International Courts and Tribunals: Rise and Reactions

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Approximately as will appear as the introduction to *The Judicialization of International Law - A Mixed Blessing?* Andreas Follesdal and Geir Ulfstein (eds.) Oxford University Press 2017. Contributions include

International courts and tribunals (ICs) are increasing in number and importance. They address an expanding variety of issues, ranging from the law of the sea to international criminal law. The ICs are typically of a compulsory character, be it *de jure* or *de facto*: states may in practice have little choice whether to accept their jurisdiction if they want to benefit from the relevant regime. They no longer only address disputes among states; several of them are open to non-state actors. And they have functions beyond dispute settlement: they develop or make law, make specialized regimes work through their interpretations, and contribute to compliance with international obligations. In short: international relations are increasingly *judicialized*. The present book maps and assesses this development - and reactions thereto, because the trends have met with mixed responses.

This judicialization of international law has been hailed as a glimmer of more effective and legitimate world governance promoting human rights, justice and peace. New ICs are called for as offering better governance for ever more problems, be it climate change or corporate wrongdoing. Some envision these ICs as contributions toward a world based on the rule of

law rather than politics, where the dignity of human beings rather than the interests of states matter.

But critics abound. The sovereign freedom of well functioning states is constrained by decisions wrought by ICs, be it the World Trade Organization (WTO) dispute settlement system or foreign investment tribunals. Some critics lament the circumvention of national democratic legislators and the neglect of cultural differences. The independence and professionalism of the judges are questioned, as are the accessibility, accountability and transparency of IC procedures

Others question the effectiveness of the ICs, asking whether there are better alternatives to such judicialization. Some fear the systemic impact of turf wars among the existing ICs, and the effects on sectors not covered by ICs, such as the environment. Yet others worry that some ICs will fall victim to their own success, pointing to the overburdened European Court of Human Rights.

These topics were addressed at the 11th Annual Conference of the European Society of International Law, held in Oslo 10-12 September 2015. The local organizer was the PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order. 400 international law scholars and practitioners gathered to discuss the judicialization of international law. The volume contains a selection of contributions presented first at the Conference, then subject to substantial editing.

The volume is composed to give a representative picture of the achievements of ICs, as well as the challenges they face. While only a few of the current international courts and tribunals are covered, those included are among those that have received most critical scrutiny.

The book shows that several of the ICs are living up to the aspirations, and that the fear of institutional fragmentation has only to a limited degree materialized. However, there is a diversity of opinions by different stakeholders of what to be desired from the ICs. Such diversity apply first of all to their general function. Should they be limited to dispute settlement, or should we expect them to develop international law, especially where there is an impasse among international negotiators? They should mainly promote effective implementation of international legal obligations, but to what extent and how should that objective be tempered by respect for national sovereignty and democratic self-determination? Should interests beyond those expressed in their founding treaty be given emphasis? And is the criticism against ICs really directed to the international judiciary or should it be addressed to the other actors and institutions in the global community? Are there good alternatives to ICs?

Other important questions concern how the ICs work. Are they strategic actors – and if so, in pursuit of which objectives, and how should they perform such a role consistent with their mandate and legal method? How do they respond to criticism, both in their legal and extra-

legal approaches? And how do and should other international actors, be they states, international organizations or NGOs, try to influence the functions of the ICs?

These questions lead to the issues of independence and accountability of the international judiciary. The basis of their legitimacy is their function as independent interpreters and appliers of international law in concrete cases. But with increasing empowerment more focus is placed on controlling the ICs: Who guards these guardians? How can they be held accountable without compromising the kinds of independence which matters for their functioning and legitimacy? Are there ways to provide control through an international institutional framework which ensures the voice of relevant stakeholders?

This volume gives food for thought on these important issues. But several of the authors underline that more – and interdisciplinary – research is needed.

The contributions to this volume address these critical questions both from general perspectives and as they pertain to particular ICs and concerning specific concerns. The first section provides a general frame for these legitimacy concerns. It discusses the historical expectations to ICs, including their law-making function; and how they are governed. The second section considers how the ICs appear to present their judgments in ways that legitimize them vis-a-vis states and other stakeholders; their inner workings; as well as possible alternatives to ICs. The following section considers the various forms of backlash several of the ICs experience, and how the ICs, states and civil society seek to respond to these challenges. The next section deals with the fragmentary character of the international judiciary. An epilogue looks to the future of international judicialization.

The first substantive chapters provide general frames for the following discussions. Jochen von Bernstorff identifies the several roles and functions of ICs from the perspective of Hans Kelsen's and Carl Schmitt's accounts of international law. Kelsen saw the international judiciary with compulsory adjudication and de facto law making authority as the key to a future peaceful world order. This would not require a world legislator. He also held that judges had considerable freedom in their interpretation and application of international law. Schmitt agreed that courts have a central law-making function, and also that judges are subject to few interpretative constraints. While the rise of the international judiciary has been remarkable, it might not have had the wide-reaching importance suggested by these two authors. Furthermore, we can query the desirability of such a prominent role of ICs. But Kelsen and Schmitt were not writing with today's sector-specific international courts in mind. Much current concerns about the legitimacy of ICs can be traced back to tensions with what could be claimed to represent a global judicial imperialism. Von Bernstorff warns against sectorial colonization in the sense that the specialized ICs take control over non-judicialized sectors.

Niels Blokker addresses a central, common legitimacy challenge to the governance of ICs themselves. How can various international organs – such as the General Assembly or the Assembly of States Parties - serve to secure the ICs' requisite independence whilst ensuring

their accountability? The governing institutions must ensure this balance in each case, but do so in different ways. Blokker demonstrates some of the dilemmas of 'balancing' the independence and the accountability of ICs. An important question is what would be the best organizational choice(s) – possibly with different answers for different ICs. International accountability is supplemented by domestic checks of IC accountability in terms of states' implementation or non-implementation of international judgments; withholding of funding; and even threats of exit. Further research is needed to assess the factual and desirable relationship between the independence of ICs and international and domestic accountability mechanisms.

The legitimacy of ICs also depends on what are the alternatives. We can think of political deliberations, conciliation, non-compliance procedures, and different forms of hybrids. All of these alternatives are to a great extent state-centred. This raises issues about the role of civil society in resolving international disputes. In the section concerning the working of ICs, Jerneja Penca contributes to the discussion about the value added of "The International Rights of Nature Tribunal" in light of the actual needs of potential users who enjoy multiple alternative venues for norm development and dispute settlement. This civil society tribunal borrows some of the language, structure and procedures from international tribunals. But this tribunal is aiming at giving Earth a voice and to influence the law and the outcome of defined disputes. Thereby, it demonstrates weaknesses of existing courts and tribunals.

The perceptions of legitimacy of ICs also depend on the substantive outcome of their judgments, as well as on their judicial reasoning. Special challenges arise when specialized ICs deal with issues beyond their specialization, such as when the WTO dispute settlement system as a trade mechanism addresses environmental questions. Christiane Gerstetter shows how WTO adjudicators seek to ensure that their decisions are accepted as legitimate where non-trade issues ("trade and …") are at stake, both by how the substantive outcome is presented and how this decision is supported by arguments. She concludes that the WTO dispute settlement bodies act strategically in order to win the acceptance of the member states, and ultimately legitimize this dispute settlement system as a judicial entity. This illustrates that ICs as legal organs can also be strategic actors in determining their judicial policy in relation to relevant actors.

Jeffrey L. Dunoff and Mark A. Pollack discuss the inner working of ICs, such as the drafting of judicial opinions; practices concerning separate opinions; the role of language and translation; and the roles of third parties They claim that 'social practice' theory can offer insights in how ICs work, and argue that such studies would benefit from inter-disciplinary approaches between international lawyers and international relations scholars. These international judicial practices vary among courts in interesting ways, and are not reducible to the structural features such as the statutes and procedural law of each court. The different practices raise questions about their historical origin as well as their suitability for addressing legal disputes in a fair and effective manner. But it is also pertinent to ask whether the different practices may colour the outcomes of the respective ICs.

Section three addresses several criticisms raised against various ICs. Some may perceive a pattern of backlash against these new, increasingly empowered independent bodies. Kjersti Lohne describes the impact of NGOs for the International Criminal Court (ICC), in particular the relative lack of regard for defendants' rights, especially the difficulties encountered by those acquitted. After the Coalition for the International Criminal Court contributed to the establishment of the ICC itself in the fight against impunity for international crimes, that Coalition has continued a victim oriented approach, arguably at the expense of defendants' rights. The ICC's focus on victims, 'truth' and 'memory' may challenge the legitimacy of the Court in the longer run. This contribution also demonstrates the particularities with international criminal tribunals compared to other ICs, in that the court's prosecutor has powers to bring cases, whereas other ICs are dependent on the willingness of the relevant rights-holders, be they states, individuals or companies, to initiate proceedings.

Malcolm Langford and Daniel Behn explore whether investment arbitrators are sensitive to vocal critics who charge them with being too favorable to investors. They discuss reasons for and against why arbitrators would be influenced by the legitimacy crisis of the investment arbitration system. Then they test their hypotheses against data found in a newly created database. The authors' primary finding is that arbitrators are responsive to negative and positive signals from states, but that large states have a disproportionately strong influence. The general mood of all states and, to some extent, other stakeholders may also be of importance. Further, arbitrators may be deferential towards states in cases raising clear issues of public interest and conflicts with other bodies of law, such as the environment. The authors conclude that more quantitative and qualitative studies are needed to test the effects of the investment legitimacy crisis on the behavior of the arbitrators. This contribution seems to support the above suggestion about ICs as strategic actors in taking account of the reactions to their practice – showing how ICs are accountable actors in being responsive to societal concerns.

David Caron and Esme Shirlow discuss the widespread criticism against investor-state dispute settlement (ISDS). They argue that these critiques must be disentangled in terms of the actors and substantive concerns. A main conclusion is that the misgivings may not be directed towards the dispute settlement mechanism itself, but rather concern broader worries about globalization. And several changes to the ISDS regime should have dampened such criticisms, raising questions about the protestors' knowledge and motives. Thus the critique will not necessarily provide useful guidance as regards the ISDS system. Similar experiences may be relevant for analyzing challenges raised against other ICs: it may be difficult to determine whether the critique really should be seen as addressed to for example to the organization of which the IC forms part, such as the WTO, or a more general protest against usurpation of national sovereignty.

Erik Franckx and Marco Benatar consider the peculiar backlash in the form of states rejecting the jurisdiction of ICs. They discuss how the People's Republic of China (PRC) rejected jurisdiction in the *Philippines v. PRC* arbitration. The authors draw comparisons with how the Russian Federation rejected the jurisdiction of an arbitration panel in the *Arctic Sunrise* case.

But both states participated in the peculiar form of forwarding 'position papers'. This allows states new modes of influencing the bench without formally participating in the proceedings, argues Franckx and Benatar. This may tempt other states to apply a similar approach. For example, Croatia has presented its views to an arbitration panel in a dispute with Slovenia, despite its non-participation after irregularities by one of the arbitrators. The PRC and the Russian Federation have also issued a joint declaration encouraging non-participation in international legal proceedings. These examples, again, show the flexibility of the ICs – within certain bounds. Also, while states may object to ICs through their practice, the examples seem to indicate that they prefer not to leave ICs entirely.

Section four considers how the ICs respond to the various fears of fragmentation across issue areas and courts. Dominika Švarc explores the way in which the interstate International Court of Justice (ICJ) deals with individual human rights and international humanitarian law. She argues that ever since the *Interpretation of Peace Treaties* case in 1950, the ICJ has taken an increasingly strong role in recognizing, interpreting and developing these two disciplines. The Court relies on the cooperation with regional human rights courts and global human rights treaty bodies.

Alain Pellet argues that we should not worry about fragmentation, given the multiplicity of international courts. To the contrary, he defends the dialogue among the many courts as contributing to the responsible development of international law. He responds to several criticisms concerning possible interpretative fragmentation; competing jurisdiction and forum shopping; as well as regional courts as a potential challenge to the global rule of law, holding that whilst fragmentation might be a problem in theory, it hardly ever occurs in practice. Pellet concludes that the several international courts are not a threat, but an enrichment of international jurisprudence.

As an epilogue to the volume, Philippe Sand lays out several of the challenges to international courts. He recalls conversations with the late Professor Vladimir Ibler from Croatia, who recommended that one should not draw conclusions about the legitimacy of ICs too quickly. Sands reminds us that international courts and tribunals are young, compared to national courts. Several of the ICs have encountered challenges, from accusations that the International Criminal Court is a neo-colonial instrument, to revelations about leakages and unacceptable communication in the boundary arbitration between Croatia and Slovenia. Sands encourages the relatively small community of practitioners and scholars engaged in the workings of ICs to speak out about the deficiencies of the system. However, he ends on a positive note with a sense of optimism for the future of the international courts and tribunals.

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The contributions in this book show that after a period of considerable expansion and increasing importance of ICs, several of them are faced with criticism about their legitimacy, and even backlashes. The criticism is diverse and may relate to the composition of the courts and tribunals, to their procedures, or to their legal interpretations and the acceptability of their

outcome. Some of the ICs are more susceptible to critique than others. The investment arbitral tribunals are currently under especial strong attack. They are accused of being composed of a small circle of lawyers, lacking in transparency, and favouring investors.

The authors demonstrate that the ICs have an ability to adapt to changing circumstances. For example, the respective courts and tribunals take into account practice from other ICs in an effort to overcome the increasing institutional fragmentation. Investment tribunals seem also to adjust their outcomes as a result of criticism. But such adaptations matters little if the concern is more general in its character, and in reality is a resistance against what is seen as a development towards undermining national sovereignty.

The ICs enjoys considerable discretion in their interpretation and application of international obligations. Their independence is a cornerstone in their legitimacy. But it does not seem that the institutional frameworks of the different ICs sufficiently reflect the need to secure both the independence and the accountability of the courts and tribunals. More focus should be on the design and functioning of such accountability mechanisms while preserving the independence essential for their credibility.

States may of course become so frustrated with the ICs that they choose to leave. But this is the rare exception. Instead, we have seen that states choose to participate in proceedings in an informal way, rather than how it is envisaged by the relevant treaty. We have so far only a couple of instances where this has happened. But while showing reluctance towards the relevant ICs, these examples seems to confirm that the threshold for a complete withdrawal is high.

Finally, the accountability of ICs should not only be a matter for the states parties. The courts and tribunals operate in an environment of public debate and academic works. There is a need for more information and engagement in the workings, successes and failures of the ICs – and of what we should reasonably expect from them. This requires further research on the ‘mixed blessing’ of international courts and tribunals.