Introduction

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The everyday presence and impact of international law in our lives has probably never been felt as much as it has in the last hundred years. International law, and its associated rules and institutions, has effected changes in social and political structures that now often determine the way public and private entities conduct their affairs. Amongst these many institutions, international courts are some of the most important, but also potentially most contentious. International courts' decisions have begun to greatly affect the lives of peoples everywhere, ranging from redefining maritime limits of States and thereby affecting the economic activities of fisheries, to determining that domestic public authorities ought to compensate individuals for violations of individual and social human rights.

These courts have become more than just *legal* institutions and have rearranged the general global *political* scenario. They can no longer be considered mere deciders of cases between parties. In doing so, international courts have also repositioned themselves within the broader international political and social spectrum and their activities have, in many cases, been contested as acting beyond their original powers. The increase in the impact of international court decisions over peoples' lives derives from them having both the *authority* and the *legitimacy* to do so. These two concepts are central and integral to better understand the position of international courts in both the international and domestic legal, political and social scenario and are the fundamental elements discussed in the chapters of this volume. This introduction will sketch out some of the main issues that bind the various chapters of this volume.

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The central issues at stake

A discussion about the legitimacy and authority of international courts must begin with some conceptual clarification. We shall begin with "authority". Nowadays, social sciences generally rely on the concept of authority provided by Max Weber at the beginning of the 20th century — a concept that serves not only as a descriptive formula but also allows one to make sense of the various political mechanisms put in place in different societal spheres.[1] It also does not consider the *loss* of authority an absolute event but instead acknowledges the different ways that authority exists and can be exercised.[2] Weber's concept of authority has been so influential that authors such as Alaisdair MacIntyre have gone as far as to assert that there is no modern conception of authority that is not Weberian in its core.[3] In this respect, this volume looks at the exercise of public authority by courts and assesses the extent to which various public law theories may be used to create a democratically oriented framework that seeks to legitimize these courts' activities.

However, in this context another central problem appears. Even though international courts make law, the question whether their acts need to be "democratically" justified remains. As compared to other international institutions, it could be said that international courts should not need to seek democratic legitimacy if they focused on exercising their counter-majoritarian function. Their primary aim should be to guarantee their functional and normative legitimacy instead.[4] Nevertheless, the process of institutionalization of the international legal order greatly relies on the work of international courts. And if institutionalizing the international legal order means guaranteeing the minimum means of redress for violations of rights or mechanisms to protect rights, then one must investigate how such courts can be legitimized vis-à-vis those who may make use of them. This is clearly shown by the fact that international courts have determined many of the basic understandings of what has come to constitute crucial rules of international law. Examples would be the *Brazilian Loans*

1 Weber, M. (1980), *Wirtschaft und Gesellschaft* (5th ed.). Tubingen: Mohr Siebeck, 123.

2 Authority is given specific characteristics according to the mode in which is exercised: *Ibid.*, 124.

3 MacIntyre, A. (2007), *After Virtue. A Study in Moral Theory*. (3rd ed.). Notre Dame: University of Notre Dame Press, 109.

4 For instance, von Bogdandy, A. and Venzke, I. (2014), *In Whose Name? A Public Law Theory of International Adjudication*. Oxford: Oxford University Press.

Case[5], the *Serbian Loans Case*[6], and the *Oscar Chinn Case*[7]. An important contextual question here is whether international courts have the same potential to not only *institutionalize* international economic law but also to create public and democratic generalities in the international sphere. Some authors have argued that, at the international level, international courts are not only capable of effecting such changes but are also voices in the name of "peoples and citizens"[8].

For this purpose, one cannot only look at democratic theories. The concept or principle of democracy must be fundamentally internalized and operationalized through a larger, more comprehensive legal framework. Applying a public law theory to the activities of international courts would make sense, insofar as it has the potential to effectively create the conditions for the development of a democratic generality that affects decision making. Public participation and transparency, amongst other principles, could indeed reinforce the process of "politicization" these institutions are going through.

Yet for such a public law framework to be applicable, an attempt to define the contours of what, in fact, *the public* of such a framework would be needs to be made. One fundamental aspect about the determination of a public for international institutions – and the future application of a public law framework to serve the principles that guide their action – is represented by the idea of a potentially existing democratic generality at the international level.[9] This "generality" is no longer only represented by States as legal subjects in international law, but also consists of individuals, singularly and collectively considered (the "peoples") as well as other types of private actors, such as non-governmental organizations, multinational enterprises, etc. All of these entities, just like States, have acquired sufficient autonomy at the international level, which pushes them towards a

5 *Brazilian Loans*, Judgement 15, PCIJ, Series A, 12 July 1929. Similar to the Serbian Loans Case, in this decision, the PCIJ strengthened the process of stabilizing and reinforcing the institution of diplomatic protection, which would be instrumental to the development of international investment arbitration.

6 *Serbian Loans*, Judgement 15, PCIJ, Series A, 12 July 1929.

7 *Oscar Chinn*, Judgement 15, PCIJ, Series A/B, 12 December 1939. The Oscar Chinn case was also instrumental in providing further legal and political content to the institution of diplomatic. It went beyond that, however, and provided a legal justification for free trade in the beginning of the 20th century.

8 Von Bogdandy and Venzke, *supra* note 4, 213.

9 *Ibid*., 134.

movement of self-determination as free legal subjects.[10] Because they also constitute entities that form part of those affected by international courts' activities, the fact that they strive to guarantee their right to existence and action both at the domestic and international level creates a tension between individual self-determination (of these entities as legal subjects) and democratic self-determination.[11]

If public law, in accordance with the liberal-democratic tradition, is understood as a system that protects individual freedom and makes collective self-determination possible, and not merely as a political jurisprudence,[12] every act with repercussions for these normative principles must come under scrutiny to the extent that these repercussions are significant enough to raise justified doubts about the legitimacy of an act.[13] This is fundamentally grounded on an idea that the reason why international courts are capable of imposing changes on other entities is because of their authority. That this authority might be sociologically grounded alone, that is it does not need to be based on a particular set of positive norms, raises the question as to whether the normative legitimacy of these courts becomes necessary.

To assess how a public law framework ought to drive the work of international courts, it becomes vital to distinguish points of international *public* law from those elements of private law in the global sphere. This attempt to identify principles governing such public law is also an attempt to determine this public law itself in the international sphere.[14] The identity of this international *public* law is crucial for the justification of its principles.[15] Most public law theories attempting to consolidate principles that guarantee not only a simple justification for international courts but to also further a *democratic* justification, rely on two fundamental concepts: public authority and democracy. Democracy, as previously observed, is

10 Möllers, C. (2005), *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*. Tübingen: Mohr Siebeck, 28.
11 For a fundamental explanation of this tension, see *Ibid*., 29–30.
12 Loughlin, M. (2010), *The Foundations of Public Law*. Oxford: Oxford University Press, 159. See also, Möllers, *supra* note 10, III.
13 Von Bogdandy and Venzke, *supra* note 4, 169.
14 Grimm, D. (2012), *Das öffentliche Recht vor der Frage nach seiner Identität*. Tübingen: Mohr Siebeck, 43.
15 *Ibid*., in particular 48–57.

hard to define, in particular when considering the international sphere.[16] Such concepts are, as Armin von Bogdandy once stated, *prima ballerinas* for the understanding of modern public law, and need to be discussed and well developed before tackling and crafting new terms, such as those of governance and accountability.[17] In domestic law, the public authority of institutions is usually granted the coercive means to enforce their decisions[18] and will most likely find its grounding in a normative instrument, usually a national constitution.[19] The three most prominent theories attempting to provide such a framework combining these two concepts are well-known today: global administrative law, global constitutionalism, and the international public authority project. They attempt, though, to reconcile in different ways the ideas of public authority and democracy to offer a proper set of principles within which one can control and retain accountable international institutions. Also, in reaction to a model of international law based on *consent*, a public law framework should provide the necessary means to constrain, but also to enable the exercise of the various social agents' freedom.[20]

In this context, normative legitimacy is no longer an issue because public authority should be considered as an "actor's capacity" and should not require any further justification.[21] As has been argued, public authority within domestic law has grown "in the context in which the state, legitimate means of coercion, sovereign control over territory, politics, policies, and public law all coincided"[22]. However, given these same conditions are not present in the global sphere, the concept of public authority applied within the domestic law context cannot be simply transposed to the international. Here, public authority ought to be defined more broadly and

16 As Manfred Schmidt observes, many of the concepts of what one refers today as democracy depend not only on ancient and modern theories of democracy, but also of the content attributed to this concept by national constitutions (Schmidt, M.G. (2006), *Demokratietheorien. Eine Einführung* (3rd ed.). Wiesbaden: VS Verlag für Sozialwissenschaften, 20). The same difficulty can be also found at the international level. See also for this, Cartledge, P. (2016), *Democracy. A Life.* Oxford: Oxford University press, 283–304.

17 Von Bogdandy, A. (2013), "Foreword", *Transnational Legal Theory* 4(3), 313–314.

18 Von Bogdandy and Venzke, *supra* note 4, 111.

19 *Ibid.*, 112.

20 Von Bogdandy, A. *et al.* (2008), "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities", *German Law Journal* 9(11), 1375–1400, 1376.

21 Von Bogdandy and Venzke, *supra* note 4, 112.

22 *Ibid.*, 113.

should, in fact, be taken as the "capacity, based on legal acts, to impact other actors in their exercise of freedom"[23]. This definition provides for the scope of public law to be enlarged, which would allow it to encompass acts of domestic, supranational and international institutions. After all, as the authors argue, the previous conception of public authority fails to grasp that institutions beyond the state are also capable of influencing political self-determination and social interactions.

Nevertheless, the question as to whether there are ways of constructing mechanisms of democratic governance beyond the state has given rise to an interesting debate in international legal scholarship. Some authors have gone as far as to claim the existence of an "emerging right to democratic governance"[24]. Debating whether or not there is such a right is essential, but does not plumb the depth of the problem. International law has functioned and continues to operate regardless of it being democratic or not.[25] Not to mention, also, that for as much as contemporary international lawyers like to do away with it, consent is still a vital element in legitimizing international law and institutions.[26] Evidence of how little importance is attached to the idea of democracy in international law is the fact that there is absolutely no consensus about its definition in international law,[27] even if there have been efforts by the UN in that sense.[28] This "second-order view" problem remains unresolved precisely because there is no answer to the "first-order view'" question: is democracy a necessary value for international law and relations? The fact that despite the lack of any answers in this regard, international law continues to exist and function goes to show that, at this point, it remains moot as to whether democracy constitutes a fundamental aspect of international life.

In this regard, justifying the public authoritativeness of the acts of international courts is crucial for understanding how courts can function within a democratic-oriented public law framework that transcends the boundaries of States. Through a reconceptualization of public authority

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23 *Ibid.*, 112.

24 See for this Franck, T. (1992), "The Emerging Right to Democratic Governance", *American Journal of International Law* 86(1), 46–91.

25 Crawford, J. (2013), "Chance, Order and Change: The Course of International Law", *Collected Courses of the Hague Academy of International Law* 365, 275.

26 Krisch, N. (2014), "The Decay of Consent: International Law in an Age of Global Public Goods", *American Journal of International Law* 118(1), 1–40, 2.

27 Crawford, *supra* note 25, 277–278.

28 Charlesworth, H. (2015), "Democracy and International Law", *Collected Courses of the Hague Academy of International Law* 371, 99–100.

and the establishment of certain criteria for democracy based on a particular set of positive laws, some authors have attempted to precisely delineate a public law framework for international courts.[29] At the European level it may be even easier to identify a "democratic generality". At the international level, as noted above, this identification is more problematic. For instance, already in the beginning of the 20th century, the PCIJ saw that its function ought to be limited to the parties and that its effects ought to be restricted to them. This meant that rules of international law were the only normative basis for PCIJ decisions and no recourse to principles outside of this normative sphere could be taken.[30]

The structure of the book

The present volume has two parts. The first part centers on the more theoretical issues arising from the debate about the work of international courts. Instead of specifically tackling the activities of individual tribunals, it looks at the fundamental challenges posed by modern theories intended to either bolster or demolish the legitimacy and authority of international tribunals. Central to this part are the critiques – not criticisms – of the use of public law theories to justify the work of courts or the need to construe mechanisms to expand their "democratic legitimacy".

Therefore, the first part starts with a reflection by Alain Zamaria on the potentialities and limits of public law theories to explain or frame the activities of international courts and regulatory agencies. Mr Zamaria looks at how courts as "non-majoritarian institutions" are increasingly empowered and thereby require limitations on the basis not only of rules of law, but of principles of public law. Following Mr Zamaria's reflections on public law and international court more broadly, we have Prof. Aida Torres Pérez' chapter on how international courts in fact speak in the name of "nobody". Challenging a growing conception that international courts ought to be "democratically" legitimized, Prof. Pérez' chapter tries to show how integral to the proper exercise of their function is the retention of their counter-majoritarian position. In this respect, they correctly ought *not* to speak in the name of anyone. The third chapter, from Ms Parvathi

29 Von Bogdandy and Venzke, *supra* note 4; also, Grossmann, N. *et al.* (eds) (2018), *Legitimacy and International Courts*. Cambridge: Cambridge University Press.

30 *Serbian Loans*, *supra* note 6, 19. "From a general point of view, it must be admitted that the true function of the Court is to decide disputes between States or Members of the League of Nations on the basis of international law."

Menon, builds on the topic raised by Prof. Pérez, but goes in another direction. By taking recourse to a TWAIL approach, Ms Menon tries to show how international courts often- if not mostly – ignore the differences existing between States and participants' positions in the northern and southern hemispheres. Chapter four, by Dr. Lorenzo Gasbarri, adopts an interesting perspective and focuses on how courts work out their own "language" in order to create their own justificatory space. The last chapter of the first part, by Dr. André Nunes Chaib, takes on the issue of democracy and democratic generalities and questions whether such principles should be in fact applied to international courts. To justify their limited applications to international tribunals, Dr Nunes Chaib, compares the ways in which such principles can be used by courts and international organizations.

The second part is of a more practical nature. Instead of focusing on specific theoretical questions, it delves into the experience of a few specific courts or courts dealing with specific topics that may generate questions of legitimacy and authority. For instance, Chapter six, by Dr Cecily Rose, looks into how questions of legitimacy have been raised at the International Court of Justice (ICJ), by focusing on the issues raised in the Croatia vs. Serbia Case. Chapter seven, by Dr Lan Nguyen, challenges traditional notions of legitimacy often applied to the International Tribunal for the Law of the Sea (ITLOS). Dr Antoine Duval, in Chapter eight, concentrates on how the legitimacy of international – or transnational – courts governing the world of sports can offer interesting reflection points on how to rethink the way in which democracy, legitimacy and authority of courts can be rethought. In Chapter nine, Dr. Geraldo Vidigal offers a novel approach to examining how the principle of democracy can be used to look into the work of the WTO dispute settlement body. In Chapter ten, Prof. Rene Urueña discusses and critiques the use of particular democratic principles in the work of the Inter-American Court of Human Rights. In Chapter eleven, Dr Freya Clausen looks at the work of the European Court of Justice from a public law perspective and questions the extent to which the idea of democracy is really necessary to grant the Court's work legitimacy. Finally, in Chapter twelve, Prof. Armin von Bogdandy and Dr Laura Hering discuss how the democratic legitimacy of the European Court of Human Rights can be said to be based on the fact that they speak *in the name of the European Club of Liberal Democracies*.

The complex, but coherent, set of chapters contained in this volume should provide the reader with a wide array of novel information and approaches as to how one can discuss and tackle the issues of the legitimacy and authority of international courts. We hope to see this not as the conclusion of the debate, but as a reimagined spark to constantly and continuously stimulate thinking about the best ways in which we can reaffirm the importance of, or challenge, the work of such international courts.