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# *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*

Armin von Bogdandy\* and Ingo Venzke\*\*

## **Abstract**

*Court judgments are epitomes of sovereign rule in many grand theoretical sketches. How may such judicial power be justified nowadays? Many domestic courts decide in the name of the people and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions. International courts, to the contrary, do not say in whose name they speak the law. This void sparks our driving question: how does the power of international courts relate to the principle of democracy? How can it be justified in accordance with basic premises of democratic theory? Our contribution develops an understanding of international adjudication as an exercise of public authority. It places emphasis on the asymmetry between international adjudication and parliamentary politics, unfolds legitimacy problems in the practice of international courts, and sketches how to interpret and develop international law in response. Procedural adjustments and politicization could react to power vested in decisions, elections might respond to the exercise of public authority, and systemic interpretation as well as a dialogue between courts may perhaps ease problems of fragmentation. We ultimately suggest that domestic constitutional organs will retain a critical role in relieving the international level from shouldering the whole legitimacy burden, contesting and accommodating authority in a normative pluriverse. We finally contend that the idea of transnational and possibly cosmopolitan citizenship should further guide the democratic justification of international courts' public authority.*

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## 1 Problematique

Court judgments are epitomes of sovereign rule in many grand theoretical sketches.<sup>1</sup> How may such judicial power be justified nowadays? Many domestic courts decide in the name of the people and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions.<sup>2</sup> International courts,<sup>3</sup> on the contrary, do not say in whose name they speak the law. This void sparks our driving question: how does the power of international courts relate to the principle of democracy? In other words, how can the rule of international courts be justified in accordance with basic premises of democratic theory?

International courts form part of institutional designs that are geared towards helping to solve some of the most pressing global problems. They are part of strategies that pursue shared aims, seek to overcome obstacles of cooperation, and try to mend failures of collective action. Like few other institutions, they stand in the service of international law's promise of contributing to global justice. And yet, every new institution gives rise to new concerns. We wish to investigate their democratic justification in particular and are concerned that international courts may fall victim to their own success. This inquiry does not exhaust the broader issue of international courts' legitimacy. Above all it should be noted that the international legal system is far from perfect, and sometimes judicial action, even if it does not wholly live up to democratic principles, is better than no action at all. At times it may deliver what everyone wants but fails to achieve by other means. And yet, the question persists.

We understand international judicial practice as an exercise of public authority and thereby wish to convey the idea that international courts' practice can be sufficiently justified neither on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values courts are supposed to serve. Nor can courts draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucracies.<sup>4</sup> As autonomous actors wielding public authority – this is our principal contention – their actions require a genuine mode of justification that lives up to basic tenets of democratic theory. In Martti Koskeniemi's fitting words, '[i]t is high time that "international adjudication" were made the object of critical analysis instead of religious faith'.<sup>5</sup>

<sup>1</sup> G.F.W. Hegel, *Philosophie des Rechts* (1970), at para. 219; J. Habermas, *Between Facts and Norms* (1997), at 196; N. Luhmann, *Das Recht der Gesellschaft* (1995), at 321. Cf. M. Shapiro, *Courts: A Comparative and Political Analysis* (1986), at 17.

<sup>2</sup> See, e.g., Bundesverfassungsgerichtsgesetz para.25(4). J. Limbach, *Im Namen des Volkes* (2006), at 108–113 (on the formula 'in the name of the people' in closer detail).

<sup>3</sup> Keeping in mind significant differences, we use the term 'court' in a broad sense to include arbitral tribunals such as WTO panels or international investment tribunals. Compare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *NYU J Int'l L & Politics* (1999) 709, at 712–715.

<sup>4</sup> S. Cassese, *I Tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009), at 103.

<sup>5</sup> Koskeniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Y. Daudet (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (2008), at 127, 152.

Our investigation is part of the general question of legitimate governance beyond the nation state and specifically triggered by the observation that, at times, international jurisprudence has shown quite drastic consequences for the possibilities of democratic self-determination. Many international courts have grown to be powerful institutions.<sup>6</sup> An example from the vibrant field of international investment arbitration serves as a case in point. International investment protection is *inter alia* based on Bilateral Investment Treaties (BITs), whose vague obligations are not only applied by arbitral tribunals in individual cases, but also creatively formed and fostered in the practice of adjudication.<sup>7</sup> As a matter of fact, this is not only a collateral side-effect of judicial practice, but from the outset it was part of a deliberate plan. The International Centre for Settlement of Investment Disputes (ICSID) can be traced back to the political advocacy of then General Counsel of the World Bank, Aron Broches, who, faced with failed international negotiations about the applicable material law, advanced the programmatic formula 'procedure before substance'.<sup>8</sup> The substance, he argued, would follow in the practice of adjudication. And so it did, as judge-made law and deeply imbued with the functional logic pervading the investment protection regime. In the wake of its economic crises, Argentina felt the painful squeeze and had to realize how narrow its room for manoeuvre had become for maintaining public order without running the risk of having to pay significant damages to foreign investors.<sup>9</sup> Also Germany might have to pay 1.4 billion Euros for the elections in its city state Hamburg. This, at least, is the amount that the Swedish energy company Vattenfall claimed for the losses it has to bear due to the higher ecological standards that the new government advocated during the electoral campaign. Democracy in the city state now has a price.<sup>10</sup>

We wish to state clearly at the outset that our investigation does not aim at marking decisions of international courts as illegitimate, let alone illegal.<sup>11</sup> We take a number of very different international courts into consideration and any concrete normative assessment would need specific and detailed analysis. Our aim is rather to develop a meaningful conceptual framework for debating the issue. Moreover, we do not at all share the view that international authority is in principle undemocratic the moment

<sup>6</sup> Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *EJIL* (2009) 73; 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* (2005), at 587; Zangl, 'Das Entstehen internationaler Rechtsstaatlichkeit', in S. Leibfried and M. Zürn (eds), *Transformationen des Staates?* (2006), at 123; Alter, 'Delegating to International Courts: Self-Binding vs. Other-Binding Delegation', 98 *L & Contemp Probs* (2008) 37.

<sup>7</sup> Schill, 'System-Building in Investment Arbitration and Lawmaking', 12 *German LJ* (2011) 1083.

<sup>8</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), at 18.

<sup>9</sup> Alvarez and Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', *Yrbk Int'l Investment L & Policy* (2009) 379.

<sup>10</sup> *Vattenfall v. Federal Republic of Germany*, ARB/09/6 (ICSID). Note that the proceedings were suspended pursuant to the parties' agreement on 15 Mar. 2010.

<sup>11</sup> For a fierce and unconvincing argument to that effect see E.A. Posner, *The Perils of Global Legalism* (2009); Murswiek, 'Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung', *Neue Zeitschrift für Verwaltungsrecht* (2009) 481, at 484.

it does not respond to the input of democratic states.<sup>12</sup> Such strands of critique miss the mark because international action is also a mechanism for overcoming the democratic deficit that results from the projection of one state's power onto the people of another domestic polity. Dismantling international authority usually does not amount to a convincing solution.

This article follows a critical intention but is much more forward-looking. We briefly recall the demand for international compulsory jurisdiction as part of progressive legal politics (in Section 2) and then unfold an understanding of international judicial practice as public authority, highlighting how a powerful judiciary withdraws the law from the grasp of political-legislative bodies – the most important source of democratic legitimation (in Section 3). A constitutionalist reading of international adjudication, we contend, is unconvincing and cannot justify the decoupling of law and parliamentary politics. Processes of fragmentation further add to the problem. In a third step, we turn to strategies in response (in Section 4). Adjustments in the judicial procedure and increased politicization are common avenues for reacting to the problems we identified. Furthermore, elections traditionally respond to the exercise of public authority, and systemic interpretation as well as a dialogue between courts may bear the potential of easing concerns that spring from processes of fragmentation. Even if all strategies were spelled out in closer detail and were met to full satisfaction, it still seems that international courts might not always be in a position to carry the whole burden of justifying their authority. Domestic constitutional organs then step in and decide from their angle about the effect of international decisions in the municipal legal order. They contest and accommodate public authority in a normative pluriverse (in Section 5). Our critique ultimately shows that the normative vanishing point for the future development of the international judiciary should be the idea of a transnational and possibly cosmopolitan citizenship (in Section 6).

## 2 An International Judiciary as a Key Demand of Progressive Legal Politics

The creation of a strong international judiciary has been a central demand of various peace movements, and also many progressive international lawyers have pushed this goal.<sup>13</sup> The International Law Association adopted at its very first meeting a resolution confirming its conviction that arbitration is '*le moyen essentiellement juste, raisonnable, et même obligatoire, pour les nations, de terminer les différends internationaux*'<sup>14</sup> and the Institut de Droit International formulated draft procedures for international arbitration at its second session in 1875.<sup>15</sup> Similarly, the Interparliamentary Union

<sup>12</sup> Cf. Posner and Yoo, 'Judicial Independence in International Tribunals', 93 *California L Rev* (2005) 1.

<sup>13</sup> Wehberg, 'Die internationale Friedensbewegung', 22 *Staatsbürgerbibliothek* (1911); H. Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange* (1914), at 36–37.

<sup>14</sup> Quoted in C. Denfeld, *Hans Wehberg (1885–1962). Die Organisation der Staatengemeinschaft* (2008), at 115.

<sup>15</sup> 'Projet de règlement pour la procédure arbitrale internationale', Session de La Haye, 1875, available at: [www.idi-iil.org/idiF/resolutionsF/1875\\_haye\\_01\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1875_haye_01_fr.pdf).

was committed to working towards the peaceful settlement of disputes and put together a 'Draft for the Organization of a Permanent Court of Arbitration' that was used in discussions at the First Hague Peace Conference of 1899.<sup>16</sup> The development of the international judiciary at the beginning of the 20th century is hard to imagine without the impulses of the peace movement and the political commitment of prominent international lawyers.

In 1898 it was, however, Tsar Nicholas II of Russia who surprised everyone with his invitation to an international conference that would pursue the goal of giving effect to the grand idea of world peace and to make it triumph over all elements of strife and mischief.<sup>17</sup> While the focus of the conference was supposed to lie on issues of disarmament, the emphasis soon shifted towards international adjudication. In spite of its sobering results, the 1899 Peace Conference in The Hague entered the historiography of international adjudication as a milestone on the way towards a permanent international court.<sup>18</sup>

In a few aspects the Second Hague Peace Conference of 1907 could surpass the results of 1899, but it did not achieve the creation of a truly permanent international court. European great powers argued that international dispute settlement is in essence part of the political domain and naturally unsuited for judicial resolution. They maintained that a strong political influence should also be felt in the judicial process.<sup>19</sup> In this vein, Friedrich von Martens, the chief Russian delegate to both Peace Conferences and an arbitrator in very high demand in his time, argued that international arbitration was merely concerned with successfully disposing of a dispute. Judicial reasoning, he opined, is of only subordinate importance for this purpose.<sup>20</sup> On the contrary, US secretary of state Elihu Root placed his hopes on the logic of the law and relied on the pacifying tongue of legal argument. He drew a close analogy to the US Supreme Court and argued that only independent judges and their impartial resolution of conflicts could gain the confidence of the parties: '[w]hat 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'.<sup>21</sup>

Even if the project of a permanent court had suffered repeated setbacks, many international lawyers felt vindicated by the Hague Peace Conferences in their quest

<sup>16</sup> A.H. Fried, *Handbuch der Friedensbewegung* (1905), at 262–265; R.P. Anand, *International Courts and Contemporary Conflicts* (1974), at 27; J.H. Ralston, *International Arbitration from Athens to Locarno* (1929), at 140.

<sup>17</sup> Fried, *supra* note 16, at 163; J.B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), at 736.

<sup>18</sup> Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference', 94 *AJIL* (2000) 4; Anand, *supra* note 16, at 33.

<sup>19</sup> P. Zorn, *Die beiden Haager Friedenskonferenzen von 1899 und 1907* (1914); Brower II, 'The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law', 18 *Duke J Int'l & Comp L* (2008) 259.

<sup>20</sup> Wehberg, 'Friedrich von Martens und die Haager Friedenskonferenzen', 20 *Zeitschrift für internationales Recht* (1910) 343.

<sup>21</sup> Quoted in H. Wehberg, *Das Problem eines internationalen Staatengerichtshofes* (1912), at 55.

for international judicial dispute resolution and pursued this project with renewed vigour.<sup>22</sup> Hans Wehberg, for example, maintained that a permanent international court must be set up in order to prevent states from invoking violations of their legal rights as pretexts for war. He continued to argue that arbitral awards are wholly unsuited to achieving this effect because they could not build on, or contribute to, the clarity of the generally applicable law. Arbitration also typically fell short of standards of legal reasoning that were absolutely necessary for international adjudication to fulfil its promise. For Wehberg, the way towards world peace inevitably led via a permanent international court, and he enthusiastically demanded ‘more development of international law by international decisions!’<sup>23</sup> The characteristic legitimatory narrative of international courts is readily tangible in his argument: international courts are the handmaidens of peace.

Aspirations for a permanent international court were finally met after World War I. In 1920 the Permanent International Court of Justice (PCIJ) was erected within the new institutional framework of the League of Nations.<sup>24</sup> James Brown Scott illustratively expressed his relief in the *American Journal of International Law*: ‘[w]e should . . . fall upon our knees and thank God that the hope of ages is in process of realization’.<sup>25</sup> Also Nicolas Politis welcomed the new court as ‘*l'avènement d'une ère nouvelle dans la civilisation mondiale*’.<sup>26</sup>

A number of international lawyers would complement the new court's work with doctrinal, theoretical, and philosophical treatises. Manley O. Hudson, for example, succeeded in developing a remarkable plan for an international order of peace that focused on a strong international judiciary. He argued that:

No system of law can depend solely on legislation for its development; however, the day-to-day application of the law must supply one of the elements of growth, and it is in this way that courts make their contribution.<sup>27</sup>

After some first and shy steps, the court seemed as if it might actually live up to high expectations.<sup>28</sup> Hersch Lauterpacht could in 1934 already look back on a rich body of case law to highlight the lawmaking dimension of the court's judicial practice. Like Hudson, he maintained that judge-made law was an inevitable feature of every

<sup>22</sup> See, e.g., W. Schücking (ed.), *Das Werk vom Haag* (1912); Schücking, ‘Die Organisation der Welt’, in W. van Calker (ed.), *Staatsrechtliche Abhandlungen. Festgabe für Paul Laband zum 50. Jahrestage der Doktor-Promotion* (1908), at 533.

<sup>23</sup> Wehberg, *supra* note 21, at 11 (trans. by the authors).

<sup>24</sup> It was only predated by the regional Central American Court of Justice that lived for 10 years starting in 1908.

<sup>25</sup> ‘Editorial Comment’, 15 *AJIL* (1921) 55; Koskenniemi, *supra* note 5, at 127.

<sup>26</sup> N. Politis, *La justice internationale* (1924), at 182.

<sup>27</sup> M.O. Hudson, *Progress in International Organization* (1981 [1932]), at 80. Cf. Hudson, ‘The Permanent Court of International Justice – An Indispensable First Step’, 108 *American Academy of Political and Social Science, Annals* (1923) 188.

<sup>28</sup> O. Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary* (2005), at 14–23.

legally constituted community.<sup>29</sup> Unlike Hudson, however, Lauterpacht did not see the project of a strong international judiciary as part of a bigger package that would eventually also include a centralized international legislative body or even a kind of world government. Hudson and others pictured the centralization of the judiciary as a first step towards an international political order with a centralized legislative organ. This approach was particularly dominant in Germany where Immanuel Kant's 'Perpetual Peace' was dusted off and served as a theoretical foundation for blueprints of international order.<sup>30</sup>

Hans Kelsen advanced the Kantian peace project a little later with all his astonishing acuity. In his account, the continuous centralization of state powers and the institutional separation of law-creation and law-application are part of the natural evolution of law. It is simply the tide of things, Kelsen observed, that law-application is centralized first and that the legislature lags behind.<sup>31</sup> The absence of an international legislature is thus no valid objection against striving for compulsory adjudication.<sup>32</sup> This argument has been inspirational for a long time. But today it needs to be reconsidered.

### 3 Problems of Justification

International courts' practice has changed in quantity and quality. Nowadays, it reaches into fields that were long deemed to be of domestic concern only and at times courts' once feeble jurisdiction has grown remarkably strong. We first recall that legal theory has moved far beyond the paradigm that pictures judicial decisions as a moment of cognition (in Section A), then develop an understanding of their practice as an exercise of international public authority (in Section B), and finally point to the asymmetries between judicial power and politico-legislative processes as one of the main problems of democratic justification (in Section C).

#### A *Speaking the Law*

##### 1 *Cognition and Decision*

Evidently, any argument that investigates the justification of international judicial decisions would be plainly pointless if the nature of right judgments was that

<sup>29</sup> H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), at ch. III.

<sup>30</sup> F. Bodendiek, *Walther Schückings Konzeption der internationalen Ordnung* (2001), at 179–182; cf. Fried, *supra* note 17, at 20–22. Compare, however, Lammasch, *supra* note 13, at 37 (calling the references to Kant's project of perpetual peace 'mere decoration').

<sup>31</sup> H. Kelsen, *Law and Peace in International Relations* (1942), at 146–148; Jabloner, 'Verrechtlichung und Rechtsdynamik', 54 *Zeitschrift für öffentliches Recht* (1999) 261.

<sup>32</sup> Kelsen, 'International Peace – By Court or Government?', 46 *Am J Sociology* (1941) 571. Also see Wehberg, 'Die Organisation der Staatengemeinschaft nach dem Kriege – Das Problem einer wahren Repräsentation der Völker', 44 *Friedens-Warte* (1944) 49.



of cognition. The scales handled by *Justitia* would then look like a purely technical instrument that yields right answers. Granted, few would still advocate a traditional cognitivist understanding of judicial interpretation as it was famously expressed by Montesquieu in his metaphor that pictured a judge or a court as ‘*bouche de la loi*’.<sup>33</sup> And yet, the view is still prevalent according to which the right interpretation may be derived from the pertinent provisions, placed within the whole of the international treaty, embedded in the international legal order, and applied to the individual case according to the intrinsic logic of legal discourse.<sup>34</sup> Most certainly, courts do not contradict this view of their practice, but are rather inclined to sustain it. What is more, this understanding of their actions 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.<sup>35</sup>

Ever since the time of Kant’s *Critique*, it has no longer been possible to claim that decisions in concrete situations can be deduced from abstract concepts.<sup>36</sup> Legal scholarship has struggled with the practical consequences of this theoretical insight ever since.<sup>37</sup> Consider, for example, Hans Kelsen’s famous argument that every act of law-application is also one of law-making precisely because a norm cannot be determinative of its concrete interpretation.<sup>38</sup> The concrete meaning of a norm cannot be *discovered* but only *created*.<sup>39</sup> Kelsen mocks theories of interpretation that want to make believe that a legal norm, applied to the concrete case, always provides a right decision, as if interpretation were an act of clarification or understanding that only required intellect but not the will of the interpreter.<sup>40</sup>

More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.<sup>41</sup> Building on the dominant variant of semantic pragmatism and its principal contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or interpretation of a concept

<sup>33</sup> See in further detail von Bogdandy and Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers’, 12 *German LJ* (2011) 979. Cf. Lege, ‘Was Juristen wirklich tun. Jurisprudential Realism’, in W. Brugger, U. Neumann, and S. KIRSTE (eds), *Rechtphilosophie im 21. Jahrhundert* (2008), at 207, 216; R. Christensen and H. Kudlich, *Theorie richterlichen Begründens* (2001), at 26.

<sup>34</sup> Compare International Law Commission, ‘Third Report on the Law of Treaties’, 2 *Yrbk ILC* 5 (1964), at 53; R. Kolb, *Interprétation et création du droit international. Esquisse d’une herméneutique juridique moderne pour le droit international public* (2006), at 412–413.

<sup>35</sup> J. N. Shklar, *Legalism* (1964), at 12–13; L. Baum, *Judges and their Audiences* (2006).

<sup>36</sup> I. Kant, *Critique of Pure Reason* (trans. W. Schwarz, 1982), at 59; cf. Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 9.

<sup>37</sup> R. Ogorek, *Richterkönig oder Subsumtionsautomat?* (1986).

<sup>38</sup> H. Kelsen, *Reine Rechtslehre* (1934), at 82–83, 91.

<sup>39</sup> See Merkl, ‘Das Doppelte Rechtantlitz’, 47 *Juristische Blätter* (1918) 425.

<sup>40</sup> Kelsen, *supra* note 38, at 74, 95; cf. Raz, ‘Kelsen’s Theory of the Basic Norm’, in J. Raz, *The Authority of Law* (1979), at 122; A. Jakab, ‘Probleme der Stufenbaulehre’, 91 *Archiv für Rechts- und Sozialphilosophie* (2005) 333, at 334;

<sup>41</sup> R. Rorty (ed.), *The Linguistic Turn* (1967).

contributes to the making of its content. The discretionary and creative elements in the application of the law make the law.<sup>42</sup> 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.<sup>43</sup> This might allow for a discursive embedding of adjudication, which can be an important element in the democratic legitimation of judicial lawmaking.

## 2 *The Reason for Reasons*

This strand of thinking does not in itself detract from the deductive model of legal reasoning. The deductive mode of reasoning, which is dear to many lawyers, does *not* presuppose the belief in the full determinacy of legal concepts. It is rather based on the principle that judicial decisions must be justified. The issue is the modus of *justifying* decisions and not the process of *finding* them.<sup>44</sup> The deductive mode of reasoning demands that whenever a norm is disputed the decision in favour of one or the other interpretation must be made explicit.<sup>45</sup> This is an important instrument for controlling judicial power.

Courts, at least those which publish their decisions and reasoning, are participants in a general legal discourse with both the justification that carries the decision (*ratio decidendi*) and with everything said on the side (*obiter dictum*).<sup>46</sup> As a matter of fact, it seems that many decisions candidly aim at influencing the general legal discourse by forcefully establishing abstract and categorical statements as authoritative reference points for later legal practice. But categorically marking the lawmaking momentum vested in the justification of legal decisions as an undue expansion of competences or as a usurpation of power would be plainly short-sighted. Judicial lawmaking is a quite inevitable part of adjudication and justifying a decision is even a legal requirement.<sup>47</sup> The alternative, refraining from justifying decisions or from making them public, is not viable. The larger legal discourse could then no longer function as a mechanism of control and critique. Also legal certainty would be sacrificed. The reasoning that carries legal decisions is part of judicial legitimation.

<sup>42</sup> Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms', 7 *European J Philosophy* (1999) 164, at 180; Müller, 'Richterrecht – rechtstheoretisch formuliert', in Hochschullehrer der Juristischen Fakultät der Universität Heidelberg (eds), *Richterliche Rechtsfortbildung. Erscheinungsformen, Auftrag und Grenzen* (1986), at 65, 78.

<sup>43</sup> Brandom, *supra* note 42, at 181.

<sup>44</sup> Neumann, 'Theorie der juristischen Argumentation', in Brugger, Neumann, and Kirste (eds), *supra* note 33, at 233, 241. Cf. Derrida, 'Force of Law. The Mystical Foundation of Authority', 11 *Cardozo L Rev* (1990) 919; Luhmann, *supra* note 1, at 308.

<sup>45</sup> Brandom, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (1998).

<sup>46</sup> Oellers-Frahm, 'Lawmaking Through Advisory Opinions', 12 *German LJI* (2011) 1033; A. Höland, 'Wie wirkt Rechtsprechung?', 30 *Zeitschrift für Rechtssoziologie* (2009) 23, at 35–39.

<sup>47</sup> See, e.g., Art. 56(1) ICJ Statute; Art. 41 Rules of Procedure, European Nuclear Energy Tribunal. Also see A. Ross, *Theorie der Rechtsquellen* (1929), at 283; M. Kriele, *Theorie der Rechtsgewinnung* (1976), at 167–171.

The WTO Appellate Body has, for example, relied on Article 3(2) DSU, setting out the dispute settlement mechanism's aim of 'providing security and predictability to the multilateral trading system', to argue that previous reports on a subject matter should be taken into account in later practice.<sup>48</sup> It recently even raised its tone a notch and suggested that a failure to do so on the part of a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.<sup>49</sup> Even if panel and Appellate Body reports do not have binding force beyond the individual dispute, they do create legitimate expectations which must be considered in subsequent adjudication. It is thus disconcerting that in the ICSID framework contradictory awards are placed side by side without any mechanism for addressing these contradictions. Frequently the justification of the awards does not relate to other decisions on the same matter and is hard to square with them. This is an immense problem of legitimation.<sup>50</sup> Indeed, legal theories so fundamentally dissonant as Habermas' discourse theory and Luhmann's systems theory agree that the stabilization of normative expectations is one of law's central functions.<sup>51</sup> An international court that mistakes this function misses one of its central tasks.

### 3 *Legitimation in Legal Discourse*

All this points to the legitimatory significance of justifying legal decisions in a way that lives up to the standards of the profession. The rules of interpretation laid down in Article 31 *et seq.* VCLT hold an important potential for legitimation. We do not doubt that a number of controversial questions may convincingly be treated and decided within the intrinsic logic of the legal discourse. But how far does the legitimation of decisions by way of their legal justification reach?

It is remarkable that many legal theories, including Kelsen's oeuvre, have no room for answering this question but are caught in a solipsistic dead end where the interpreter is left to herself. Of course there is merit to good legal justification. But how should one approach choices between different alternatives? Jürgen Habermas suggests looking at the judicial process as a discourse in which the parties and adjudicators are framed in a way that allows them to challenge each other's claims, thereby increasing the desirability of the outcome.<sup>52</sup> He distinguishes discourses of norm justification (the work of the legislature) and discourses of norm application (the work of the judiciary). Only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons, while the latter has to stay within the bounds of what is

<sup>48</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10 and 11/AB/R, 4 Oct. 1996, at 15 and 31.

<sup>49</sup> This is a reference to Art. 11 DSU. Cf. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30. Apr. 2008, at para. 162.

<sup>50</sup> 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* (2008), at 323, 344; Schill, *supra* note 7.

<sup>51</sup> Habermas, *supra* note 1, at 427; Luhmann, *supra* note 1, at 151; cf. Stein, 'Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran–U.S. Claims Tribunal', 78 *AJIL* (2984) 1, at 48.

<sup>52</sup> Habermas, *supra* note 1, at 229–237.

permitted in *legal* discourse.<sup>53</sup> The separation of powers is reflected in the 'distribution of the possibilities for access to different sorts of reasons'.<sup>54</sup>

This has a lot of purchase but also problems. In particular, Habermas writes that 'the judiciary must be separated from the legislature and prevented from programming itself'.<sup>55</sup> It needs to stick to the legal discourse because it is part of a different setting and has different legitimacy credentials from the legislature. But, he continues,

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.<sup>56</sup>

He thus recognizes that the concomitant separation of powers and types of discourses might indeed be very difficult, especially when, as is often the case on the international level, the political-legislative process is not up to speed. He is silent, however, with regard to the consequences of this observation.<sup>57</sup> Even if one considered the potential of legitimation for the practice of international courts that is nested in legal discourse, it would still remain an open question how far it might carry.

## B *The Exercise of Public Authority*

International adjudication would not require an elaborate justification of its own if it did not amount to an exercise of public authority. But it may be recalled that *Justitia* herself wields a sword. It is rather evident in democratic constitutional contexts marked by the rule of law that coercive mechanisms are in place effectively to implement domestic court decisions. This is evidently not the same when it comes to decisions of international courts. According to Article 94(2) of the UN Charter the Security Council could take coercive measures if disregard for decisions of the ICJ threatened international peace and security.<sup>58</sup> In practice, however, non-compliance with judgments of the ICJ or most other courts rarely draws coercive measures in response.

The lack of coercive enforcement on the part of international institutions, be it bureaucracies or courts, could indicate that legitimacy concerns should not be taken too seriously. This would correspond to a traditional conception that is based on coercive power.<sup>59</sup> Yet, such a traditional conception has become, if it has not

<sup>53</sup> *Ibid.*, at 192–193, 229–237.

<sup>54</sup> *Ibid.*, at 192.

<sup>55</sup> *Ibid.*, at 172.

<sup>56</sup> *Ibid.*, at 439–440. Cf. T. Lieber, *Diskursive Vernunft und formelle Gleichheit* (2007), at 222.

<sup>57</sup> Cf. Kuhl and Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals', 12 *German LJ* (2011) 1261.

<sup>58</sup> Mosler and Oellers-Frahm, 'Article 94', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), at 1174, 1176.

<sup>59</sup> Dahl, 'The Concept of Power', 2 *Behavioral Science* (1957) 201, at 202; R. Dahrendorf, *Über den Ursprung der Ungleichheit unter den Menschen* (1961), at 20.

always been, inadequate. In an era of influential institutions of global governance, it should rather include other ways of exercising power that are no less decisive and incisive than coercive enforcement.<sup>60</sup> We understand authority as the legal capacity to determine others and to influence their freedom, i.e., to shape their legal or factual situation.<sup>61</sup> Today, it is then an empirical fact that the power of many international institutions is similar in significance and in its potential with shape and constrain freedom when compared with domestic institutions.<sup>62</sup> Even if international judicial decisions are usually not backed by coercive mechanisms, they still condition parties to the dispute as well as other subjects of the legal order in their actions.<sup>63</sup>

That said, international courts *are* frequently embedded in contexts that may employ considerable coercive mechanisms in support of judicial decisions. The Committee of Ministers of the Council of Europe oversees the implementation of decisions of the European Court of Human Rights (ECtHR);<sup>64</sup> member states of the ICC cooperate with the Court in the execution of sentences and are obliged to implement its decisions;<sup>65</sup> WTO members may resort to countermeasures once their claims have succeeded in adjudication;<sup>66</sup> 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.<sup>67</sup>

In conclusion, international courts exercise public authority in deciding legal disputes. But what about the lawmaking dimension of international decisions that reaches beyond the individual case? It seems to depend not only on the *voluntas* but also on its *ratio*.<sup>68</sup> Legal scholarship, legal counsel, other courts, and the same court at a later point in time need first to be convinced of the quality of the decision. If this is so, does it then make sense to understand lawmaking in the practice of adjudication as an exercise of public authority?

We think so because international judicial decisions usually enjoy an exceptional standing in semantic disputes about what the law means. Courts regularly use precedents and at times engage in detailed reasoning on whether earlier decisions are

<sup>60</sup> Barnett and Duvall, 'Power in Global Governance', in M. Barnett and R. Duvall (eds), *Power in Global Governance* (2005), at 1.

<sup>61</sup> von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German LJ* (2008) 1375, at 1381–1382.

<sup>62</sup> Venzke, 'International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law', 9 *German LJ* (2008) 1401.

<sup>63</sup> See A. Guzman, *How International Law Works* (2008), at 71. On the impact of private institutions compare Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport', 12 *German LJ* (2011) 1317, at 1335.

<sup>64</sup> Art. 46(2) ECHR. Cf. Fynys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', 12 *German LJ* (2011) 1231.

<sup>65</sup> Art. 93 ff ICC Statute.

<sup>66</sup> Art. 22 DSU.

<sup>67</sup> Art. 54 ICSID Convention.

<sup>68</sup> Ruiz Fabri, 'La motivation des décisions dans le règlement des différends de l'OMC', in H. Ruiz Fabri and J.-M. Sorel (eds), *La motivation des décisions des juridictions internationales* (2008), at 103, referring to C. Perelman.

relevant or not.<sup>69</sup> Judicial precedents redistribute argumentative burdens, and no participant in international legal discourse can easily escape the spell of precedents. 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. Disputing parties are of course well aware of this. They fight about the meaning of earlier judicial decisions as if they formed part of the sources of international law and as if they could carry judgments of (il)legality. The dispute about precedents illustrates how judicial decisions impact on the legal order and influence individual as well as collective spheres of freedom beyond the individual case.

This effect of judicial precedents is concealed by the doctrinal ordering of things in light of Article 38(1)(d) of the ICJ Statute which classifies international judicial decisions as 'subsidiary means for the determination of rules of law'. Under the impact of the cognitivist understanding of judicial interpretation, decisions are pictured as a source for recognizing the law but not a source of law.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> The distinction retains importance in particular if one considers that the international institutional order is marked by an asymmetry between powers to which we shall turn immediately.

It may be worth adding that our relatively broad conception of authority stems from a principal 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. This now leads us to the central problem in the justification of international courts: in contrast to many domestic contexts, their public authority is not embedded in a responsive political system.

## C *Judiciary without a Functional Legislative*

### 1 *The Decoupling of Law from Parliamentary Politics*

It is one of the quintessential lessons of modern constitutional thinking that legislative law-creation and judicial law-application are two phenomena that should be kept apart and at the same time be understood in their intricate interaction with other

<sup>69</sup> See in detail Jacob, 'Precedents: Lawmaking Through International Adjudication', 12 *German LJ* (2011) 1005.

<sup>70</sup> Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *Statute of the International Court of Justice. A Commentary* (2006), at 677, at marginal nos 301–319; G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983), at 169.

<sup>71</sup> 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 (1994), at 29.

<sup>72</sup> A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 266–272.

powers.<sup>73</sup> The prevailing approach comes under the heading of separation of powers and situates the legitimation of every power in their interaction.<sup>74</sup> Moreover, law means *positive law*, at least in modern constitutional states.<sup>75</sup> The hallmark of positivity is that the legislature is responsible for this law.<sup>76</sup> 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.<sup>77</sup> This legitimation by way of democratic representation is strained when it comes to international law in two ways.

A *static perspective* focuses on the role of the parliament in the making of international agreements.<sup>78</sup> In many countries ratification of important international treaties demands parliamentary approval, so that at first glance it looks as if an international treaty norm enjoys the same democratic legitimacy as a domestic statute. This first glance is deceptive. The treaty text is the outcome of diplomatic negotiations among executives that usually precede parliamentary procedures and domestic parliaments, with the exception of the US Congress, tend to be more deferential to the executive in treaty negotiations when compared with matters of domestic legislation.<sup>79</sup> The autonomy of governmental-administrative elites is considerably greater than in domestic political processes too, not least because international processes geared towards consensus require largely unconstrained actors.<sup>80</sup> Moreover, parliaments often lack information or knowledge. Overall, they remain sidelined.<sup>81</sup> Actors in the executive and other interest groups also frequently use contexts of multi-level governance to increase their power in relation to parliamentary bodies or to get an edge on competitors on the domestic level.<sup>82</sup> Sure enough, there are a number of possible responses to these challenges.<sup>83</sup> But after all decision-making beyond the EU constitutes one of the open flanks of parliamentarism. It amounts to one of the greatest contemporary challenges in the justification of public authority.<sup>84</sup>

<sup>73</sup> See Böckenförde, 'Entstehung und Wandel des Rechtsstaatsbegriffs', in E.-W. Böckenförde, *Recht, Staat, Freiheit* (1991) 143; M. Loughlin, *Public Law and Political Theory* (1992), at 138.

<sup>74</sup> J. Locke, *The Second Treatise of Government* (1690), at ch. XII. Cf. G. de Vergottini, *Diritto costituzionale comparato* (1999), at 346 ff; C. Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich* (2005).

<sup>75</sup> For an early use of such a conception of positivity see Hegel, *supra* note 1, at para. 3.

<sup>76</sup> Böckenförde, 'Demokratie als Verfassungsprinzip', in Böckenförde, *supra* note 73, at 289, 322; P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (1991), at 141.

<sup>77</sup> A. von Bogdandy, *Gubernative Rechtsetzung* (2000), at 35.

<sup>78</sup> Our argument only relates to countries with a democratic constitution. For citizens living under authoritarian rule, the problem has to be examined separately.

<sup>79</sup> P. Dann, *Parlamente im Exekutivföderalismus* (2004), at 294.

<sup>80</sup> Böckenförde, 'Die Zukunft politischer Autonomie', in Böckenförde, *supra* note 73, at 103; M. Zürn, *Regieren jenseits des Nationalstaats* (1998), at 233 and 347.

<sup>81</sup> For lessons from EU Law see Dann, 'The Political Institutions', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2010), at 237, 267–269.

<sup>82</sup> Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *Int'l Org* (1988) 427.

<sup>83</sup> In detail see Wolfrum, 'Die Kontrolle der auswärtigen Gewalt', 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler* (1997) 38.

<sup>84</sup> Regarding the fate of parliamentarism in Europe see von Bogdandy, 'Parlamentarismus in Europa: Eine Verfalls- oder Erfolgsgeschichte?', 130 *Archiv des öffentlichen Rechts* (2005) 445.

Legitimation by way of democratic representation is further challenged from a *dynamic perspective*. 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.<sup>85</sup> This strategy is particularly incisive when it comes to regimes that are characterized by relatively strong mechanisms of adjudication, because such regimes typically 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 can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option because the costs of exit are prohibitively high.<sup>86</sup>

## 2 The Constitutionalist Argument

The problematique of democratic justification of international courts' authority would look very different if international courts exercised a constitutional function. This would in fact ease most concerns about the decoupling of law and parliamentary politics. Most constitutions mount higher obstacles for amendments to the constitution than simple legislation. They withdraw constitutional law from the simple legislative process.<sup>87</sup> Constitutional law guides and channels the 'normal' political process and provides the central mechanisms that stabilize the distinction *and* interaction between law and politics in contemporary societies.<sup>88</sup> If international courts performed a constitutional role, the normative implications of a missing functional legislator on the international level and the resulting decoupling of law from parliamentary politics would not so much look like a deficit but could rather be understood as an asset.

A constitutional function of international courts could best be supported within the broader framework of constitutionalism in international law.<sup>89</sup> But notably, most variants within this strand of thinking pay very little attention, if any, to international courts as actors.<sup>90</sup> They are geared above all towards strengthening the international

<sup>85</sup> Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *Int'l Org* (2000) 421, at 429; Goldstein *et al.*, 'Introduction: Legalization and World Politics', 54 *Int'l Org* (2000) 385.

<sup>86</sup> Although it does indeed remain a possibility. Compare Bolivia Foreign Ministry, 'Letter Concerning Denunciation of ICSID Convention', 1 May 2007, 46 *ILM* (2007) 973.

<sup>87</sup> Cruz Villalón, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich', in A. von Bogdandy, P. Cruz Villalón, and P. Michael (eds), *Handbuch Ius Publicum Europaeum*, vol. 1 (2007), at para. 13, at mn. 74; Vergottini, *supra* note 74, at 206 and 234.

<sup>88</sup> Habermas, *supra* note 1, at 27; Luhmann, *supra* note 1, at 407.

<sup>89</sup> See Ley, 'Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich', 69 *ZaöRV* (2009) 317; d'Aspremont and Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders', 69 *ZaöRV* (2009) 939. Compare von Bogdandy and Dellavalle, 'Universalism and Particularism as Paradigms of International Law', 3 *ILLJ Working Paper* (2008).

<sup>90</sup> See Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in J. Habermas, *The Divided West* (2006) 113; Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours* (2001) 13.



level. Constitutionalism in international law then aims at reforming the institutions of world society by introducing more supranational elements and by thoroughly reforming the United Nations in a way that enables it legitimately to meet global challenges. This project is mainly *de lege ferenda* and mostly part of political theory.<sup>91</sup> In a similar vein, but with less critical content, other constitutional lines of argument are *de lege lata*. They point to strengthening the law in place and endow certain existing institutions with functions that are traditionally taken up by domestic constitutions and constitutional organs. Some strands conceive constitutionalism as an expression of a consolidated international community of values.<sup>92</sup> This approach also understands the function of a number of international courts in constitutional terms, and some courts have also seen themselves vested with constitutional tasks.<sup>93</sup>

Alas, a constitutionalist reading of international courts' activities does not convince. Expanding and watering down a concept of such central importance and with so many implications as 'constitution' should be thoroughly thought through. We are of the opinion that the democratic politicization of a legal order is of such eminent importance for the concept of a constitution that we reject any conception that dispenses with this critical prerequisite. The concept of constitutionalism is also closely connected to federalist conceptions of supranational order. Such a conception makes a lot of sense in European Union law, but it has little force in international law as it stands today. Finally, attributing constitutional functions to international courts lacks a basis in positive law. The competences of international courts are usually far too narrow.

At most it may be convincing to argue that international courts perform a constitutional role in the context of the *internal* constitutionalization of international organizations.<sup>94</sup> This approach concerns the accountability of international organizations and seeks to find legal yardsticks for assessing their activities – above all legal principles that are known from domestic constitutional contexts, like the principle of protecting human rights, the principle of attributed competences, and the principle of political and legal responsibility.<sup>95</sup> Such internal constitutionalization, however,

<sup>91</sup> Habermas, *supra* note 90.

<sup>92</sup> Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000) 427, at 431; de Wet, 'The International Constitutional Order', 55 *ICLQ* (2006) 51, at 57. For a well arranged overview of the diverse positions see Ruiz Fabri and Grewe, 'La constitutionnalisation à l'épreuve du droit international et du droit européen', in *Les dynamiques du droit européen en début de siècle* (2004) 189.

<sup>93</sup> This applies first of all to the ECJ, which is embedded in a federal context. See Case 294/83, *Parti écologiste 'Les Verts' v. Parliament* [1986] ECR 1339, at para. 23; *Opinion 1/91 EEA* [1991] ECR I-6079, at para. 21; Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat v. Council & Commission* [2008] ECR I-6351, at paras 285 and 290. For an example from the ECtHR see App. No. 5310/71, *Ireland v. United Kingdom* (1978). Cf. Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', 12 *German LJ* (2011) 1203, at 1212; Petersmann, 'Welthandelsrecht als Freiheits- und Verfassungsordnung', 65 *ZaöRV* (2005) 543; Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia J Transnat'l L* (1998) 529, at 539 and 607.

<sup>94</sup> International Law Association, 'Accountability of International Organisations', Final Report (2004). Compare Klabbers, 'Constitutionalism Lite', 1 *Int'l Org L Rev* (2004) 31.

<sup>95</sup> von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 11 *German LJ* (2008) 1909.

cannot ease concerns related to the decoupling of law and parliamentary politics and is not so much concerned with the relationship between international law and domestic politics.

### 3 *Fragmentation as a Problem for Democracy*

A further critical dimension of 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. And this is problematic in terms of democratic theory in light of the requirement of generality. In its legitimacy 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.<sup>96</sup> More specifically, it demands that procedures in this place are thematically unsettled and open to all kinds of competing perspectives. It must further be open-ended in the sense that the solution is not predetermined. Procedures must not prejudice or in principle preclude any relevant aspect in the decision-making process from the point of view of a particular functional perspective.<sup>97</sup> 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, a 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.<sup>98</sup>

Due to the functional differentiation of distinct areas of politics on the international level, the chances of meeting this imperative of democratic generality are dim. In functionally tailored international regimes it is next to impossible to arrive at a certain degree of generality, because in every regime there is an already prevalent particular set of preferences and concerns.<sup>99</sup> This undermines the requirement of generality as a critical element of the democratic principle.<sup>100</sup> A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.

<sup>96</sup> Lieber, *supra* note 56, at 226–229.

<sup>97</sup> We take this point from Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*, 18 Soziale Welt Sonderband (2009), at 177. Cf. Möllers, *supra* note 74, at 31 and 223.

<sup>98</sup> Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?', in Broude and Shany (eds), *supra* note 50, at 193, 210.

<sup>99</sup> Koskeniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553; Treves, 'Fragmentation of International Law, The Judicial Perspective', 23 *Comunicazione e studi* (2007) 821.

<sup>100</sup> 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 here.

## 4 Elements of Strategies in Response

Problems in the justification of decisions are usually met by changes in procedures and by reforms of politico-legislative processes (see Section A). Elections traditionally respond to the exercise of public authority (Section B), and the normative implications of fragmentation might be addressed by way of systematic interpretation and in a dialogue among courts (Section C).

### A Procedural Legitimation and Politicization

#### 1 Ineluctable Democracy

International decisions are traditionally viewed as flowing from the consent of the states they address. In addition, and in particular where decisions go beyond referring to the norm text, they are justified by way of functional narratives in the sense that international decisions promote values, goals, or community interests, above all international peace. At times they are even expected to act *en lieu* of political-legislative mechanisms to achieve outcomes in the collective interest that the 'normal' political process has been unable to deliver.<sup>101</sup> There are a number of constellations in which these sources of legitimacy may sufficiently carry the justification of an international court's authority. In light of the growing autonomy of some courts as well as the breadth of controversial fields in which international courts have been involved, however, there are now also many constellations in which neither the original consent nor the functional goal can any longer convincingly settle legitimacy concerns. The function of successfully settling disputes in the service of peace certainly remains salient, not least for the promotion of democratic governance – after all democracy flourishes better in a peaceful world.<sup>102</sup> And yet, such a justification misses large chunks of the phenomenon of an international judiciary. Many international courts with a particular thematic outlook are therefore frequently justified on the basis of their function of effectively implementing specific goals that have come to replace, or at least to complement, the maintenance of international peace.

Other accounts of legitimation place their hopes on the implementation of universal values or in the pursuit of community interests.<sup>103</sup> The institutional design of some international judicial institutions speaks in their favour: non-governmental organizations may get involved, individuals are heard or may even initiate proceedings, and

<sup>101</sup> Kelsen *supra* note 31, at 165.

<sup>102</sup> Apart from this, international courts can also foster democratization through a democracy oriented human rights jurisprudence: see App. No. 24833/94, *Matthews v. Great Britain*, ECtHR (1999). Compare Ress, 'Das Europäische Parlament als Gesetzgeber: Der Blickpunkt der EMRK', 2 *Zeitschrift für Europarechtliche Studien* (1999) 219, at 226; Martínez, 'Towards an International Judicial System', 56 *Stanford L Rev* (2003) 429, at 461.

<sup>103</sup> Oellers-Frahm, 'Nowhere to Go? – The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction', in T. Giegerich (ed.), *A Wiser Century?* (2009), at 435, 440; Thiele, 'Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft', 46 *Archiv des Völkerrechts* (2008) 1, at 13.

also the fact that parties accept new international courts' compulsory jurisdiction is explained with regard to the community interests that are at stake.<sup>104</sup> The international criminal tribunals and the ICC, for instance, are supposed to gain legitimacy by way of ending impunity for international crimes.<sup>105</sup> Such functional narratives appear to be a little bit weaker with regard to the WTO and arbitration in investment disputes, but here too it is possible to find elements providing links for functional legitimation, such as increasing economic welfare in the WTO or fostering economic development through foreign investment in the case of ICSID.<sup>106</sup>

Still, as important as a certain goal may be, it cannot conclusively settle problems of the justification of public authority. The aim cannot offer sufficient basis for concrete decisions that inevitably also entail normative questions and redistributions of power. Moreover, functional arguments offer no solution for the unavoidable competition between different goals. Sometimes international adjudication delivers what everyone wants and yet fails to achieve.<sup>107</sup> But those may be lucky hits. History cautions that not too much confidence should be placed even on the benevolent and enlightened ruler. Democracy as a normative foundation is ineluctable.

## 2 Procedures

The procedural law of international judicial institutions is largely a product of their own making and legal changes are above all part of judicial practice.<sup>108</sup> International courts rule over procedures. 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.'<sup>109</sup> 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 legitimation that is nested in the judicial process itself. It is noteworthy that the more the jurisgenerative dimension of adjudication comes to be recognized, the more traditionally prevalent procedural requirements are supplemented by new demands – the successful settlement

<sup>104</sup> Romano, 'The Shift from Consensual to Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *NYU J Int'l L & Politics* (2007) 791.

<sup>105</sup> In detail see Benzling, 'Community Interests in the Procedure of International Courts and Tribunals', 5 *Law and Practice of Int'l Courts and Tribunals* (2006) 369, at 373.

<sup>106</sup> Broude, 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO', 45 *Columbia J Transnat'l L* (2006–2007) 221; Dolzer and Schreuer, *supra* note 8, at 149.

<sup>107</sup> Howse and Esserman, 'The Appellate Body, the WTO Dispute Settlement System and the Politics of Multilateralism', in G. Sacerdoti *et al.* (eds), *The WTO at Ten* (2006), at 61.

<sup>108</sup> On the notion of procedural law see Kolb, 'General Principles of Procedural Law', in Zimmermann, Tomuschat, and Oellers-Frahm (eds), *supra* note 70, at 793, 795.

<sup>109</sup> Sorel, 'International Courts and Tribunals, Procedure', in R. Wolfrum (ed.), *Max Planck Encyclopaedia Public International Law* (2009), at mn. 1.

of disputes as the overarching goal and considerations of party autonomy then no longer dictate what the procedures should look like.<sup>110</sup>

There remains a fundamental question. How may judicial procedures 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? Conceptually, two features come to mind by way of which judicial procedures could strengthen the democratic legitimacy of judicial decisions.<sup>111</sup> 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 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 of democracy that feeds the democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potentials if only they are embedded in normative discourses. Both features raise the same demand for developing procedural law.

#### a. Publicness and Transparency

A crucial link for publicness and transparency is the oral proceedings that some court statutes explicitly provide for.<sup>112</sup> In other contexts like the WTO confidentiality is the rule. But procedures have opened up in practice to some prerequisites of publicness and transparency.<sup>113</sup> 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 had better be public.<sup>114</sup> Of course it remains critically important to pay due respect to the interests of the parties. Also sensitive trade secrets must be kept. Often

<sup>110</sup> 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* (1998), at 427.

<sup>111</sup> Concepts of deliberative democracy are crucial in this respect. They have by now been mainstreamed into democratic thought: see M.G. Schmidt, *Demokratiethorien* (2008), at 236 ff.; cf. A. Sen, *The Idea of Justice* (2009), at 321 ff.

<sup>112</sup> Art. 46 ICJ Statute; Art. 59 ICJ Rules of Court; Art. 26(2) ITLOS Statute; Art. 74 Rules of ITLOS; Art. 40 ECHR; Art. 63(2) Rules of ECtHR; Arts 67 and 68(2) ICC Statute. Cf. von Schorlemer, 'Art. 46', in Zimmermann, Tomuschat, and Oellers-Frahm (eds), *supra* note 70, at 1063, 1070–1071.

<sup>113</sup> Arts 14(1), 18(2), and 17(10) DSU provide that procedures and written submissions are confidential. Ehring, 'Public Access to Dispute Settlement Hearings in the World Trade Organization', 11 *JIEL* (2008) 1021.

<sup>114</sup> Consultative Board to the Director-General Supachai Panitchpakdi, 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium ("Sutherland Report")' (2004), at paras 261f.

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 personal membership closer to the ethos of arbitration.<sup>115</sup>

And yet there is room for more publicness. The position taken by the panel in *Canada – Continued Suspension* is, for instance, most remarkable. The panel held hearings in public and justified this step *inter alia* with the truly original 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.<sup>116</sup> The Appellate Body maintained on another occasion that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. . . . Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules based system of adjudication. Consequently, under the DSU, confidentiality is relative and timebound.'<sup>117</sup>

Procedures in the ICSID framework fall short of those in the WTO on this point. But also here first cracks start to show that may soon widen so as to accommodate growing demands for more transparency.<sup>118</sup> 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 . . . 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'.<sup>119</sup> Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness it explicitly describes building up a visible body of jurisprudence as a goal to be pursued.<sup>120</sup>

## b. Third Party Intervention

Further avenues for responding to problems in the justification of international courts' exercise of public authority may be found in increasing the possibilities for

<sup>115</sup> Weiler, 'The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *J World Trade* (2001) 191; van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System', in Sacerdoti *et al.* (eds), *supra* note 107, at 289; Ehlermann, 'Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization', 36 *J World Trade* (2002) 605.

<sup>116</sup> Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, 31 Mar. 2008, at para. 7.47.

<sup>117</sup> Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 Feb. 2009, at para. 4.

<sup>118</sup> Brower, Brower II, and Sharpe, 'The Coming Crisis in the Global Adjudication System', 19 *Arb Int'l* (2003) 415; C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration. Substantive Principles* (2007), at 57.

<sup>119</sup> OECD, 'Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures: Statement by the OECD Investment Committee' (2005), at 1.

<sup>120</sup> See the reformed ICSID Rules of Procedure, 10 Apr. 2006, Rule 32 (2). Compare *Aguas Argentinas Sa, Suez Sociedad General de Aguas de Barcelona SA and Vivendi Unviersal SA v. Argentine Republic*, ICSID Case No. ARB/03/19 (2005), Order in Response to a Petition for Transparency and Participation as Amicus Curiae, at para. 1.

intervention and participation. It is noteworthy that in the seminal *Pulau Ligitan* case the ICJ principally allowed that a party may intervene even if it cannot itself show a jurisdictional link to any of the parties.<sup>121</sup> The trend towards wider participation in judicial proceedings testifies to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. It is yet another indication that understanding judicial decisions as acts of simply finding the law or as acts that are binding only *inter partes* is inadequate.<sup>122</sup>

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.<sup>123</sup> In contrast to the procedures of the ICJ and also 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.<sup>124</sup> In *EC – Bananas III*, a large number of developing countries asked to attend the hearings and the panel observed that decisions in this regard 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 the requesting states to attend the hearings and justified this with the special economic implications that the EC legal regime on bananas had for them.<sup>125</sup> 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 that are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete individual case, keeping business secrets, and preserving space for sensitive concessions and compromises that may only be reached in confidential settings.<sup>126</sup> And yet there are trends to expand the proceedings. They may be better discussed with regard to the role of *amici curiae*.

<sup>121</sup> *Sovereignty over Pulau Ligitan und Pulau Sipadan (Indonesien v. Malaysia)*, Application by the Philippines for Permission to Intervene [2001] ICJ Rep 575, at para. 35.

<sup>122</sup> Cf. E. Jouannet, 'Remarques d'ensemble', in H. Ruiz Fabri and J.-M. Sorel (eds), *Le tiers à l'instance devant les des juridictions internationales* (2005), at 255; Zimmermann, 'International Courts and Tribunals, Intervention in Proceedings', in Wolfrum (ed.), *supra* note 109 (2006).

<sup>123</sup> Arts 4(11), 10, 17(4), and 21 DSU. Compare Hilf, '§27. Das Streitbeilegungssystem der WTO', in M. Hilf and S. Oeter (eds), *WTO-Recht. Rechtsordnung des Welthandels* (2005), at 505, 521; McRae, 'What is the Future of WTO Dispute Settlement?', 7 *JIEL* (2004) 2.

<sup>124</sup> Art. 10 and Appendix 3(6) DSU. Cf. Arend, 'Article 10 DSU', in R. Wolfrum, P.-T. Stoll, and K. Kaiser (eds), *Max Planck Commentaries on World Trade Law* (2006), ii, at 373.

<sup>125</sup> See P. van den Bossche, *The Law and Policy of the World Trade Organization* (2008), at 279.

<sup>126</sup> Delaney and Magraw, 'Procedural Transparency', in P. Muchlinski, F. Ortino, and C. Schreuer (eds), *Oxford Handbook of International Investment Law* (2009), at 721, 775.

### c. *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.<sup>127</sup> Above all NGO participation may open up legitimacy potentials. They may bridge the gap between the legal procedures and a 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.<sup>128</sup>

The procedural law of the ICJ and ITLOS does not provide for submissions by *amici curiae*.<sup>129</sup> In one of the ICJ's first cases ever, its registrar rejected the motion on the part of an NGO to submit its opinion in writing and to present its view orally.<sup>130</sup> This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.<sup>131</sup> 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*.<sup>132</sup> Ever since the *Gabcikovo-Nagymaros* case it has also been clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.<sup>133</sup> Beyond this minimal common denominator there prevails considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposing opinions have so far impeded developments as they have taken place in other judicial institutions.<sup>134</sup> Former President Gilbert Guillaume said 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.<sup>135</sup>

Neither do the WTO Agreements make any provisions on how to deal with *amici curiae* briefs. But in this context legal practice has warmed to the idea that maybe *amici*

<sup>127</sup> Sands and Mackenzie, 'International Courts and Tribunals, Amicus Curiae', in Wolfrum (ed.), *supra* note 109 (2009), at mn. 2; Zimmermann, *supra* note 122, at mn. 1. Terminology is by no means used consistently: see Vierucci, 'NGOs before International Courts and Tribunals', in P.-M. Dupuy and L. Vierucci (eds), *NGOs in International Law* (2008), at 155, 156; Ascensio, 'L' amicus curiae devant les juridictions internationales', 105 *RGDIP* (2001) 897.

<sup>128</sup> Habermas, *supra* note 1, at 303 and 382; Nanz and Steffek, 'Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens', in P. Niesen and B. Herborth (eds), *Anarchie der kommunikativen Freiheit* (2007), at 87; von Bernstorff, 'Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenhegemonie?', in Brunkhorst (ed.), *supra* note 97, at 277.

<sup>129</sup> In detail see Wolfrum, *supra* note 110.

<sup>130</sup> See Dupuy, 'Article 34', in Zimmermann, Tomuschat, and Oellers-Frahm (eds), *supra* note 70, at 545, 548; A.-K. Lindblom, *Non-Governmental Organisations in International Law* (2005), at 303.

<sup>131</sup> Art. 66 ICJ Statute.

<sup>132</sup> Lindblom, *supra* note 130, at 303.

<sup>133</sup> *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7.

<sup>134</sup> See ICJ Practice Direction XII (2004).

<sup>135</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Separate Opinion, Judge Guillaume [1996] ICJ Rep 287.



*curiae* should have a word to say.<sup>136</sup> As early as in 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 again explicitly rejected *amici curiae* submissions but was corrected by the higher level of jurisdiction. The Appellate Body further argued that ‘the DSU accords to a panel . . . 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’.<sup>137</sup>

ICSID proceedings have for long been sealed off from any possibility of participation beyond the parties to the case, but practice is starting to change.<sup>138</sup> 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.<sup>139</sup> Similarly, the OECD Investment Committee elaborated in the report mentioned above that, ‘especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation’.<sup>140</sup> The new ICSID Arbitration Rules of 2006 finally introduced a new Article 37 which now speaks on the possibility of submissions by third parties and *amici curiae*.<sup>141</sup>

### 3 Politicization

In our opinion, public authority of international courts ultimately demands increased politicization as part of its justification. Many regimes limp at present and it is even noticeable that international courts long for politico-legislative counterparts. After all, judicial institutions need to be understood as part of the overall framework of democratic politics. The success of many international courts thus leads to the question of corresponding politicization. By this we mean not to cherish political power-play but to suggest that multilateral spaces be used and constructed where actors can engage in meaningful political contestation, introducing their interests, explaining their convictions, and discussing their beliefs, interests, and positions.<sup>142</sup> Politicization opens

<sup>136</sup> Howse, ‘Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy’, 9 *ELJ* (2003) 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* (2002), at 317.

<sup>137</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 Oct. 1998, at para. 106. The *EC – Asbestos* case was also of great importance. See especially WTO Appellate Body Communication, WTO Doc. WT/DS135/9, 8 Nov. 2000; Minutes of the Meeting of the General Council Held on 22 Nov. 2000, WTO Doc. WT/GC/M/60, 23 Jan. 2001.

<sup>138</sup> See Delaney and Magraw, *supra* note 126.

<sup>139</sup> NAFTA Free Trade Commission, ‘Recommendation on Non-disputing Party Participation’, 7 Oct. 2004.

<sup>140</sup> ‘Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures’, Statement by the OECD Investment Committee (2005), at 1.

<sup>141</sup> Art. 37(2) Arbitration Rules. See also ‘Possible Improvements of the Framework for ICSID Arbitration’, ICSID Discussion Paper, 22 Oct. 2004.

<sup>142</sup> Compare Weber, ‘Wissenschaft als Beruf’, in 17 *Max Weber Gesamtausgabe* (1992) 506; R. Forst, *Das Recht auf Rechtfertigung* (2007) 7. Also see Venzke, *supra* note 62, at 1425.

up contexts of justification. There are a number of grand sketches that look far ahead to this effect and suggest building global institutions or reforming the structures of the United Nations, above all strengthening the parliamentary qualities of the UN General Assembly.<sup>143</sup> Apart from such slightly lofty projects, there are a number of avenues for politicization that are closer at hand.

Notably, within the institutional framework of the WTO, three former Directors General recognized the normative limits of judicial lawmaking and complained that the organization is acutely threatened by member states' use of the dispute settlement procedures 'as a means of filling out gaps in the WTO system; first, where rules and disciplines have not been put in place, or, second, are the subject of differences of interpretation'.<sup>144</sup> Their statement directs attention towards methods of political-legislative lawmaking in international organizations that may, in spite of well-known obstacles, frequently be better suited for dealing with subject matters in need of regulation.<sup>145</sup> Impacting on jurisprudence by way of authoritative interpretations may be one possible avenue, even if such attempts are not always, and not immediately, successful. The NAFTA Free Trade Commission crafted, for example, an interpretation on the highly disputed standard of fair and equitable treatment in the context of the *Pope & Talbot* case with which it sought to limit an increasingly extensive interpretation. At least at first, however, adjudicators paid strikingly little attention to the Commission's interpretation.<sup>146</sup>

Another variant of politicization may be seen in the strategy of refraining from adding to the substance of a disputed norm and rather formulating procedural requirements instead. This may then lead to a discursive processing of the conflict by political actors and disputing parties. The WTO Appellate Body has interpreted Article XX in this vein and obliged regulating states to include affected actors in the decision-making process. Rather than adding to the substance of Article XX, it provided procedural rights to those affected.<sup>147</sup> ITLOS has similarly read Article 73 UNCLOS in a way that grants procedural rights to flag states in the domestic processes of coastal states.<sup>148</sup>

<sup>143</sup> Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft', in W. Brugger, U. Neumann, and S. Kirste (eds) *Rechtspilosophie im 21. Jahrhundert* (2009), at 360, 368 and 376.

<sup>144</sup> A. Dunkel, P. Sutherland, and R. Ruggiero, 'Statement on the Multilateral Trading System' (2001), at 1.

<sup>145</sup> Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests', 20 *EJIL* (2009) 615.

<sup>146</sup> NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001. More recent arbitral awards do seem to apply the interpretation of the Free Trade Commission rather strictly. See *Glamis Gold Ltd. v. United States of America*, Award of 8 June 2009, at paras 598 ff.

<sup>147</sup> An important strand in WTO jurisprudence supports this approach: Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 29 Apr. 1996, at 22; Appellate Body Report, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, Recourse to Article 21.5, WT/DS58/AB/R, at paras 164 and 167. See von Bogdandy, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization', in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), at 103.

<sup>148</sup> *Juno Trader Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release, ITLOS, 18 Dec. 2004, at paras 77 and 102.

This approach may lead disputing parties towards resolving their controversies on the basis of international law and in the shadow of judicial proceedings. It picks up the idea of constitutional theory according to which constitutional courts serve the democratic principle best if they foster a fair political process.<sup>149</sup> In short, it may be beneficial for the democratic justification of international judicial decisions if courts do not hand down substantive interpretations of the disputed norm themselves but instead delegate the task to the disputing parties in a multilateral context under its supervision and tutelage.

## **B Independence, Impartiality and the Election of International Judges**

### *1 The Importance of Independence and Impartiality*

The classic way to democratic legitimation of public authority is that of electing those in office. But on the face of it, the main aim of the nomination and election process seems not so much to be about democratic legitimation as about entrusting capable individuals of integrity with applying the law in an independent and impartial way. The legitimacy momentum of the election would be centred on these important elements, which are, no doubt, of central significance also for the democratic justification of international courts' public authority.<sup>150</sup> The second Article of the ICJ Statute specifies in an exemplary fashion 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'.<sup>151</sup>

Overall, the different procedures portray 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. No two or more 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'.<sup>152</sup> This condition reflects how (judicial) socialization bears on legal interpretation.<sup>153</sup> Often disputing parties who do not have a judge of their nationality on the bench may choose a judge *ad hoc*.<sup>154</sup>

<sup>149</sup> Habermas, *supra* note 1, at 263; J. H. Ely, *Democracy and Distrust* (1980), at 100; U. Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Misstrauen* (1998). Cf. Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law', 12 *German LJ* (2011) 1175.

<sup>150</sup> Benvenisti and Downs, 'Prospects for the Increased Independence of International Tribunals', 12 *German LJ* (2011) 1057.

<sup>151</sup> Art. 2 ICJ Statute.

<sup>152</sup> *Ibid.*, Art. 9.

<sup>153</sup> L.V. Prott, *The Latent Power of Culture and the International Judge* (1979).

<sup>154</sup> Art. 31(2)–(3) ICJ Statute; Art. 17 ITLOS Statute. Cf. Scobbie, 'Une hérésie en matière judiciaire? The Role of the Judge *ad hoc* in the International Court', 4 *Law and Practice of Int'l Courts and Tribunals* (2005) 421.

Analyses of the practice of judicial elections have highlighted the dominance of executives in the process. A state's political position and its leverage in bargaining in an international regime are often decisive for its opportunities to fill a vacancy on an international bench. When a decent chance exists, only then does the executive look for a suitable candidate. In most cases candidates need the strong support of their respective governments, which have to invest considerable political capital in the election campaign.<sup>155</sup>

Suggestions for improvement again centre mainly on the qualifications of judges, their independence, and their impartiality. To this effect, some propose to introduce longer single terms in 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 the campaign for re-election.<sup>156</sup> Striving for better possibilities to assess candidates is another target of reform. The ICC Statute, for example, requires that member states must justify candidacies, thus providing minimal conditions for a meaningful debate.<sup>157</sup> And the Caribbean Court of Justice, operative since 2005, is the first international court that entirely entrusts the appointment of judges to the Regional Judicial and Legal Services Commission.<sup>158</sup>

Apart from elections, 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. These provisions have gained prominence in the course of recent cases on the matter.<sup>159</sup> Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundzija* case. On that occasion it carved out a number of criteria according to which actual, or, under further conditions, probable partiality of a judge leads to exclusion from the proceedings.<sup>160</sup> Some courts, whose statutes provide insufficient clarity on this issue or do not speak on it at all, have adopted directives in this regard on their own initiative.<sup>161</sup>

<sup>155</sup> Jouannet, 'Actualité des questions d'indépendance et d'impartialité des juridictions internationales', in H. Ruiz Fabri and J.-M. Sorel (eds), *Indépendance et impartialité des juges internationaux* (2010), at 271, 283 ff; D. Terris, C. Romano, and L. Swigart, *The International Judge: An Inquiry into the Men and Women Who Decide the World's Cases* (2007), at 23; 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* (2005), at 313, 319.

<sup>156</sup> Mackenzie and Sands, 'Judicial Selection for International Courts: Toward Common Principles and Practices', in K. Maleson and P. Russell (eds), *Appointing Judges in an Age of Judicial Power* (2006), at 213, 223; Keohane, Moravcsik, and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', *54 Int'l Org* (2000) 457, at 476.

<sup>157</sup> Art. 36(4) ICC Statute.

<sup>158</sup> Byron and Malcolm, 'Caribbean Court of Justice', in Wolfrum (ed.), *supra* note 109 (2009).

<sup>159</sup> This is an increasingly hot topic in investment arbitration: see, e.g., *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on the Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 Dec. 2010. See also Shany and Horowitz, 'Judicial Independence in The Hague and Freetown: A Tale of Two Cities', *21 Leiden J Int'l L* (2008) 113.

<sup>160</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1 A, Judgment, at para. 189.

<sup>161</sup> Shetreet, 'Standards of Conduct of International Judges: Outside Activities', *2 Law and Practice of Int'l Courts and Tribunals* (2003) 127.

The imperatives of independence and impartiality of international judges, securing good judicial qualifications and aiming at ethical integrity on the bench, are very important and need to be further pursued. But they do not exhaust the potential of democratic legitimation that judicial elections contain. In particular when courts engage in judicial lawmaking on subjects that are thoroughly contested, the political leanings of judges are of primary significance. Under democratic premises it is impossible to resolve problems in the justification of public authority – decisions among competing possibilities of legal regulation – with reference to the ‘high moral character’ (Article 2 ICJ Statute) of the personal ruler. 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?

## 2 Election and Democratic Forum

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.<sup>162</sup> But which institutions and *fora* should elect international judges as long as the peoples that are subject to a court’s jurisdiction do not constitute a single people? This question had already caused Kant many a headache.<sup>163</sup> Three answers may be distinguished.<sup>164</sup>

The traditional *intergovernmental approach* traces the authority of international courts to the will of their founding fathers – unitary states. State governments then figure prominently as representatives in international law (only consider Article 7(2) VCLT). In this view, the selection of judges forms a genuine part of foreign politics and remains a prerogative of the executive. This approach indeed informs most of the procedures for electing judges. Some even suggest that judges should be responsive to the input of their governments. They argue that only this would secure that the will of the parties is effectively implemented.<sup>165</sup>

The *liberal 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 to align the procedures for choosing senior

<sup>162</sup> Compare, e.g., Art. II, para. 2, cl. 2 US Constitution; Art. 94 German Basic Law; Art. 150 Constitution of Estonia; Art. 135 Constitution of Italy; Art. 85 Constitution of Latvia; Art. 103 Constitution of Lithuania; Art. 147 Constitution of Austria; Art. 149 Constitution of Poland; Art. 159 Constitution of Spain. Also see Malleson and Russell (eds), *supra* note 156; C.N. Tate and T. Vallinder, *The Global Expansion of Judicial Power* (1995).

<sup>163</sup> von Bogdandy and Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10 *German LJ* (2009) 5, at 29.

<sup>164</sup> Compare Krisch, ‘The Pluralism of Global Administrative Law’, 17 *EJIL* (2006) 247, at 253; de Wet, ‘Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review’, 11 *German LJ* (2008) 1987, at 1989; Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), at 264, 297.

<sup>165</sup> Posner and Yoo, ‘Judicial Independence in International Tribunals’, 93 *California L Rev* (2005) 1.

domestic and international judges. This points towards a prominent role for domestic parliaments to play.<sup>166</sup>

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 institutions, and on this basis supranational parliamentary *fora* can generate democratic legitimacy in the election of judges.<sup>167</sup> This approach finds a cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.<sup>168</sup> Ever since 1998, interviews with candidates by a sub-committee have also borne the potential of nourishing the development of a public that further increases the legitimacy momentum. This procedural element 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.<sup>169</sup>

### 3 Supranational Parliamentarism

How much justification can the transnational and cosmopolitan approach actually shoulder? Discourse theory may help once more. Habermas has worked towards loosening the close ties of the concepts of democracy, constitution, and law with the idea of the state. He 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 striven for.<sup>170</sup> He paves 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.<sup>171</sup> Legitimizing new forms of public authority in the post-national constellation therefore has to connect to the threads of legitimation that passes through democratic states and should further be complemented by an additional cosmopolitan basis of legitimation.<sup>172</sup>

<sup>166</sup> In line with this, the German parliament will have an influence 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 Sept. 2009), ss. 1 and 3.

<sup>167</sup> See Arndt, 'Parliamentary Assemblies, International', in Wolfrum (ed.), *supra* note 109 (2006).

<sup>168</sup> Art. 22 ECHR. See Frowein, 'Art. 22', in J.A. Frowein and W. Peukert, *EMRK-Kommentar* (2009), at mn. 2.

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

<sup>170</sup> J. Habermas, *Die postnationale Konstellation* (1998), at 165.

<sup>171</sup> Habermas, *supra* note 90, at 141.

<sup>172</sup> Habermas, *supra* note 143, at 362. On the usefulness of cosmopolitanism for studying global governance see Zürn, 'Vier Modelle einer globalen Ordnung in kosmopolitischer Absicht', 52 *Politische Vierteljahresschrift* (2011) 78.

Accordingly, the participation of international bodies in the election of judges may already offer a certain degree of transnational and possibly 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.<sup>173</sup> Be it noted, however, that the degree of transnational and cosmopolitan justification hinges on the discursive quality of participation. In any event, the mechanism of judicial election as it is practised in the context of the ECtHR turns out to be truly forward-looking from the point of view of democratic theory.

### *C Systematic Interpretation as Democratic Strategy?*

We argued that processes of fragmentation create problems for democratic legitimisation of international courts' public authority. In response we now wonder whether systematic interpretation can be a strategy to curb detrimental effects. Article 31(3)(c) VCLT demands that in treaty interpretation 'there shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties'. 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, the 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".'<sup>174</sup> 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'.<sup>175</sup>

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.<sup>176</sup>

<sup>173</sup> See <http://opiniojuris.org/2008/11/03/will-the-icj-have-a-us-style-nomination-fight-we-can-only-hope/>.

<sup>174</sup> International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 Apr. 2006, UN Doc. A/CN.4/L.682, at para. 479.

<sup>175</sup> *Ibid.*

<sup>176</sup> Still in this line of reasoning see H.L.A. Hart, *The Concept of Law* (1997 [1961]), at 92, 156, and 214. Compare Kennedy, 'Primitive Legal Scholarship', 27 *Harvard Int'l LJ* (1986) 1; Craven, 'Unity, Diversity and the Fragmentation of International Law', 14 *Finnish Yrbk Int'l L* (2005) 3, at 9.

If the exaggerated hopes for what the idea of a system can really achieve are relaxed and freed from its etatistic linkages, 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.<sup>177</sup> Against this background there are good arguments that speak in favour of supposing that there is a system of international law.<sup>178</sup> In the communicative practice – on the level of interpretation, that is – the idea of a system performs 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 are strong testimony for the fixation with a legal system. At issue is precisely the fragmentation of sectoral parts of the law that conceptually have to belong to a whole.<sup>179</sup> 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.

The principle of systematic integration pervades a number of judicial decisions even though courts only seldom invoke Article 31(3)(c) explicitly. But the ICJ held as early as in 1971 that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'.<sup>180</sup> 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'.<sup>181</sup> International trade law in the context of the WTO, the most thoroughly judicialized part of universal international law, thus clearly presents itself as a part of the whole of international law. In stark contrast to European law it has not formed an independent legal order.<sup>182</sup> 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.<sup>183</sup>

<sup>177</sup> R. Christensen and H. Kudlich, *Gesetzesbindung. Vom vertikalen zum horizontalen Verständnis* (2008), at 139; Oeter, 'Vielfalt der Gerichte – Einheit des Prozessrechts?', in R. Hofmann *et al.* (eds), *Die Rechtskontrolle von Organen der Staatengemeinschaft* (2007), at 149, 158; Simma and 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* (2009), at 678, 686.

<sup>178</sup> Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *EJIL* (2006) 483; Dupuy, 'L'unité de l'ordre juridique international', 297 *Recueil des Cours* (2002) 12, at 89.

<sup>179</sup> G.W.F. Hegel, *Wissenschaft der Logik I* (1932 [1812]), at 59.

<sup>180</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [971] ICJ Rep 16, at para. 53.

<sup>181</sup> Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 Apr. 1996, at 17.

<sup>182</sup> W. Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (1990).

<sup>183</sup> Compare Simma, 'Self-Contained Regimes', 16 *Netherlands Yrbk Int'l L* (1985) 111; J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 37; International Law Commission, *supra* note 174, at para. 174.



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.<sup>184</sup> Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.<sup>185</sup> In the course of fragmentation it is also possible that different understandings compete in a dialogue *between* courts.<sup>186</sup> Interpretations of functionally specialized courts might be aligned by way of the common language of international law. Of course this requires international courts to open up to such a dialogue. Some voices from the benches indicate that they would be inclined to follow this path.<sup>187</sup> While there is a danger of embellishing *de facto* results sustained by power relations, this way of dealing with the consequences of fragmentation would still be preferable compared to proposals that would introduce a formal hierarchy between judicial institutions, for example by installing the ICJ as a higher authority that can receive preliminary or advisory proceedings.<sup>188</sup> 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'<sup>189</sup> or if they are viewed as an 'invisible college'<sup>190</sup> 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. These are minimal safeguards and any genuine effect of legitimation can set in only when minimal preconditions for a legitimated 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. The 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.

<sup>184</sup> R. Dworkin, *Taking Rights Seriously* (1977).

<sup>185</sup> Habermas, *supra* note 1, at 224.

<sup>186</sup> Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 272; H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (2008), at 107; Teitel and Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order', 41 *NYU J Int'l L & Politics* (2009) 959; Kleinlein, 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law', 12 *German LJ* (2011) 1141.

<sup>187</sup> Treves, *supra* note 6. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', 55 *ICLQ* (2006) 791; Simma, 'Fragmentation in a Positive Light', 25 *Michigan J Int'l L* (2004) 845.

<sup>188</sup> Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions', 5 *Max Planck Yrbk UNL* (2001) 67; Oeter, *supra* note 177, at 167–170.

<sup>189</sup> Terris, Romano, and Swigart, *supra* note 155, at 64.

<sup>190</sup> See Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern U L Rev* (1977) 217; Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise', 5 *European Human Rts L Rev* (2001) 463.

## 5 The Disencumbering Role of Constitutional Organs

Our article has identified problems in the democratic legitimation of international decisions and has shown that those problems are not easy to solve. No solutions are readily available to ease all concerns. Strategies in response to persistent problems must be spelled out in further detail, and it remains to be seen how they stand the test of practice and which legitimacy effect they will actually be able to achieve. In view of this ambivalence, our conviction that the increasing authority of international courts constitutes a grand achievement is paralleled by a sense of discomfort springing from the thought 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 on the international level.<sup>191</sup>

It is important to note then that international decisions generally have no direct effect in municipal legal orders and that their implementation is mediated by the municipal legal system.<sup>192</sup> In the present state of international law, the possibility should exist that decisions about the effect of international norms or judicial decisions be made on the basis of the municipal legal order, at least in liberal democracies and to the extent that the international norm or decision severely conflicts with domestic constitutional principles. This approach frees the international legal order from legitimacy burdens that it may not always be in a position to shoulder. The interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This approach does not provide an obstacle to the further development of international law. Quite to the contrary, relieving international law from some of the burdens of legitimation may actually subserve its development. To clarify: the more incisive international decisions were, the more they would immediately impact on capacities for individual or collective self-determination, the higher would be demands for their democratic justification. It is thus important that the consequences of non-compliance are rather clear. Unmistakably then, the mere disregard of an international decision cannot justify military sanctions.<sup>193</sup> The remaining weakness of international courts with regard to the enforcement of their decisions might in fact turn out to reduce legitimacy concerns.<sup>194</sup>

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not

<sup>191</sup> Howse and Nicolaïdis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', in Broude and Shany (eds), *supra* note 50, at 63.

<sup>192</sup> In detail see A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', 6 *ICON* (2008) 397.

<sup>193</sup> Art. 50 Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>194</sup> Compare Petersen, 'Lawmaking by the International Court of Justice – Factors of Success', 12 *German LJ* (2011) 1295.

only control the effects of international decisions within their legal order. We suggest that they do so with explicit reasons. They can thus formulate standards for their assessments and may inspire further developments in the international legal order.<sup>195</sup> It should be added that non-compliance triggers argumentative burdens. Domestic organs should consider the consequences of their decisions for the international legal order. Non-compliance may indeed damage broader processes of legalization and could place stress on constitutional principles such as the rule of law and a general openness towards international law.

## 6 In Whose Name Then?

In an overall assessment in line with the Kantian tradition, the contemporary power of international courts amounts to a great achievement, even if it does not fulfil all aspirations and remains critically entrenched in processes of fragmentation. Above all, it is probably one of the most important effects of the rise of an international judiciary that it has contributed to the legalization and transformation of international discourses.<sup>196</sup> In principle, this corresponds to the Kantian quest for an international order of peace and offers empirical support for this thread of thinking. This assessment holds true even if international courts have so far not unambiguously turned out to work towards a more just world. It also prevails in spite of the fact that not all interests are protected by compulsory jurisdiction.<sup>197</sup>

And yet, developments in international adjudication demand a moment of contemplation and reconsideration that centres on the legitimacy foundations and their limits; not least so as to prevent international courts from falling victim to their own success. We have tried to elucidate legitimacy problems with regard to their practice, building our investigation on an understanding of international judicial decisions as an exercise of public authority. With this qualification we first of all wished to express the needs of justification. We then carved out a number of concrete propositions; namely, expanding roles for the public to play in judicial elections and in judicial proceedings, extending complementary political procedures, clearly marking the goal of systemic integration in judicial interpretation as well as in the dialogue between courts, and stressing the responsibility that municipal constitutional organs retain in implementing international decisions.

<sup>195</sup> Case C-93/02 P, *Établissements Biret et Cie SA v. Council* [2003] ECR I-10497; Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakat v. Council & Commission* [2008] ECR I-6351. See also Reinisch, 'Conclusions', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010), at 258, 263.

<sup>196</sup> Brimmer, 'International Politics needs International Law', in E. Jouanet, H. Ruiz Fabri, and J.-M. Sorel (eds), *Regards d'une Génération sur le Droit International* (2008), at 113; M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), at 494.

<sup>197</sup> M. Koskenniemi, *From Apology to Utopia* (2005), at 600–615 (on the notion of a structural bias).

Now, in whose name do international courts decide? International jurisprudence appears to be predominantly based on international agreements and intergovernmental interaction. International courts then decide in the name of states as subjects of the international legal order. In view of democratic principles for the justification of international public authority, this seems to be increasingly unsatisfactory. There are a number of ways in which the democratic legitimation of international decisions may be improved. In the Kantian tradition, and this is the best one we have, there is philosophically only one answer to the question: the starting point of democratic justifications are the individuals whose freedom shapes the judgments, however indirect and mediated this may be. In this vein, international adjudication in the post-national constellation should be guided by the idea of transnational and possibly cosmopolitan citizenship.