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Armin von Bogdandy · Ingo Venzke (eds.)

International Judicial Lawmaking

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International Judicial Lawmaking

On Public Authority and Democratic Legitimation in Global Governance

With a foreword by Bruno Simma

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Foreword

This book explores three interrelated propositions under one thematic project. First, it describes the phenomenon of judicial law-making arising from various forms of international adjudication and analogous mechanisms of international dispute settlement. Secondly, it endorses judicial law-making when conducted in a legitimate manner. As a third proposition, the book argues that the legitimacy of any form of judicial law-making should be measured according to the value of democracy. (This democracy-based test of legitimacy of the exercise of public authority appears to continue the Heidelberg Max Planck Institute's innovative undertaking which led in 2010 to the publication of *The Exercise of Public Authority by International Institutions: Advancing* International *Institutional Law*). The grand vision of the project is to reveal the discursive patterns presumably unique to, and inherent in, the role of judges, arbitrators, and other types of dispute-settlers in the international system, in order to reach a more scientific *précis* of international legal normativity as developed by this community of decision-makers. As an enterprise both bold and provocative in contemporary international legal scholarship, the present book is not – as shown in the individual articles comprising this volume – without attendant, but interesting, complexities.

Armin von Bogdandy and Ingo Venzke submit that judicial law-making comprises the "judicial development of the law", and as such "is an intrinsic element of adjudication and it is not as such ultra vires" (*On the Democratic Legitimation of International Judicial Lawmaking*, 12 German Law Journal 1341-1370 (2011), at 1345). They do not confine law-making to the "sources" of international law enumerated in Article 38 of the Statute of the International Court of Justice but rather hold law-making virtually synonymous with all forms of "legal normativity." (*Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 German Law Journal 979-1004 (2011), at 979). Clearly, the present

book purposely expands the notion of "law" into a broader "normative" concept. It does not intend to demonstrate that, and how, international judicial institutions "create" or "author" the pedestrian categories of "sources" of international law, such as treaties, custom, or general principles. Instead, the book maintains that these institutions conduct "law-making" when their international decisions wield a primarily contextual influence on the ultimate content of international legal principles. To this end, it becomes relevant for von Bogdandy, Venzke, and the subsequent contributors to the book to identify possible "shifts" in the "normative expectations" of international actors as well as the addressees of their acts (*ibid*.) Using this broader understanding of "law" as "norms", several contributions propose to map some new (and quite unorthodox) spheres of "judicial law-making" in the international system – apart from the expected influence of international decisions as precedents. These instances of "norm-setting", in the view of the authors of the volume, actually describe cases of judicial law-making. For them, "lawmaking is an inevitable aspect of judicial interpretation". (*On the Democratic Legitimation of International Judicial Lawmaking*, at p. 1344).

Positivist international lawyers may not readily accept this deliberate shift, from a determination of the positive content of international law through the sources listed in Article 38 of the ICJ Statute towards a broader (and possibly more unwieldy) process of locating international legal normativity based on trends in judicial reasoning. But it is nonetheless a significant scholarly position that can advance the understanding of progressive developments in international law. In my 1995 Hague Academy lectures, I made an attempt to demonstrate that the contemporary international legal order reflects a marked transition from interstate bilateralism to a legal order founded on broader community interests. In an EJIL article (*The 'International Community': Facing the Challenge of Globalization,* 9 Eur. J. Intl. L. (2) (1998) pp. 266-277), Andreas Paulus and I also contended that States now channel the pursuit of many individual interests through multilateral institutions with different functional mandates. If one accepts that multiple institutions, individuals, and authorities now assume roles in the postulation of international law, one can better appreciate the innovative approaches of this book, with a caveat that the leap from postulation to legality remains a fairly aspirational one for the present. For this reason, I have some lingering reservations about the book's eagerness to explore all potential sources of normativity, even if they might go too far beyond the canon of Article 38 sources (*On the Democratic Legitimation of In-*

ternational Judicial Lawmaking, p. 1350). It is not clear to me, for example, whether the authors' call to have international judges "make explicit the principles they pursue with a certain decision", or to be "more open about the policies they pursue and what kind of social effects they intend to promote with a judgment" *(ibid.,* p. 1349), would still remain within the realm of the Court's jurisdiction to resolve disputes framed strictly according to the submissions made by sovereign States as parties before the Court. To some, the authors' call for such 'policy' disclosures by international judges might be read as a rather dangerous license for judicial overreach.

Leaving that ambiguity aside, however, one can still take a moderate view of the equivalence between norms and law to appreciate and examine the authors' conception of judicial law-making premised on a specific (and fairly constitutionalist) separation of powers paradigm. Here von Bogdandy and Venzke find that it is a "core problem of international judicial lawmaking" that there is a "distance to parliamentary politics" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1350). In order to expose this gap, several contributions in the present book focus on the processes of judicial reasoning in relation to political claims, institutional realities, and normative developments. For example, Niels Petersen (*Lawmaking by the International Court of Justice – Factors of Success*, 12 German Law Journal 1295-1316 (2011)) proposes innovations derived from game theory (although using some rather indeterminate variables for empirical measurement, such as 'state perceptions'), in order to isolate "legal developments" that are generated by decisions of the World Court. On the other hand, Thomas Kleinlein (*Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 German Law Journal 1141-1174 (2011)) presents an intriguing proportionality-based framework to rein in potentially overlapping, if not conflicting, interpretations of similar norms across different international regimes. Somewhat controversially, however, Eyal Benvenisti and George W. Downs draw a rather grim picture of the 'control' allegedly exercised by a "handful of powerful states that have tended to dominate the institutional design process [of international tribunals]" (*Prospects for the Increased Independence of International Tribunals*, 12 German Law Journal 1057-1082 (2011), at 1058) and which, according to these authors, have led to the issuance of international decisions of questionable legitimacy in the eyes of less powerful, or ultimately powerless, developing States. Resonating extreme realist overtones, these latter characterizations warrant further analysis and verification, in my view, where they suggest or im-

ply that international adjudication is ultimately a fatal enterprise because it is simply subordinated to the demands of *Realpolitik* and utterly devoid of any rule of law.

It is quite understandable that the various contributors to this book did not all adopt the same methodologies for determining or identifying the constituent elements of "judicial rule-making". The range of methodologies thus used provides insight into how the authors regarded and evaluated various aspects of international adjudication and dispute settlement. Marc Jacob takes a didactic and comparative law approach in his article on the theory of (often implied) precedents in international law (*Precedents: Lawmaking Through International Adjudication*, 12 German Law Journal 1005-1032 (2011)), an approach similarly employed by Stephan W. Schill when he argues that system-building occurs through precedent in investment treaty arbitration and accordingly generates normative expectations carried over to investment lawmaking (*System-Building in Investment Treaty Arbitration and Lawmaking*, 12 German Law Journal 1083-1110 (2011)); and by Ingo Venzke when he scrutinizes the effect of precedents from the WTO Appellate Body on the content of domestic regulatory policies protected under the exceptions of GATT Article XX (*Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 German Law Journal 1111-1140 (2011)). Karin Oellers-Frahm undertakes a taxonomic listing of the use of the advisory jurisdiction in numerous international organizations and tribunals (*Lawmaking Through Advisory Opinions?*, 12 German Law Journal 1033-1056 (2011)) as well as a description of the substantive and procedural requirements for the issuance of provisional measures by different international tribunals (*Expanding the Competence to Issue Provisional Measures – Strengthening the International Judicial Function*, 12 German Law Journal 1279-1294 (2011)). This descriptive approach is also mirrored in Michael Ioannidis' contribution on participation rights within the framework of rules contained in the WTO Covered Agreements (*A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 German Law Journal 1175-1202 (2011)), as well as in Markus Fyrnys' treatment of the pilot judgment procedure in the European Court of Human Rights (*Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights*, 12 German Law Journal 1231-1260 (2011)). Christina Binder uses a functionalist lens to analyze the impact of internal structural arrangements within the Inter-American Court of Human Rights

on the kind of 'norm-control' manifested in the trend of the Court's amnesty jurisprudence (*The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 German Law Journal 1203-1230 (2011)); somewhat analytically similar to the tools of discourse theory and institutional analysis employed by Milan Kuhli and Klaus Günther to expose the deliberate 'norm justification' conducted by the International Criminal Tribunal for the former Yugoslavia in its judgments (*Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 German Law Journal 1261-1278 (2011)). Most of the articles portray international decisions as forming a coherent (albeit at times dissonant) architecture of legal reasoning and international policy – which might be challenged in some quarters to be a foregone result of the authors' *a priori* selection of methodological tools that might be supportive of their ultimate conclusions. Nevertheless, irrespective of the occasional methodological disparities, I find that the contributions in this book valuably elicit, and helpfully succeed in provoking, a profound discussion of the actual scope of the "larger discursive contexts" (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1354) that underlie the making and enforcement of international decisions, including the potential effect of these discursive contexts upon similar disputes in the future.

Beyond describing judicial law-making, however, the present book moves to more provocative propositions. It endorses legitimate judicial law-making and tests for such legitimacy based on judicial law-making's conformity with democratic values. Von Bogdandy and Venzke are quite careful to state that their investigation into the democratic legitimation of judicial law-making does not aim "at bringing the noise of popular assemblies to the quiet halls of learnt justice… (*On the Democratic Legitimation of International Judicial Lawmaking*, p. 1343). Rather, on the premise 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" (*Beyond Dispute: International Judicial Institutions as Lawmakers*, p. 980), they posit that judicial lawmaking can (or indeed should) "be linked to the values, interests, and opinions of those whom it governs, i.e. its democratic credentials." (*Ibid*.). Manifestations of these democratic values include, among others, the independence and impartiality of international judges and the processes for their appointment; the public or transparent nature of international judicial proceedings as well as the access of a wider set of interested parties and public stakeholders to the disputes pending before international tribunals. As described in the various contributions

of the book, there are 'democratic deficits' in these aspects of international adjudication, which, the authors argue, ultimately militate against fulfilling the international community's expectations of the legitimacy of international judgments.

With the value of 'democracy' as its primary yardstick and a Montesquieu-esque constitutional theory of separation of powers as its foremost analytical paradigm, the book succeeds in thus depicting several 'democratic deficits' in various international tribunals such as ICSID tribunals, the WTO, ITLOS, and the ICJ. These critiques of undemocratic procedures in international adjudication also call to mind Francesco Francioni's arguments on the notion of an international right to access to justice (*Access to Justice as a Human Right*, 2007), but more importantly, the book brings to the forefront the key issue of international legitimacy as a separate and valid question in international lawmaking. The book's reliance on democracy as a key value in international relations, in my view, cogently delivers interesting realities and aspirations towards the achievement of common values in the international system. I still maintain that a strongly constitutionalist approach for assessing progressive developments in international law could be somewhat misguided as it "forces thinking about these developments into dogmatic structures (and strictures) that are, with regard to many questions, alien to the field and do not contribute to their creative-constructive handling." (Bruno Simma, *Fragmentation in a Positive Light*, 25 Mich. J. Int'l L. 845 (2003-2004)). However, I do not find that to be the case in the present book, as its authors carefully advance their claims about the lack of democratization within the institutional structures, rules, and processes of various international courts and tribunals. My only reservation lies with the extent of the authors' conceptions of democratization as a legitimating value, which, in my view, should perhaps be carefully differentiated with contextual sensitivity towards the actual internal mandates of such courts and tribunals and their corollary influence on the eventual paths of the international adjudicative practices of judges, arbitrators, and other dispute-settlers. For example, the 'exercise of public authority' by ICSID arbitral tribunals and the alleged accretive effect of ICSID awards on the evolving contours of international investment law, will necessarily be of a much different complexion from that wielded by the International Court of Justice according to its Rules of Court, Practice Directions, institutional history dating back to its predecessor, the work of the Permanent Court of International Justice, and the ultimate authoritativeness of the Court's jurisprudence as international precedents especially on general international

law issues of State responsibility, treaty interpretation, or the formation of custom, among others. To this end, Niels Petersen's use of game theory and reputational proxies to determine what states perceive as a "good decision" of the World Court (*Lawmaking by the International Court of Justice*, p. 1300) should be construed as his arbitrary view of possible determinants for the acceptance of an international judgment, inasmuch as it is Stephan Schill's perception that the development of a *jurisprudence constante* strikes an appropriate balance between the interests of investors and States is a democratic operation of 'legal certainty and predictability' (*System-Building in Investment Treaty Arbitration and Lawmaking*, p. 1106). While von Bogdandy's and Venzke's initial and concluding articles tightly describe their conceptual understanding of the value of democracy from judicial reasoning and forms of argument to issues of systematic interpretation and procedural legitimacy through the independence and impartiality of judges and the openness of international judicial procedures, this understanding does not always permeate all of the contributions to the book in equal or comparable degrees. As I have previously discussed, various authors also highlight other manifestations of the value of democracy in a given form of international adjudication – a tendency which might, at times, fail to adequately capture the overall functional realities faced by, and the integral nature of the institutional operations of, an international court or tribunal.

Finally, I note that while the book views "fragmentation" as a problem for democracy, it is laudable that the authors do not paint all international courts and tribunals with the same brush. As I stressed several years ago, "various judicial institutions dealing with questions of international law have displayed utmost caution in avoiding to contradict each other" (*Fragmentation in a Positive Light* at 846). The extent to which this holds true at present, given the undeniable "variation of themes" in international arbitral awards and court judgments, might be debatable, but the book in any case prudently refrains from viewing the problem of fragmentation according to the notion of a supposed overriding unity or extreme universality of treaty regimes. Rather, the book cautiously examines and explains internal fragmentation in the different fields of international adjudication as a symptom of the lack of political oversight within most functional treaty regimes. These concepts of political oversight and institutional accountability are, yet again, pillars of constitutionalist reasoning that were adapted to accomplish the purposes of this book.

I congratulate the Max Planck Institute on issuing this noteworthy analytical contribution to the growing number of critical works that seek to reframe and recharacterize the nature of progressive developments of modern international institutions, processes, and norms. The volume exemplifies a truly innovative perspective, with valuable insights into, and hypotheses on, the nature of international judicial reasoning, and their visibly larger consequences on the robust (if not, at times, controverted and controversial) trajectories of international law.

Bruno Simma, The Hague, June 2011

Preface by the Editors

The increase of international adjudication has been one of the most remarkable developments within the international legal order of the past two decades. New international courts and tribunals have entered the scene and existing institutions have started to play more significant roles. We identify and study one particular dimension of this development: international judicial lawmaking. We observe that in a number of fields of international law, judicial institutions have become weighty actors and shape the law in their practice. Their authority transcends particular disputes and bears on the law in general. The contributions in this volume set out to capture this phenomenon and ask: How does international judicial lawmaking score when it comes to democratic legitimation?

One of our principal propositions is that international judicial lawmaking can and should be understood as an exercise of public authority. We thereby connect to our previous work, see "The Exercise of Public Authority by International Organizations", Special Issue, 9 *German Law Journal* (2008); Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer 2010). We now develop the thought that international judicial institutions influence all participants of the legal system with their decisions and have become noteworthy lawmakers. Sure enough, judicial lawmaking is a common phenomenon of any legal order, but there are a number of reasons that make it especially intriguing at the international level and that exacerbate its normative challenges. The contributions unfold these thoughts in principle, in particular detail, and with regard to a number of specific institutions.

The present volume is the product of a long process of discussion and mutual learning in which the active engagement of all contributors has been key. Participants met together with other colleagues for a first

workshop in October 2009. They discussed drafts at a second workshop in April 2010 and presented their contributions at an international conference at the Institute in Heidelberg in June 2010. We are grateful to our commentators and critics inside and outside the Institute, especially to our colleagues who work on related themes under the rubric of Global Administrative Law. Isabel Feichtner has been of great help in organizing these steps.

Our gratitude further extends to the editors in chief of the German Law Journal, Professors Russell Miller (Washington and Lee University, School of Law) and Peer Zumbansen (Osgoode Hall Law School, York University, Toronto), who published the contributions in a special issue of the German Law Journal (vol. 5, 2011) and whose tireless dedication is truly admirable. We also thank their team of students who assisted in the publication process. Anna Lechermann, Hannes Fischer, Max Mayer, Lea Roth-Isigkeit and Matthias Schmidt were all of great help in finalizing the contributions at the Institute. Lewis Enim and Eric Pickett proofread the texts. Angelika Schmidt touched up the contributions for the present edited volume.

Finally, we wish to thank Bruno Simma for offering a profound foreword.

Heidelberg, August 2011

Armin von Bogdandy
Ingo Venzke

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I. Framing the Issue

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

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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).

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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 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

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[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).

[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 B.III, 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).

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 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

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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.

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]

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 in-

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[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).

[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).

terest 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, 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

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[12] JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001); Stephan Leibfried & Michael Zürn, *Von der nationalen zur postnationalen 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).

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

[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.

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.). 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 through 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]

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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).

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.

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]

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[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.

[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).

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 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

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[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).

[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).

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, this practice reaches beyond the case at hand.[29] A judgment, its decisions, as well as its justification can amount to signifi-

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[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: Rechtsphilosophie 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.

[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.