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# INTERNATIONAL COURTS AND JUDGES: INDEPENDENCE, INTERACTION, AND LEGITIMACY

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## I. INTRODUCTION

The increased judicialization of the international legal order does not only mean that more international courts and tribunals (ICs) have been established; generally, they also have compulsory jurisdiction. And while states retain the formal possibility not to become parties, they may de facto have to do so, for example, in order to benefit from trade regulations under the World Trade Organization (WTO) or foreign investment under bilateral investment treaties (BITs). The combined effect means that the international order is, progressively, subject to the rule of law. Moreover, the fact that several ICs are open to non-state actors, such as individuals and companies, results in far more usage and escalating interference with what have traditionally been considered the internal aspects of states. This contributes to a growing internationalized—or transnational—judiciary.

The judicialization is uneven, in the sense that large areas such as military issues, global financial governance, and the environment are excluded from international courts and tribunals.<sup>1</sup> The international judiciary is also fragile in its dependence on states for funding and for effective implementation of judgments and decisions.<sup>2</sup> While ever more interna-

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1. Benedict Kingsbury, *International Courts: Uneven Judicialisation in Global Order*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203, 212 (James Crawford & Martti Koskenniemi eds., 2012).

2. DANIEL TERRIS ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES 226 (2007).

tional challenges may require their resolution by international organs like ICs, the future development will be determined by geopolitics, including global power shifts. However, states' willingness to establish new ICs will also depend on the perceived functioning of existing courts.

The increasing importance of ICs raises legal, empirical, and normative issues. The legal issues include relevant methods of interpretation of treaty obligations, such as the use of a dynamic (evolutive) interpretation, the design of remedies, and the relationship between different ICs and their interaction with national courts. The empirical questions comprise the origins and the effectiveness of ICs, and their usefulness in resolving international issues. The normative aspects concern such matters as the equitable effects of ICs, as well as the control of ICs as mechanisms for the exercise of power in the international and national legal order. Obviously, there are close connections between the legal, empirical, and normative aspects of the international judiciary.

In the following, I will first address the relationship between state control and independence of ICs: Should they be considered agents or trustees? Then I will discuss the interaction between the multiple international courts: Does their judicial practice represent increasing anarchy or order? Finally, I will turn to the legitimacy of the ICs: Are they instruments of international governance or unaccountable bodies pursuing their own policies?

## II. AGENTS OR TRUSTEES?

Jack L. Goldsmith and Eric A. Posner's point of departure is state power and state interests. They apply a *rational actor* approach in arguing that "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."<sup>3</sup> Posner argues that the increasing number of ICs does not mean a stronger international judiciary, but rather that ". . . the proliferation of international courts is a sign of the weakness of the international system, not its strength,"<sup>4</sup> and that international judges have very limited

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3. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005).

4. ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 173-74 (2009).

power: "So, while domestic legalism has led to a system of judges with great power, global legalism has led to a system of judges without (or with greatly limited) power."<sup>5</sup>

Posner and John C. Yoo also support the thesis that the fragmentation of international courts is a sign of the weakness of the international judiciary, rather than its strength. They maintain that this fragmentation can be explained by the states' desire for control over the international judiciary: "Our arguments also explain why international adjudication is fragmented rather than unified like a domestic legal system. By limiting the jurisdiction of international tribunals, states maintain control over how they decide cases."<sup>6</sup>

As a consequence of their state-centered view, Posner and Yoo argue not only that states exercise much control over ICs as a descriptive fact, but also that dependent judges, rather than independent international tribunals, are more effective at resolving international disputes: "In the international realm, where there is no political unification, international tribunals cannot be both independent and effective."<sup>7</sup>

On the other hand, Andrew T. Guzman, also a rational choice theorist, finds it impossible to determine generally whether a dependent or an independent court is most effective on the basis of what he sees as the two functions of courts: to assist states to come to a common understanding on disputed law and facts, and to sanction a party that has violated its legal obligations.<sup>8</sup>

Anne-Marie Slaughter and Laurence R. Helfer contest the contradiction between independence and effectiveness. They argue that states are well-served by independent ICs. But the courts and tribunals are—and should be—subject to 'constrained independence':

Our theory asserts that states (1) establish formally independent international tribunals to enhance the credibility of their commitments, and (2) then rely on a range of structural, political, and discursive

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5. *Id.* at 174.

6. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 73 (2005).

7. *Id.* at 72.

8. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 54 (2008).

mechanisms to ensure that independent judges are nevertheless operating within a set of legal and political constraints.<sup>9</sup>

They claim that:

Constrained independence maximizes the benefits of delegation to independent decision makers while minimizing its costs. It allows states to enhance the credibility of their commitments while signaling to independent courts, tribunals, and quasi-judicial review bodies when they are approaching – or have exceeded – the politically palatable limits of their authority.<sup>10</sup>

It has also been contended that ICs, rather than being seen as *agents* of states, should be considered as *trustees*. Alec Stone Sweet and Thomas L. Brunell hold that the European Court of Human Rights, the European Court of Justice, and the WTO Appellate Body are trustees in the following sense:

In the international context, a trustee court can be identified on the basis of three criteria: (1) the court is recognized as the authoritative interpreter of the regime's law, which it applies to resolve disputes concerning state compliance; (2) the court's jurisdiction, with regard to state compliance, is compulsory; and (3) it is virtually impossible, in practice, for contracting states to reverse the court's important rulings on treaty law.<sup>11</sup>

Karen Alter distinguishes between the other-binding and self-binding roles of ICs. The distinction is based on the purpose of the court: Is the point to control the acts by other states or the acts by the ratifying state itself? She argues: "Courts can play both self-binding and other-binding roles. In other-binding judicial roles, courts may well be the agents of

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9. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 902 (2005).

10. *Id.* at 942.

11. Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & Cts. 62 (2013).

states. In self-binding roles, however, courts are trustees of the law.”<sup>12</sup>

Eric Voeten maintains that empirically, both judges and states may want international courts to enjoy an independent function:

Much of the early literature conceptualized the problem of international judicial independence as a contest between judges interested in expanding the reach of their court and states eager to rein them in. . . . Recent research and events have made these assumptions untenable. We now know that judges vary considerably in the degree to which they prefer their court to act independently from the *raison d'état*. . . . it must be true that at least some governments at some times believe that delegating authority to an independent IC suits their interests just fine.<sup>13</sup>

But Voeten warns against the agent-trusteeship divide:

There is a danger that this empirical work will be overly focused on the “agent-trustee” debate. Both terms have connotations that easily lend themselves to straw-men constructions. The term “agent” is sometimes portrayed as equivalent with “diplomat in robes,” even if principal-agent theories stipulate that judges have constrained independence. Conversely, the term “trustee” can be interpreted as meaning that judges operate in splendid isolation, even if the theories on which the trustee claim is based hinge on the social and political context in which courts operate. There is no evidence that international judges operate “as if” they were diplomats, and there is plenty of evidence that judges are acutely aware of the political context in which they operate. This makes the straw-

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12. Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 345, 358 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

13. Erik Voeten, *International Judicial Independence*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART*, *supra* note 12 at 421, 425–26.

men versions of either side of the agent-trustee dichotomy easy to falsify.<sup>14</sup>

There can be no doubt that from a formal point of view, ICs and their judges enjoy legal independence in the sense that once elected, the judges cannot be instructed about how they should exercise their function. Furthermore, they have considerable independence in their interpretation of the relevant international obligations; for example, whether or not to apply a dynamic interpretation. This flexibility also leaves room for taking into account what may be called strategic (extra-legal) considerations, such as calibrating their interpretation to the expected reactions by states. This may, for example, be important in the initial phases of a court in order to build up its credibility among the state parties. For example, the WTO Appellate Body was more inclined to use a literal interpretation of the relevant agreements in its early days, before its authority was more firmly established.<sup>15</sup>

Such reactions by state parties may also provide guidance in deciding on the pace and direction of judicial lawmaking. The International Court of Justice's (ICJ) recognition of the concept of *erga omnes* in the *Barcelona Traction* case<sup>16</sup> should, for example, be seen as a response to the criticism of the Court after its decision in the *South West Africa* cases,<sup>17</sup> where Liberia and Ethiopia had been denied standing in their proceedings against South Africa for violations of the U.N. mandate in Namibia.<sup>18</sup>

Both in a legal and a descriptive sense, the ICs may to a great, but variable, extent be considered trustees. But just as Voeten has warned against the descriptive use of the terms

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14. *Id.* at 437–38.

15. Mitsuo Matsushita, *The Dispute Settlement Mechanism at the WTO: The Appellate Body—Assessment and Problems*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION* 507, 528 (Marita Narlikar, Martin Daunton & Robert M. Stern eds., 2012).

16. *Barcelona Traction, Light and Power Co., Ltd. (Second Phase) (Belg. v. Spain)* 1970 I.C.J. 3, ¶ 33 (Feb. 5).

17. *South West Africa Cases (Second Phase) (Eth. v. S. Afr.; Liber. v. S. Afr.)* 1966 I.C.J. 6 (July 18).

18. Stephan Wittich, *Barcelona Traction Case*, *MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* ¶ 26 (May 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e101?rskey=uI9Yig&result=1&prd=EPIL>.

agents or trustees, a similar caution is advised with respect to the use of the term “trustee” in a legal context. While the image of trustees may give some indication about the form and extent of ICs’ freedom, there is a danger that implications for the legal status of ICs may be drawn from the use of this concept in national law. This is an aspect of the pitfalls of “translation”: the use of a term for a different purpose than what it was intended. It would seem better to address the factual as well as the legal independence of ICs directly without the intervening concepts of agents and trustees.

But how should ICs be controlled and be subject to what Helfer and Slaughter called “constrained independence”? States have various formal ways of influencing the actions of ICs. They may select their preferred judges, but only subject to the criteria on independence and expertise stipulated in the relevant treaty. Furthermore, state parties may adopt amendments to the constituent treaty, but this requires unanimity between the states. Finally, states may withdraw from the treaty, but, as stated above, this means that they would miss the benefits of the cooperation, such as access to markets under trade agreements. The difficulties of controlling ICs through formal means suggest that increased emphasis should be placed on other forms of checks and balances.

First, there may be possibilities of influencing ICs through “quasi lawmaking,” such as the adoption of declarations by the U.N. General Assembly on the interpretation of international legal obligations. A well-known example is the reliance of the ICJ on the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in the *Nicaragua* case.<sup>19</sup> Such soft law instruments may, however, also be adopted by other specialized international bodies and serve as guidance for the relevant international courts. The Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) has, for example, the power to adopt and amend “elements of crime” which shall “assist the Court in the interpretation and application of Articles 6, 7, 8 and 8 bis” (genocide, crimes against humanity, war crimes and the crime

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19. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, ¶ 188 (June 27).



of aggression), subject to the condition that such elements “shall be consistent” with the Rome Statute.<sup>20</sup>

Second, ICs should only act within the bounds of recognized principles of interpretation in international law.<sup>21</sup> They are lawmakers only to the extent that it can be justified by their role as judicial, as opposed to political, organs. Their ‘strategic’ decisions about their judicial policy must also be within the legal bounds. But this leaves wide discretion to international courts and tribunals, and it would be difficult for states to claim that ICs have acted *ultra vires* and that states, accordingly, are not bound by their decisions. It would be wiser for states—as well as other stakeholders and the academic community—to voice their critique of the applied methods of interpretations and/or the findings of the ICs. The ICs would in turn be well-advised to take into account such views if they are representative of the state parties, in order to avoid negative future consequences in the form of non-implementation of judgments or restrictions on funding.

A third form of interaction between ICs and state parties is based on the principle of subsidiarity. This principle aims to protect national freedom by leaving decisionmaking to states, unless it is more effectively or efficiently performed at the international level.<sup>22</sup> The principle may provide guidance for ICs in balancing effective interpretation of international obligations, and, on the other hand, leave room for certain discretion by states. This is well-accepted in the design of remedies

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20. Rome Statute of the International Criminal Court art. 9, July 17, 1998, 2187 U.N.T.S. 90.

21. See Andreas Follesdal, *To Guide and Guard International Judges*, 46 N.Y.U. J. INT’L L. & POL. 793 (forthcoming 2014) (proposing mechanisms to limit, guide, and check judges’ discretion).

22. See Isabel Feichtner, *Subsidiarity*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2007), <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1477?rskey=lqEFSu&result=2&prid=EPIL> (exploring the concept of subsidiarity in international law); Andreas Follesdal, *Survey Article: Subsidiarity*, 6 J. POL. PHIL. 190 (1998) (surveying interpretations and justifications of subsidiarity); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38 (2003) (discussing subsidiarity in connection with European Union fundamental rights law and international human rights law); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 920–24 (2004) (exploring the principle of subsidiarity).

imposed by ICs, while its role in determining the substantive obligation of states is more uncertain. For example, it is difficult to allow states discretion in the interpretation of the prohibition against the use of force and the right to self-defense.<sup>23</sup> On the other hand, it is well-known that the European Court of Human Rights applies a 'margin of appreciation' in its interpretation of the European Convention on Human Rights.

But the principle of subsidiarity also leaves room for the interaction between the IC and domestic authorities. National authorities have certain discretion both when it comes to the interpretation of a judgment to which the state has been a party, as well as choosing the appropriate means to implement the judgment. The precedential effects beyond the *res judicata* obligations are also a matter of interpretation, and a possibility of interaction. It means that domestic authorities, and especially national courts, may play a role in influencing the interpretation in future cases. National courts may point to the significance of local conditions or through well-reasoned opinions try to persuade ICs to choose a different interpretation. A more general practice by national courts may amount to subsequent state practice that ICs must take into account. Finally, national authorities may refer to the principle of 'dualism,' and on a principled basis refuse to implement an international judgment in the national legal system. Such a stance may find support, for example, in the protection of fundamental human rights in relation to other international obligations, such as international trade agreements. But it may also have a snowballing effect and encourage other states not to comply with international judgments, and thus undermine efforts to build more respect for the international rule of law.

### III. ANARCHY OR ORDER?

The debate about the institutional fragmentation represented by the increasing number of specialized international courts and tribunals is less concerned with the relationship between the ICs and states; rather, the question is whether the multitude of ICs represents a danger of jurisdictional conflicts

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23. Geir Ulfstein, *The International Judiciary*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 126, 145 (Jan Klabbers et al. eds., 2009).

between the different courts and tribunals, and conflicts and inconsistencies in their jurisprudence.

There are, however, only a few examples of formally overlapping jurisdiction between different ICs, although it may occur between a court with general jurisdiction, like the ICJ and a specialized court, or between different specialized courts. The relationship between different ICs may be subject to explicit regulations in the relevant treaties. Such conflicts may also be mitigated by the principles of *res judicata*, *lis pendence*, and comity between different ICs.

Moreover, the difficulties represented by conflicting and inconsistent jurisprudence may be alleviated by 'systemic interpretation' of the relevant treaties and by mutual acceptance of the precedential value of judgments by other courts and tribunals, both international and national.

Slaughter has also emphasized the importance of judicial networks between the different ICs, including national courts:

What is striking about the world of judicial networks, however, is how they all fit together. Talk of a "global legal system" sounds ambitious, if not fanciful. It conjures images of a global supreme court with satellites in every region and country, with national courts carefully tied in. In fact, however, the system described here is loosely composed of horizontal and vertical networks of national and supranational judges. It is closer in some ways to a global "community of courts", in the sense that judges around the world interact with one another aware of their membership and participation in a common enterprise – regardless of their actual status as a state, national, regional, or international judges.<sup>24</sup>

But a certain amount of fragmentation of international law may be inevitable and even serve positive functions, such as protecting the specific aims of specialized regimes and national traditions and self-determination.<sup>25</sup> The different ICs may also examine similar cases from different angles. The re-

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24. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 100–01 (2004).

25. Andre Nollkaemper & Ole Kristian Fauchald, *Conclusion, in THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW* 343, 343, 366 (Andre Nollkaemper & Ole Kristian Fauchald eds., 2012).

sult may be a well-informed and consistent international case law, built up step by step.<sup>26</sup>

Generally, the increasing number and significance of ICs should be welcomed in the service of promoting the international rule of law in ever increasing areas. Admittedly, they may also create jurisdictional and jurisprudential difficulties and hence have the potential to undermine the general rule of law. But it seems so far that the ICs promote legal order rather than anarchy.<sup>27</sup>

This does not necessarily mean that all new international courts should be welcomed. For example, it is debatable whether a new World Court of Human Rights is needed.<sup>28</sup> Whether areas without ICs might suffer when the existing ICs deal with areas beyond their particular treaty should also be scrutinized; for example, when trade courts address the environment.

#### IV. GOVERNANCE OR UNACCOUNTABILITY?

International courts and tribunals serve essential governance functions by resolving legal disputes. Their mandate may be of a general nature, such as the ICJ. But ICs with a limited mandate, such as those established to accommodate legal issues pertaining to a specialized legal regime, like the WTO,

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26. See Jonathan Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 700 (1999) (discussing how the multiplicity of international courts leads to experimentation and facilitates evaluation of ideas by the international community as a whole). See also Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEILS DES COURS (1998) (exploring the effect of multiple international tribunals on the international legal system).

27. See Christopher Greenwood, *Some Challenges of International Litigation*, 1 CAMBRIDGE J. INT'L & COMP. L. 7 (2012) (discussing the challenges of international litigation); Ruti Teitel & Robert Howse, *Cross-judging: Tribunalization in a Fragmented But Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2009) (exploring tribunalization).

28. JULIA KOZMA ET AL., *A WORLD COURT OF HUMAN RIGHTS—CONSOLIDATED STATUTE AND COMMENTARY* (2010); Geir Ulfstein, *Do We Need a World Court of Human Rights?*, in *LAW AT WAR—THE LAW AS IT WAS AND THE LAW AS IT SHOULD BE* 261 (Ola Engdahl & Pål Wrangé eds., 2008); Philip Alston, *Against a World Court of Human Rights* 1–22 (New York Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-71, 2013).

are just as important. These ICs may be vital for the effective functioning of such regimes. Together, the ICs promote the international rule of law and thus international governance.

The perceived wider functions of ICs may vary, depending on whose views we examine: is it the opinions of the drafters, the judges, or the international community? On the basis of their interviews with international judges, Daniel Terris, Cesare P.R. Romano, and Leigh Swigart state:

Asked what their institutions are ultimately *for*, judges give a variety of answers. Despite the many differences among the types of court they sit on and cases they hear, their responses fall into three areas: the establishment of a community of law, the preservation of the dignity of the individual, and the prevention of violence and war.<sup>29</sup>

But while these may be the ultimate purposes of international courts, some more operational functions may be closer to the day-to-day work of the courts and tribunals. International courts have traditionally been seen as organs for resolving legal disputes. The recent literature on international courts suggests, however, that they also serve several other functions.<sup>30</sup> The courts and tribunals may:

- Determine an authoritative interpretation of a legal norm beyond the relevant case (precedential or *erga omnes* effect);
- Develop international legal norms through their interpretation ('lawmaking');
- Contribute to the operation and legitimation of related legal regimes and institutions;
- Promote compliance with specialized and general international legal norms, as well as the rule of law in the international society.

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29. TERRIS ET AL., *supra* note 2, at 229.

30. Laurence R. Helfer, *The Effectiveness of International Adjudicators* (2012), available at <http://ssrn.com/abstract=2194189>; Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49 (2013); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225 (2012); Kingsbury, *supra* note 1; Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537 (2009).

This list of functions already brings up the issue of how to determine their content, and whether the functions may change over time. Moreover, questions may arise about the relationships between the manifold functions of ICs. The resolution of legal disputes, as well as contributing to precedents and judicial lawmaking, are all functions well-known to national and international courts, although the relative importance of these functions may create difficulties, and may vary between different courts and tribunals. However, the increasing number of ICs raises new questions in the exercise of traditional functions, such as the significance of promoting the rule of law within the specialized regime and the general rule of law in the international society.

What is more, as the roles of ICs are extended beyond these well-known functions, new questions arise. To what extent should ICs take into account the need for legitimizing a regime? For example, should they be more active in their lawmaking in instances of blockages in decisionmaking by political organs? Or should they censure their decisionmaking through judicial review? And should ICs choose 'strategic' considerations in their substantive decisions or in the design of remedies, which would promote compliance by states and international organs on a short and/or long-term basis? Should such consideration be made explicit in the reasoning of the ICs?

This is not to deny the importance of ICs in international governance. This role should be acknowledged as being of increasing import. But it raises issues both about how ICs can best fulfill such functions, and also about their relative advantages compared to other international institutions.

The different functions of international courts and tribunals have implications in terms of assessing their legitimacy. To the extent that ICs are weak and controlled by states—as is the realist perception—the legitimacy of the system will largely depend on the legitimacy of the participating states. But more power being given to ICs may require supplementary bases of legitimacy; this may necessitate more than states' consent through ratification of the legal instrument establishing the IC. The reason is, as we have seen, that international courts and tribunals enjoy considerable independence in their adjudication.

A distinction is usually made between different institutions' normative and descriptive (or sociological) legitimacy. The first concerns whether an institution is worthy of our support and whether its decisions merit deference. The second focuses on whether the institution's authority is accepted by the actors and that the actors are therefore willing to implement even unpopular decisions.<sup>31</sup> The interaction between the normative and descriptive aspects is complex.<sup>32</sup> In the following, I focus on some aspects of ICs that are important both from a normative and descriptive perspective.

The legitimacy of international courts and tribunals has been addressed by different theoretical approaches, including Global Administrative Law (GAL), the Constitutionalization of International Law, and International Public Authority (IPA). GAL does not encompass treaty-making or dispute settlement as such; it considers only ICs as review mechanisms of rulemaking by international and national regulatory bodies:

As a matter of provisional delineation, global administrative action is rulemaking, *adjudications*, and other decisions that are neither treaty-making nor simple dispute settlements between parties.<sup>33</sup>

It may be asked whether GAL by its focus on international and national regulatory bodies encompasses international courts. But as just stated, it also includes 'review' of such decisions. GAL thus points to the relationship between ICs and regulatory institutions—both international and national. For example, it has been argued that the Appellate Body of the WTO

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31. Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART, *supra* note 12, at 321, 326–377. See also Andreas Follesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory*, 14 THEORETICAL INQUIRIES IN LAW 339, 345 (2013) (distinguishing normative from social legitimacy); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 115 (2009) (stating that a legitimate court is one that has popular acceptance); Nienke Grossman, *The Normative Legitimacy of International Courts* (Dec. 2012), available at <http://dx.doi.org/10.2139/ssrn.2185304> (exploring approaches to justifying the legitimacy of international courts).

32. Bodansky, *supra* note 31, at 327.

33. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 17 (2005) (emphasis added).

[C]ould accord significant deference to the administrative bodies' interpretations of the WTO agreements, but do so on the condition that they afford notice and opportunity for public input to their decisions and provide reasoned justifications for their interpretations in relation to materials generated by the decisional processes.<sup>34</sup>

The increasing interest in the constitutionalization of international law, as another theoretical approach, does not only focus on international courts and tribunals as reviewers of rulemaking, but more generally on the empowerment of international institutions, including ICs. Arguably, the increased power of ICs means that they exercise constitutional functions in the sense that they may interfere significantly with the activities of national legislative, executive, and judicial national organs. This raises normative issues, such as whether ICs should be subject to democratic control and constitutional guarantees comparable to what is known from national constitutions.<sup>35</sup>

To the extent that international courts are independent and make binding decisions, they exercise what Armin von Bogdandy and his colleagues call "international public authority."<sup>36</sup> Von Bogdandy and Ingo Venzke emphasize the need for democratic control in relation to international courts:

We understand international judicial practice as an exercise of public authority and thereby wish to convey the idea that international courts' practice can be sufficiently justified neither on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values courts are supposed to serve. Nor can courts draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucra-

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34. Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, in CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW 468 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011).

35. See Ulfstein, *supra* note 23 (exploring these normative issues).

36. Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS 3, 5 (Armin von Bogdandy et al. eds., 2010).



cies. As autonomous actors wielding public authority—this is our principal contention—their actions require a genuine mode of justification that lives up to basic tenets of democratic theory.<sup>37</sup>

These different theoretical approaches serve to underline normative requirements that should be fulfilled by ICs exercising legal authority in the international order. These approaches supplement rather than contradict each other. Critical comments against these approaches, pointing to the virtues of a pluralistic rather than a fully constitutionalized legal order<sup>38</sup> and warning that the “publicness” of international law can be taken too far, should also be taken into account.<sup>39</sup> Nevertheless, ICs should, as power-wielding organs, fulfill the following legitimacy elements.

First of all, international courts and tribunals should be composed of members possessing the necessary expertise, representativeness, and independence. But there is no one-size-fits-all approach. Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands state that they “do not subscribe to any particular vision of what constitutes a ‘good international judge,’ beyond the claim that those appointed should be independent and highly qualified within the terms laid down for each court.”<sup>40</sup>

This means that the composition of the IC should reflect its particular functions. This applies also to the second of the legitimacy elements; namely, that ICs should fulfill certain pro-

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37. Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 8 (2012). For a more in-depth treatment of the interplay between international judicial law making and democratic legitimacy, see also INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE (Armin von Bogdandy & Ingo Venzke eds., 2012).

38. NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

39. See, e.g., José E. Alvarez, *Beware: Boundary Crossings*, in BOUNDARIES OF RIGHTS, BOUNDARIES OF STATE (Tsvi Kahana & Anat Scolnicov eds., forthcoming) (reacting to a perception of “publicness” of international investment law being taken too far).

40. RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* 5–6 (2010). See also TERRIS ET AL., *supra* note 2, at 177 (discussing the selection of judges of the International Court of Justice and the International Criminal Court).

cedural requirements, in the form of equal access and fair hearing (due process). But again, the procedure should accommodate the specific functions of the IC; for example, the variance of stakeholders in the relevant area, be it human rights or the law of the sea.

A fundamental requirement for ICs' legitimacy is that the law is properly applied, to which the state parties have consented by ratifying the constituent instrument. Several important issues arise, for instance: How far should ICs go in law-making? Alter and Helfer have shown that there is not necessarily a link between dynamic interpretation and perceived illegitimacy.<sup>41</sup> But while dynamic interpretation of international obligations is well-known and accepted, there is nevertheless a question of how far ICs should go.

Another legitimating factor is that ICs should fulfill their functions in the sense that they actually produce their intended effects. As discussed above, ICs serve functions beyond dispute settlement. Their effectiveness may be difficult to assess to the extent that ICs have a complex set of functions and often depend on deference by other actors for their effects. But these other functions may also create tensions between the judicial role of the ICs and their perceived wider role(s). How far ICs should go in accommodating such functions without losing their legitimacy in their core role of dispute settlement is questionable.

The objective of final decisionmaking on international legal disputes is furthermore challenged both by the fragmentation between different ICs and the relationship between ICs and national courts. So far, it seems that international courts and tribunals promote the rule of law within their specialized regimes as well as the rule of law in the general legal order. But whether this will continue to be the case depends on explicit regulations of the respective roles of different ICs and their and national courts' willingness to take into account judgments by their peers.

Finally, demands for democratic control must be assessed both in relation to the need for independent international courts and tribunals and the other above-mentioned bases of

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41. Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES IN LAW 479, 482 (2013).

legitimacy, not least in an international environment with many undemocratic states. Whether democratic legitimacy should be provided by a national or international legislator is also a question, and if so, to what extent and in what form.

It may be concluded that international courts and tribunals serve essential governance functions in the international legal order. But in the absence of strong international enforcement powers, the effectiveness of ICs in fulfilling such functions is, to a great extent, a result of their perceived legitimacy. On the other hand, their success is also a source of legitimacy. The further expansion and use of the international judiciary, and thus its role in ensuring respect for the international rule of law, will depend on how the existing courts and tribunals accomplish their functions.