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International Courts as Lawmakers

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The increasing number of international judicial institutions, producing an ever-growing stream of decisions, has been one of the dominant features of the international legal order of the past two decades. The shift in quantity has gone hand in hand with a transformation in quality. Today, it is no longer convincing to only think of international courts in their role of settling disputes.[1] While this function is as relevant as ever, many international judicial institutions have developed a further role in what is often called global governance. Their decisions have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures. The practice of international adjudication creates and shifts actors' normative expectations and as such develops legal normativity.[2] Many actors relate to international judicial decisions when they devise or justify their actions, in ways similar to legal bases recognized as formal sources of international law.[3]

Although international courts have always been producing such normativity, not only the sheer volume, but also the systematic fashion in which some are developing a body of law of general relevance, points to a change in kind.[4] At the same time, we find that neither theory nor doctrine has yet adequately captured this aspect of international judicial activity. We suggest that the inevitable generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and hence as an exercise of public authority. Equipped with this understanding, we hope to draw attention to the legitimatory implications of international judicial lawmaking, placing the project in

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1 Note that we follow a broad understanding of the term 'court'. It covers arbitral tribunals as well as other institutions fulfilling a court-like function such as the WTO panels and Appellate Body even if they change in composition and do not formally *decide* a case. See also Project on International Courts and Tribunals <http://www.pict-pcti.org> (26 May 2011) (adopting an equally broad understanding of 'court'); cf. C. Romano 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 NYU JILP 709.

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

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

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

the context of broader investigations of legitimate governance beyond the nation state.[5] Above all, we explore how this judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials.

The phenomenon of international judicial lawmaking is omnipresent but most visible in legal regimes in which courts have compulsory jurisdiction and decide with sufficient frequency to allow for a *jurisprudence constante* to develop. Important examples include the judicial creation of the system of investment law, the development of Art. XX GATT into incisive standards for domestic regulatory policy, the creation of procedural obligations in policy-making, the lawmaking potential of proportionality analysis, the prohibition of amnesties in human rights law, the criminalization of belligerent reprisals in international humanitarian law, the doctrine of *erga omnes* in general international law, and the self-empowerment of courts, be it through proportionality analysis, through provisional measures, or through the pilot judgment procedure of the European Court of Human Rights.[6]

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

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

Perhaps the most noticeable legal and institutional development has occurred in international economic law. For example, international investment agreements usually contain standards that have only gained substance in the practice of adjudication. Fair and equitable treatment, one such standard, started as a vague concept that hardly stabilized normative expectations with regard to what would legally be required from host states. Today, there exists a rich body of investment law on the issue, shaping and hardening the standard.[7] International arbitral tribunals have decisively regulated the relationship between investors and host states and have developed and stabilized their reciprocal expectations.[8]

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

Such judicial lawmaking is difficult to square with traditional understandings of international adjudication, which usually view the international judiciary as fixed on its dispute settlement function. Many textbooks of international law present international courts and tribunals, usually towards the end of the book, simply as mechanisms to settle

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

[8] Schill (note 6).

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

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

disputes, together in the same chapter with mediation and good offices.[11] They focus only on part of the picture and shut their eyes to the rest. Even if international courts are admitted or expected to contribute to the development of the law, it remains either obscure what is meant by development or development is equated with clarifying what the law is. Our interest in judicial lawmaking is specifically triggered by the observation that judicial practice is creative and that it may have considerable consequences for the regulatory autonomy of states, thus affecting the space for domestic democratic government. We wish to explore above all the democratic justification of international judicial lawmaking, stating clearly at the outset, however, that international law and adjudication may also serve as devices that can alleviate democratic deficits in the postnational condition.[12] We are not out to categorically mark international judicial lawmaking as illegitimate, let alone as illegal.[13]

It should be stressed that addressing judicial activity as lawmaking does not, as such, entail a negative judgment. Also, quite obviously, insisting, in doctrinal terms, that judges should only *apply* and not *make* the law does not make the phenomenon go away. Judicial lawmaking is an integral element of almost any adjudicatory practice. At the same time, there are different degrees of judicial innovation. Without too much theoretical baggage it is probably easy to see and safe to say that the International Court of Justice's lawmaking impetus differs widely between its *Kosovo* opinion and its *Wall* opinion.[14] We discuss degrees of

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

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

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

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

judicial lawmaking and questions of legitimacy in our concluding contribution. At this stage it may already be noted that the absence of judicial innovation, as it characterizes the *Kosovo* opinion, might actually be no less problematic than more audacious instances of judicial lawmaking.

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

I. The Phenomenon of Lawmaking by Adjudication

1. (Far) Beyond the Cognitive Paradigm of Adjudication

Any argument that investigates judicial lawmaking and its justification would either be nonsensical or plainly pointless if the nature of judgments was that of cognition. The scales handled by *Justitia* would then look like a purely technical instrument that yields right answers. Correct adjudication would have to discover the law that is already given and judicial reasoning in support of a decision would simply serve the purpose of showing the rightness of cognition. Sure enough, few would still advocate a traditional cognitivistic understanding of judicial interpretation as Montesquieu famously expressed it in his metaphoric depiction of a judge or a court as 'bouche de la loi'.[15] And yet, there is still

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

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

a strong view suggesting that the right interpretation may be derived from the whole of the legal material in view of the intrinsic logic of the individual case through the correct application of the rules of legal discourse, considering all pertinent provisions, the context of the respective treaty, its object and purpose, and the whole of the international legal order.[16]

Moreover, there is a strong incentive for judges and courts to maintain such an image of their activity as it forms an intricate part of a prevailing and self-reinforcing judicial ethos: judges apply the law, this is the source of their authority, and whenever the impression gains currency that this is not what they are actually doing, they are usually in trouble.[17] But the obvious gap between the outward show and the actual activity should be overcome by more appropriate theory and doctrine that give a convincing account, both descriptive just as well as normative, of international judicial activity in the 21st century, an account that can also be conveyed in a rather straightforward fashion.

The traditional understanding of international adjudication as nothing but applying given abstract norms to concrete cases at hand has been proved unsound for a long time. It is beyond dispute that cognitivistic understandings of judicial decisions do not stand up to closer scrutiny. From the time of Kant's *Critique* it may hardly be claimed that decisions in concrete situations can be deduced from abstract concepts.[18] It is one of the main issues of legal scholarship how to best define this insight and how to translate it into doctrine. Hans Kelsen famously argued that it is impossible to maintain a categorical distinction between

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

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

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

law-creation and law-application.[19] More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.[20] Building on the dominant variant of semantic pragmatism and its principle contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or, which is the same, interpretation of a concept contributes to the making of its content. The discretionary as well as creative element in the application of the law makes the law.[21] He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[22] This might allow for a discoursive embedding of adjudication which can be an important element in the democratic legitimation of judicial lawmaking.[23]

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

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

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

[21] Brandom argues that 'there is nothing more to the concept of the legal concepts being applied that the content they acquire through a tradition of such decisions, that the principles that emerge from this process are appropriately thought of as "judge-made law"'. R.B. Brandom 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' (1999) 7 European Journal of Philosophy 164 (180).

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

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

justified. The reasoning in support of a decision does not serve to show a necessary result but it is burdened with justifying the decision. In this view, Hans-Joachim Koch and Helmut Rüßmann defend the deductive mode of arguing as the central place of judicial rationality. They do not extend their defense to the schema of *analytical* deduction.[24] The deductive mode of reasoning demands that whenever a norm is disputed, the decision in favor of one or the other interpretation must be justified – it needs to be made explicit, to recall the work of Brandom on this issue.[25] In sum, deductive reasoning turns out to be an instrument for controlling and legitimizing judicial power. It regards the modus of *justifying* decisions and not the process of *finding* decisions.[26]

2. Judicial Lawmaking

The creation and development of legal normativity in judicial practice takes place in the context of concrete cases. Judicial decisions settle the particular case between the parties. They apply pertinent norms in view of the facts and legal interpretations presented to them. Owing to the doctrine of *res judicata*, judgments are taken to prescribe definitely what is required in a concrete situation from the parties of the dispute. At the same time, this practice reaches beyond the case at hand.[27] A judgment, its decisions as well as its justification can amount to signifi-

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

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

[26] U. Neumann 'Theorie der juristischen Argumentation' in Brugger, Neumann and Kirste (note 15) 233 (241). Many have argued that the concept of decision, i.e. a choice between at least two alternatives, defies the possibility that it can be *found*.

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

cant legal arguments in later disputes about what the law means.[28] We concentrate precisely on this dimension of judicial lawmaking that we see in the creation and development of actors' general normative expectations – that is expectations sustained and stabilized by law about how actors should act and, more specifically, how they should interpret the law. Most international judgments reach beyond the dispute and the parties.

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

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

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

[30] Binder (note 6).

[31] Oellers-Frahm (note 6).

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

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

decisions not only aim at settling the case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon that also clearly transcends the limits of the particular dispute and impacts the general development of the legal order is of particular interest to us.

Judicial lawmaking is not a concept of positive law, but a scholarly concept; as such it is to be judged on its usefulness for legal scholarship. One contending conceptual proposal is judicial activism (or pro-active courts).[34] One of the main drawbacks of this concept is that it does not specify in what the activism lies. It also obscures the most important element of such 'activism'; namely the generation of legal normativity for third parties not involved in the dispute. This holds true for the concept of dynamic interpretation as well that also tends to overdo what states would have had to know in the moment they entered into legal obligations.[35] In the German speaking world, the concept of *richterliche Rechtsfortbildung* is much used,[36] it can be translated as the judicial development or evolution of the law which are also terms of art in English. Its upside is that it clearly marks the difference with legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both these aspects are well expressed in the concept of judicial lawmaking, which is, in addition, well introduced in the Anglo-American legal terminology.[37] For these reasons we opt for lawmaking as our leading concept to mark

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

[34] See Binder (note 6).

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

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

[37] This distinction is held up in the use of different terms in German-speaking legal science whereas in the world of common law the innovative judge frequently simply figures as *lawmaker*. *South Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Justice Holmes, dissenting); L. Reid 'The Judge as Law Maker' (1972) 12 Journal of the Society of Public Teachers of Law 22.

our object of inquiry, i.e. the generation of general normativity by international courts that creates, develops or changes normative expectations.

The term *judicial* lawmaking indicates that it is not the only form of lawmaking. In fact, much lawmaking occurs by using the formal sources of law. One reason for unease with the concept of judicial lawmaking might be due to the concern that it is oblivious to important differences between judicial lawmaking and lawmaking through formal sources.[38] We agree with this concern. Whoever develops theory and doctrine on judicial lawmaking needs to be cautious of differences with lawmaking through formal sources, paying particular attention to distinct legitimatory profiles and the divergent institutional requirements. Sweepingly equating judicial law-*application* and *legislation* may hardly convince. Speaking of judicial lawmaking is far less precarious than also using the term legislation for the activity of courts.[39] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

3. International Judicial Lawmaking as an Exercise of Public Authority

International adjudication would not require an elaborate justification of its own under the principle of democracy if it did not amount to an exercise of public authority: the very term *kratos* implies that link.[40] In the domestic setting, the public authority of courts is an essential element: *Justitia* herself not only handles scales but also wields a sword. It is rather evident in democratic constitutional contexts marked by the rule of law that mechanisms are in place to effectively implement domestic court decisions. This is evidently not the same when it comes to decisions of international courts. According to Art. 94 (2) of the UN Charter, the Security Council could take coercive measures if disregard

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

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

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

for decisions of the ICJ threatened international peace and security.[41] In practice, however, noncompliance with judgments of the ICJ or most other courts rarely draws coercive measures of such kind in response.

The relative lack of strong enforcement mechanisms on part of international institutions, be it bureaucracies or courts, certainly needs to be taken into account in addressing their democratic legitimation. But does this mean that our investigation into their democratic justification is skewed? This might indeed be the case if one followed a traditional conception of public authority that is limited to coercive power.[42] The activity of most international institutions, including judicial lawmaking, would then not amount to public authority. Yet, such a traditional conception has become, if it has not always been, both inadequate and implausible. The concept of public authority should rather include other ways of exercising power that are no less decisive and incisive than coercive enforcement.[43] Today, it is an empirical fact that the impact of international institutions on social life can be similar in significance to that of domestic institutions.[44] In order to give effect to this observation and experience, we understand authority more broadly as the legal capacity to influence others in the exercise of their freedom, i.e. to shape their legal or factual situation.[45] Even if international judicial decisions are usually not backed by coercive mechanisms, they still condition

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

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

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

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

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

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

That said, international courts *are* frequently embedded in contexts that may lever considerable enforcement mechanisms in support of their decisions, even if not to the same degree as in many domestic contexts of the rule of law. The Ministerial Committee of the Council of Europe oversees the implementation of decisions of the ECtHR,[47] member states of the ICC cooperate with the court in the execution of sentences and are obliged to implement its decisions,[48] in the framework of the WTO members may resort to countermeasures once their claims have succeeded in adjudication,[49] and arbitration awards of ICSID-Panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[50] In sum, a more refined understanding of how authority is exercised and a cursory look at the enforcement mechanisms that do exist supports the contention that international courts do exercise public authority in deciding legal disputes.

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

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[46] Reputational costs are relevant even for such weighty and mighty actors as the United States. In a *rational choice* perspective, see A. Guzman *How International Law Works* (OUP Oxford 2008) 71.

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

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

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

[50] Art. 54 of the ICSID Convention.

International decisions enjoy an exceptional standing in semantic struggles about what the law means.[51] Judicial precedents redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape.[52] In many judgments, precedents figure as arguments in support of decisions that in terms of authority are hardly inferior to provisions spelled out in an international treaty. Courts regularly use precedents in their legal reasoning and at times engage in detailed reasoning on how earlier decisions are relevant or not. Disputing parties are of course well aware of this and thus fight about the meaning of earlier judicial decisions as if they formed part of the sources of international law and as if they could themselves carry judgments of (il)legality. In practice the response to one party relying on an earlier judicial decision is not that there is no formal rule of precedent but rather to counter that claim with other arguments, distinguishing the case referred to, or using it in a different way. Many contributions in this volume analyzed this dynamic in closer detail.[53]

The Appellate Body of the WTO has for example relied on Art. 3 (2) of the DSU (providing that '[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system') to argue that previous reports on a subject matter 'create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute'.[54] Recently it raised its tone a notch and even suggested that a failure to do so on part of a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.[55] Panel and Ap-

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

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

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

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

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

pellate Body reports plainly do create legitimate expectations that must be considered in subsequent adjudication.[56] This is usually seen clearly in legal scholarship and it is evident to anyone involved in the operation of the system. The Brazilian representative in the WTO Dispute Settlement Body illustratively stated in the discussions pertaining to the *US – Shrimp* report that '[a]lthough no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement'.[57]

In sum, the disputes about precedents illustrate how judicial decisions impact the legal order and influence individual as well as collective spheres of freedom beyond the individual case. The adjudicatory practice of any court that has some reputation should accordingly be qualified as an exercise of public authority that demands justification.[58] This is in particular so when courts have compulsory jurisdiction and decide a stream of cases conducive to a *jurisprudence constante*. It may be worth adding that our relatively broad conception of authority also stems from a principled consideration: if public law is seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination, then any act with an effect on these normative vantage points should come into consideration the moment its effects are significant enough to give rise to reasonable doubts about its legitimacy. International courts and tribunals enjoy an outstanding position in international legal discourse and their interpretations palpably redistribute argumentative burdens. They develop the law through their practice in a way that conditions others in the exercise of their freedom as they find themselves in a legal situation shaped by the courts.

This effect of judicial precedents is concealed by the doctrinal ordering of things in light of Art. 38 (1) (d) of the ICJ Statute, classifying international judicial decisions as 'subsidiary means for the determination of rules of law'. Under the impact of the cognitivistic understanding of judicial interpretation decisions are thought of as a source that helps rec-

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56 See Venzke (note 6).

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

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

ognizing the law but not a source of law.[59] It is still a lasting task to formulate a convincing response to the dissonance between the ordering of sources doctrine and the actual working of precedents. This is a task that strikes above all at positivist thinking prevalent in continental Europe.[60] Conversely, scholars at home in the common law tradition tend to neglect prerequisite institutional contexts when they downplay the distinction between sources of law and sources for the determination of law, above all they ignore the fact that in domestic contexts the common law idea of judicial lawmaking goes hand in hand with a notion of parliamentary legitimation that is unworkable at the international level.[61] The distinction retains importance in particular if one considers that the international institutional order is marked by an asymmetry between powers. This leads us to the central problem in the justification of international courts: in domestic contexts of functioning democracies judicial lawmaking is embedded in a responsive political system, something that is lacking at the international level in similar quality.

II. On the Legitimacy of International Judicial Lawmaking

1. The Decoupling of Law from Parliamentary Politics

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

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

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

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

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

quintessential lessons of modern constitutionalism, which is worth recalling, is that legislation and judicial adjudication are two phenomena that should be kept apart and at the same time be understood in their intricate interaction.[63] It is a related and similarly great achievement of constitutional theory that it has conceptually grasped both distinction and connection, while stabilizing their simultaneity in legal institutions. The prevailing approach comes under the heading of separation of powers (or checks and balances) and it situates the legitimation of every power in its interaction with other powers.[64] Years of quarrel and learning have also established that law means *positive law*, at least in modern constitutional states.[65] The hallmark of positivity is that the legislature is responsible for this law.[66] In democratic societies, the majority (usually understood as the elected government) can intervene in the legal order by way of legislative procedures and can thus change the law.[67]

This main avenue of democratic legitimation is strained when it comes to international law and adjudication in a static perspective that focuses on the role of the parliament in the making of international agreements.[68] But the phenomenon of international judicial lawmaking pri-

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

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

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

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

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

[68] Our argumentation only relates to countries with a democratic constitution. For citizens living under authoritarian rule, this problem has to be examined separately. On the role of parliaments, see R. Wolfrum 'Die Kontrolle der auswärtigen Gewalt' (1997) 56 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler 38.

marily directs attention to a *dynamic perspective*.[69] International courts do not operate as parts of polities that include functioning political legislatures. Once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. By agreeing to an international treaty, the parliamentary majority of the moment cements its position and puts it beyond the reach of any later majority.[70] This strategy is particularly incisive when it comes to regimes that are characterized by relatively strong mechanisms of adjudication because such regimes tend to portray a greater dynamic and non-compliance usually bears greater costs. A later majority may in principle be able to exit a regime. But this possibility speaks in favour of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of domestic public authority.[71] It can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option because it is legally impracticable (long sunset clauses on investment treaties, for example) or the costs of exit are prohibitively high.[72]

This dynamic perspective on the decoupling of law from politics is critical when it comes to areas of the law which are marked by international judicial institutions. As analyses of the American Convention on Human Rights, the European Charter on Human Rights, as well as international trade and investment law all show, international judicial institutions have had significant impact on the development of the law

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

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

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

[72] Note that, referring to the doubtful legitimation of arbitral jurisdiction, Bolivia declared on 1 May 2007, that it would exit the ICSID Convention, see Bolivia Foreign Ministry 'Letter Concerning Denunciation of ICSID Convention, 1 May 2007' (2007) 46 ILM 973.

and on the shape of the respective legal regimes.[73] Their grasp on the making of the law has not been confined to substantive provisions but is maybe all the more creative with regard to developments in procedural law and their genuine competences.[74] The history of provisional measures tells the intriguing story of a vivid dynamic between international courts and tribunals, starting out with a claim by the Inter-American Court of Human Rights that its provisional measures are binding, via a number of other international judicial institutions, including the International Court of Justice, and even leading arbitral tribunals and human rights bodies to make the same claim, although the wording and drafting history of the rules of procedure of the former suggested otherwise and the latter are not even empowered to deliver binding opinions.[75] The European Court of Human Rights has also contributed to a remarkable innovation in its procedures with the instigation of so-called *pilot judgments*.[76]

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

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

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

[75] Oellers-Frahm (note 6).

[76] Fyrnys (note 6).

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

2. Fragmentation as a Problem for Democracy

A further critical element in the justification of international courts' authority concerns the institutional differentiation of distinct issue areas. Such differentiation narrows down the perspectives that may be cast on a certain subject matter. Why is this relevant, let alone problematic, with regard to the quality of democratic legitimation? Because it negatively affects the requirement of generality. In its legitimatory aspect, the requirement of generality is related to the process of law-creation and demands that the democratic legislature is the central place of norm production and legitimation.[78] More specifically, it demands that procedures in this place are thematically unsettled and are open to all kinds of competing perspectives. It must further be open-ended, in the sense of being without a predetermined solution. They must not prejudge or in principle preclude any relevant aspect in the decision-making process from the point of view of a particular functional perspective.[79] Subject matters should precisely not be distorted from the outset by the order of things as defined by functional narratives. The starting point of this argument is the individual as a whole, multidimensional human being that cannot be split into functional logics but rather calls for a mechanism of representation in which competing perspectives can be negotiated.[80]

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

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

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

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

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

generality are dim. In functionally tailored international regimes it is next to impossible to arrive at a certain degree of generality because in every regime there is an already prevalent particular set of preferences and concerns.[81] This undermines the requirement of generality as a critical element of democratic legitimation.[82] A functionally fragmented international judiciary threatens to weaken democratic generality in the further development of the legal order.

This is a problem that is part of but distinct from the decoupling of the law from parliamentary politics generally because it relates to deeper processes of sectoral differentiation. It suggests that increasing political oversight would be democratically meaningful to the extent that it heeds to the principle of generality. Oversight would have to transcend sectoral fragmentation, largely a question of personnel and of links to domestic levels of governance. The shift towards functional and institutional differentiation of international decision-making processes must not go hand in hand with a shift from democratic to technocratic rule.[83] Against this background we are also skeptical that seeing fragmented regimes in a system of checks and balances, where one rationale (and its institution) counters others, helps to ease concerns.

3. The Relevance of Democratic Legitimation

How can one square judicial lawmaking with the principle of democracy? A first response could be to negate the phenomenon. If there were no such thing as judicial lawmaking, there would evidently be no need for its justification. This response, though unconvincing, merits attention all the same because according to the traditional and still widespread view of international dispute settlement, international decisions flow from the consent of the state parties to the dispute – both from the consensual basis of the applicable law and from consent-based jurisdiction. If state parties are democratic, then the presence of their

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

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

[83] Paulus (note 80) 210.

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

These understandings are difficult to maintain, both as descriptions of international judicial practice and as normative constructions. It is therefore not surprising that alternative narratives of justification have surfaced in response. Most important among these are functional accounts suggesting that international decisions promote values, goals or community interests, above all international peace. By this token they may even attempt to justify lawmaking, precisely because international politico-legislative mechanisms are unable to achieve outcomes in the collective interest.[84] If this were so, a second response to questions regarding the democratic legitimation of international judicial lawmaking could be to argue that it strengthens democratic governance in a broader sense, rather than detracting from it.

It is true that the function of successfully settling disputes in the name of peace remains most relevant, not least for the promotion of democratic governance – after all democracy flourishes better in a peaceful world.[85] At the same time many international courts with a particular thematic outlook are justified on similar functional lines due to their contribution to effectively implementing specific goals that have come to complement the maintenance of international peace.[86] The international criminal tribunals and the International Criminal Court (ICC), for instance, are supposed to gain legitimacy by way of ending impunity for international crimes,[87] the WTO functions *inter alia* to increase

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[84] Kelsen (note 19) 165.

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

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

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

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

Still, as important as a certain goal may be, it cannot fully settle the justification of public authority. The aim cannot offer a sufficient basis for concrete decisions that inevitably entail normative questions and redistributions of power. Moreover, functional arguments offer no solution for the unavoidable competition between different goals. At times it may be that international adjudication achieves what everyone wants and yet still fails to deliver.[89] But even those may be lucky hits. History cautions that not too much confidence should be placed even in the benevolent and enlightened ruler. This is particularly true in light of the growing autonomy of some courts as well as the breadth of controversial fields in which such courts have been involved: there are now many constellations in which this functional goal can no longer convincingly settle legitimatory concerns. In short, our conviction is that all aspects of judicial activity need a convincing justification in light of the principle of democracy. Democratic justification is ineluctable for the exercise of any public authority.

Some might suspect that our investigation into the democratic legitimation of judicial lawmaking aims at bringing the noise of popular assemblies to the quiet halls of learnt justice. However, we do not challenge the premise that the reasoning, the institution, the procedure of adjudication need to follow a specific logic, which is different from the reasoning, the institution, the procedure in the 'true' and 'primary' arena of politics.[90] But asking about democratic justification leads us to study how judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs. Each of the following broad elements in

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

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

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

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

III. The Reasoning

1. The Democratic Dimension of Judicial Reasoning

One of the first and foremost elements that contribute to the democratic legitimation of judicial lawmaking is nested in the established forms of legal argument, in the respective discursive treatment of the legal material. Any government and parliament ratifying an international agreement expects and requires that norms be interpreted and developed in accordance with the argumentative tools laid down in Arts 31 and 32 of the VCLT. The rules of interpretation prescribe how legal decisions can be justified; in the practice of international adjudication, such a justification is a straightforward legal requirement. Statutes of international courts and tribunals contain provisions that are akin to the example of Art. 56 (1) of the Statute of the International Court of Justice: 'The judgment shall state the reasons on which it is based.'[91] The alternatives, refraining from justifying decisions or from making them public, might weaken the lawmaking effect of judicial decisions. However, this would not only violate the statute and rules of the court, but it would also threaten the legitimacy of the decision: parties to the dispute would feel neither vindicated nor respected, the larger legal discourse could no longer function as a mechanism of control and critique and legal certainty would be sacrificed.[92] All of this points to the legitimatory significance of justifying legal decisions in a way that lives up to the standards of the profession and that meets expectations of participants in legal discourse.

Many scholars stress this point as a core element for justifying not only the final decision concerning the parties of the dispute, but also the

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

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

lawmaking that affects third parties.[93] As lawmaking is an inevitable aspect of judicial interpretation, it is warranted that the reasoning should not only focus on the case at hand, but also look beyond it. Marking this lawmaking momentum vested in the justification of legal decisions as an undue expansion of competences or even as a usurpation of power on part of politicized courts would be plainly wrongheaded. Reasoning in the established forms that justifies a legal decision is part of judicial legitimation and required by the principle of democracy as it establishes the link with the formal sources that carry the democratic legitimacy of the norm-setting process. Sure enough, these forms of argument do not determine any outcome. Yet, one should not underestimate their constraining function. The creative lawmaking element is not only enhanced, but also tamed by the fact that judges are tied to past practices by the prospective reception of their interpretations; for that acceptance, a justification along the lines of Arts 31 and 32 of the VCLT is of great importance.[94] The semantic pragmatism we follow in view of the *linguistic turn* does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[95]

Lawmaking is an intrinsic element of adjudication and it is not as such *ultra vires*. At the same time, not all lawmaking falls within a court's competence. It is interesting to note that there have been long and difficult efforts to isolate judicial lawmaking that is beyond the competence of the court. Consider for example the recent decision of the German Federal Constitutional Court (FCC). On the one hand, the decision confirms that judicial lawmaking (or 'judicial development of the law', as the court puts it) is part of the competence of supranational and international courts.[96] It sees judicial lawmaking particularly warranted

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

94 Although it is, at least empirically seen, a necessary element. Some important lawmaking decisions are supported by very little reasoning, for example the introduction of the *erga-omnes* rule by the ICJ, see Petersen (note 73).

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

96 Bundesverfassungsgericht [Federal Constitutional Court, FCC] (6 July 2010) 2 BvR 2661/06, for an English translation see <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html> (28 May 2011). The judgment deals with the European Court of Justice (ECJ), but the FCC – engaging in general lawmaking – formulates a general point applicable not just to the ECJ as a supranational court, but also to international courts in general. In fact, the

when it 'concretizes programs', in the sense that it implements the normative project of a treaty, when it fills in legal gaps and when it solves contradictions.[97] On the other hand, the FCC considers judicial lawmaking likely to be *ultra vires* when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law. Judicial lawmaking is in particular illegal, according to the German court, if a supranational or international court lays new normative foundations or structurally alters the fundamental balance of power.[98]

Two clarifications are called for. First, legitimatory concerns do not only set in when a court acts *ultra vires* but also when it engages in lawmaking that might be deemed within its competence. Second, the standards that the FCC develops to distinguish one from the other are sketched only in the vaguest of terms and they are themselves in need of justification. The only certain element is that the court justifies them with the principle of democracy.

One attempt to give more substance to these standards can be found in discourse theory, understanding the separation of powers as a 'distribution of the possibilities for access to different sorts of reasons'.[99] Jürgen Habermas maintains that only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons while the judiciary has to stay within the narrower bounds of what is permitted in *legal* discourse.[100] According to this approach, law is a source of legitimation

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

97 Ibid. para. 64: 'There is particular reason for further development of the law by judges where programmes are fleshed out, gaps are closed, contradistinctions of evaluation are resolved'.

98 Ibid.: 'Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence'.

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

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

and not just a medium for the exercise of political authority. Law soaks up communicatively generated power and carries it into the rule of law – a kind of 'transmission belt', in Habermas terms.[101] This takes place in discourses that justify a norm, and their potential of legitimation hinges on the quality of democratic processes of political will formation.[102] At this stage and juncture, participants may draw on the whole spectrum of reasons. The administration and judiciary live on the communicatively generated power that was fed into the law at the moment of its legislative creation. Habermas argues that for this reason, 'the judiciary must be separated from the legislature and prevented from programming itself'.[103] This resonates well with the position taken by the Federal Constitutional Court.[104]

With respect to judicial lawmaking Habermas writes that 'to the extent that legal programs are in need of further specification by the courts … juristic discourses of application must be visibly supplemented by elements taken from discourses of justification. Naturally, these elements of a quasi-legislative opinion- and will-formation require another kind of legitimation than does adjudication proper. The additional burden of legitimation could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.'[105] He does not elaborate on the consequences of this proposition and how it can be operationalized. However, a close analysis of a judicial decision often indicates the degree of legal innovation and hence the magnitude of lawmaking. If one sets out to look for good reasons in support of important judgments of international courts, it appears quite evident when standard arguments in judicial discourses are not sufficient to convincingly justify a legal decision to the indubitable exclusion of all possible rival interpretations. The arguments given then tend to look like they mask the reasoning that really carries the judgment. Unsurprisingly, the scholarly and political discussions with regard to those judgments usually involve kinds of reasons that are grounded in discourses of norm justification. The question, for example, whether international trade law permits placing trade restrictions on products produced in a way that is

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

[102] Habermas (note 99) 150.

[103] Ibid. 172.

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

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

excessively detrimental to the climate can hardly be convincingly justified by interpreting Arts III, XI und XX of the GATT within the confines of the standard modes of the legal discourse.[106] They would rather need to be opened up to include arguments that are on discourse theory's terms only available in norm justification which is usually reserved to processes of political-legislative lawmaking.

It merits attention that Habermas develops his argument for the domestic setting where, at least in democratic states, parliaments and public opinion can generate communicative power that is channeled through legislative lawmaking into administrative and judicial adjudication. And which with the exception of constitutional adjudication the normal legislative process can override the judiciary. For international law, the situation is different. One conclusion might be that judicial lawmaking in the international realm should not be under the same constraints as in the domestic setting. In other words, the deficiencies of the international political system would provide a specific justification for judicial lawmaking. Kelsen's plea for a strong international judiciary is based on this view, considering the international legal order as a primitive legal order which – as any primitive legal order – receives its momentum of development from the courts.[107] Yet, it is hard to argue that international law today is primitive in the sense Kelsen saw it in 1944. It is also noteworthy in this regard that Hersch Lauterpacht, writing in 1933, explicitly linked his advocacy for the development of international law by judicial means to the fact that the law of his time was confined to a static and narrow set of international relations.[108]

We acknowledge that a court might be faced with a situation of crisis. For example, one might consider the ECtHR pilot judgment a response to its unbearable caseload.[109] A court might further be presented with a small window of historic opportunity, as in the prohibition of amnesties by the IACtHR after the fall of the dictators in Latin America.[110] That needs to be considered when evaluating judicial lawmaking in such extraordinary situations. But such necessities or opportunities cannot

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[106] See Jacob (note 6).

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

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

[109] Fyrnys (note 6).

[110] See Binder (note 6).

substitute a principled argument. Hence, the forms of legal argument are as essential for the democratic legitimation of an international court as they are for a domestic one. Any decision needs to be embedded in the relevant sources and precedents. But that will oftentimes not fully carry a decision, in particular if such a decision has a strong lawmaking dimension.

The question is how a court should deal with its discretion: in particular, whether it should justify the exercise of this discretion. For Kelsen, the judge only has to mark the outer limits that define the field of possible interpretations, but then he or she is not burdened with justifying any specific choice within these bounds.[111] On the other end of the broad spectrum of theoretical views Ronald Dworkin but also Hans-Joachim Koch and Helmut Rüßmann demand more elaborate justifications.[112]

Our pragmatic and discourse oriented approach to the issues of democratic legitimation pushes towards the second direction, and is in many respects similar to the proposal of Milan Kuhli and Klaus Günther on this issue.[113] A more fully argued decision can be better placed within the general context of debating the exercise of public authority. The open discussion of interests and competing positions is part of the social basis of democracy that sustains a democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potential if they are embedded in normative discourses of a certain quality. Accordingly, judges should make explicit the principles they pursue with a certain decision. Such a decision is more intelligible for most citizens than purely 'legal-technical' reasoning phrased in hermetic language, which obscures the real choices that the court does indeed make. This also militates against decisions whose reasoning is so long and complex that even most experts are unable to criticize it with any depth, not least for time constraints. The WTO provides a number of examples for lengthy reports that are for that reason hard to understand and to critique.

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

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

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

Moreover, in many cases it would be a good start if judges were more open about the policies they pursue and what kind of social effects they intend to promote with a judgment. When those social effects do not set in, this would diminish the precedential effect of such decisions in later discourse. Please note: we do not suggest shedding the 'camouflage' of legal reasoning to talk politics instead.[114] There is ample space in legal analysis to make policy choices explicit without falling for blunt and perhaps hegemonic instrumentalism that reduces law to a handmaiden of power.[115] Considerations of policy and social effects can enter the legal reasoning in the form of teleological or purposive arguments.[116] They would contribute to a meaningful politizisation of the legal discourse which should be welcomed in light of the principle of democracy. Politicization in this sense may advance the public discourse on judicial decisions and can inform and guide future practice.[117] We are aware that these are demanding standards, not least because almost any international decision is the product of a college of judges.

2. Referring to Political Outcomes Beyond Formal Sources

In addition to tending to policy considerations in judicial reasoning with greater attention, politicization may relate to political processes in international institutional settings. In fact, the political discourse in such settings frequently yields outcomes that can and do play a role in the reasoning of international courts. Judges justify their decisions not only through formal sources of law. They also invoke other policy

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

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

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

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

documents whose precise legal standing is rather murky.[118] Within the context of this project, Markus Fyrnys for example meticulously shows the close relationship between decisions within the political institutions of the Council of Europe and decisions of the European Court of Human Rights.[119]

Given our starting point that the distance to parliamentary politics is one of the core problems of international judicial lawmaking, the justificatory relevance of such outcomes requires attention. With respect to the democratic legitimation of international judicial lawmaking, we find of particular interest the question whether the reference to non-binding acts of international organizations can be supportive of the democratic legitimation of judicial lawmaking, although the act in question is neither binding nor the result of a parliamentary decision.[120] Such considerations may also extend to documented reactions with regard to previous jurisprudence on a certain issue area, above all by relevant political bodies.[121]

Under a discourse oriented concept of democracy, such international acts might indeed justify a judicial decision *if* the process leading to that act fulfils certain requirements. At this point, it might be helpful to distinguish two different conceptions of politics. A first conception stands in the tradition of realism. Politics accordingly refers to the exercise of power.[122] If the act in question is seen to be the imposition of the will of

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

[119] Fyrnys (note 6).

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

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

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

one state or a few states on a larger group of states, the reference to such an act cannot support the democratic legitimacy of a judicial decision.[123] Politics according to this understanding is plainly ill-suited for responding to problems of justification.

However, the international settings might also institutionalize processes of arguing.[124] They might provide multilateral spaces for the development of outcomes that are representative,[125] or fair, as Thomas Franck puts it.[126] In the light of discourse theory, such outcomes can be of significance to support the democratic legitimation of judicial lawmaking which refers to such outcomes. It supports the democratic legitimacy of international judicial lawmaking.[127] However, the court needs to ascertain the inclusive quality of the process leading to the outcome that it plans to use.[128]

3. Systematic Interpretation as Democratic Strategy?

We have argued that processes of fragmentation in international law threaten its democratic legitimation in general and the justification of international courts' public authority in particular. Some judicial institutions tend to develop the law in a way that is imbued with the functional logic of their respective regime; judicial lawmaking potentially

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

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

[125] Venzke (note 44) 1425.

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

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

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

aggravates the problem.[129] In response we now wonder whether systematic interpretation can be a strategy to curb those detrimental effects of fragmentation and hence to possibly foster the democratic legitimation of international adjudication. Art. 31 (3) (c) of the VCLT demands that in treaty interpretation 'there shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties.'[130] The ILC Report on fragmentation understands this rule of interpretation as an expression of the principle of systematic integration. In the words of the report, rule and principle of systemic integration 'call upon a dispute-settlement body – or a lawyer seeking to find out "what the law is" – to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background".'[131] The decisive point is that the interpretation of a norm 'refers back to the wider legal environment, indeed the "system" of international law as a whole.'[132]

Sure enough, the idea of a legal system is fraught with difficulties and tends to be overburdened with philosophical aspirations. Not so long ago, a legal system was thought to be inherent in the law in a kind of crypto-idealistic fashion. In this mode of thinking, the idea of a system indeed faces severe problems. In the 19th century, legal science and its concern with the legal system was closely connected to the idea of a national legal order that in turn figured as an expression of the unitary will of the state and as an object of scientific investigation. In comparison with such a demanding project, international law could not possibly constitute a system and was understood as a primitive legal order.[133]

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[129] See Koskenniemi and Leino (note 81). While this is debatable as a general and timeless claim, examples are not hard to come by. The jurisprudence under the GATT, at least in its early years, testifies to this proposition just as well as instances of investment arbitration. See Venzke (note 6).

[130] At least since the 2001 ILC Fragmentation Report, a vivid discussion concerning the scope of this rule of interpretation has emerged, International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682 [herafter *ILC Fragmentation Report*].

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

[132] Ibid.

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

If the exaggerated hopes for what the idea of a system can really achieve are relaxed and freed from its etatistic shackles, then it appears as an external instrument for ordering and handling the law. Today the idea of a system features as an objective in the practice of interpretation.[134]

There are then good arguments that speak in favour of supposing that there is a system of international law.[135] In the communicative practice – on the level of interpretation, that is – the idea of a system can perform a significant role, especially under the impact of fragmentation. It is not a bygone topic in legal theory but rather reverberates in the thought that the meaning of a norm is inescapably contextual and relational. Also the extensive discussion about the fragmentation of international law and the protracted dominance of this topic is a strong testimony for the fixation of legal scholars and practitioners with the notion of a legal system. At issue is precisely the fragmentation of sectoral parts of the law that conceptually have to belong to a whole.[136] Finally, the demand to relate interpretations to the system of the law is part of positive law and of the prevailing legal ethos. In sum, it is every interpreter's task to aim at the system, not least because it serves legal equality.

As a matter of practice, the principle of systematic integration does pervade a number of judicial decisions even though courts only seldom invoke Art. 31 (3) (c) of the VCLT explicitly.[137] The ICJ already held in 1971 that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time

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

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

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

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

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

of the interpretation.'[138] Also the WTO Appellate Body prominently found in its very first case that the GATT should not be read in 'clinical isolation from public international law.'[139] International trade law in the context of the WTO, among the most thoroughly judicialized parts of universal international law, thus clearly presents itself as a part of the whole of international law. In stark contrast to European Union law, it has not formed an independent legal order.[140] Struggles for independence or isolation that have come under the heading of *self-contained regimes* do not take away from the effectiveness of systemic integration.[141]

Concerns about practical feasibility in the sense that no interpreter and no international judge could be expected to take into account all of international law are not compelling. Systematic interpretation does not demand an ideal judge like Dworkin's superhuman *Hercules* who is able to find the one and only right interpretation of a norm at issue in light of all the legal practice of the system.[142] Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.[143] In the course of fragmentation it is also possible that different understandings compete in a dialogue *between* courts.[144] In the open process of interpretation between functionally specialized courts perspectives might compete and may possibly be approximated by way of the common language of international law. Some voices from the benches indicate that

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

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

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

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

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

[143] Habermas (note 99) 224.

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

they would be inclined to follow this path.[145] This way of dealing with the consequences of fragmentation is also preferable when compared with proposals that would introduce a hierarchy between judicial institutions, for example by installing the ICJ as a higher authority that can receive preliminary or advisory proceedings.[146] It does not spoil the benefits gained by functional fragmentation.

It may be the case, however, that the strategy of systematic integration in and between judicial decisions builds on excessive trust in international judges. If judges are understood to form an 'epistemic community'[147] or if they are viewed as an 'invisible college'[148] together with legal scholars, then it could even be that the strategy ends up advocating an autocratic rule of courts. The 'community' must not be closed and the 'college' must not be invisible.[149] These are minimal safeguards and any genuine effect of legitimation could only set in when minimal preconditions for a legitimatory juridical discourse are met – above all, publicness, transparency and adequate participation. Judicial proceedings on the whole hinge on a critical general public that transcends functional differentiations. Precondition for all of this is a sensibility for the problems of legitimating international judicial authority. Not least, our contribution intends to contribute to such sensibility.

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

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

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

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

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

IV. The Judges

1. The Democratic Importance of Independence and Impartiality

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

Independence and impartiality are essential legal requirements. Indeed, the second article of the ICJ Statute specifies that '[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices'.[151] The statutes of all other courts and tribunals contain similar provisions. However, as Eyal Benvenisti and George Downs explain, there are various elements that might structurally jeopardize the independence and impartiality.

For improving independence and impartiality, some propose to introduce longer singular terms of office and to rule out the possibility of re-election. This might decrease judges' dependence on their governments, whose support they would otherwise need in a campaign for re-election.[152] Striving for greater scrutiny in the assessment of candidates is another possibility for reform. The ICC Statute for example requires that member states must justify candidacies, thus providing minimal conditions for a meaningful debate.[153] And the Caribbean Court of Jus-

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[150] Benvenisti and Downs (note 77).

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

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

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

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

Statutes of international courts usually give instructions on the exercise of office – for instance, on a judge's secondary employment or the conditions under which she would have to recuse herself. These provisions have gained prominence in the course of recent cases on the matter.[155] Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundžija* case. On that occasion, it carved out a number of criteria according to which an actual, or, under further conditions, a probable partiality of a judge leads to the exclusion from the proceedings.[156] Some courts, whose statutes provide insufficient clarity on this issue or do not speak of it at all, have adopted directives on their own initiative that spell out certain codes of conduct in considerable detail.[157]

2. Reconsidering the Process of Appointment

The imperatives of independence and impartiality of international judges, good judicial qualifications, and ethical integrity on the bench are all very important. Accordingly, they are two commanding tenets in the process of appointment to which we turn now. In fact, the appointment procedure is largely studied in this light. Nonetheless, looking at the lawmaking function of international courts, one needs to go beyond this in order to understand the full importance of the appointment procedure in light of the principle of democracy. For example, it makes a great difference whether an international judge considers state sovereignty as the most basic principle of international law or rather conceives the state as an agent of the international community in gen-

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

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

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

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

eral and international human rights in particular.[158] It is above all when courts engage in judicial lawmaking on subject matters that are thoroughly contested, the political leanings of judges are of primary significance. Under democratic premises it is impossible to justify the path of lawmaking only with reference to the 'high moral character' (Art. 2 of the ICJ Statute) of the office holder.

Within the domestic system, the democratic element of the appointment procedure is well-studied, in particular with respect to judges of constitutional courts. Their appointment is not left to the executive alone, parliaments usually play some role in that procedure.[159] The role of executive institutions is far stronger with respect to international judges. Overall, the various procedures display a lot of similarities. Usually the UN Secretary-General or the secretariats of sectoral organizations invite member states to submit nominations. Candidates are then selected by the plenary body of the organization or by the assembly of all states. The example of the ICJ is paradigmatic. The General Assembly and Security Council elect judges with an absolute majority and in secret ballot for a term of nine years with the possibility of re-election. Not more than one of the 15 judges may have the nationality of the same state and, furthermore, the bench shall represent 'the principal legal systems of the world'.[160] The latter condition may be understood as recognition of the fact that (judicial) socialization bears on legal interpretation.[161] It stands in some tension to the idea of judicial independence that disputing parties who do not have a judge of their na-

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

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

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

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

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

Analyses of the practice of judicial elections have highlighted the dominance of executives in the process. A state's political position and its leverage in bargaining in an international regime is often decisive for its opportunities to fill a vacancy on an international bench. Only if a decent chance exists does the executive look for a suitable candidate. In most cases candidates need heavy support of their respective governments, which have to invest considerable political capital in the election campaign.[163] Is this dominant role of the domestic governments a problem in light of the principle of democracy? This leads us to consider the vanishing point of democratic justification.

In whose name do international courts speak the law and which forum is called upon to elect international judges? With regard to domestic constitutional adjudication there are good reasons to involve the representation of the democratic sovereign in the election of judges. This usually translates into requirements of parliamentary participation, supplemented in light of discourse theoretical considerations with demands for publicness. But which institutions and *fora* should elect international judges as long as the states that are subject to a court's jurisdiction do not constitute a single nation? Three answers may be distinguished.[164]

The traditional *intergovernmental approach* traces the authority of international courts to the will of the legal entities which created them – states. State governments then figure prominently as representatives in international law (consider only Art. 7 (2) of the VCLT). Viewed from this angle, the selection of judges forms a genuine part of foreign poli-

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

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

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

tics and remains a prerogative of the executive. This approach indeed informs most of the procedures for electing judges. Some even suggest that judges should be responsive to the input of their governments.[165]

The *liberal or domestic approach* does not accept the division of domestic and foreign politics that characterizes the traditional intergovernmental approach. A categorical distinction is indeed increasingly less plausible in the wake of the globalization of many spheres of life. The liberal approach then pleads in favour of aligning the procedures for choosing senior domestic and international judges. This points towards a prominent role for domestic parliaments to play.[166]

The *cosmopolitan approach*, in contrast, looks at new supranational *fora*. It takes the individual citizen to be the ultimate reference point in the justification of public authority and invests it with a national as well as a cosmopolitan identity. The latter relates the citizen to supranational or international institutions and on this basis supranational or international parliamentary *fora* can generate democratic legitimacy in the election of judges.[167] This approach finds cautious expression in the election of judges to the ECtHR by the Parliamentary Assembly of the Council of Europe.[168] Ever since 1998, interviews with candidates by a sub-committee also bear the potential of nourishing the development of a public that further increases the legitimatory momentum. This procedural element has for example triggered a positive politicization of the election process when the assembly rejected a member state's list of candidates because it did not include any female candidate.[169]

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

166 In line with this, the German parliament will have a say on the selection of Future German ECJ judges, see Richterwahlgesetz in der Fassung des Gesetzes über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, 22 September 2009, paras 1 and 3.

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

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

169 See, however, ECtHR *Advisory Opinion on Certain Legal Questions concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights* (Grand Chamber, 12 February 2008). Also note that some statutes explicitly try to address the disproportionately weak representation of women, see, e.g., Art. 36 (8) (a) (iii) of the ICC Statute.

How much justification can the cosmopolitan approach actually shoulder? Can the election of international judges by international bodies generate democratic legitimacy, or does the cosmopolitan approach lead to the wrong track? Discourse theory once more is of help. Habermas has worked towards loosening the close ties of the concepts of democracy, constitution and law with the idea of the state and explores questions of democratic legitimation in a politically organized world society while neither assuming that this political organization has the attributes of a state, nor suggesting that this is a goal to be desired.[170] Habermas builds here on his theory of intersubjectivity, paving the way for imagining democracy without implying that there is a unitary people. At the same time, he underlines that domestic constitutional orders have created democratic processes for forming public opinion and political will that are hard to reproduce at the supranational level.[171] Legitimating new forms of public authority in the postnational constellation therefore has to connect to the threads of legitimation that passes through democratic states and should further be complemented by an additional cosmopolitan basis of legitimation.[172]

Accordingly, the participation of international bodies in the election of judges may already offer a certain degree of cosmopolitan justification. For this purpose it is crucial that the election of judges is embedded in a global public. This is not sheer aspiration. It may be recalled that the election of Christopher Greenwood to the ICJ stirred some global criticism and discussion because of his legal opinions with regard to the war in Iraq.[173] Be it noted, however, that the degree of cosmopolitan justification hinges on the discursive quality of participation. In any event, the mechanism of judicial election as it is practiced in the context of the ECtHR turns out to be truly forward-looking from the point of view of democratic theory.

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

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

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

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

V. The Procedure

After having looked at courts' reasoning and judicial appointments in light of the principle of democracy, we now turn to procedural law. The first question is how judicial procedures can be understood as spaces in which democratic legitimacy may be generated while neither calling into doubt the judge's monopoly over the judicial decision nor watering down a nuanced concept of democracy that demands effective participation in decision-making processes. In the tradition of pragmatics and discourse theory, two features appear by way of which judicial procedures could strengthen the democratic legitimation of judicial decisions. The first concerns the justification of decisions with regard to the participants in the process. The parties to a dispute are involved in how the case is handled and the court is required to deal with the arguments that they introduce. This co-operative treatment of the matter in dispute is not confined to questions of fact or evidence but – against the widespread understanding of the principle of *iura novit curia* – also extends to questions of law. The other element, more central to the focus of our study, is the way in which the procedure allows the wider public to take part in the process of judicial will formation, embedding the judges in the general discourses on a given topic.

This way of looking at the procedures of international adjudication is certainly not very common and the relevant law is underdeveloped in this respect. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for and what it actually does. So far that has almost exclusively been the settlement of the dispute at hand. The more the generation of legal normativity in the practice of international adjudication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations.[174] The more judicial lawmaking becomes palpable, the more procedural law will start to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.

This section highlights how the increasing recognition of the jurisgenerative dimension of international judicial practice is reflected in

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

mounting demands for transparency, publicness and participation in international proceedings. It investigates comparatively how the procedural law of international courts and tribunals copes with similar problems, in particular regarding legitimatory concerns that are triggered by the phenomenon of judicial lawmaking. At the same time, trends in procedural law give evidence to shifting ideas about international dispute settlement that inform even larger debates about the nature of the international legal order and its deep social structure.

It is worth noting that the procedural law of international judicial institutions is largely a product of their own making.[175] As Jean-Marc Sorel put it, 'self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers'.[176] We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of international decisions and as part of attempts that aim at strengthening the capacity of democratic legitimation that is nested in the judicial process itself. Three dimensions are of particular relevance.[177]

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[175] The notion of *procedural law* describes the body of requirements that govern how a judicial process has to be conducted. No uniform *procedural law* for all courts is thereby postulated. R. Kolb 'General Principles of Procedural Law' in Zimmermann, Tomuschat and Oellers-Frahm (note 59); C. Brown *A Common Law of International Adjudication* (OUP Oxford 2007) 6.

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

[177] Other dimensions include the establishment of facts and rules of evidence, both may be relevant for the legitimation of international adjudication, possibly less so, however, with regard to international judicial lawmaking. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Joint Dissenting Opinion of Judges Al-Khasawneh and Simma*) [2010] ICJ General List No. 135 para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the court should have either appointed its own experts or had party-appointed experts subjected to cross-examination); M. Benzing *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (Springer Berlin 2010).

1. Publicness and Transparency

A crucial element for publicness and transparency and hence democracy are the oral proceedings that some court statutes explicitly provide for.[178] In other contexts like the WTO and much of investment arbitration confidentiality is the rule. But even here procedures have opened up in practice to some prerequisites of publicness and transparency.[179] The Sutherland Report of 2004 reinforced this trend by stating that 'the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution' and by suggesting that oral proceedings should be public.[180] Of course it remains critically important to pay due respect to the interests of the parties. Also sensitive trade secrets must be kept. Often proceedings do remain behind closed doors, in particular in cases before the panels that are, in comparison to the Appellate Body, as an institution as well as in their nature, composition and ethos closer to the arbitration model.[181]

And yet there is room for improvement. The position taken by the panel in *Canada – Continued Suspension* is remarkable. The panel held hearings in public and justified this step *inter alia* with the innovative argument that the provisions about confidentiality of proceedings only relate to the internal deliberations of the panel but not the exchange of arguments between the parties.[182] And the Appellate Body maintained

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

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

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

[181] J.H.H. Weiler 'The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191; C.-D. Ehlermann 'Six Years on the Bench of the "World Trade Court" - Some Personal Experiences as Member of the Appellate Body of the World Trade Organization' (2002) 36 JWT 605.

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

that '[i]n practice, the confidentiality requirement in Article 17.10 has its limits. […] Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.'[183]

Procedures in the ICSID framework fall short of those of the WTO on this point. But also here first cracks are starting to show that may soon widen so as to accommodate growing demands for more transparency.[184] In June 2005, the OECD Investment Committee threw its authority behind the argument when it maintained that '[t]here is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence.'[185] Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[186]

2. Third Party Intervention

Further avenues for responding to problems in the justification of international courts' exercise of public authority may be found in an expansion of possibilities for intervention and participation. In a straight-

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

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

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

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

forward fashion, Art. 63 of the ICJ Statute gives every party to a convention a right to intervene if the interpretation of that convention is at issue. Beyond this clear provision, it is noteworthy that in the seminal *Pulau Ligitan* case the ICJ in principle allowed that a party may intervene even if it cannot itself show a jurisdictional link to any of the parties.[187] The trend towards wider participation in judicial proceedings is a testament to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. This is yet another indication showing that understanding judicial decisions as acts of simply finding the law and as acts that are binding only *inter partes* is inadequate.[188]

In the procedures of the WTO, members that are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[189] In contrast to the ICJ and also to ITLOS, however, the black letter procedural law does not grant intervening parties the right to attend hearings. Whether and how often hearings are opened up to third parties largely lies within the discretion of the panels.[190] In *EC – Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties – a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective states attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[191] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

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

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

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

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

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

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are a number of salient reasons for this approach that are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete individual case, sensitive concessions and compromises that may only be reached in confidential settings, and protection of business secrets.[192] And yet, even in this field of adjudication there are trends to expand the proceedings. They may be better discussed with regard to the role of *amici curiae*.

3. *Amici Curiae*

Usually *amici curiae* are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[193] Above all NGO participation may open up legitimatory potential. This may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalisation that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[194]

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

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

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

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

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

opinion in writing and to present its view orally.[196] This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.[197] Only a little later the same NGO received a positive response from the registrar and was allowed to appear as *amicus curiae* in the advisory proceedings concerning the *Status of South-West Africa*.[198] Ever since the *Gabcíkovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[199] Beyond this minimal common denominator there remains considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposing opinions have so far impeded developments like they have taken place in other judicial institutions.[200] Former President Gilbert Guillaume stated bluntly that nowadays states and intergovernmental institutions should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued, that the ICJ should better ward off unwanted *amicus curiae* submissions.[201]

Neither treaty law within the WTO context makes any provisions on how to deal with *amicus curiae* briefs. But here legal practice has warmed up to the idea that maybe *amici curiae* should have a role to play. Legal practice has been paralleled by a significant discussion among practitioners and scholars on the issue.[202] As early as the *US – Gasoline* case NGOs pushed to present their views but were simply ignored by the panel. In the path-breaking *US – Shrimp* case, the panel explicitly rejected *amicus curiae* submissions but was corrected by the

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196 The answer was an easy one because the NGO had tried to base its claim on Art. 34 of the ICJ Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed. See P.-M. Dupuy 'Article 34' in Zimmermann, Tomuschat and Oellers-Frahm (note 59) 545 (548).

197 Art. 66 ICJ of the Statute.

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

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

200 See ICJ Practice Direction XII (2004).

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

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

higher level of jurisdiction. The Appellate Body argued that '[t]he thrust of Arts 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.'[203]

ICSID proceedings have for long been sealed off from any possibility of participation beyond the parties to the case. And yet, even in this context legal practice has changed and opened up avenues for *amici curiae*.[204] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle prevent third parties from stating their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[205] Similarly, the OECD Investment Committee elaborated in the report mentioned above that 'Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific regulations.'[206] The new ICSID Arbitration Rules of 2006 responded to shifts in practice as well as political commentary and introduced a new Art. 37 that speaks of the possibility of submissions by third parties and *amici curiae*.[207]

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

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

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

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

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

VI. The Role of Domestic Organs

Our piece has identified problems in the democratic legitimation of international judicial lawmaking and has shown that there are promising strategies to respond, but that no solutions are readily available to ease all concerns. Moreover, such strategies must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimatory effect they will actually be able to achieve. On its own, it is hard to see how it is possible to fully square international judicial lawmaking with the principle of democracy.

So we see a dilemma: our conviction is that the increasing authority of international courts constitutes a grand achievement. Even if the international judiciary does not fulfil all aspirations of global justice,[208] its lawmaking has significantly contributed to legalization and hence a transformation of international discourses. Although one should not see international legalization as a value per se irrespective of content, the overall process should be welcomed.[209] Yet, these achievements are accompanied by a sense of discomfort springing from the insight that, as of now, international courts may not always satisfy well-founded expectations of legitimation.

The resulting tension may be relaxed by holding up the political and legal responsibility that municipal constitutional organs retain in deciding about the effect of international decisions and by bearing in mind how they, in turn, can feed back into developments at the international level.[210] From a legal point of view, this means that the effect of international law and international decisions, including the precedential effect for domestic courts, is determined by constitutional law. Their normativity in the domestic realm is mediated by the municipal legal sys-

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

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

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

tem.[211] This mediation frees international judicial lawmaking from legitimatory burdens that it may not always be in a position to shoulder. Such interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This constellation does not provide an obstacle to further develop international adjudication. Quite to the contrary, relieving such adjudication from some of the burdens of legitimation may actually serve its development. For that purpose it is important that the consequences of non-compliance are made clear. Unmistakably then, the mere disregard of an international decision cannot justify military sanctions, unless it amounted to a threat to international peace and security and was sanctioned by the UN Security Council.[212]

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they exercise their control function with explicit reasons. They can thus formulate standards and may inspire further developments in the international legal order.[213] It should be stressed that domestic non-compliance triggers heavy argumentative burdens.[214] In the present state of the world, the smooth operation of international law is of critical importance and domestic organs must consider the consequences of any non-compliance for the international legal order in general and for the authority of the international court in question in particular.

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

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

[213] Case C-93/02 P, *Établissements Biret et Cie SA v. Council of the EU*, 2003 E.C.R. I-10497; Joined Cases C-402/05 P and 415/05 P, *Kadi and Al Barakaat v. Council of the EU and EC Commission*, 2008 E.C.R. I-6351 (also following this logic).

[214] Bundesverfassungsgericht (Federal Constitutional Court), 14 October 2004, 2 BvR1481/04, 111 Entscheidungen des Bundesverfassungsgerichts 307, for an English translation see <http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html> (31 May 2011). Cf. on the role of domestic courts, E. Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.