Beyond Dispute:
International Judicial Institutions as Lawmakers

By Armin von Bogdandy & Ingo Venzke[*]

A. The Research Interest

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

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[1] Note that we follow a broad understanding of the term "court". It covers arbitral tribunals as well as other institutions fulfilling a court-like function such as the WTO panels and Appellate Body even if they change in composition and do not formally *decide* a case. *See also* Project on International Courts and Tribunals, available at: http://www.pict-pcti.org, (adopting an equally broad understanding of "court"); *cf*. Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,* 31 NYU JOURNAL OF INTERNATIONAL LAW & POLITICS 709 (1999).

[2] The creation and stabilization of normative expectations is considered by many, otherwise diverging, contemporary theories as the core function of law, *see* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 427 (1997); NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 151 (1995).

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ways as they do formal sources of international law.[3] To us, this role of international adjudication beyond the individual dispute is beyond dispute.

Although international courts have always been producing such normativity, not only the sheer volume, but also the systematic fashion in which some are developing a body of law of general relevance points to a change in kind.[4] At the same time, we find that neither theory nor doctrine has yet adequately captured this aspect of international judicial activity. Our collaborative research project suggests that the generation of legal normativity in the course of international adjudication should be understood as judicial lawmaking and as an exercise of public authority. Equipped with this understanding, we ultimately hope to draw attention to the legitimatory implications of international judicial lawmaking, placing the project in the context of broader investigations of legitimate governance beyond the nation state.[5] Above all, we explore how this judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials. In that vein, one could say that international judicial lawmaking is not only beyond dispute in the sense of being an undeniable facet of global governance, but also in terms of being removed from politico-legislative processes and from challenge in the court of public opinion.

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

[3] Note that Art. 38 ICJ-Statute refers to judicial decisions as "subsidiary means for the determination of rules of law", we discuss this qualification *infra* section II.C, notes 62-64.

[4] *Cf*. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73 (2009).

[5] It follows the study on "The Exercise of Public Authority by International Organizations", Special Issue, 9 GERMAN LAW JOURNAL (2008); THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds, 2010). *See further* INGO VENZKE, ON WORDS AND DEEDS. HOW THE PRACTICE OF INTERPRETATION DEVELOPS INTERNATIONAL NORMS (unpublished doctoral thesis, 2010).

procedure of the European Court of Human Rights.[6] It also analyses the creation of a global *lex sportiva* through private arbitration, in order to allow for comparison.[7]

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

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

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[6] *See* respectively the contributions in this issue by Stephan Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*; Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*; Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*; Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*; Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*; Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*; Karin Oellers-Frahm, *Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function*; Markus Fyrnys, *Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*; Marc Jacob, *Precedents: Lawmaking Through International Adjudication*.

[7] Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, in this issue.

[8] Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 151 (Stephan Schill ed., 2010).

[9] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 18 (2008).

[10] Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective,* in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW, 323, 344 (Tomer Broude & Yuval Shany eds, 2008).

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Such judicial lawmaking is difficult to square with traditional understandings of international adjudication, which usually view the international judiciary as fixed on its dispute settlement function. Many textbooks of international law present international courts and tribunals, usually towards the end of the book in the same chapter with mediation and good offices, simply as mechanisms to settle disputes.[11] They focus only on part of the picture and shut their eyes to the rest. Even if international courts are admitted or expected to contribute to the development of the law, it remains either obscure what is meant by development or development is equated with clarifying what the law is. Our interest in judicial lawmaking is specifically triggered by the observation that judicial practice is creative and that it may have considerable consequences for the regulatory autonomy of states, thus affecting the space for domestic democratic government. We wish to explore above all the democratic justification of international judicial lawmaking, stating clearly at the outset, however, that international law and adjudication may also serve as devices that can alleviate democratic deficits in the postnational constellation.[12] We are not out to categorically mark international judicial lawmaking as illegitimate, let alone as illegal.[13]

The aim of this project is three-fold. It first seeks to contribute to a better understanding of international judicial lawmaking and the challenges it raises for prevailing narratives of legitimation in international law. This mainly requires conceptual work and theoretical reflection. Second, it examines instances of lawmaking by particular institutions in closer detail. Such analyses will show that these institutions portray different dynamics and face different problems. Third, it proposes ideas about how to react to problems in the legitimation of judicial lawmaking and it makes suggestions as to how to develop the law accordingly. The task for the present contribution is to introduce the *problématique* and overall framework.

It should be noted from the beginning that addressing judicial activity as lawmaking does not, as such, entail a negative judgment. Also, quite obviously, insisting, in doctrinal terms,

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[11] *See*, e.g., MALCOLM N. SHAW, INTERNATIONAL LAW 1010 (2008); PATRICK DAILLIER, ALAIN PELLET, MATHIAS FORTEAU & NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 923 (2009).

[12] JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001); Stephan Leibfried & Michael Zürn, *Von der nationalen zur post-nationalen Konstellation*, in: TRANSFORMATIONEN DES STAATES?, 19 (Stephan Leibfried & Michael Zürn eds, 2006); Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EJIL 885 (2004); VENZKE (note 5).

[13] For a fierce and unconvincing argument on the illegitimacy, or, at best, plain futility of international adjudication, *see* ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (2009); with regard to the ECJ, *see* Dietrich Murswiek, *Die heimliche Entwicklung des Unionsvertrages zur europäischen Oberverfassung*, 28 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 481, 484 (2009).

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that judges should only *apply* and not *make* the law does not make the phenomenon go away. Judicial lawmaking is an integral element of almost any adjudicatory practice. At the same time, there are different degrees of judicial innovation. Without too much theoretical baggage, it is probably easy to see, and safe to say, that the International Court of Justice's lawmaking impetus differs widely between its *Kosovo* opinion and its *Wall* opinion.[14] We discuss degrees of judicial lawmaking and questions of legitimacy in our concluding contribution. At this stage it may already be noted that the absence of judicial innovation, as it characterizes the *Kosovo* opinion, might actually be just as problematic as more audacious instances of judicial lawmaking.

Our focus does not question the view that international courts are integral parts of strategies to pursue shared aims, to mend failures of collective action, and to overcome obstacles of cooperation. International courts frequently play a crucial role in meeting hopes for betterment and in fulfilling promises vested in international law. But it is a common feature that the successful establishment of any new institution gives rise to new concerns. As many courts and tribunals have become significant lawmakers, their actions require an elaborate justification that lives up to basic democratic premises and feeds into the development of doctrinal *acquis*.[15] Traditional approaches miss large chunks of reality and are no longer sufficient.

The first step of this introductory contribution aims at defining more closely the phenomenon we investigate, i.e. the generation of normativity by international adjudication. It presents the reasons why the cognitive paradigm for understanding judicial activity is inadequate (B.I.), specifies what we mean by judicial lawmaking (B.II.), and works out the understanding of judicial lawmaking as an exercise of public authority, indicating why it needs to live up to standards of democratic justification (B.III.). With this qualification of the phenomenon, the second step addresses the problems in the justification of international judicial lawmaking. Judicial lawmaking is a common feature of most legal orders, but in international law it is particular to the extent that it is not balanced with a functionally equivalent legislative process (C.I.) Further problems in the justification of international judicial lawmaking arise from its fragmentary nature (C.II.).

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[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, available at: http://www.icj-cij.org/docket/files/141/15987.pdf; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, available at: http://www.icj-cij.org/docket/files/131/1671.pdf. *See* Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, in this issue. For pointed commentary on the direction of impact of each opinion, *see* Robert Howse & Ruti Teitel, *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?*, 11 GERMAN LAW JOURNAL 841 (2010); *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AJIL 1 (2005).

[15] Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, in this issue.

We discuss strategies in response to these problems in our separate contribution that concludes this issue in view of the wealth of its different insights. The final step of this introduction sketches this special issue's structure and walks trough its contents (D.).

B. The Phenomenon of Lawmaking by Adjudication

I. (Far) Beyond the Cognitive Paradigm of Adjudication

Any argument that investigates judicial lawmaking and its justification would either be nonsensical or plainly pointless if the nature of judgments was that of cognition. The scales handled by *Justitia* would then look like a purely technical instrument that yields right answers. Correct adjudication would have to discover the law that is already given and judicial reasoning in support of a decision would simply serve the purpose of showing the rightness of cognition. Sure enough, few would still advocate a traditional cognitivistic understanding of judicial interpretation as Montesquieu famously expressed it in his metaphoric depiction of a judge or a court as "*bouche de la loi*."[16] And yet, there is still a strong view suggesting that the right interpretation may be derived from the whole of the legal material in view of the intrinsic logic of the individual case through the correct application of the rules of legal discourse, considering all pertinent provisions, the context of the respective treaty, its object and purpose, and the whole of the international legal order.[17]

Moreover, there is a strong incentive for judges and courts to maintain such an image of their activity as it forms an intricate part of a prevailing and self-reinforcing judicial ethos. Judges apply the law, this is the source of their authority, and whenever the impression gains currency that this is not what they are actually doing, they are usually in trouble.[18] But the obvious gap between the outward show and the actual activity should be overcome by more appropriate theory and doctrine that gives a convincing account, both descriptive as well as normative, of international judicial activity in the 21st century, an account that can also be conveyed in a rather straightforward fashion.

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[16] *Cf.* Joachim Lege, *Was Juristen wirklich tun. Jurisprudential Realism,* in: RECHTSPHILOSOPHIE IM 21. JAHRHUNDERT, 207, 216 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008); RALPH CHRISTENSEN & HANS KUDLICH, THEORIE RICHTERLICHEN BEGRÜNDENS 26 (2001).

[17] *See* International Law Commission, *Third Report on the Law of Treaties*, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 5, 53 (1964) (assembling testimony for such a view on interpretation). *Cf.* Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning,* in: MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY, 34 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds, 2010).

[18] JUDITH N. SHKLAR, LEGALISM 12-13 (1964). Consider the ICJ's emblematic pronouncements in *Fisheries Jurisdiction* (Great Britain and Northern Ireland v. Iceland), 25 July 1974, ICJ Reports 1974, 3, para. 53; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para. 18.

The traditional understanding of international adjudication as a method of applying given abstract norms to concrete cases at hand has proved unsound for a long time. It is beyond dispute that cognitivistic understandings of judicial decisions do not stand up to closer scrutiny. From the time of *Kant's Critique* it may hardly be claimed that decisions in concrete situations can be deduced from abstract concepts.[19] One of the main issues of legal scholarship is determining how to best define this insight and how to translate it into doctrine. Hans Kelsen famously argued that it is impossible to maintain a categorical distinction between law-creation and law-application.[20] He mocked theories of interpretation that want to make believe that a legal norm, applied to the concrete case, always provides a right decision, as if interpretation was an act of clarification or understanding that only required intellect but not the will of the interpreter.[21]

More recently, the *linguistic turn* has thoroughly tested the relationship between surfaces and contents of expressions.[22] Building on the dominant variant of semantic pragmatism and its principle contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or interpretation of a concept contributes to the making of its content. The discretionary and creative elements in the application of the law make the law.[23] He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have

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[19] IMMANUEL KANT, CRITIQUE OF PURE REASON A131-148 (2008 [1781]). *Cf.* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9 (2007).

[20] HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 163 (1942); HANS KELSEN, REINE RECHTSLEHRE. EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK 82-83 (1934).

[21] *Id*., 74, 95; HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZE xii-xvi (1923). In closer detail, András Jakab, *Probleme der Stufenbaulehre*, 91 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 333, 334 (2005).

[22] *See* THE LINGUISTIC TURN. ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty ed., 1967) (giving the name to this shift in philosophy); Richard Rorty, *Wittgenstein, Heidegger, and the Reification of Language*, in: 2 ESSAYS ON HEIDEGGER AND OTHERS, 50 (1991) (offering an accessible overview on what it is about).

[23] Brandom argues that "there is nothing more to the concept of the legal concepts being applied that the content they acquire through a tradition of such decisions, that the principles that emerge from this process are appropriately thought of as 'judge-made law'". 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, 180 (1999). A similar argument has been developed before by Friedrich Müller, *Richterrecht – rechtstheoretisch formuliert*, in: RICHTERLICHE RECHTSFORTBILDUNG. ERSCHEINUNGSFORMEN, AUFTRAG UND GRENZEN, 65, 78 (Hochschullehrer der Juristischen Fakultät der Universität Heidelberg eds, 1986).

to connect to the past in a way that is convincing in the future.[24] This might allow for a discursive embedding of adjudication, which can be an important element in the democratic legitimation of judicial lawmaking.[25]

This strand of thinking does not detract from the deductive model of legal reasoning. The deductive mode of reasoning, which is dear to many lawyers, does not presuppose the belief in the full determinacy of legal concepts. It is rather based on the principle that judicial decisions must be justified. The reasoning in support of a decision does not serve to show a necessary result but it is burdened with justifying the decision. In this view, Hans-Joachim Koch and Helmut Rüßmann defend the deductive mode of arguing as the central place of judicial rationality. They do not extend their defense to the schema of *analytical* deduction.[26] The deductive mode of reasoning demands that whenever a norm is disputed, the decision in favor of one or the other interpretation must be justified—it needs to be made explicit, to recall the work of Brandom on this issue.[27] In sum, deductive reasoning turns out to be an instrument for controlling and legitimizing judicial power. It regards the modus of *justifying* decisions and not the process of *finding* them.[28]

II. Judicial Lawmaking

The creation and development of legal normativity in judicial practice takes place in the context of concrete cases. Judicial decisions settle the particular case between the parties. They apply pertinent norms in view of the facts and legal interpretations presented to them. Owing to the doctrine of *res judicata*, judgments are taken to prescribe definitely what is required in a concrete situation from the parties of the dispute. At the same time,

[24] Brandom (note 23), 181 ("[t]he current judge is held accountable to the tradition she inherits by the judges yet to come."). *Cf.* JASPER LIPTOW, REGEL UND INTERPRETATION. EINE UNTERSUCHUNG ZUR SOZIALEN STRUKTUR SPRACHLICHER PRAXIS 220-226 (2004).

[25] Von Bogdandy & Venzke (note 15).

[26] HANS-JOACHIM KOCH & HELMUT RÜßMANN, JURISTISCHE BEGRÜNDUNGSLEHRE 5, 69 (1982). *See* specifically on the lawmaking dimension of judicial decisions *id.*, 248.

[27] This is also the central theme in RORBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT (1998). For a concise introduction into this theme, *see* Robert B. Brandom, *Objectivity and the Normative Fine Structure of Rationality*, in: ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM, 186 (2000).

[28] Ulfried Neumann, *Theorie der juristischen Argumentation,* in: RECHTSPILOSOPHIE IM 21. JAHRHUNDERT, 233, 241 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds, 2008). Many have argued that the concept of decision, *i.e.* a choice between at least two alternatives, defies the possibility that it can be *found*. This is quite a fitting thought, although not all consequences drawn from it are equally compelling. Jacques Derrida, *Force of Law. The Mystical Foundation of Authority*, 11 CARDOZO LAW REVIEW 919 (1990); LUHMANN (note 2), 308.

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this practice reaches beyond the case at hand.[29] A judgment, its decisions, as well as its justification can amount to significant legal arguments in later disputes about what the law means.[30] We concentrate precisely on this dimension of judicial lawmaking that we see in the creation and development of actors' general normative expectations—that is expectations sustained and stabilized by law about how actors should act and, more specifically, how they should interpret the law. Most international judgments reach beyond the dispute and the parties.

Courts, at least those that publish their decisions and reasoning, are participants in a general legal discourse with the very decision of the case, with the justification that carries the decision (*ratio decidendi*), and with everything said on the side (*obiter dictum*).[31] For good reasons, actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court to rule consistently if a similar case arises. Actors in Latin America will expect the Inter-American Court of Human Rights to declare amnesties for generals who ordered torture null and void;[32] a party requesting a provisional measure by the ICJ will expect the court to declare it as binding;[33] and foreign investors, as well as host states, will expect any investment tribunal to consider arbitrary and discriminatory processes, or a lack of due process, as breach of fair and equitable treatment.[34] Some domestic constitutional courts even require domestic institutions, in particular domestic courts, to heed the authority of international decisions as precedent.[35] In addition, it seems that, as a matter of fact, many decisions not only aim at settling the

[29] William S. Dodge, *Res Judicata*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2006), available at: http://www.mpepil.com.

[30] Christian Kirchner, *Zur konsequentialistischen Interpretationsmethode,* in: INTERNATIONALISIERUNG DES RECHTS UND SEINE ÖKONOMISCHE ANALYSE, 37, 39 (Tomas Eger, Jochen Bigus, Claus Ott & Georg von Wangenheim eds, 2008).

[31] MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 76, 209 (1996); Iain Scobbie, *Res Judicata, Precedent, and the International Court: A Preliminary Sketch*, 20 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 299 (1999); STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 321 (2009); Armin Höland, *Wie wirkt Rechtsprechung?*, 30 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 23, 35 (2009). *Also see* Oellers-Frahm (note 14), 1046 (arguing that advisory opinions do not only clarify the law but also contribute to establishing basic doctrines of international law)

[32] Binder (note 6).

[33] Oellers-Frahm (note 6).

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

[35] 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, margin number 68 (referring to a domestic court's duty to take a decision of the ECHR into account).

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case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon that also clearly transcends the limits of the particular dispute and impacts the general development of the legal order is of particular interest to us.

Judicial lawmaking is not a concept of positive law, but a scholarly concept; as such it is to be judged on its usefulness for legal scholarship. One contending conceptual proposal is judicial activism (or pro-active courts).[36] One of the main drawbacks of this concept is that it does not specify in what the activism lies. It also obscures the most important element of such "activism"; namely the generation of legal normativity for third parties not involved in the dispute. This also holds true for the concept of dynamic interpretation that tends to overdo what states would have had to know the moment they entered into legal obligations.[37] In the German-speaking world, the concept of *richterliche Rechtsfortbildung* is used often[38] and can be translated as the judicial development or evolution of the law, which are also terms of art in English. Its upside is that it clearly differentiates adjudication and legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both of these aspects are expressed in the concept of judicial lawmaking, which is, in addition, introduced in the Anglo-American legal terminology.[39] For these reasons we opt for lawmaking as our leading concept to mark our object of inquiry. It captures the generation of legal normativity by international courts that creates, develops, or changes normative expectations.

The term *judicial* lawmaking indicates that it is not the only form of lawmaking. In fact, much lawmaking occurs by using the formal sources of law. One reason for unease with the concept of judicial lawmaking might be due to the concern that it is oblivious to important differences between judicial lawmaking and lawmaking through formal sources.[40] We agree with this concern. Whoever develops theory and doctrine on judicial lawmaking needs to be cautious of differences with lawmaking through formal sources,

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[36] *See* Binder (note 6).

[37] *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, para. 64. *Cf.* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 443 (2010).

[38] *See* RICHTERLICHE RECHTSFORTBILDUNG. ERSCHEINUNGSFORMEN, AUFTRAG UND GRENZEN (Hochschullehrer der Juristischen Fakultät der Universität Heidelberg eds, 1986).

[39] This distinction is held up in the use of different terms in German-speaking legal science whereas in the world of common law the innovative judge frequently simply figures as *lawmaker*. *South Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Justice Holmes, dissenting); Lord Reid, *The Judge as Law Maker*, 12 JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 22 (1972).

[40] Oellers-Frahm (note 14), section D.III.

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paying particular attention to distinct legitimatory profiles and the divergent institutional requirements. Sweepingly equating judicial law *application* and *legislation* may not be convincing. Speaking of judicial lawmaking is much less precarious than also using the term legislation for the activity of courts.[41] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

III. International Judicial Lawmaking as an Exercise of Public Authority

International adjudication would not of its own require an elaborate justification under the principle of democracy if it did not amount to an exercise of public authority: The very term *kratos* implies that link.[42] In the domestic setting, the public authority of courts is an essential element: *Justitia* herself not only handles scales but also wields a sword. It is rather evident in democratic constitutional contexts marked by the rule of law that mechanisms are in place to effectively implement domestic court decisions. This is evidently not the same when it comes to decisions of international courts. According to Art. 94(2) UNC the Security Council could take coercive measures if disregard for decisions of the ICJ threatened international peace and security.[43] In practice, however, noncompliance with judgments of the ICJ or most other courts rarely draws coercive measures of such kind in response.

The relative lack of strong enforcement mechanisms at international institutions, whether the institution is a bureaucracy or a court, certainly needs to be taken into account in addressing their democratic legitimation. But does this mean that our investigation into their democratic justification is skewed? This might indeed be the case if one followed a traditional conception of public authority that is limited to coercive power.[44] Then the activity of most international institutions, including judicial lawmaking, would not amount to public authority. Yet, such a traditional conception has become, if it has not always been, both inadequate and implausible. The concept of public authority should rather include other ways of exercising power that are no less decisive and incisive than coercive enforcement.[45] Today, it is an empirical fact that the impact of international institutions

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[41] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 155-223 (1958) (speaking of "judicial legislation").

[42] *See* Werner Conze, *Demokratie*, in: 1 GESCHICHTLICHE GRUNDBEGRIFFE, 848 (Otto Brunner, Werner Conze & Reinhart Koselleck eds, 1972).

[43] *See* Hermann Mosler & Karin Oellers-Frahm, *Article 94,* in: THE CHARTER OF THE UNITED NATIONS. A COMMENTARY, 1174, 1176 (Bruno Simma ed., 2002).

[44] Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCIENCE 201, 202 (1957); RALF DAHRENDORF, ÜBER DEN URSPRUNG DER UNGLEICHHEIT UNTER DEN MENSCHEN 20 (1961).

[45] *Cf*. Michael Barnett & Raymond Duvall, *Power in Global Governance*, in: POWER IN GLOBAL GOVERNANCE, 1 (Michael Barnett & Raymond Duvall eds, 2005) (offering a nuanced conception of power that suits present purposes).

on social life can be similar in significance to that of domestic institutions.[46] In order to give effect to this observation and experience, we understand authority more broadly as the legal capacity to influence others in the exercise of their freedom, i.e. to shape their legal or factual situation.[47] Even if international judicial decisions are usually not backed by coercive mechanisms, they still condition parties to the dispute as well as other subjects of the legal order in the exercise of their freedom.[48]

That said, international courts *are* frequently embedded in contexts that may lever considerable enforcement mechanisms in support of their decisions, even if not to the same degree as in many domestic contexts of the rule of law. The Committee of Ministers of the Council of Europe oversees the implementation of decisions of the ECtHR;[49] member states of the ICC cooperate with the court in the execution of sentences and are obliged to implement its decisions;[50] in the framework of the WTO, members may resort to countermeasures once their claims have succeeded in adjudication;[51] and arbitration awards of ICSID-Panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[52] In sum, a more refined understanding of how authority is exercised and a cursory look at the enforcement mechanisms that do exist supports the contention that international courts do exercise public authority in deciding legal disputes.

But what about the lawmaking dimension of international decisions that reaches beyond the individual case? Judicial decisions impact the legal order differently than new legal provisions that pass by the way of the sources of law. Decisions figure as arguments and influence the law through their impact in the legal discourse. The lawmaking effect of judicial decisions, in particular in their general and abstract dimension that goes beyond the individual case, does not only depend on the *voluntas*, but also on its *ratio*. Legal scholarship, legal counsel, other courts and the same court at a later point in time must first be convinced of the quality of the decision. Whether a judicial interpretation turns

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

[47] 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, 1381 (2008).

[48] Reputational costs are relevant even for such weighty and mighty actors as the United States. In a *rational choice* perspective, *see* ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS 71 (2008).

[49] Art. 46 (2) European Convention on Human Rights.

[50] Art. 193 *et seq.* Rome Statute of the International Criminal Court.

[51] Art. 22 Dispute Settlement Understanding.

[52] Art. 54 ICSID-Convention.

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out to make law depends on its reception by other actors involved. If this is so, does it then make sense to understand lawmaking in the practice of adjudication as an exercise of public authority?

International decisions enjoy an exceptional standing in semantic struggles about what the law means.[53] Judicial precedents redistribute argumentative burdens in legal discourse in a way that is hard, if not impossible, to escape.[54] In many judgments, precedents act as arguments in support of decisions that in terms of authority are hardly inferior to provisions spelled out in an international treaty. Courts regularly use precedents in their legal reasoning and, at times, engage in detailed reasoning on how earlier decisions are relevant or not. Disputing parties are of course well aware of this and thus fight about the meaning of earlier judicial decisions as if they formed part of the sources of international law and as if they could themselves carry judgments of (il)legality. In practice the response to one party relying on an earlier judicial decision is not that there is no formal rule of precedent, but rather, the response is to counter that claim with other arguments, distinguishing the case referred to, or using it in a different way. Many contributions in this issue analyze this dynamic in closer detail.[55]

The Appellate Body of the WTO has for example relied on Art. 3(2) DSU (providing that "[t]he dispute settlement of the WTO is a central element in providing security and predictability to the multilateral trading system") to argue that previous reports on a subject matter "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[56] Recently it raised its tone a notch and even suggested that a failure to do so by a panel might amount to a

[53] On the akin concept of „semantic fights", *see* Ralph Christensen & Michael Sokolowski, *Recht als Einsatz im semantischen Kampf,* in: SEMANTISCHE KÄMPFE. MACHT UND SPRACHE IN DEN WISSENSCHAFTEN, 353 (Ekkehard Felder ed., 2006). For a yet more drastic understanding, *see* Robert M. Cover, *Violence and the Word*, 95 YALE LAW JOURNAL 1601 (1986).

[54] ALAN E. BOYLE & CHRISTINE M. CHINKIN, THE MAKING OF INTERNATIONAL LAW 272-311 (2007). *Cf*. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS LAW JOURNAL 814, 838 (1987), ("The judgment represents the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone. These performative utterances … formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized. They succeed in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose.")

[55] *See*, in particular, the contributions by Jacob (note 6); Schill (note 6); Venzke (note 6); Oellers-Frahm, (note 14).

[56] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS 8, 10 and 11/AB/*R,* 4 October 1996, 14-15.

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violation of the obligation to conduct an objective assessment of the matter before it.[57] Panel and Appellate Body reports plainly do create legitimate expectations that must be considered in subsequent adjudication.[58] This is usually seen clearly in legal scholarship and it is evident to anyone involved in the operation of the system. For example, in the discussions pertaining to the *US-Shrimp* report, the Brazilian representative in the WTO Dispute Settlement Body stated that "[a]lthough no binding precedents had been created, the findings and conclusions of panels and the Appellate Body adopted by the DSB had created expectations concerning future interpretations of the DSU and the WTO Agreement."[59]

In sum, the disputes about precedents illustrate how judicial decisions impact the legal order and influence individual as well as collective spheres of freedom beyond the individual case. The adjudicatory practice of any court that has some reputation should accordingly be qualified as an exercise of public authority that demands justification.[60] This is in particular so when courts have compulsory jurisdiction and decide a stream of cases conducive to a *jurisprudence constante*. It may be worth adding that our relatively broad conception of authority also stems from a principled consideration: If public law is seen in a liberal and democratic tradition as an order for safeguarding personal freedom and for allowing collective self-determination, then any act with an effect on these normative vantage points should come into consideration the moment its effects are significant enough to give rise to reasonable doubts about its legitimacy. International courts and tribunals enjoy an outstanding position in international legal discourse and their interpretations palpably redistribute argumentative burdens. They develop the law through their practice in a way that conditions others in the exercise of their freedom as they find themselves in a legal situation shaped by the courts.

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

[57] This is a reference to Art. 11 DSU. *See*, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para. 162 (stating that "We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system").

[58] *See* Venzke (note 6).

[59] Dispute Settlement Body, Minutes of the Meeting held on 6 November 1998, WT/DSB/M/50, 12.

[60] On the concept of reputation, *see* GUZMAN (note 48), 71.

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law but not as a source of law.[61] It is still a lasting task to formulate a convincing response to the dissonance between the ordering of sources doctrine and the actual working of precedents. This is a task that strikes above all at positivist thinking prevalent in continental Europe.[62] Conversely, scholars at home in the common law tradition tend to neglect prerequisite institutional contexts when they downplay the distinction between sources of law and sources for the determination of law; above all, they ignore the fact that in domestic contexts the common law idea of judicial lawmaking goes hand in hand with a notion of parliamentary legitimation that is unworkable at the international level.[63] The distinction retains importance in particular if one considers that the international institutional order is marked by an asymmetry between powers. This leads us to the central problem in the justification of international courts: In domestic contexts of functioning democracies, judicial lawmaking is embedded in a responsive political system—something that is lacking at the international level in similar quality.

C. On the Justification of International Judicial Lawmaking

I. The Decoupling of Law from Parliamentary Politics

The lawmaking effect of adjudication is a common feature of judicial activity in any legal order.[64] However, *international* judicial lawmaking displays specific features that make it structurally more problematic when compared to the domestic context. One of the quintessential lessons of modern constitutionalism, which is worth recalling, is that legislation and judicial adjudication are two phenomena that should be kept apart and at the same time be understood in their intricate interaction.[65] It is a related and similarly great achievement of constitutional theory that it has conceptually grasped both distinction and connection, while stabilizing their simultaneity in legal institutions. The prevailing approach comes under the heading of separation of powers (or checks and

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[61] Allain Pellet, *Article 38,* in: STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 677, paras 301-319; GODEFRIDUS J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 169 (1983).

[62] *See, e.g.,* Georges Abi-Saab, *Les sources du droit international: Essai de déconstruction,* in: 1 EL DERECHO INTERNACIONAL EN UN MUNDO EN TRANSFORMACION, 29 (Manuel Rama-Montaldo ed., 1994); BOYLE & CHINKIN (note 54), 267.

[63] *Id.,* 266-272; more cautious and openly flagging his common law bias, Robert Howse, *Moving the WTO Forward—One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223 (2009).

[64] *See* already MANLEY O. HUDSON, PROGRESS IN INTERNATIONAL ORGANIZATION 80 (1981 [1932]); LAUTERPACHT (note 41), 155 ("judicial law-making is a permanent feature of administration of justice in every society ").

[65] *See* Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in: RECHT, STAAT, FREIHEIT, 143 (1991); MARTIN LOUGHLIN, PUBLIC LAW AND POLITICAL THEORY 138 (1992).

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balances) and it situates the legitimation of every power in its interaction with other powers.[66] Years of quarrel and learning have also established that law means *positive law*, at least in modern constitutional states.[67] The hallmark of positivity is that the legislature is responsible for this law.[68] In democratic societies, the majority (usually understood as the elected government) can intervene in the legal order by way of legislative procedures and, thus, can change the law.[69]

This main avenue of democratic legitimation is strained when it comes to international law and adjudication in a static perspective that focuses on the role of the parliament in the making of international agreements.[70] But the phenomenon of international judicial lawmaking primarily directs attention to a *dynamic perspective*.[71] International courts do not operate as parts of polities that include functioning political legislatures. Once an international agreement is in place, it is largely withdrawn from the grasp of its individual makers. This profoundly changes the relationship between law and politics. By agreeing to an international treaty, the parliamentary majority of the moment cements its position and puts it beyond the reach of any later majority.[72] This strategy is particularly incisive when

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[66] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. XII (1690); GIUSEPPE DE VERGOTTINI, DIRITTO COSTITUZIONALE COMPARATO 346 *et seq.* (1999); for a detailed analysis, *see* HANSJÖRG SEILER, GEWALTENTEILUNG: ALLGEMEINE GRUNDLAGEN UND SCHWEIZERISCHE AUSGESTALTUNG (1994); CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG: LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH (2005).

[67] For an early use of such a conception of positivity, *see* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHIE DES RECHTS § 3 (1970).

[68] Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, in: RECHT, STAAT, FREIHEIT, 289, 322 (1991). With regard to the situation in a common law context: PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 141 (1991).

[69] ARMIN VON BOGDANDY, GUBERNATIVE RECHTSETZUNG 35 (2000). We do not think that international courts can draw sufficient legitimacy from the fact that they check the power exercised by other institutions. Such argument is made by SABINO CASSESE, WHEN LEGAL ORDERS COLLIDE: THE ROLE OF COURTS 122-124 (2010).

[70] Our argumentation only relates to countries with a democratic constitution. For citizens living under authoritarian rule, this problem has to be examined separately. On the role of parliaments, *see* Armin von Bogdandy, *Parlamentarismus in Europa: eine Verfalls- oder Erfolgsgeschichte?*, 130 ARCHIV DES ÖFFENTLICHEN RECHTS 445 (2005); PHILIPP DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS 294 (2004); Meinhard Hilf & Matthias Reuß, *Verfassungsfragen lebensmittelrechtlicher Normierung im europäischen und internationalen Recht*, 24 ZEITSCHRIFT FÜR DAS GESAMTE LEBENSMITTELRECHT 289, 293 (1997); Rüdiger Wolfrum, *Die Kontrolle der auswärtigen Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTLER 38 (1997).

[71] Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 405 (2005); Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism?* 53 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 861 (2004).

[72] Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421, 429 (2000); Judith Goldstein, Miles Kahler, Robert Keohane & Anne-Marie Slaughter,

it comes to regimes that are characterized by relatively strong mechanisms of adjudication because such regimes tend to portray a greater dynamic and non-compliance usually bears greater costs. A later majority may in principle be able to exit a regime. But this possibility speaks in favor of democratic legitimacy in the same unsatisfactory way as the right of individuals to emigrate supports the legitimacy of domestic public authority.[73] It can hardly be a sufficient escape hatch and, in any event, it frequently does not constitute a realistic option because it is legally impracticable (long sunset clauses on investment treaties, for example) or the costs of exit are prohibitively high.[74]

This dynamic perspective on the decoupling of law from politics is critical when it comes to areas of the law which are marked by international judicial institutions. As analyses of the American Convention on Human Rights, the European Convention on Human Rights, as well as international trade and investment law all show, international judicial institutions have had significant impact on the development of the law and on the shape of the respective legal regimes.[75] Their grasp on the making of the law has not been confined to substantive provisions but is maybe all the more creative with regard to developments in procedural law and their genuine competences.[76] The history of provisional measures tells the intriguing story of a vivid dynamic between international courts and tribunals, starting out with a claim by the Inter-American Court of Human Rights that its provisional measures are binding, passing via a number of other international judicial institutions, including the International Court of Justice, and even leading arbitral tribunals and human rights bodies to make the same claim, although the wording and drafting history of the rules of procedure of the former suggested otherwise and the latter are not even empowered to

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Introduction: Legalization and World Politics, 54 INTERNATIONAL ORGANIZATION 385 (2000) (understanding this to be a general political strategy).

[73] Art. 13(2) Universal Declaration of Human Rights, GAOR III Resolutions, UN-Doc. A/810, 71; Art. 12(2) International Covenant on Civil and Political Rights, UNTS, vol. 999, 171; Art. 2(2) Additional Protocol 4 to the European Convention on Human Rights, ETS No. 46.

[74] Note that, referring to the doubtful legitimation of arbitral jurisdiction, Bolivia declared on 1 May 2007, that it would exit the ICSID Convention, *see* Bolivia Foreign Ministry, Letter Concerning Denunciation of ICSID Convention, 1 May 2007, 46 INTERNATIONAL LEGAL MATERIALS 973 (2007). *Also see* Christian Tietje, Karsten Nowrot & Clemens Wackernagel, *Once and Forever? The Legal Effects of a Denunciation of ICSID*, in: 74 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (Christian Tietje, Gerhard Kraft & Rolf Sethe eds, 2008).

[75] *See* respectively the contributions by Binder (note 6), Venzke (note 6), Schill (note 6), Oellers-Frahm (note 14). Compare this with the ambivalent track record explained by Petersen (note 6).

[76] On developments in procedural law that form part of strategies responding to problems in the justification if international judicial lawmaking, *see* von Bogdandy & Venzke (note 15).

deliver binding opinions.[77] The European Court of Human Rights has also contributed to a remarkable innovation in its procedures with the instigation of so-called *pilot judgments*.[78]

A number of qualifications would be in order and a more detailed picture may well offer instances in the institution's histories that seem ambivalent. Some institutions, and some judges in those institutions, are also more dynamic than others. This does not diminish the argument that the remarkable increase in number of international judicial institutions and quantity of international decisions has contributed to a greater detachment of the law from parliamentary politics. It is interesting to note in this regard that dispute among state parties about the law and about the proper course that a court should take may not only be understood as a factor that pushes a court to be more cautious in its interpretations but also as a context that may offer it more leeway because it faces less risk of being countered in form of interpretative declarations or treaty amendments. Eyal Benvenisti and George Downs argue that the absence of consent among subjects of the law may increase the chances of judicial lawmaking.[79]

II. Fragmentation as a Problem for Democracy

A further critical element in the justification of international courts' authority concerns the institutional differentiation of distinct issue areas. Such differentiation narrows down the perspectives that may be cast on a certain subject matter. Why is this relevant, let alone problematic, with regard to the quality of democratic legitimation? Because it negatively affects the requirement of generality. In its legitimatory aspect, the requirement of generality is related to the process of law-creation and demands that the democratic legislature is the central place of norm production and legitimation.[80] More specifically, it demands that procedures in this place are thematically unsettled and are open to all kinds of competing perspectives. It must further be open-ended, in the sense of being without a predetermined solution. They must not prejudge or, in principle, preclude any relevant aspect in the decision-making process from the point of view of a particular functional perspective.[81] Subject matters should not be distorted from the outset by the order of

[77] Oellers-Frahm (note 6).

[78] Fyrnys (note 6).

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

[80] TOBIAS LIEBER, DISKURSIVE VERNUNFT UND FORMELLE GLEICHHEIT. ZU DEMOKRATIE, GEWALTENTEILUNG UND RECHTSANWENDUNG IN DER RECHTSTHEORIE VON JÜRGEN HABERMAS 226-229 (2007).

[81] We take this point from Jürgen Bast, *Das Demokratiedefizit fragmentierter Internationalisierung,* in: DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT – SONDERBAND 18, 177 (Hauke Brunkhorst ed., 2009). *Also see* MÖLLERS (note 66), 31, 223.

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things as defined by functional narratives. The starting point of this argument is the individual as a whole, multidimensional human being that cannot be split into functional logics but rather calls for a mechanism of representation in which competing perspectives can be negotiated.[82]

Due to the functional differentiation of distinct areas of politics on the international level, the chances of meeting this imperative of democratic generality are dim. In functionally tailored international regimes, it is next to impossible to arrive at a certain degree of generality because in every regime there already is a particular set of preferences and concerns that is prevalent.[83] This undermines the requirement of generality as a critical element of democratic legitimation.[84] A functionally fragmented international judiciary threatens to weaken democratic generality in the continued development of the legal order.

This is a problem that is part of, but distinct from, the decoupling of the law from parliamentary politics generally because it relates to deeper processes of sectoral differentiation. It suggests that increasing political oversight would be democratically meaningful to the extent that it heeds to the principle of generality. Oversight would have to transcend sectoral fragmentation, largely a question of personnel and of links to domestic levels of governance. The shift towards functional and institutional differentiation of international decision-making processes must not go hand in hand with a shift from democratic to technocratic rule.[85] Against this background we are also skeptical that seeing fragmented regimes in a system of checks and balances, where one rationale (and its institution) counters others, helps to ease concerns.

D. Structure of this Special Issue

The remainder of Part I offers additional conceptual groundwork that helps to understand the phenomenon of judicial lawmaking. Marc Jacob exposes in greater depth the issue of *Precedents: Lawmaking Through International Adjudication*. Transcending the partisan views on the issue that often stem from particular jurisdictions and legal traditions, he

[82] Andreas L. Paulus, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?*, in: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY, 193, 210 (Tomer Broude & Yuval Shany eds, 2008).

[83] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553 (2002); Tullio Treves, *Fragmentation of International Law, The Judicial Perspective*, 23 COMUNICAZIONE E STUDI 821 (2007).

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

[85] Paulus (note 82), 210.

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argues that the working of precedents is a rather natural byproduct of legal reasoning and dispute settlement. Saying that precedents are not binding in international law has very little purchase, if any. As a matter of fact, precedents are key to shaping the law as it is. They both create and constrain future legal practice while exclusively focusing on lawmaking by way of formal sources turns a blind eye to the critical role of precedents. The real question, Jacob maintains, is not whether judicial precedents form part of lawmaking, that much is hard to deny, but what the limits might be to this activity. He thus takes a closer look at how precedents are utilized in making claims regarding a system of law and how they actually operate in practical legal reasoning, concluding that, irrespective of any officially afforded normativity, precedents are not inherently more determinative as statements of law than formal sources are. But from whatever angle one looks at them, they shift and stabilize normative expectations and, thus, play an integral part in the making of international law.

The contribution by Karin Oellers-Frahm then asks about the *Lawmaking through Advisory Opinions*. Showing their general impact on the international legal order is of particular importance for this research project because advisory opinions are not even considered binding on any parties. But as Oellers-Frahm illustrates, they evidently impose argumentative burdens and justify state action. Even if advisory opinions could never be successfully invoked as genuine sources of the law in front of any court, they cannot be ignored either as they channel discourses about what the law is. Her contribution pointedly presents the wealth of practice of different institutions on this matter, explaining that advisory opinions weigh heavily in legal argument as authoritative statements of the law. Oellers-Frahm draws particular attention to the role advisory opinions may play in processes of customary law formation, as statements about the law but also as initial reference points that may give rise to new customary rules. She concludes by re-emphasizing that these considerations should not be taken without question to tear town all distinctions between the practice of courts, on the one hand, and legislation through the formal channel of sources, on the other. Also upholding the difference between what happens as a matter of fact and as a matter of law, Oellers-Frahm argues, is critical in view of state consent being the legitimatory basis of international law.

Eyal Benvenisti and George Downs bring the issue's first part to a close with their contribution on *Prospects for the Increased Independence of International Tribunals*. They complement the view on international courts as autonomous actors with an understanding that pictures them as possible instruments in the hand of more powerful states. The authors focus on the impact of powerful, developed, states on international courts and look at the domestic institutional context to learn how independence may be increased in the international system. They draw attention to judicial independence as a necessary, albeit insufficient, condition for legitimate judicial lawmaking. Beyond the nomination and work of judges as a decisive factor for courts' freedom to interpret and develop the law in the way they deem appropriate, Benvenisti and Downs suggest examining more closely the broader political context in which courts operate. The authors point out how political

divisions between constituent states (interstate competition) but also between branches of government (interbranch competition) impact the independence of international tribunals and their role in shaping the law, the contention being that more political competition translates into less constraints on their actions. The contribution concludes with an outlook on the respective merits of judicial lawmaking in comparison to politico-legislative processes, suggesting at the end that international courts may actually turn out to take better account of different interests and to better counter the distorting impact of powerful executives or dominant sectoral interests on the development of the law.

These introductory and foundational considerations pave the way for this special issue to turn to judicial lawmaking in distinct fields of the international legal order. It proceeds in the order of what may appear to be most problematic in terms of democratic legitimation. Part II covers the field of international economic law, characterized by a large amount of judicial practice and avenues of compulsory jurisdiction. Stephan Schill starts out by addressing *System-Building in Investment Treaty Arbitration and Lawmaking*. He observes that the practice of adjudication has created a rather closely-knit system of investment law that is significantly removed from the reach of states. Adjudication has palpably developed the normative expectations of both investors and host states. Schill examines the institutional features of international investment arbitration that might stand in the way of this development even though they ultimately will not hamper its dynamic. He pays close attention to the working of precedents in the making of a system of investment law that overlays the roughly 2,600 Bilateral Investment Treaties and he points to the wide range of policies under its purview, ranging from water management to the protection of cultural property. Large areas of domestic administration may come under considerable pressure from international investment law. The contribution closes with possible reactions to the current problems regarding the justification of international investment tribunal's exercise of public authority and proposes that the lawmaking of international investment tribunals should be guided by comparative public law.

Ingo Venzke addresses the no less dynamic and no less penetrating practice of adjudication in international trade law in his contribution on *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*. Setting the scene with a discussion of the institutional developments and normative environments in this field, he illustrates how the adjudicators have shaped the law on general exceptions in trade law, creating demanding thresholds that domestic policies pursuing non-trade objectives have to surmount in order to be justifiable. Portraying the argumentative patterns in this practice, Venzke also draws particular attention to the spells of precedents that structure the space of interpretation and generate legal normativity, a dynamic that was reinforced with developments ever since the inception of the World Trade Organization and the rise of the Appellate Body as the supreme authority on this issue. He examines how past arguments, even if part of reports that were not adopted by the political bodies, pervade legal practice and how the Appellate Body transformed them in its decisions. He closes with a discussion of the emergence of proportionality analysis as

a new hallmark of the Appellate Body's reign over general exceptions and concludes with a discussion of international adjudication in the context of multilevel governance, suggesting that practice should be informed by an understanding for the respective spheres of authority in a normative pluriverse.

What are possible reactions in response to judicial lawmaking in this field and elsewhere? The following two contributions continue to canvass the phenomenon of judicial lawmaking, placing the emphasis on strategies that may help to alleviate concerns about its normative justification. Michael Ioannidis proposes *A Procedural Approach to the Legitimacy of International Adjudication*. Drawing inspiration from the practice and theory of domestic administrative law, he highlights international courts' potential contribution in increasing the democratic qualities of decision-making processes; in short, their process-perfecting task. Such a kind of judicial lawmaking might be an appropriate alternative to substantive lawmaking. The well-known decision of the Appellate Body in *US-Shrimp*, Ioannidis suggests, may be read precisely in this light, obliging domestic regulators to give those affected outside their polity a meaningful say in the process of decision-making. Instead of adding to the substance of international norms, adjudicators could develop standards ensuring that internationally important decisions are the outcome of transnational processes of a certain quality, conducted in the shadow of the court. Such a procedural approach merits renewed consideration and may inspire practice in other fields of the law.

Thomas Kleinlein concludes the second part of this special issue with his contribution on *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*. He responds to the gap in the International Law Commission' study on the topic of fragmentation and to the significant role international courts can play in shaping the borders between different legal regimes. Kleinlein's contribution analyzes the potential benefits and the limits of balancing and proportionality analysis as a response to fragmentation, suggesting that these techniques can be understood both as restraints, in the sense that they are used by international adjudicators to hold back and acknowledge the authority of other regimes, and as judicial lawmaking, in the sense that with time this practice of governing the borders between legal regimes becomes structured and principled. He concludes that the potential of these techniques hinges on how well they stay attuned to different institutional sensitivities and to views on the proper allocation of authority, not only between regimes but also between the international and the domestic level.

The fields of human rights and humanitarian law treated in Part III know strong courts with compulsory adjudication just as well. But due to the nature of the matter, the terms of the debate are in part rather distinct. "Proactive" or "progressive" adjudication—lawmaking in our terms—for the protection of individuals against human rights violations and for safeguarding their privileges as civilians in combat situations may seem to many as intrinsically justified, yet problems in the democratic legitimation of judicial lawmaking

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persist also in this field. Christina Binder examines *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, drawing attention to how the court contributed to the growth of it competences throughout the years by broadly interpreting its mandate. The court quite successfully established that its judgments have direct effect and void contravening domestic laws. It also claimed that domestic courts within its reach are obliged to engage in a decentralized "conventionality control," testing domestic laws and acts when they come up against the American Convention on Human Rights. Binder points out how the court's jurisprudence has reshaped and confined the sphere of domestic policy-making. But she also notes that domestic courts, even in those states that were not part of respective disputes, have largely accepted this development. The convention's special rank in most domestic constitutional orders in Latin America helps to explain and justify this fact, just as well as the context of fragile democracies. In the long run, Binder argues, the court needs to continue striking a sensitive balance between developing international protection standards and accounting for spheres of domestic autonomy; its activity may cause a considerable stir beyond the issue of amnesties in which it has been most active so far.

Markus Fyrnys dwells on the matter of competences in his contribution *Expanding Competences by Judicial Law-Making: The Pilot Judgment Procedure of the European Court of Human Rights*. He addresses the court's crisis due to the huge number of 139,650 pending cases, many arising out of a systemic malfunctioning at the domestic level. The court however only has the capacity to handle 800 per year at a maximum. After politico-legislative efforts to meet this challenge remained unsuccessful, the court itself developed the pilot judgment procedure in its practice, identifying the systemic problem and telling the domestic legislature in surprising detail what steps they have to take. Fyrnys highlights how the court's new procedure affects the division and balance of competences in the system in both the horizontal dimension, above all in relation to the Committee of Ministers, and in the vertical dimension, in relation to domestic self-government. He concludes his contribution by drawing attention to the individual applicants whose claims would be stalled in the summary treatment of the problem on the basis of only one exemplary case.

The contribution on *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals* by Milan Kuhli and Klaus Günther studies international humanitarian law and the International Criminal Tribunal for the Former Yugoslavia, one of the most prolific international judicial institution to date. Drawing on the framework of discourse theory, the authors develop a distinction between discourses of norm justification, paradigmatically the business of legislatures, and norm identification, the business of judicial institutions. Kuhli and Günther focus on circumstances in which courts enter norm-justificatory discourses, a circumstance they illustrate with the tribunal's decision in *Kupreškić*. In said case the tribunal candidly makes moral arguments in support of its findings on the legality of belligerent reprisals. The authors contend in conclusion that such lawmaking activity on part of the tribunal does not give rise to legitimatory concerns

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to the extent that the tribunal's claims in norm-justificatory discourses remain subject to the acceptance by other participants in the discourse; after all, they conclude, the court's validity claims remain defeasible.

Part IV is dedicated to other aspects of the phenomenon that may so far have raised fewer concerns with respect to their democratic justification. In her contribution on *Expanding the Competence to Issue Provisional Measures—Strengthening the International Judicial Function*, Karin Oellers-Frahm shows the mutual influence between international judicial institutions in shaping the regime on provisional measures, in particular in regard to the question whether such measures are to be considered binding. While this was first either denied or seen as an open question, a dynamic triggered by the Inter-American Court of Human Rights more recently also lead international arbitral tribunals to make the claim that their provisional measures are indeed binding, in spite of the fact that the language and drafting histories of their rules of procedure might have suggested otherwise. It is interesting how courts draw upon each other here and transform their respective reasoning. Oellers-Frahm argues that the power to issue binding provisional measures may be deemed an inherent power of international courts. But when an institution does not even have the capacity to render binding final decisions, she suggests, it expands its competence claiming that its provisional measures are binding nevertheless.

The contribution *Lawmaking by the International Court of Justice—Factors of Success* by Niels Petersen develops a complementary theoretical account to determine whether international courts have actually engaged in lawmaking. He contends that there needs to be a change in the law over time and this change needs to be traceable in the activity of the court. Petersen further sets out to theorize which factors are conducive to such judicial lawmaking and relates this question to the structure of interests among states. Taking two instances from the International Court of Justice—the *Barcelona Traction Case* and the *Fisheries Jurisdiction Cases*—he illustrates both failure and success of judicial lawmaking, depending on whether or not the Court was responsive to the structure of interests prevailing at the time. The author concludes that this is what is decisive, much more so than the argumentative persuasiveness of the judgment.

With his contribution *The Making of a* Lex Sportiva *by the Court of Arbitration for Sport*, Lorenzo Casini offers comparative insights from private law arbitration in the transnational space. Setting the stage with an institutional history of the court marked by competition with other bodies and its ultimate victory, Casini shows how the court was the driving force in developing a global law for sport competition, developing common legal principles, interpreting global norms, and in effect harmonizing the law. He examines the relationship between the Court of Arbitration and national public authorities, suggesting that the latter sometimes commit themselves to standards developed by the court or cannot escape having their actions reviewed by it. Casini concludes by placing the practice of the Court of Arbitration in the broader discussion of judicial lawmaking in global governance. His study

offers support for the theory that the more complex private law regimes become, the more they resemble public law.

Part V concludes this special issue with a discussion of strategies in response to the phenomenon of international judicial lawmaking and its normative implications, building on the rich material unfolded in all contributions. In our closing article *On the Democratic Legitimation of International Judicial Lawmaking* we argue at the outset that it is not possible to do without considerations of democratic legitimation, showing the irreducible quality of the principle of democracy in context with other narratives of justification. This step mainly contrasts functionalist accounts that cling to the importance of the goals to be pursued. We then turn to three aspects of international judicial practice that harbor legitimatory potential. We first consider the democratic dimensions of judicial reasoning, above all its argumentative standards that allow for critique, but also its relation to political documents not amounting to sources. In view of repercussions following from processes of fragmentation we ultimately ask whether systemic interpretation may amount to a democratic strategy in judicial reasoning. Second, we show how judicial independence and impartiality are very important under the principle of democracy, reconsider the processes of judicial appointments and draw attention to the competing democratic *fora*. Third, we examine the judicial procedure for its legitimatory potential and argue that trends towards greater publicness and participation testify to an increasing recognition of the role of international judicial institutions in developing legal normativity beyond concrete cases. We conclude that, despite all achievements and even if strategies in response to legitimatory problems proved successful, there remains the discomfort that international courts may not always satisfy well-founded expectations of legitimation. Domestic organs will therefore continue to play a critical role in relieving the international level from some of its burden. But they would need to offer good reasons if they chose to contest international legal normativity; that should be beyond dispute too.