelcome development is perhaps not so unlikely as it seems if the area of law concerned is in an early stage of development. And if this is a real danger, how is it to be guarded against?

As regards the parties to a specific case, they will not plead before the Court for a solution that they would not welcome; but we should not overlook the rule *jura novit curia*: it is possible for the two States parties to a case to have different views of the applicable law, and to seek to learn from the Court which of them is right, only to be told that they are both wrong: the law is otherwise. It is possible in principle for the parties to restrain the scope of the matter submitted to the Court,[11] and

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plied in the case of *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] ICJ Rep. 46.

[11] When the law of maritime delimitation was still in an uncertain and inchoate state, the first submissions of such matters to the ICJ were guarded in their terms: in the *North Sea Continental Shelf* cases the parties in their special agreement asked the Court merely to declare the 'rules and principles of international law' applicable to the delimitation of their continental shelves, reserving for themselves the actual delimitation: *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep. 3 (6); in the case *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] the parties went further, asking the Court to 'specify precisely the practical way' in which the principles and rules that it would have defined should be applied (*Continental Shelf [Tunisia/Libyan Arab Jamahiriya]* [1982] ICJ Rep. 18 [23]), and in fact the Court very nearly drew the parties' line for them (see the map at ibid. 90). Later applications to the Court have asked for a line as well as an examination of the law.

the principle *ne ultra petita* then keeps the decision within bounds;[12] but it is doubtful whether the Court's law-finding activity can be restrained in this way.[13]

If the decision concerns the interpretation of a bilateral treaty, and neither party likes the Court's ruling, the remedy is, up to a point, clearly in their own hands: to agree to a different interpretation. Since however the original dispute concerned, or involved, precisely that point of interpretation, this may not be such a simple matter. If the matter concerns a multilateral treaty, the question of the identification of the hypothetical unsatisfied customer becomes crucial: if it is the two parties that are unhappy, they can again (subject to the same practical problem) agree a mutual interpretation, which may or may not match the general view of the other States parties to the treaty. It could on the other hand be a matter of concern to the generality of States parties if the Court adopts, in a case between two only of them, an interpretation that does not correspond to the wishes and beliefs of those third States. The ICJ Statute of course contains a provision, Art. 63, to enable third States to be heard by the Court on the interpretation of a multilateral or plurilateral treaty, but the downside of this is that in such case the intervening State becomes bound by the Court's interpretation; so far in most cases States have preferred to remain on the sidelines, so as to keep their own reserved legal position intact.

In the case of a decision by the Court concerning a rule of customary law, no such power of intervention exists; and it is doubtful whether Art. 62 of the Statute, permitting intervention when the third State 'has an interest of a legal nature which may be affected by the decision' would extend to the protection, as an academic point, of the integrity of

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[12] For a recent criticism suggesting that the Court had in effect disregarded this principle, see the separate opinion of Judge *ad hoc* Sur appended to the Order of 28 May 2009 in the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Provisional Measures) (Separate Opinion of Judge* ad hoc *Sur)* ICJ Doc. 2009 General List No. 144 paras 14–15.

[13] Note however the examination by the Court of the Special Agreement in the case of the *Continental Shelf* between Tunisia and Libya, authorizing the Court to take into account the 'new accepted trends' in UNCLOS; the Court observed that 'It would no doubt have been possible for the Parties to have identified in the Special Agreement certain specific developments in the law of the sea of this kind, and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*'; but the Court found that this had not been the intention; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (note 11) para. 24.

a customary rule. It may seem that the hypothesis of the Court producing an eccentric view of a customary rule is an artificial one; but the study already quoted above gives a number of examples.[14]

Furthermore, there is a reforming spirit abroad in some Members of the Court, a view that might be crudely expressed as being that the judge sometimes sees more clearly than the *justiciable* how law should develop, and he should thus not be tied to custom as established in practice. While denying that it amounts to 'judicial legislation', a recent President of the Court, of great authority, has stated that 'It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another should be preferred'.[15] The nature of customary law, in principle unwritten and fragmented (despite the achievements of the International Law Commission), lends itself to comparative freedom of interpretation; and abstract concepts of justice, and the growing importance attached to human rights, may act as a spur. The Court might not go so far as Wotan addressing Freya: 'Stets Gewohntes/nur magst du verstehn:/doch was noch nie sich traf/danach trachtet mein Sinn';[16] but if it is once conceded that it is part of the role of the Court to develop – judiciously – the law, it cannot necessarily be expected that the development will please everybody, or be universally regarded as a logical extension of what was already established.[17] In the case of *Armed Activities on the Territory of the Congo*, the Court hinted at a re-visiting of the ruling in the advisory opinion on *Reservations to the Genocide Convention* that a reservation to Art. IX of that Convention (the disputes-settlement clause, providing for ICJ jurisdiction) is not incompatible with the ob-

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[14] Boyle and Chinkin (note 3) 279–80.

[15] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Dissenting Opinion of Judge Higgins)* [1996] ICJ Rep. 591 para. 32.

[16] Richard Wagner *Die Walküre* Act II Sc. 1: 'All that *you* can understand is ever what is customary: it is toward what has not yet occurred that *my* spirit strives'.

[17] If an anecdote may be excused: the writer was told many years ago that the decision in the *Nottebohm* case took the form it did, not on the basis of the parties' arguments on customary law, but because one of the judges had recently read a thesis by a young scholar suggesting that the law was, or should be, on those lines, and the judge was sufficiently impressed to convince his colleagues. How much truth there is in the tale it is impossible to determine.

ject and purpose of the Convention;[18] and a joint opinion of five Members of the Court was still more specific.[19] It may be doubted whether the general desire to repress genocide leads States, as opposed to judges, to consider appropriate the abandonment of this instance of their right to decide for themselves the extent of their commitment to judicial settlement.

A clear – and well-known – example can be cited of what might be called 'judge-made law' which in fact *did* please, and ended up by becoming the accepted standard. When the Court was asked for an advisory opinion in the case of *Reservations to the Genocide Convention*, it was faced both with divergent views and with divergent practice on the question whether a State that became a party to a multilateral convention with a reservation was or was not to be regarded as a party to it without the express acceptance of all the other States parties. The Court's solution, that the test was whether the reservation was 'compatible with the object and purpose of the Convention', and that a State could be a party *vis-à-vis* States that did not object to its reservation, and not a party *vis-à-vis* those that did, was accepted and incorporated in the Vienna Convention on the Law of Treaties.[20]

On the other hand, an equally classic example can be cited of an ICJ ruling which was received with something like horror and incredulity by the generality of States: the 1966 decision in the *South West Africa*

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[18] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* [2006] ICJ Rep. 32 para. 67, where the Court carefully limits finding of compatibility to 'the circumstances of the present case'.

[19] Ibid. 68 para. 13, referring to the 1951 advisory opinion as not foreclosing 'legal developments in respect of hitherto uncharted waters in the future'; it is difficult to see in what respect there are here 'uncharted' areas; note also ibid. 72 para. 28.

[20] Art. 20 of the VCLT. The resulting situation is open to criticism as causing confusion and as injurious to the unity of the treaty, but it had, and has, its merits. The study of Reservations to Treaties by the ILC in 1993–1997 did not propose any amendments to the Convention in this respect; in the discussions in the Sixth Committee in 1997 it was generally agreed that the Convention rules remained applicable, but might be supplemented by a Code of Practice. See the draft Guidelines adopted in 1998/1999: UNGA 'Report of the International Law Commission on the Work of its fiftieth Sesstion' (20 April–12 June 1998, 27 July–14 August 1998) UN Doc. A/53/10 para. 540 and UNGA 'Report of the International Law Commission on the work of its fifty-first Session' (3 May–23 July 1999) UN Doc. A/54/10 para. 470.

cases,[21] which was generally, but inaccurately, perceived as a refusal on the merits to condemn the racist policies of the then Government of South Africa. The legal point on which the decision turned, the extent to which the League of Nations Mandate for South West Africa rendered the actions of the mandatory power justiciable at the suit of other former Members of the League, tended to be lost sight of. If the General Assembly had had, for example, a power of repeal or legislative correction similar to that possessed by a domestic legislature in relation to a domestic court decision, its exercise as a matter of *general* legislation would have been pointless, since South West Africa was the only territory 'left over' from a Mandate regime in respect of which the question was of any relevance.[22]

In the absence of any such repealing or reforming power in the General Assembly or elsewhere, if the Court were to state a customary rule that did not correspond to the expectations of States, it is not clear what action might be taken. The parties to the case, once again, may, if they are both dissatisfied, be able to agree to regulate their affairs in a manner inconsistent with the Court's ruling (barring, of course, any question of *jus cogens*). If they accept the ruling, an interesting theoretical question offers itself: do their actions rank as State practice for purposes of later assessment of the customary character of the new rule? It would seem that they would not, since they were, on the hypothesis we are considering, based on an identifiable *opinio juris* consistent with the action taken. On the wider international level, one could imagine the matter being referred to the ILC for study, but only in an egregious case, of vital import to the majority of States – not a very probable scenario. Otherwise, States not bound by the decision are free to go on as though it had never been given; but if the new ruling suits the interest of one State, or group of States, but not the others, one can envisage it being seized on as a negotiating point.

There is however a special class of case in which a decision of the Court that could be regarded as incorrect would nevertheless have, *de facto*, virtually complete authority: if the decision concerned the Court's own legal powers.[23] Here the decision in the *LaGrand* case as to the binding

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[21] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase)* [1966] ICJ Rep. 6.

[22] And on the question of the illegality of *apartheid* as such the UN General Assembly had repeatedly made its collective view known.

[23] Interestingly, it is on this kind of question that the Court often backs its statements with a lengthy enumeration of its own previous decisions in the

character of provisional measures may serve as a paradigm. Let it be accepted as a hypothesis, for argument's sake, that the intention of the draftsmen of the Statutes of the Permanent Court and the post-war Court was *not* to confer a power to indicate measures binding on the State to which they were addressed, but merely a power to make 'indications' – meaning non-binding recommendations.[24] On that basis, the decision in *LaGrand* was a development (to put the matter favourably) or a distortion (to put it less favourably).[25] It is hardly likely that a State to which the Court has addressed an order indicating provisional measures will be able to remedy this by coming to an agreement with its opponent that the measures will not be regarded as binding, since it is presumably binding measures that were being asked for. The question is thus whether it is open to a State now to argue before the Court that it may not indicate binding measures; or that measures which it has indicated, and which we will suppose the State does not intend to comply with, are not binding? The Court would no doubt listen to such arguments with its usual courtesy, but the objecting State might still feel it was a dialogue of the deaf. There is nothing to exempt the *LaGrand* decision from the general rule of Art. 59 of the Statute; and yet there would be something contradictory about successive decisions of the Court about its own powers which came to opposite conclusions –

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same sense: see for example the recent Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141 paras 29–30 (on the Court's discretion to give or refuse an opinion).

[24] There was of course a significant body of scholarly opinion (shared by the present writer) to the effect that this was indeed the legal situation (see the useful survey in K. Oellers-Frahm 'Article 41' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm [eds] *The Statute of the International Court of Justice* [OUP Oxford 2006] 955–56 paras 86–87); but it is not our purpose to argue that issue here. For a critical examination of this aspect of the *LaGrand* decision, see H. Thirlway 'The Law and Procedure of the International Court of Justice' (2001) 37 BYIL (111–25).

[25] It is striking, perhaps even disturbing, to find an ICSID arbitral tribunal taking the *LaGrand* decision as a general principle applicable to all judicial or arbitral bodies, so as to justify such a tribunal in declaring its power to indicate binding measures, in the face of a constitutional text referring to the action of the tribunal as a 'recommendation': see Rule 39 of the ICSID Arbitration Rules, and the decision in the case of *Victor Pey Casado v. Chile* (note 9) paras 19 et seq.

rather more so than if the two decisions were on a rule of general law which happened to be relevant in two successive cases.

Another example of a decision of the Court in the field of its own powers and procedures which could be, and indeed was, challenged, related to intervention under Art. 62 of the Statute. In the *Land, Island and Maritime Frontier Dispute* a chamber had been formed at the request of the parties, El Salvador and Honduras, and on the basis of their unofficial indications as to its preferred composition, to hear the case. The Government of Nicaragua then applied to intervene in the case under Art. 62 of the Statute, and the procedural problem that arose was whether this application should be heard and determined by the Chamber or by the full Court. The Court examined the matter, and decided that the application was for the Chamber to rule upon;[26] Judge Shahabuddeen, in a powerful dissenting opinion,[27] argued that this was wrong. It may be presumed that Nicaragua was of the same view, since, as Judge Shahabuddeen pointed out, Nicaragua could reasonably suppose that the Court had created for the original parties a Chamber composed according to their wishes:

> 'In substance, therefore, the Applicant is being told by the Court that it has no option but to submit to a Chamber all of whose five members it is reasonably entitled to feel have been practically handpicked by the existing Parties'.[28]

Judge Shahabuddeen considered that the case was one:

> 'in which the application by the Court of a text taken at its received face value yields a result so deeply offensive to basal norms of justice as to make it impossible for the Court responsibly to avert its gaze from the necessity to examine the foundations of the system which leads to that result'.[29]

He was thus led to examine the interpretation of Art. 62 of the Statute by the Court, as reflected in Art. 17 (2) of the Rules of Court, by which the parties were consulted as to 'their views regarding the composition

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[26] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (Order of 28 February 1990)* [1990] ICJ Rep. 3.

[27] Ibid. 18.

[28] Ibid. 19. The Chamber did authorize the intervention (*sub modo*) of Nicaragua, and Nicaragua participated in the proceedings before the 'packed' Chamber, with apparent satisfaction: see the eventual Judgment at [1992] ICJ Rep. 351.

[29] Ibid. 20.

of the chamber' to be formed, and in the unofficial but generally recognized practice of the Court giving effect to those views. His view was that Art. 62 was being mis-interpreted; his argument is extremely compelling; and if it was not shared by his colleagues (and possibly by States forming the clientele of the Court), the reason is that the notion of letting the parties choose their judges in a chamber was an idea whose time had come, and the fact that it was inconsistent with the Statute (and, as Judge Shahabuddeen showed, with the *travaux préparatoires*) was not allowed to stand in its way.[30]

The interesting hypothesis is therefore the opposite: if States parties to the Statute had shared Judge Shahabuddeen's view that the Court was in breach of that text, and that this should not continue; what then? In a domestic context, the legislature could, as noted above, step in to restore the intention of the Statute.[31] The International Court could however not be compelled to change its practice by anything short of an unambiguous amendment of the Statute; and amendment of the Statute, though authorized by its Art. 69, is to be by the same procedure as for the Charter, and is generally considered almost as hazardous an enterprise as amendment of the Charter itself. From this the surprising conclusion must be that in practice the Court is free to 'bend' the Statute with impunity.[32]

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[30] Chambers do not however seem necessarily to have retained this popularity in more recent years; leaving aside the Chamber formed for the *Application for Revision of the Judgment of 11 September 1992 in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening) (El Salvador v. Honduras)* [2003] ICJ Rep. 392, which was in effect a continuation of the original Chamber, the last request for the formation of an *ad hoc* chamber was in *Frontier Dispute (Benin/Niger)* [2005] ICJ Rep. 90; and no such request has been made for the similar *Frontier Dispute (Burkina Faso/Niger)* of 2010.

[31] Interestingly, Judge Shahabuddeen demonstrates, in the course of his argument, that 'The history of the creation of the Permanent Court makes it clear that the concept of a court of justice to which the Court was intended to conform was that of a court of justice as generally understood in municipal law': ibid. 33.

[32] A practice which on a more trivial level may be regarded as inconsistent with the Court's function is that of including, in a decision finding a lack of jurisdiction, recommendations to the parties as to their behaviour. One such recommendation was objected to by a Member of the Court: 'The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order':

Shelley saw poets as unacknowledged legislators; another nineteenth-century British poet, Tennyson, saw the acknowledged legislative activity of the English courts, the development of law through judicial decision, as a force wholly for good; England was for him:

> 'A land of settled government,/ A land of just and old renown,/ Where Freedom slowly broadens down/ From precedent to precedent'.[33]

He was right to discern the essential genius of the common law as embodied in the system of judicial precedent; but perhaps did not give enough credit to the possible role of the legislature in ensuring that the precedents were always such as to broaden freedom, or at all events such as to advance the interests of the society served by the courts. At the international level, in the absence of such constitutional checks and balances, it must be incumbent on the international judge in principle to take international law as he finds it – that finding of it is already his peculiar role and privilege – and to be particularly wary of temptations to improve it on his own responsibility.

Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda) (Order of 10 July 2002) (Declaration by Judge Buergenthal) [2002] ICJ Rep. 257 para. 4.

[33] Alfred Lord Tennyson *You Ask Me Why, Tho' Ill at Ease* (1842).

Lawmaking of Courts and Tribunals Results in the Destruction of the Rule of Law

*Paper submitted by Karl Doehring †**

Definition: What is the essential core of law-making? The essence of law-making is the creation of binding legal rules *erga omnes* within a legal system conferring this competence on the creator with the effect that new rules may supersede former rules, eventually *contra legem*. Under western democratic constitutions the law-making competence is vested in the parliament in its capacity as legislator. Limits of such a competence are to be sought and found in the legal system conferring the law-making competence.

This definition is not meant to ignore or to neglect the task of the courts to interpret legal norms. The courts contribute in this way to the development of the law where existing rules need concretization. Regarding international law no deviation from this fundamental concept can be identified.[1]

Concretization of a legal rule through interpretation by a court does not signify the creation of a new rule but has to respect the spirit of the rule to be interpreted and the spirit of the legal system forming the basis

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[1] J.A. Frowein 'Randbemerkungen zu den Grenzen des Richterrechts in rechtsvergleichender Betrachtung' in G. Reinhart (ed.) *Richterliche Rechtsfortbildung: Erscheinungsformen, Auftrag und Grenzen, Festschrift der Juristischen Fakultät zur 600-Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (Müller Heidelberg 1986) 555–65; K. Doehring 'Die Rechtsprechung als Quelle des Völkerrechts: Zur Auslegung des Art. 38 Abs. 1 Ziff. d des Statuts des Internationalen Gerichtshofs' in G. Reinhardt ibid. 541–54.

of the rule. There is no room for law-making as such because the deciding court should remain with in the frame of law-application.

Definition: What is the true core of the rule of law? It is the calculability of norms producing certainty of law this way. The parties to a litigation before a court must be sure that the dispute will be resolved on the basis of existing norms that are generally known by the members of the legal community. Any rule applied by a court which is created by the court itself in deciding a legal dispute would logically have been unknown to the parties appearing before the court. No calculability of law would prevail, and the judgment of a court based on a newly-created rule would have a surprising effect.

This basic principle also forms part of the generally accepted rule which denies a retroactive effect of norms. Any non-observance of such a basic principle of the rule of law would signify the government of men and not of law.

The calculability of norms as a basic principle of the rule of law is confirmed by the procedural rules of international courts. The decisions of an international court produce binding effect only upon the parties to the litigation, i.e. *inter partes*, and limit in this way the *res iudicata*. Third States are not bound so that any law-making effect regarding their rights is excluded. Where the competence of the court embraces the power to interpret a multilateral treaty only the parties to that treaty are bound, due to their obligations laid down in the treaty. So far that decision produces again an effect only *inter partes*.

Also in regard to the binding effect only *inter partes* a court has to apply the law which is defined by the statute of the court or by the treaty to be applied. Regarding the Statute of the International Court of Justice which declares that the Court has to decide on the basis of international law, it is expressly laid down that international treaties, international customary law and the general principles of law recognized by civilized nations form the body of the norms to be applied. Moreover, Art. 94 of the United Nations Charter declares that the observance of the decisions of the Court is only obligatory for the parties before the Court. Judicial decisions and teachings of reputable scholars may be invoked by the Court only as devices to find out the existing law and thus do not belong to the sources of law.

Art. 59 of the Statute of the International Court of Justice declares that a decision of the Court produces binding force only upon the parties to

the litigation and only in regard to the subject matter dealt with by the Court.

The worldwide accepted principle which guarantees the independence of the judiciary and of judges forms part of the 'general principles of law recognized by civilized nations'. The justification of that independence reposes – as a kind of compensation – on the binding force of law imposed on the judges. If they were to create new rules the principle of judicial independence would be misused. Law-making judges would be comparable to dictators because they misuse the power also to decide *contra legem*. The protection of the individuals through the rule of law then ceases. The German history during the national socialist regime and the Marxist system of the Soviet Union are clear examples of that situation.

International courts do not have the power to produce international customary law. The creator of these rules is the law-making practice of the International Society of States. Any law-making function of international courts denies the exclusive competence of States to create or abolish customary law and would signify an uncontrolled power of the courts to invent rules by themselves, i.e. rules which nobody had known of before, which would be a clear contradiction to the rule of law.

Even if one would emphasize the view that in reality the transition from interpretation of law to the creation of law remains often a vague determination so that the court would always be in position to create new rules, this argument would be of a misleading character. The misuse of a principle does not justify its negation. The fact that judges might transgress the threshold between interpretation and creation of law in a given case reminds us to observe the classic rule that we never should confuse facts and norms. Georg Jellinek who invented the famous expression of the *Normative Kraft des Faktischen* was fully aware of the need to clearly recognize facts as legally relevant only where the legal community attributes this relevance to the facts and Hans Kelsen saw this principle as the basis of judicial thinking, namely the strict distinction between 'sein and sollen'.

Regarding national law a competence of national courts to create law would signify a violation of the principle of the separation of powers guaranteeing at least indirectly the rule of law.