Beyond Dispute:
International Judicial Institutions as Lawmakers

On the Democratic Legitimation of International Judicial Lawmaking

By Armin von Bogdandy & Ingo Venzke[*]

A. The Relevance of Democratic Legitimation

While the introductory contribution addressed the questions and definitions of our research into judicial lawmaking, this concluding chapter discusses strategies regarding the justification of international judicial lawmaking that our introduction sought to capture and that the volume set out to present. How can one square such lawmaking with the principle of democracy? A first response could be to negate the phenomenon. If there were no such thing as judicial lawmaking, there would evidently be no need for its justification. This response, though unconvincing, merits attention all the same because, according to the traditional and still widespread view of international dispute settlement, international decisions flow from the consent of the state parties to the dispute, both from the consensual basis of the applicable law and from consent-based jurisdiction. If state parties are democratic, then the presence of their consent should solve any legitimate question as long as the courts only fulfill their task of dispute settlement properly. This explains the emphasis that traditional schools of thought place on the cognitive paradigm and on the principle that judges are limited to applying the law to the dispute at hand.

But, as we pointed out in our introduction, these understandings are difficult to maintain, both as descriptions of international judicial practice and as normative constructions. It is therefore not surprising that alternative narratives of justification have surfaced in response. Most important among these are functional accounts suggesting that international decisions promote values, goals or community interests, above all international peace. By this token they may even attempt to justify lawmaking, precisely because international politico-legislative mechanisms are unable to achieve outcomes in

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the collective interest.[1] If this were so, a second response to questions regarding the democratic legitimation of international judicial lawmaking could be to argue that it strengthens democratic governance in a broader sense, rather than detracting from it.

It is true that the function of successfully settling disputes in the name of peace remains most relevant, not least for the promotion of democratic governance; after all democracy flourishes better in a peaceful world.[2] At the same time many international courts with a particular thematic outlook are justified on similar functional lines due to their contribution to effectively implementing specific goals that have come to complement the maintenance of international peace.[3] The international criminal tribunals and the International Criminal Court (ICC), for instance, are supposed to gain legitimacy by way of ending impunity for international crimes,[4] the WTO functions inter alia to increase economic welfare,[5] and arbitration in investment disputes should foster economic development by inducing foreign investments.[6]

Still, as important as a certain goal may be, it cannot fully settle the justification of public authority. The aim cannot offer a sufficient basis for concrete decisions that inevitably entail normative questions and redistributions of power. Moreover, functional arguments offer no solution for the unavoidable competition between different goals. At times, it may be that international adjudication achieves what everyone wants and yet still fails to deliver.[7] But even those may be lucky hits. History cautions that not too much confidence

[1] HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 165 (1942).

[2] Apart from this, international courts can, for instance, foster democratization through a democracy oriented human rights jurisprudence. *See* Eur. Court H.R., *Matthews v. Great Britain*, Case No. 24833/94, Judgment of 18 February 1999. *Cf.* Georg Ress, *Das Europäische Parlament als Gesetzgeber: Der Blickpunkt der EMRK*, 2 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 219, 226 (1999); Jenny Martinez, *Towards an International Judicial System*, 56 STANFORD LAW REVIEW 429, 461 (2003) (seeing this as the main function of international jurisprudence).

[3] Karin Oellers-Frahm, *Nowhere to Go? The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction*, in: A WISER CENTURY?, 435, 440 (Thomas Giegerich ed., 2009); Carmen Thiele, *Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft*, 46 ARCHIV DES VÖLKERRECHTS 1, 13 (2008).

[4] In detail, *see* Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 369, 373 (2006).

[5] Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 221 (2006–07); PAOLO PICONE & ALDO LIGUSTRO, DIRITTO DELL'ORGANIZZAZIONE MONDIALE DEL COMMERCIO 26 (2002).

[6] DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 149 (2008); Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 JOURNAL OF WORLD INVESTMENT & TRADE 183 (2005).

[7] Robert Howse & Susan Esserman, *The Appellate Body, the WTO Dispute Settlement System, and the Politics of Multilateralism*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 61 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (pointing to a number of instances in which adjudication in the WTO overcame deadlocks in processes of political negotiation).

should be placed even in the benevolent and enlightened ruler. This is particularly true in light of the growing autonomy of some courts as well as the breadth of controversial fields in which such courts have been involved: there are now many constellations in which this functional goal can no longer convincingly settle legitimatory concerns. In short, our conviction is that all aspects of judicial activity need a convincing justification in light of the principle of democracy. Democratic justification is ineluctable for the exercise of any public authority.

Some might suspect that our investigation into the democratic legitimation of judicial lawmaking aims at bringing the noise of popular assemblies to the quiet halls of learnt justice. But we do not challenge the premise that the reasoning, the institution, the procedure of adjudication need to follow a specific logic, which is different from the reasoning, the institution, the procedure in the "true" and "primary" arena of politics.[8] Asking about democratic justification leads us to study how judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs. Each of the following broad elements in response will lay out how its topic is connected with the principle of democracy.

The first element concentrates on judicial reasoning and starts by showing the democratic importance of the standard forms of arguments, not because they reveal the true consent of states, but because they permit judicial decisions to be discursively embedded and to be critiqued before the court of public opinion (B.I). Given our starting point that the distance to politics is one of the core problems of international judicial lawmaking, we note how international judges often justify their lawmaking by referring to what is sometimes called "soft law" and discuss the relevance of such acts of international institutions (B.II). The last step in the part on reasoning discusses whether systematic interpretation might serve as a strategy to counter the effects that fragmentation has on democratic legitimation (B.III). The second part examines the main actors, the judges. In light of the principle of democracy, it looks at the two main standards of legitimate adjudication, namely independence and impartiality (C.I), and then investigates possible improvements in the process of appointing judges (C.II). The third part concerns trends in the judicial procedure that aim at strengthening the democratic legitimation of international judicial lawmaking by enhancing publicness and transparency (D.I), by lowering the thresholds for third party intervention (D.II) and by easing the access of amici curiae (D.III). The contribution closes by highlighting the crucial role of domestic organs (E).

[8] For a brilliant description of what happens if the difference between courts and politics collapses, *see* Marcelo Neves, *La concepción del Estado de derecho y su vigencia prática en Suramerica*, in: INTEGRACIÓN SURAMERICANA A TRAVÉS DEL DERECHO?, 51 (Armin von Bogdandy, César Landa Arroyo & Mariela Morales Antoniazzi eds, 2009).

B. The Reasoning

I. The Democratic Dimension of Judicial Reasoning

One of the first and foremost elements that contribute to the democratic legitimation of judicial lawmaking is nested in the established forms of legal argument—in the discursive treatment of the legal material. Any government and parliament ratifying an international agreement expects and requires that norms be interpreted and developed in accordance with the argumentative tools laid down in Articles 31 and 32 VCLT. The rules of interpretation prescribe how legal decisions can be justified; in the practice of international adjudication, such a justification is a straightforward legal requirement. Statutes of international courts and tribunals contain provisions that are akin to the example of Art. 56(1) Statute of the International Court of Justice: "The judgment shall state the reasons on which it is based."[9] The alternatives, refraining from justifying decisions or from making them public, might weaken the lawmaking effect of judicial decisions. This would violate the statute as well as the rules of the court and it would threaten the legitimacy of the decision. Parties to the dispute would feel neither vindicated nor respected, the larger legal discourse could no longer function as a mechanism of control and critique, and legal certainty would be sacrificed.[10] All of this points to the legitimatory significance of justifying legal decisions in a way that lives up to the standards of the profession and that meets expectations of participants in legal discourse.

Many contributions for the present research project stress this point as a core element for justifying not only the final decision concerning the parties of the dispute, but also the lawmaking that affects third parties.[11] As lawmaking is an inevitable aspect of judicial interpretation, it is warranted that the reasoning should not only focus on the case at hand, but also look beyond it. Marking this lawmaking momentum vested in the justification of legal decisions as an undue expansion of competences or even as a usurpation of power on the part of politicized courts would be plainly wrongheaded. Reasoning in the established forms that justifies a legal decision is part of judicial legitimation and required by the principle of democracy as it establishes the link with the formal sources that carry the democratic legitimacy of the norm-setting process. Sure

[9] Failure to state reasons is also one of the few possible grounds for annulment in the ICSID system (Art. 52(1)(e) ICSID-Convention). *See* further Art. 41 Rules of Procedure of the European Nuclear Energy Tribunal (5 September 1965). *See* also ALF ROSS, THEORIE DER RECHTSQUELLEN 283 (1929); MARTIN KRIELE, THEORIE DER RECHTSGEWINNUNG 167–71 (1976).

[10] The function of this discourse for the democratic legitimation of a decision is discussed below, *see* infra section II.A.

[11] Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in this issue; Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, in this issue.

enough, these forms of argument do not determine any outcome. Yet, one should not underestimate their constraining function. The creative lawmaking element is not only enhanced, but also tamed by the fact that judges are tied to past practices by the prospective reception of their interpretations. The semantic pragmatism we follow in view of the linguistic turn does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future.[12] In order to be convincing, a justification along the lines of Articles 31 and 32 VCLT is of great importance.[13]

Lawmaking is an intrinsic element of adjudication and it is not as such ultra vires. At the same time, not all lawmaking falls within a court's competence. It is interesting to note that there have been long and difficult efforts to isolate judicial lawmaking that is beyond the competence of the court. Consider, for example, a recent decision of the German Federal Constitutional Court (FCC). On the one hand, it confirms that judicial lawmaking (or "judicial development of the law," as the court puts it) is part of the competence of supranational and international courts.[14] It sees judicial lawmaking particularly warranted when it "concretizes programs" (in the sense that it implements the normative project of a treaty), when it fills in legal gaps and when it solves contradictions.[15] On the other hand, the FCC considers judicial lawmaking likely to be ultra vires when it goes against what is clearly stated in the text, or when it creates new rights or obligations without sufficient justification in the relevant positive law. Judicial lawmaking is in particular illegal, according to the German court, if a supranational or international court lays new normative foundations or structurally alters the fundamental balance of power.[16]

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[12] Robert B. Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 EUROPEAN JOURNAL OF PHILOSOPHY 164, 181 (1999) ("[t]he current judge is held accountable to the tradition she inherits by the judges yet to come."). *See* in illuminating detail JASPER LIPTOW, REGEL UND INTERPRETATION. EINE UNTERSUCHUNG ZUR SOZIALEN STRUKTUR SPRACHLICHER PRAXIS 220–26 (2004). *See* also Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue.

[13] Although it is, at least empirically seen, a necessary element. Some important lawmaking decisions are supported by very little reasoning, for example the introduction of the erga-omnes rule by the ICJ, *see* Niels Petersen, *Lawmaking by the International Court of Justice – Factors of Success*, in this issue.

[14] Bundesverfassungsgericht (Federal Constitutional Court, FCC), 6 July 2010, 2 BvR 2661/06, for an English translation, *see* http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html. The judgment deals with the European Court of Justice (ECJ), but the FCC—engaging in general lawmaking—formulates a general point applicable not just to the ECJ as a supranational court, but also to international courts in general. In fact, the lawmaking by the European Court of Human Rights is at least as relevant for the FCC as that of the ECJ.

[15] *Id.*, para. 64 ("There is particular reason for further development of the law by judges where programmes are fleshed out, gaps are closed, contradistinctions of evaluation are resolved").

[16] *Id.* ("Further development of the law transgresses these boundaries if it changes clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties), or creates new provisions without sufficient connection to legislative statements. This is above all not permissible where case-law makes

Two clarifications are called for. First, legitimatory concerns do not only set in when a court acts ultra vires but also when it engages in lawmaking that might be deemed within its competence. Second, the standards that the FCC develops to distinguish one from the other are sketched only in the vaguest of terms and they are themselves in need of justification. The only certain element is that the court justifies them with the principle of democracy.[17]

One attempt to give more substance to these standards can be found in discourse theory, which understands the separation of powers as a "distribution of the possibilities for access to different sorts of reasons."[18] Jürgen Habermas maintains that only the legislature enjoys unlimited access to normative, pragmatic, and empirical reasons while the judiciary has to stay within the narrower bounds of what is permitted in legal discourse.[19] According to this approach, law is a source of legitimation and not just a medium for the exercise of political authority. Law soaks up communicatively generated power and carries it into the rule of law—a kind of "transmission belt," in Habermas terms.[20] This takes place in discourses that justify a norm, and their potential of legitimation hinges on the quality of democratic processes of political will formation.[21] At this stage and juncture, participants may draw on the whole spectrum of reasons. The administration and judiciary live on the communicatively generated power that was fed into the law at the moment of its legislative creation. Habermas argues that for this reason, "the judiciary must be separated from the legislature and prevented from programming itself."[22] This resonates well with the position taken by the Federal Constitutional Court.

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fundamental policy decisions over and above individual cases or as a result of the further development of the law causes structural shifts to occur in the system of the sharing of constitutional power and influence.").

[17] *See*, still more clearly in this line of argument, FCC, 12 October 1993, 89 BVerfGE 155.

[18] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 192 (1992). *Cf*. Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 14 (2010); Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, in this issue.

[19] HABERMAS (note 18), 192–93, 229–37.

[20] *Id*., 188–91; Klaus Günther, *Communicative Freedom, Communicative Power, and Jurisgenesis*, 17 CARDOZO LAW REVIEW 1035 (1996).

[21] HABERMAS (note 18), 150.

[22] *Id*., 172.

With respect to judicial lawmaking, Habermas writes that:

> [T]o the extent that legal programs are in need of further specification by the courts . . . juristic discourses of application must be visibly supplemented by elements taken from discourses of justification. Naturally, these elements of a quasi-legislative opinion and will-formation require another kind of legitimation than does adjudication proper. The additional burden of legitimation could be partly satisfied by additional obligations before an enlarged critical forum specific to the judiciary.[23]

He does not elaborate on the consequences of this proposition and how it can be operationalized. However, a close analysis of a judicial decision might indicate the degree of legal innovation and hence the 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 rival interpretations. The arguments given then tend to look like they mask the reasoning that really carries the judgment. Unsurprisingly, the scholarly and political discussions with regard to those judgments usually involve kinds of reasons that are grounded in discourses of norm justification. The question, for example, whether international trade law permits placing trade restrictions on products produced in a way that is excessively detrimental to the climate can hardly be convincingly justified by interpreting Arts III, XI and XX GATT within the confines of the standard modes of the legal discourse.[24] They would rather need to be opened up to include arguments that are on discourse theory's terms only available in norm justification which is usually reserved to processes of politico-legislative lawmaking.

It merits attention that Habermas develops his argument for the domestic setting where, at least in democratic states, parliaments and public opinion can generate communicative power that is channeled through legislative lawmaking into administrative and judicial adjudication. And with the exception of constitutional adjudication, the normal legislative process can override the judiciary.[25] For international law, the situation is different.[26] One

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[23] Habermas (note 18), 439–40. TOBIAS LIEBER, DISKURSIVE VERNUNFT UND FORMELLE GLEICHHEIT. ZU DEMOKRATIE, GEWALTENTEILUNG UND RECHTSANWENDUNG IN DER RECHTSTHEORIE VON JÜRGEN HABERMAS 222 (2007).

[24] See Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue (suggesting that convincingness in legal argumentation in general is about more than just sources and their "correct" application).

[25] On the reasons why the international judiciary should not be understood as constitutional adjudication, *see* von Bogdandy & Venzke (note 18).

[26] Von Bogdandy & Venzke (note 12), section C.I.

conclusion might be that judicial lawmaking in the international realm should not be under the same constraints as in the domestic setting. In other words, the deficiencies of the international political system would provide a specific justification for judicial lawmaking. Kelsen's plea for a strong international judiciary is based on this view, considering the international legal order as a primitive legal order which—as any primitive legal order—receives its momentum of development from the courts.[27] Yet, it is hard to argue that international law today is primitive in the sense Kelsen saw it in 1944. It is also noteworthy in this regard that Hersch Lauterpacht, writing in 1933, explicitly linked his advocacy for the development of international law by judicial means to the fact that the law of his time was confined to a static and narrow set of international relations.[28] The conditions for his argument have changed.

We acknowledge that a court might be faced with a situation of crisis. For example, one might consider the ECtHR pilot judgment a response to its unbearable caseload.[29] A court might further be presented with a small window of historic opportunity, as in the prohibition of amnesties by the IACtHR after the fall of the dictators in Latin America.[30] The extraordinary quality of such situations needs to be taken into account when evaluating judicial lawmaking. But necessities or opportunities cannot substitute a principled argument. The forms of legal argument are as essential for the democratic legitimation of an international court as they are for a domestic one. Any decision needs to be embedded in the relevant sources and precedents. But that will oftentimes not fully carry a decision, particularly if such a decision has a strong lawmaking dimension.

The question remains how a court should deal with its discretion in lawmaking; in particular, whether and how it should justify the exercise of this discretion. Kelsen, clearly recognizing creative and discretionary elements in adjudication, has remarkably little to say on this issue and seems to suggest that the judge simply decides without further ado.[31] On the other end of the broad spectrum of theoretical views, Ronald Dworkin but also Hans-Joachim Koch and Helmut Rüßmann demand more elaborate justifications.[32]

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[27] HANS KELSEN, PEACE THROUGH LAW (1944).

[28] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 249–50 (1933).

[29] Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, in this issue.

[30] *See* Binder (note 11).

[31] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 145-46 (1945).

[32] RONALD DWORKIN, JUSTICE IN ROBES (2006); HANS-JOACHIM KOCH & HELMUT RÜßMANN, JURISTISCHE BEGRÜNDUNGSLEHRE 5, 69, 221 (1982). *See also* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 39 (1958).

Our pragmatic and discourse oriented approach to the issues of democratic legitimation pushes towards the second direction, and is in many respects similar to the proposal of Milan Kuhli and Klaus Günther on this issue.[33] A more fully argued decision can be better placed within the general context of debating the exercise of public authority. The open discussion of interests and competing positions is part of the social basis of democracy that sustains a democratic public as well as processes of social integration. Judgments of courts are part of this and may generate democratic potential if they are embedded in normative discourses of a certain quality. Accordingly, judges should make explicit the principles they pursue with a certain decision. Such a decision is more intelligible for most citizens than purely "legal-technical" reasoning phrased in hermetic language and possibly obscuring the real choices that the court does indeed make. This also militates against decisions whose reasoning is so long and complex that even most experts are unable to criticize it with any depth, not least for time constraints. The WTO provides a number of examples for lengthy reports that are for that reason hard to understand and to critique.

Moreover, in many cases it would be a good start if judges were more open about the policies they pursue and what kind of social effects they intend to promote with a judgment. When those social effects do not set in, this would diminish the precedential effect of such decisions in later discourse. Please note that we do not suggest shedding the "camouflage" of legal reasoning to talk politics instead.[34] There is ample space in legal analysis to make policy choices explicit without falling for blunt and perhaps hegemonic instrumentalism that reduces law to a handmaiden of power.[35] Considerations of policy and social effects can enter the legal reasoning in the form of teleological or purposive arguments.[36] They would contribute to a meaningful politicization of the legal discourse which should be welcomed in light of the principle of democracy. Politicization in this sense may advance the public discourse on judicial decisions and can inform and guide future practice.[37] We are aware that these are demanding standards, not least because almost any international decision is the product of a college of judges.

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[33] Kuhli & Günther (note 18), section D.

[34] *Cf*. Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 453, 462 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006) (asking whether it is not better "to shed the camouflage" if the true reasons are hidden by technical legal reasoning).

[35] Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN LAW REVIEW 1 (2007)

[36] Art. 31(1) VCLT; cf. GERTRUDE LÜBBE-WOLFF, RECHTSFOLGEN UND REALFOLGEN 139 et seq. (1981).

[37] Douglas A. Irwin & Joseph H.H. Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 WORLD TRADE REVIEW 71 (2008) (criticizing the 'textual fetish and policy phobia' of the Appellate Body).

II. Referring to Political Outcomes Beyond Formal Sources

In addition to tending to policy considerations in judicial reasoning with greater attention, adjudicators may relate their practice to political processes in international institutional settings. In fact, the political discourse in such settings frequently yields outcomes that can and do play a role in the reasoning of international courts. Judges justify their decisions not only through formal sources of law. They also invoke other policy documents whose precise legal standing is rather murky.[38] Within the context of this project, Markus Fyrnys, for example, meticulously shows the close relationship between decisions within the political institutions of the Council of Europe and decisions of the European Court of Human Rights.[39]

Given our starting point that the distance to parliamentary politics is one of the core problems of international judicial lawmaking,[40] the justificatory relevance of such political outcomes requires attention. With respect to the democratic legitimation of international judicial lawmaking, we find of particular interest the question whether the reference to non-binding acts of international organizations can be supportive of the democratic legitimation of judicial lawmaking, although the act in question is neither binding nor the result of a parliamentary decision.[41] Such considerations may also extend to documented reactions with regard to previous jurisprudence on a certain issue area, above all by relevant political bodies.[42]

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

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

[39] Fyrnys (note 29).

[40] Von Bogdandy & Venzke (note 12), section C.1.

[41] The study of such outcomes and an attempt of their doctrinal classification has been the focus of an earlier research, *see* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2008); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN LAW JOURNAL 1865 (2008).

[42] Note, for example, how state representatives do invest considerable time in discussing judicial reports in the WTO's Dispute Settlement Body. On further elements of politicization in this context, *see* TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 335–44 (2004); Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Public Interests*, 20 EJIL 615 (2009).

power.[43] If the act in question is seen to be the imposition of the will of one state or a few states on a larger group of states, the reference to such an act cannot support the democratic legitimacy of a judicial decision.[44] Politics according to this understanding is plainly ill-suited for responding to problems of justification.

However, the international settings might also institutionalize processes of arguing.[45] They might provide multilateral spaces for the development of outcomes that are representative,[46] or fair, as Thomas Franck puts it.[47] In the light of discourse theory, such outcomes can be of significance to support the democratic legitimation of judicial lawmaking which refers to such outcomes.[48] However, the court needs to ascertain the inclusive quality of the process leading to the outcome that it plans to use.[49]

III. Systematic Interpretation as Democratic Strategy?

In our first contribution, we argued that processes of fragmentation in international law threaten its democratic legitimation in general and the justification of international courts' public authority in particular. Some judicial institutions tend to develop the law in a way that is imbued with the functional logic of their respective regime.[50] In response, we now

[43] Max Weber, *Wissenschaft als Beruf*, in: 17 MAX WEBER GESAMTAUSGABE, 506 (Wolfgang J. Mommsen & Wolfgang Schluchter eds, 1992).

[44] On the issue of hegemony, *see* Eyal Benvenisti & George Downs, *Prospects for the Increased Independence of International Tribunals*, in this issue.

[45] RAINER FORST, DAS RECHT AUF RECHTFERTIGUNG 7 (2007); HANS KELSEN, ALLGEMEINE STAATSLEHRE 27 *et seq*. (1925) (differentiating between "politics as ethics" and "politics as technique").

[46] Ingo Venzke, *International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law*, 9 GERMAN LAW JOURNAL 1401, 1425 (2008).

[47] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[48] In more detail, Kuhli & Günther (note 18), section D.

[49] It would conversely be problematic to give legal effect to international standards in relation to parties that have not consented to such standards, as has arguably happened weith Appellate Body Report*, EC – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002. *Cf*. Robert Howse, A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards', in: CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION, 383 (Christian Joerges and Ernst-Ulrich Petersmann eds, 2006).

[50] *See* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002). While this is debatable as a general and timeless claim, examples are not hard to come by. The jurisprudence under the GATT, at least in its early years, testifies to this proposition just as well as instances of investment arbitration. *See* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in: INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, 678 (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds, 2009); Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in this issue.

wonder whether systematic interpretation can be a strategy to curb those detrimental effects of fragmentation and hence to possibly foster the democratic legitimation of international adjudication. Art. 31(3)(c) VCLT demands that in treaty interpretation "there shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties."[51] The ILC Report on fragmentation understands this rule of interpretation as an expression of the principle of systematic integration. In the words of the report, rule and principle of systemic integration:

> [C]all upon a dispute-settlement body—or a lawyer seeking to find out "what the law is"—to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background."[52]

The decisive point is that the interpretation of a norm "refers back to the wider legal environment, indeed the 'system' of international law as a whole."[53]

Sure enough, the idea of a legal system is fraught with difficulties and tends to be overburdened with philosophical aspirations. Not so long ago, a legal system was thought to be inherent in the law in a kind of crypto-idealistic fashion. In this mode of thinking, the idea of a system indeed faces severe problems. In the 19th century, legal science and its concern with the legal system was closely connected to the idea of a national legal order that in turn figured as an expression of the unitary will of the state and as an object of scientific investigation. In comparison with such a demanding project, international law could not possibly constitute a system and was, as we already mentioned above, understood as a primitive legal order.[54] If the exaggerated hopes for what the idea of a

[51] At least since the 2001 ILC Fragmentation Report, a vivid discussion concerning the scope of this rule of interpretation has emerged, *see* International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, UN Doc. A/CN.4/L.682. *Cf.* the special issue 17 FINNISH YEARBOOK OF INTERNATIONAL LAW (2006); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 279 (2005); Duncan French, Treaty Interpretation and the Incorporation of Extraneous Legal Rules, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 300 (2006).

[52] ILC, Fragmentation Report (note 51), para. 479.

[53] *Id*.

[54] Still in this line of reasoning, HERBERT L.A. HART, THE CONCEPT OF LAW 92, 156, 214, (1997 [1961]). *Cf*. David Kennedy, *Primitive Legal Scholarship*, 27 HARVARD INTERNATIONAL LAW JOURNAL 1 (1986); Matthew Craven, *Unity, Diversity and the Fragmentation of International Law*, 14 FINNISH YEARBOOK OF INTERNATIONAL LAW 3, 9 (2005).

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.[55]

There are good arguments that speak in favor of supposing that there is a system of international law.[56] In the communicative practice—on the level of interpretation, that is—the idea of a system can perform a significant role, especially under the impact of fragmentation. It is not a bygone topic in legal theory but rather reverberates in the thought that the meaning of a norm is inescapably contextual and relational. Also, the extensive discussion about the fragmentation of international law and the protracted dominance of this topic is a strong testimony for the fixation of legal scholars and practitioners with the notion of a legal system. At issue is precisely the fragmentation of sectoral parts of the law that conceptually have to belong to a whole.[57] Finally, the demand to relate interpretations to the system of the law is part of positive law and of the prevailing legal ethos. In sum, it is every interpreter's task to aim at the system, not least because it serves legal equality.

But how could systematic interpretation work in the practice of adjudication more precisely? Thomas Kleinlein points out that the ILC report on the issue of fragmentation leaves open a number of institutional as well as methodological questions.[58] In particular it remains unclear how conflicts between different values or policy aims that are embedded in distinct regimes could be dealt with. He proposes considering the techniques of balancing and proportionality analysis to do the job of handling trade-offs between regimes, additionally illuminating what the ILC still considers a "legal black hole."[59] In shaping the borders between legal regimes, these techniques might allow for restraint on the part of the courts in the sense that they may hold off from projecting their interpretations onto the law while respecting the authority of other judicial institutions. The course of practice may build up a set of precedents that might further stabilize these inter-regime relations. Much of the legitimating effect that balancing and proportionality analysis can have, Kleinlein maintains, hinges on the extent to which they rationalize

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[55] RALPH CHRISTENSEN & HANS KUDLICH, GESETZESBINDUNG. VOM VERTIKALEN ZUM HORIZONTALEN VERSTÄNDNIS 139 (2008); Stefan Oeter, *Vielfalt der Gerichte – Einheit des Prozessrechts?*, in: DIE RECHTSKONTROLLE VON ORGANEN DER STAATENGEMEINSCHAFT, 149, 158 (Rainer Hofmann, August Reinisch, Thomas Pfeiffer, Stefan Oeter & Astrid Stadler eds, 2007); Simma & Kill (note 50), 686.

[56] Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EJIL 483 (2006); Pierre-Marie Dupuy, *L'unité de l'ordre juridique international*, 297 RECUEIL DES COURS 12, 89 (2002).

[57] GEORG WILHELM FRIEDRICH HEGEL, 1 WISSENSCHAFT DER LOGIK 59 (1932 [1812]).

[58] Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, in this issue.

[59] ILC, Fragmentation Report (note 51), para. 493.

decisions made at the borders between regimes. Ultimately this potential seems limited. Formal considerations that relate to procedural qualities in decision-making and interpretative processes may play a role. But for the time being, international judicial institutions enjoy considerable freedom in making decisions over inter-regime trade-offs. Time will tell whether they entrench or counter processes of fragmentation.[60]

As a matter of practice, the principle of systematic integration does pervade a number of judicial decisions even though courts only seldom invoke Art. 31(3)(c) VCLT explicitly.[61] The ICJ already held in 1971 that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."[62] Also, the WTO Appellate Body prominently found in its very first case that the GATT should not be read in "clinical isolation from public international law."[63] International trade law in the context of the WTO, among the most thoroughly judicialized parts of universal international law, thus clearly presents itself as a part of the whole of international law. In stark contrast to European Union law, it has not formed an independent legal order.[64] Struggles for independence or isolation that have come under the heading of self-contained regimes do not take away from the effectiveness of systemic integration.[65]

Concerns about practical feasibility, in the sense that no interpreter and no international judge could be expected to take into account all of international law, are not compelling. Systematic interpretation does not demand an ideal judge like Dworkin's superhuman Hercules who is able to find the one and only right interpretation of a norm at issue in light of all the legal practice of the system.[66] Systematic integration is only the objective marked by rules of interpretation. What is more, individual decisions are embedded in larger discursive contexts.[67] In the course of fragmentation it is also possible that different

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[60] *Cf*. SABINO CASSESE, WHEN LEGAL ORDERS COLLIDE: THE ROLE OF COURTS 111–19 (2010) (suggesting that the latter effect will dominate).

[61] ILC, Fragmentation Report (note 51), para. 410.

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

[63] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 17.

[64] WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT (1990) (critically on the early tendencies to understand the GATT as an independent legal order).

[65] *Cf*. Bruno Simma, *Self-Contained Regimes*, 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 111 (1985); JOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 37 (2003); ILC, Fragmentation Report (note 55), para. 174.

[66] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[67] HABERMAS (note 18), 224.

understandings compete in a dialogue between courts.[68] In the open process of interpretation between functionally specialized courts, perspectives might compete and may possibly be approximated by way of the common language of international law. Such processes may shape the techniques employed at the borders between regimes that Kleinlein proposes.[69] Of course, this requires international courts to open up to such a dialogue. Some voices from the benches indicate that they would be inclined to follow this path.[70] This way of dealing with the consequences of 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.[71] It does not spoil the benefits gained by functional fragmentation.

It may be the case, however, that the strategy of systematic integration in and between judicial decisions builds on excessive trust in international judges. If judges are understood to form an "epistemic community"[72] or if they are viewed as an "invisible college"[73] together with legal scholars, then it could even be that the strategy ends up advocating an autocratic rule of courts. The "community" must not be closed and the "college" must not be invisible; a point also Kuhli and Günther stress.[74] These are minimal safeguards, and

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[68] Ruit G. Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 NYU JOURNAL OF INTERNATIONAL LAW AND POLITICS 959 (2009); Oeter (note 55); YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 272 (2003); HEIKO SAUER, JURISDIKTIONSKONFLIKTE IN MEHREBENENSYSTEMEN 107 (2008); Paolo Picone*, I conflitti tra metodi diversi di coordinamento tra ordinamenti*, 82 RIVISTA DI DIRITTO INTERNAZIONALE 325 (1999); Lidia Sandrini*, La concorrenza tra il Comitato per i diritti umani e la Corte europea dei diritti dell'uomo nell'esame di istanze individuali: brevi note sulle clausole di coordinamento*, in: LIBER FAUSTO POCAR, DIRITTI INDIVIDUALI E GIUSTIZIA INTERNAZIONALE, 837 (Gabriella Venturini & Stefania Bariatti eds, 2009).

[69] Kleinlein (note 58).

[70] Tullio Treves, *Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?*, in: DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, 587 (Rüdiger Wolfrum & Volker Röben eds, 2005). Rosalyn Higgins*, A Babel of Judicial Voices? Ruminations from the Bench*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 791 (2006); Bruno Simma, *Fragmentation in a Positive Light*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 845 (2004).

[71] Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction: Problems and Possible Solutions*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 67 (2001); Oeter (note 55), 167–70.

[72] DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INQUIRY INTO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 64 (2007).

[73] Oscar Schachter, *The Invisible College of International Lawyers*, 72 NORTHWESTERN UNIVERSITY LAW REVIEW 217 (1977). David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUROPEAN HUMAN RIGHTS LAW REVIEW 463 (2001) (unfolding a pointed critique of the apologetic sides to the idea of an invisible college).

[74] Kuhli & Günther (note 18), section D.

any genuine effect of legitimation could only set in when minimal preconditions for a legitimatory juridical discourse are met—above all, publicness, transparency and adequate participation. Judicial proceedings on the whole hinge on a critical general public that transcends functional differentiations. Precondition for all of this is a sensibility for the problems of legitimating international judicial authority; not at the least, our contribution intends to contribute to such sensibility.

C. The Judges

I. The Importance of Independence and Impartiality

Judicial lawmaking is part of the regular mandate of international courts and tribunals. But such mandate comes with strings attached. After discussing those flowing from the argumentative tools that are permissible in legal discourse, we now look at those concerning the acting individuals. Here, the requirements of independence and impartiality stand out. We reconsidered them in light of the principle of democracy. Eyal Benvenisti's and George Down's contribution develops the importance of these two standards for the democratic legitimation of international judicial lawmaking and shows how they are wanting in the current set-up.[75]

Independence and impartiality are essential legal requirements. Indeed, the second article of the ICJ Statute specifies that "[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices."[76] The statutes of all other courts and tribunals contain similar provisions. However, as Benvenisti and Downs explain, there are various elements that might structurally jeopardize the independence and impartiality.

For improving independence and impartiality, some propose to introduce longer singular terms of office and to rule out the possibility of re-election. This might decrease judges' dependence on their governments, whose support they would otherwise need in a campaign for re-election.[77] Striving for greater scrutiny in the assessment of candidates is another possibility for reform. The ICC Statute for example requires that member states must justify candidacies, thus providing minimal conditions for a meaningful debate.[78]

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[75] Benvenist & Downs (note 44).

[76] Art. 2 Statute of the ICC corresponds to Art. 4 Statute of the ICJ.

[77] Ruth Mackenzie & Philippe Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, in: APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD, 213, 223 (Katie Malleson & Peter Russell eds, 2006); Robert D. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INTERNATIONAL ORGANIZATION 457, 476 (2000).

[78] Art. 36 (3) Statute of the ICC. See Mackenzie & Sands (note 77), 228.

And the Caribbean Court of Justice, operative since 2005, is the first international court that entirely entrusts the appointment of judges to the international Regional Judicial and Legal Services Commission.[79]

Statutes of international courts usually give instructions on the exercise of office—for instance, on a judge's secondary employment or the conditions under which she would have to recuse herself. These provisions have gained prominence in the course of recent cases on the matter.[80] Among other courts, the ICTY had to deal with an objection that called into doubt the impartiality of one of the judges in the *Furundzija* case. On that occasion, it carved out a number of criteria according to which an actual, or, under further conditions, a probable partiality of a judge leads to the exclusion from the proceedings.[81] Some courts, whose statutes provide insufficient clarity on this issue or do not speak of it at all, have adopted directives on their own initiative that spell out certain codes of conduct in considerable detail.[82]

II. Reconsidering the Process of Appointment

The imperatives of independence and impartiality of international judges, good judicial qualifications, and ethical integrity on the bench are all very important. Accordingly, they are two commanding tenets in the process of appointment, to which we turn now. In fact, the appointment procedure is largely studied in this light. Nonetheless, looking at the lawmaking function of international courts, one needs to go further in order to understand the full importance of the appointment procedure in light of the principle of democracy. For example, it makes a great difference whether an international judge considers state sovereignty as the most basic principle of international law or rather looks at the state as an agent of the international community in general and international human rights in particular.[83] It is above all when courts engage in judicial lawmaking on thoroughly contested subject matters that the political leanings of judges are of primary significance. Under democratic premises, it is impossible to justify the path of lawmaking only with reference to the "high moral character" (Art. 2 ICJ Statute) of the office holder.

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[79] Dennis Byron & Christopher Malcolm, *Caribbean Court of Justice (CCJ)*, in: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL) (Rüdiger Wolfrum ed., 2009).

[80] Art. 49 (2) Statute of the ICC; Art. 7 (1) Statute of the ITLOS; Yuval Shany & Sigall Horovitz, *Judicial Independence in The Hague and Freetown: A Tale of Two Cities*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 113 (2008).

[81] *Prosecutor v. Furundzija*, Judgment of 21 July 2010, Case No. IT-95-17/1 A, para. 189.

[82] Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activites*, 2 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 127 (2003).

[83] For an elaboration of these visions, *see* Armin von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ WORKING PAPER (2008/3), available at: http://www.iilj.org/publications/2008-3Bogdandy-Dellavalle.asp.

Within the domestic system, the democratic element of the appointment procedure is well-studied, in particular with respect to judges of constitutional courts. Their appointment is not left to the executive alone and parliaments usually play some role in that procedure.[84] The role of executive institutions is far stronger with respect to international judges. Overall, the various procedures display a lot of similarities. Usually, the U.N. Secretary General or the secretariats of sectoral organizations invite member states to submit nominations. Candidates are then selected by the plenary body of the organization or by the assembly of all states. The example of the ICJ is paradigmatic. The General Assembly and Security Council elect judges with an absolute majority and in secret ballot for a term of nine years with the possibility of reelection. Not more than one of the fifteen judges may have the nationality of the same state and, furthermore, the bench shall represent "the principal legal systems of the world."[85] The latter condition may be understood as recognition of the fact that (judicial) socialization bears on legal interpretation.[86] It stands in some tension to the idea of judicial independence that disputing parties who do not have a judge of their nationality on the bench may choose a judge ad hoc, but this may also be traced back to the same idea of representing diversity.[87]

Analyses of the practice of judicial elections have highlighted the dominance of executives in the process. A state's political position and its leverage in bargaining in an international regime are often decisive for its opportunities to fill a vacancy on an international bench. Only if a decent chance exists does the executive look for a suitable candidate. In most cases, candidates need heavy support of their respective governments, which have to invest considerable political capital in the election campaign.[88] Is this dominant role of the domestic governments a problem in light of the principle of democracy? This leads us to consider the vanishing point of democratic justification.

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[84] *Cf*. Art. II 2(2) U.S. Constitution; Art. 94 German Basic Law; Art. 150 Constitution of Estonia; Art. 135 Constitution of Italy; Art. 58 Constitution of Latvia; Art. 103 Constitution of Lithuania; Art. 147 Constitution of Austria; Art. 149 Constitution of Poland; Art. 159 Constitution of Spain. *See also* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleson & Peter Russell eds, 2006); C. NEAL TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER (1995).

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

[86] LYNDEL V. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE (1979).

[87] Art. 31(2–3) ICJ-Statute. Cf. Iain Scobbie, *Une hérésie en matière judiciaire? The Role of the Judge ad hoc in the International Court*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 421 (2005). The far younger ITLOS also provides for judges ad hoc, Art. 17 ITLOS Statute.

[88] Philippe Sands, *The Independence of the International Judiciary: Some Introductory Thoughts*, in: LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO, 313, 319 (Steve Charnovitz, Debora Steger & Peter van den Bossche eds, 2005); TERRIS, ROMANO & SWIGART (note 72), 23.

In whose name do international courts speak the law and which forum is called upon to elect international judges? With regard to domestic constitutional adjudication there are good reasons to involve the representation of the democratic sovereign in the election of judges. This usually translates into requirements of parliamentary participation, supplemented in light of discourse theoretical considerations with demands for publicness. But which institutions and fora should elect international judges as long as the states that are subject to a court's jurisdiction do not constitute a single nation? Three answers may be distinguished.[89]

The traditional intergovernmental approach traces the authority of international courts to the will of the legal entities which created them—states. State governments then figure prominently as representatives in international law (consider only Art. 7(2) VCLT). Viewed from this angle, the selection of judges forms a genuine part of foreign politics and remains a prerogative of the executive. This approach indeed informs most of the procedures for electing judges. Some even suggest that judges should be responsive to the input of their governments.[90]

The liberal or domestic approach does not accept the division of domestic and foreign politics that characterizes the traditional intergovernmental approach. A categorical distinction is indeed increasingly less plausible in the wake of the globalization of many spheres of life. The liberal approach then pleads in favor of aligning the procedures for choosing senior domestic and international judges. This points towards a prominent role for domestic parliaments to play.[91]

The cosmopolitan approach, in contrast, looks at new supranational fora. It takes the individual citizen to be the ultimate reference point in the justification of public authority, and invests it with a national as well as a cosmopolitan identity. The latter relates the citizen to supranational or international institutions, and on this basis, supranational or international parliamentary fora can generate democratic legitimacy in the election of judges.[92] This approach finds cautious expression in the election of judges to the ECtHR by

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[89] *Cf.* Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EJIL 247, 253 (2006) (sketching these competing constituencies with regard to the accountability of international bureaucracies); *see also* Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review*, 11 GERMAN LAW JOURNAL 1987, 1989 (2008).

[90] Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIFORNIA LAW REVIEW 1 (2005).

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

[92] *See* Felix Arndt, *Parliamentary Assemblies, International*, in: MPEPIL (Rüdiger Wolfrum ed., 2006).

the Parliamentary Assembly of the Council of Europe.[93] Ever since 1998, interviews with candidates by a sub-committee also bear the potential of nourishing the development of a public that further increases the legitimatory momentum. This procedural element has, for example, triggered a positive politicization of the election process when the assembly rejected a member state's list of candidates because it did not include any female candidate.[94]

How much justification can the cosmopolitan approach actually shoulder? Can the election of international judges by international bodies generate democratic legitimacy, or does the cosmopolitan approach lead to the wrong track? Discourse theory once more is of help. Habermas has worked towards loosening the close ties of the concepts of democracy, constitution, and law with the idea of the state; and explores questions of democratic legitimation in a politically organized world society, while neither assuming that this political organization has the attributes of a state, nor suggesting that this is a goal to be desired.[95] Habermas builds here on his theory of inter-subjectivity, paving the way for imagining democracy without implying that there is a unitary people. At the same time, he underlines that domestic constitutional orders have created democratic processes for forming public opinion and political will that are hard to reproduce at the supranational level.[96] Legitimating new forms of public authority in the post-national constellation therefore has to connect to the threads of legitimation that passes through democratic states and should further be complemented by an additional cosmopolitan basis of legitimation.[97]

Accordingly, the participation of international bodies in the election of judges may already offer a certain degree of cosmopolitan justification. For this purpose it is crucial that the election of judges is embedded in a global public. This is not sheer aspiration. It may be recalled that the election of Christopher Greenwood to the ICJ stirred some global criticism

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[93] Art. 22 ECHR. See Jochen Abr. Frowein, *Art. 22*, in: EMRK-KOMMENTAR (Jochen Abr. Frowein & Wolfgang Peukert, 2009), para. 2.

[94] *See*, however, ECtHR Grand Chamber, Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008 (holding that such a list should not be rejected if a state has indeed taken all steps to find at least one female candidate). This was the court's first ever advisory opinion. Also note that some statutes explicitly try to address the disproportionately weak representation of women, *see*, e.g., Art. 36 (8)(a)(iii) ICC-Statute.

[95] JÜRGEN HABERMAS, DIE POSTNATIONALE KONSTELLATION 165 (1998).

[96] Jürgen Habermas, *Does the Constitutionalization of International Law Still have a Chance?*, in: THE DIVIDED WEST, 113, 141 (Ciaran Cronin trans., 2006).

[97] Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft*, in: RECHTSPILOSOPHIE IM 21. JAHRHUNDERT, 360, 362 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008).

and discussion because of his legal opinions with regard to the war in Iraq.[98] Be it noted, however, that the degree of cosmopolitan justification hinges on the discursive quality of participation. In any event, the mechanism of judicial election as it is practiced in the context of the ECtHR turns out to be truly forward-looking from the point of view of democratic theory.

D. The Procedure

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

This way of looking at the procedures of international adjudication is certainly not very common and the relevant law is underdeveloped in this respect. International judicial institutions, specifically their procedural law, respond to conceptions of what international dispute settlement is about, what it is for and what it actually does. So far that has almost exclusively been the settlement of the dispute at hand. The more the generation of legal normativity in the practice of international adjudication becomes visible, the more traditionally prevailing requirements for judicial procedures need to be supplemented by further considerations.[99] The more judicial lawmaking becomes palpable, the more procedural law will start to respond to legitimatory concerns that spring from the jurisgenerative dimension of international adjudication.

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[98] See http://opiniojuris.org/2008/11/03/will-the-icj-have-a-us-style-nomination-fight-we-can-only-hope/.

[99] Christine Chinkin, *Art. 62*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 1331, 1366 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); Paolo Palchetti, *Opening the International Court of Justice to Third States Intervention and Beyond*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 139 (2002); Rüdiger Wolfrum, *Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea*, in: LIBER AMICORUM GÜNTHER JAENICKE - ZUM 85. GEBURTSTAG, 427 (Volkmar Götz, Peter Selmer & Rüdiger Wolfrum eds, 1998).

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

It is worth noting that the procedural law of international judicial institutions is largely a product of their own making.[100] As Jean-Marc Sorel put it, "self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers."[101] We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of 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.[102]

[100] The notion of procedural law describes the body of requirements that govern how a judicial process has to be conducted. No uniform procedural law for all courts is thereby postulated. Robert Kolb, *General Principles of Procedural Law*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 793, 795 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 6 (2007).

[101] Jean-Marc Sorel, *International Courts and Tribunals, Procedure*, in: MPEPIL (Rüdiger Wolfrum ed., 2009), margin number 1.

[102] Other dimensions include the establishment of facts and rules of evidence, both may be relevant for the legitimation of international adjudication, possibly less so, however, with regard to international judicial lawmaking. *See Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, 20 April 2010, para. 8 (lamenting that the court excessively relied on expertise offered by the parties and arguing that the court should have either appointed its own experts or had party-appointed experts subjected to cross-examination); MARKUS BENZING, DAS BEWEISRECHT VOR INTERNATIONALEN GERICHTEN UND SCHIEDSGERICHTEN IN ZWISCHENSTAATLICHEN STREITIGKEITEN (2010).

I. Publicness and Transparency

A crucial element for publicness and transparency—and hence democracy—are the oral proceedings that some court statutes explicitly provide for.[103] In other contexts like the WTO and much of investment arbitration, confidentiality is the rule. But even here procedures have opened up in practice to some prerequisites of publicness and transparency.[104] The Sutherland Report of 2004 reinforced this trend by stating that "the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution" and by suggesting that oral proceedings should be public.[105] Of course, it remains critically important to pay due respect to the interests of the parties. Also, sensitive trade secrets must be kept. Often, proceedings do remain behind closed doors, in particular in cases before the panels that are, in comparison to the Appellate Body, as an institution as well as in their nature, composition and ethos closer to the arbitration model.[106]

And yet there is room for improvement. The position taken by the panel in *Canada—Continued Suspension* is remarkable. The panel held hearings in public and justified this step inter alia with the innovative argument that the provisions about confidentiality of proceedings only relate to the internal deliberations of the panel but not the exchange of arguments between the parties.[107] And the Appellate Body maintained on another occasion that "[i]n practice, the confidentiality requirement in Article 17.10 has its limits . . . . Public disclosure of Appellate Body reports is an inherent and necessary feature

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[103] Art. 46 ICJ-Statute; Art. 59 ICJ Rules of Court; Art. 26(2) ITLOS-Statute; Art. 74 Rules of ITLOS; Art. 40 ECHR; Art. 63(2) Rules of ECtHR; Arts 67, 68(2) ICC-Statute. *See* Sorel (note 101), margin number 18; Sabine von Schorlemer, *Art. 46*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 1063, 1070 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[104] Arts 14(1), 18(2) & 17(10) DSU provide that procedures and written submissions are confidential. Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1021 (2008).

[105] Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium („Sutherland Report") (2004), paras 261 et seq.

[106] Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats. Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191 (2001); Peter van den Bossche, *From Afterthought to Centrepiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in: THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, 289 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds, 2006); Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court" – Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 605 (2002).

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

of our rules based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound."[108]

Procedures in the ICSID framework fall short of those of the WTO on this point. But first cracks are starting to show that may soon widen so as to accommodate growing demands for more transparency.[109] In June 2005, the OECD Investment Committee threw its authority behind the argument when it maintained that:

> There is a general understanding among the Members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence.[110]

Apart from the fact that the Committee clearly connects questions of transparency with questions of legitimacy and effectiveness, it should be highlighted that it explicitly describes building up a visible body of jurisprudence as a valuable goal to be pursued.[111]

II. Third Party Intervention

Further avenues for responding to problems in the justification of international courts' exercise of public authority may be found in an expansion of possibilities for intervention and participation. In a straightforward fashion, Art. 63 ICJ Statute gives every party to a

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

[109] Charles N. Brower, Charles H. Brower II & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARBITRATION INTERNATIONAL 415 (2003); Carl-Sebastian Zoellner, *Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings*, in: THE INTERNATIONAL CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID), 179 (Rainer Hofmann & Christian Tams eds, 2007); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES 57 (2007).

[110] OECD, Transparency and Third Party Participation, in: INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES: STATEMENT BY THE OECD INVESTMENT COMMITTEE, 1 (2005).

[111] Rule 32 (2) ICSID Rules of Procedure (10 April 2006). From legal practice, *see*, for instance, *Aguas Argentinas, S.A., Suez Sociedad General de Aguas de Barcelona, S.A. and Vivendi Unviersal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of 19 May 2005, para. 6. *See also* MCLACHLAN, SHORE & WEINIGER (note 109), 57.

convention a right to intervene if the interpretation of that convention is at issue. Beyond this clear provision, it is noteworthy that in the seminal *Pulau Ligitan* case the ICJ in principle allowed that a party may intervene even if it cannot itself show a jurisdictional link to any of the parties.[112] The trend towards wider participation in judicial proceedings is a testament to an increasing recognition of the effects that judgments create beyond those who are immediately involved in the particular dispute. This is yet another indication showing that understanding judicial decisions as acts of simply finding the law, and as acts that are binding only inter partes, is inadequate.[113]

In the procedures of the WTO, members that are not parties to the dispute have always been able to participate in all steps of the dispute (consultations, panel proceedings, appellate proceedings, and surveillance of implementation).[114] In contrast to the ICJ and also to ITLOS, however, the black letter procedural law does not grant intervening parties the right to attend hearings. Whether and how often hearings are opened up to third parties largely lies within the discretion of the panels.[115] In *EC–Bananas III*, a large number of developing countries requested to attend the hearings and the panel observed that decisions to open up the hearings have so far always been taken with the consent of the disputing parties—a crucial element that it saw lacking in the case at hand. In the same breath, the panel nevertheless allowed that the respective states attend the hearings and justified this decision with the special economic implications that the EC legal regime on bananas had.[116] Judicial practice has since supported the claim that special circumstances may justify extended possibilities for participation in judicial proceedings.

Practice in investment arbitration still shows that the traditional logic of arbitration leaves little room for third parties to participate. There are a number of salient reasons for this approach that are akin to those that already militated against transparency and publicness of the proceedings: the effective dispute resolution in the concrete individual case, sensitive concessions and compromises that may only be reached in confidential settings, and protection of business secrets.[117] And yet, even in this field of adjudication there are

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[112] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Application by the Philippines for Permission to Intervene, Judgment of 23 October 2001, ICJ Reports 575, para. 35.

[113] Andreas Zimmermann, *International Courts and Tribunals, Intervention in Proceedings*, in: MPEPIL (Rüdiger Wolfrum ed., 2006).

[114] Arts 4(11), 10, 17(4) & 21 DSU. *Cf.* Meinhard Hilf, *Das Streitbeilegungssystem der WTO*, in: WTO-RECHT. RECHTSORDNUNG DES WELTHANDELS, 505, 521 (Meinhard Hilf & Stepfan Oeter eds, 2005); Donald McRae, *What is the Future of WTO Dispute Settlement?*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 2 (2004).

[115] Art. 10 & Appendix 3(6) DSU. *Cf.* Katrin Arend, *Article 10 DSU*, in: 2 MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, 373 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds, 2006).

[116] *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 279 (2008).

[117] Joachim Delaney & Daniel B. Magraw, *Procedural Transparency*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 721, 775 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2009).

trends to expand the proceedings. They may be better discussed with regard to the role of amici curiae.

III. Amici Curiae

Usually, amici curiae are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene.[118] Above all, NGO participation may open up legitimatory potential. This may bridge the gap between the legal procedures and the global or national public. They can also introduce additional perspectives and might be able to trigger processes of scandalisation that contribute to discussions and mobilize the general public. Civil society at the periphery of international processes tends to show a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making.[119]

The procedural law of the ICJ and ITLOS do not provide for submissions by amici curiae.[120] In one of the ICJ's first cases ever, its registrar rejected the motion on the part of an NGO that sought to submit its opinion in writing and to present its view orally.[121] This decision holds for contentious cases but not when the ICJ acts in an advisory capacity.[122] Only, a little later, the same NGO received a positive response from the registrar and was allowed to appear as amicus curiae in the advisory proceedings concerning the Status of South-West Africa.[123] Ever since the *Gabcikovo–Nagymaros* case, it is also clear that amicus

[118] Philippe Sands & Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, in: MPEPIL (Rüdiger Wolfrum ed., 2009), margin number 2; Zimmermann (note 113), margin number 1. Terminology is by no means used consistently. *See* Luisa Vierucci, *NGOs before International Courts and Tribunals*, in: NGOs IN INTERNATIONAL LAW. EFFICIENCY IN FLEXIBILITY?, 155, 156 (Pierre-Marie Dupuy & Luisa Vierucci eds, 2008); Hervé Ascensio*, L'amicus curiae devant les juridictions internationales*, 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 897 (2001).

[119] HABERMAS (note 18) 303, 382; Patrizia Nanz & Jens Steffek, *Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens*, in: ANARCHIE DER KOMMUNIKATIVEN FREIHEIT. JÜRGEN HABERMAS UND DIE THEORIE DER INTERNATIONALEN POLITIK, 87 (Peter Niesen & Benjamin Herborth eds, 2007); Jochen von Bernstorff, *Zivilgesellschaftliche Partizipation in Internationalen Organisationen: Form globaler Demokratie oder Baustein westlicher Expertenherrschaft?*, in: DEMOKRATIE IN DER WELTGESELLSCHAFT, 18 SOZIALE WELT SONDERBAND 277 (Hauke Brunkhorst ed., 2009).

[120] In detail, *see* Wolfrum (note 99).

[121] The answer was an easy one because the NGO had tried to base its claim on Art. 34 ICJ-Statute, whose relevant paragraph 3 is shaped to fit public international organizations. Therefore, the simple conclusion that the NGO is not a public international organization sufficed. *See* Pierre-Marie Dupuy, *Article 34*, in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY, 545, 548 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006); ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 303 (2005); Eduardo Valencia-Ospina, Non-Governmental Organizations and the International Court of Justice, in: CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, 277 (Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea & Chiara Ragni eds, 2005).

[122] Art. 66 ICJ-Statute.

[123] LINDBLOM (note 121).

curiae briefs may be introduced as part of the submissions of the disputing parties.[124] Beyond this minimal common denominator, there remains considerable disagreement within the ICJ on how to deal with amicus curiae briefs. Opposing opinions have so far impeded developments like they have taken place in other judicial institutions.[125] Former President Gilbert Guillaume stated bluntly that states and intergovernmental institutions should be protected against "powerful pressure groups which besiege them today with the support of the mass media." For that reason, he argued, that the ICJ should better ward off unwanted amicus curiae submissions.[126]

Neither treaty law within the WTO context makes any provision on how to deal with amicus curiae briefs. But here, legal practice has warmed up to the idea that maybe amici curiae should have a role to play. Developments in this regard have been paralleled by a significant discussion among practitioners and scholars on the issue.[127] As early as the *US–Gasoline* case, NGOs pushed to present their views but were simply ignored by the panels. In the path-breaking *US–Shrimp* case, the panel explicitly rejected amicus curiae submissions but was corrected by the higher level of jurisdiction. The Appellate Body argued that:

> The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.[128]

ICSID proceedings have for long been sealed off from any possibility of participation beyond the parties to the case. And yet, even in this context, legal practice has changed

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[124] *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 7.

[125] *See* ICJ Practice Direction XII (2004).

[126] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Separate Opinion of Judge Guillaume, ICJ Reports 1996, 287.

[127] Robert Howse, *Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUROPEAN LAW JOURNAL 496 (2003); Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in: EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION. STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN, 317 (Armin von Bogdandy, Yves Mény & Petros C. Mavroidis eds, 2002); McRae (note 114), 2.

[128] Appellate Body Report, *United States - Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 106. The EC-Asbestos Case was also of great importance, see especially WTO Appellate Body Communication, WTO Doc. WT/DS135/9, 8 November 2000; and Minutes of the Meeting of the General Council Held on 22 November 2000, WTO Doc. WT/GC/M/60, 23 January 2001.

and opened up avenues for amici curiae.[129] The NAFTA Free Trade Commission passed a recommendation in which it maintained that the rules of procedure do not in principle prevent third parties from stating their views. It went on to argue that in their decisions on this issue panels should be guided by the consideration of whether the case concerned a public interest.[130] Similarly, the OECD Investment Committee elaborated in the report mentioned above that, "Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific regulations."[131] The new ICSID Arbitration Rules of 2006 responded to shifts in practice as well as political commentary and introduced a new Art. 37 that speaks of the possibility of submissions by third parties and amici curiae.[132]

E. The Role of Domestic Organs

Our introductory piece has identified problems in the democratic legitimation of international judicial lawmaking. Our concluding contribution shows that there are promising strategies to respond, but that no solutions are readily available to ease all concerns. Moreover, such strategies must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimatory effect they will actually be able to achieve.

Our conviction is that the increasing authority of international courts constitutes a grand achievement. Even if the international judiciary does not fulfill all aspirations of global justice,[133] its lawmaking has significantly contributed to legalization and hence a transformation of international discourses. Although one should not see international legalization as a value per se irrespective of content, the overall process should be welcomed.[134] Yet, these achievements are accompanied by a sense of discomfort springing from the insight that, as of now, international courts may not always satisfy well-founded expectations of legitimation.

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[129] *See* Delaney & Magraw (note 117).

[130] NAFTA Free Trade Commission, Recommendation on Non-disputing Party Participation, 7 October 2004.

[131] OECD, Transparency and Third Party Participation (note 110).

[132] Art. 37(2) Arbitration Rules. *Cf*. Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper, 22 October 2004.

[133] *See* Benvenisti & Downs (note 44) (sharpening the understanding of how powerful states and sectoral interests strategically use international judicial institutions).

[134] Esther Brimmer, *International Politics Needs International Law*, in: REGARDS D'UNE GÉNÉRATION SUR LE DROIT INTERNATIONAL, 113 (Emmanuelle Jouannet, Hélène Ruiz Fabri & Jean-Marc Sorel eds, 2008); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 494 (2001).

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.[135] This speaks in favor of the view that the effect of international law and international decisions, including the precedential effect for domestic courts, is determined by constitutional law. Their normativity in the domestic realm is mediated by the municipal legal system.[136] This mediation frees international judicial lawmaking from legitimatory burdens that it may not always be in a position to shoulder. Such interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This constellation does not provide an obstacle to further develop international adjudication. Quite to the contrary, relieving such adjudication from some of the burdens of legitimation may actually serve its development. For that purpose, it is important that the consequences of non-compliance are made clear. Unmistakably then, the mere disregard of an international decision cannot justify military sanctions, unless it amounted to a threat to international peace and security and was sanctioned by the U.N. Security Council.[137]

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they exercise their control function with explicit reasons. They can thus formulate standards and may inspire further developments in the international legal order.[138] It should be stressed that domestic non-compliance triggers heavy argumentative burdens.[139] In the

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[135] Robert Howse & Kalypso Nicolaïdis, *Democracy without Sovereignty: The Global Vocation of Political Ethics*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY, 163 (Tomer Broude & Yuval Shany eds, 2008).

[136] In detail, see Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 397 (2008).

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

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

[139] Bundesverfassungsgericht (Federal Constitutional Court), 14 October 2004, 2 BvR1481/04, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 307, for an English translation, see http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html. *Cf.* Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MODERN LAW REVIEW 183 (2008); on the role of domestic courts, Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

present state of the world, the smooth operation of international law is of critical importance and domestic organs must consider the consequences of any non-compliance for the international legal order in general and for the authority of the international court in question in particular. That too should be beyond dispute.