International Public Authority in Perspective: Comparing the Roles of Courts and International Organizations in Democratizing International Law

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I. Introduction

It is an undeniable fact that international institutions of all sorts nowadays exercise some sort of authority over States, local populations, and individuals.[1] This topic has become central to modern international legal scholarship — as well as that of international relations — and comprises an assessment of not only the work of international organizations,[2] but also of international courts.[3] After analysing the process by which international organizations have increasingly centralized aspects of the management and administration of world economy, a question remains as to whom these organizations should answer in the exercise of their functions. From a social perspective, one may assume that they are accountable to their constitutive members — in this case, the States. Nevertheless, once the activi-

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1 Zürn, M. (2018), *A Theory of Global Governance*. *Authority, Legitimacy and Contestation.* Oxford: Oxford University Press, 107–111.

2 Both in international law and in international relations, this has been a topical subject. For an international legal perspective, see, e.g., von Bogdandy, A. *et al.* (eds) (2010), *The Exercise of Public Authority by International Institutions*. Heidelberg: Springer. For a conceptual discussion, see Goldmann, M. (2014), *Internationale Öffentliche Gewalt*. Heidelberg: Springer. In international relations, see, e.g., Zürn *supra* note 1; Hurd, I. (2013), *International Organizations. Politics, Law, Practice*. Cambridge: Cambridge University Press; Sending, O.J. *et al.* (eds) (2015), *Diplomacy and the Making of World Politics*. Cambridge: Cambridge University Press; Pouliot, V. (2016), *International Pecking Orders. The Politics and Practice of Multilateral Diplomacy*. Cambridge: Cambridge University Press.

3 In this respect, see, for instance, Alter, K. (2014), *The New Terrain of International Law: Courts, Politics and Rights*. Princeton: Princeton University Press; also, von Bogdandy, A. and Venzke, I. (2014), *In Whose Name? A Public Law Theory of International Adjudication*. Oxford: Oxford University Press; and more recently, see also Grossman, N. *et al.* (eds) (2018), *Legitimacy and International Courts*. Cambridge: Cambridge University Press.

ties of these organizations end up effecting changes in the legal, political or social condition of other entities that do not form the organizations' constituencies, one needs to find appropriate means to justify or at least to create the conditions for making them more broadly accountable or responsible. One method — used continuously in legal scholarship — is to look for the *principles* that should guide an organization's actions.

In the search for such a principle, or principles, two fundamental elements have to be investigated: 1) are the organizations in question recognized as exercising authority over agents in the international social order other than their constitutive members? 2) Is this authority characteristic of public power? These are precisely some of the points this section addresses. It argues that international organizations need to be bound necessarily by certain principles that typically govern the work of public authorities and powers in domestic settings. Differently from international courts — which in analogy with domestic courts (in particular Constitutional and Supreme Courts) —play an essential counter-majoritarian role in international politics, international organizations must have their actions always guided by certain norms to guarantee the appropriateness of their actions in respect of those affected by them. Precisely because in many cases, IOs have developed a "law-making" function,[4] attempts to verify the principles upon which they work are of fundamental importance.[5] In the particular case of IOs, if one considers that these organizations have been legally and political modelled on domestic ideals of administration, it is only reasonable that one makes an attempt at applying the principle of democracy to understanding their function, but also to provide them with normative guidance. Ultimately, it can be argued that a democratic principle applied to international organizations might create better chances to develop a democratic generality and allow for the democratization of international law.

One needs to recognise the fact that certain international courts, such as the ICJ, the WTO Dispute Settlement Mechanism, or even ICSID, within the World Bank Group, are considered in one way or another as integral parts of international organizations. This is true of their organizational and structural origins, and it is undeniable that their work remains in large part attached to the principles that govern the whole of the organization. Yet the authority they have acquired to perform their functions that they

4 See, generally, Alvarez, J. (2006), *International Organizations as Law-Makers.* Oxford: Oxford University Press.

5 *Ibid.*, 67–75.

have come to exercise over time has become detached from the organization that created them. For instance, one can argue that despite having been created by Security Council resolutions, the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal for the ex-Yugoslavia (ICTY) developed their authority, created their spaces for contestation, and elaborated on their *public* well beyond of the confines initially established by the UN instrument. Although organs of international organizations, these courts became beings in their own right and therefore can have their relation characterization as *public authorities* well-distinguished, and also compared to those of international organizations exercising mostly an *executive* function at the international level.

This chapter briefly compares how the democratic principle effect changes in different international institutions. In this respect, it will compare the exercise of public authority by courts and international organizations and assess to which extent the various public law theories may be used to create a democratically oriented framework that seeks to legitimize these organizations' activities. The first step is to establish the conditions under which the actions of an international organization can be said to constitute those of a public authority — similar to those in domestic public administrations. One can also raise the question as to whether the general fragmentation of international law and politics poses a problem to the creation of a proper public and a democratic generality to these international organizations.

II. Conceptualizing Authority for International Institutions

As part of the investigation into the nature of the power or authority that is exercised by international institutions, more specifically international organizations — with a view to compare them with international courts —, a few conceptual clarifications ought to be made. The previous paragraphs have referred to the potential of international courts and IOs for exercising public authority.[6] Before delving into the nature of the authority international organizations exercise, one needs first to define what is to be understood by this authority. It matters to know how and why they can exercise any authority towards other entities participating in the international political life. In this context, authority needs to be distinguished from other means of conditioning others' actions, such as, for instance, power,

6 Zürn, *supra* note 1, 38–40.

coercion, and violence.[7] A brief survey of these usages will clear the ground for our understanding of authority and provide a stronger justification for why it seems necessary to couple it with the principle of democracy.

Although international organizations exercise functions similar to public administrations and governments, differently from the "State", they do not possess the monopoly of violence, or the conditions to exercise any physical threat proper to make effective their decisions.[8] The exercise of power by international organizations is, therefore, hindered. In short, the lack of power of international organizations can be summarized by their incapacity to directly impose direct sanctions on those outside their organizational ambit, such as States or private entities, in the cases where they violate a norm established by the organization or one that the organization holds as being a necessary conditioner of behaviour for those actors. Therefore, IOs rely, to make their decisions effective, either on the will of States to bring them to consecution or on the authority they exercise over them. This is why the concept of authority becomes so instrumental in understanding the role they have in shaping international politics and international law. More specifically concerning international law, precisely because IOs lack those necessary elements to exercise proper power, but do exercise authority and effect changes in the law, it becomes essential to understand the conditions under which the exercise of such authority is made legitimate. Thus to guarantee that the authority of the organizations is adequate, there should be a certain number of principles to which this exercise should attend to. In turn, the application of (legal) principles to the activity of international organizations should also prompt an immediate change in the way the activities are exercised. Here lies the fundamental importance of grasping the meaning of authority for these organizations. This is, for instance, the point of departure the ILA took in its final report on the accountability of IOs, for attempting to precisely understand what rules and principles apply to IOs to determine their "accountability": "The starting point for the rules and recommended practices is that, as a matter

7 Arendt, H. (2006) [1954], *Between Past and Future*. New York: Penguin, 92.

8 Weber, M. (1992), "*Politik als Beruf*" In: H. Baier *et al.* (eds), *Max Weber Gesamtausgabe*. *Abteilung 1: Schriften und Reden. Band 17.* Tubingen: Mohr Siebeck, 158–159.

of principle, accountability is linked to the authority and power of an IO. Power entails accountability, that is, the duty to account for its exercise."[9]

In this context, one does well to go back to Max Weber's definition of authority. Weber's definition, although simple, is rather useful: authority is the case where a command attributed to a specific person will be obeyed.[10] Similar to that definition put forward by Hannah Arendt, authority here is also defined in opposition to power.[11] For Weber, power exists when within the framework of social relations; one is capable of imposing her will on another even against the latter's resistance.[12] Authority is therefore exercised whenever, from both the commanding and the recipient's position, there is a clear recognition that the command is to be obeyed without the further exercise of force. This relationship is further clarified by Chapter 3 of Weber's oeuvre *Economy and Society*, when he includes the *interest* of the addressee of a command as a fundamental element of obedience to authority.[13] Whether there is a moral obligation or not to follow commands from authorities, especially when authority and power are somewhat exercised concomitantly, is not a question that needs to be necessarily tackled here.[14] This definition of authority remains central in the principal doctrines of international relations and law. It informs much of the understanding of what public administrations in both domestic and international settings can and should do. In international politics, in particular, where most international organizations are not endowed with means to exercise proper power,[15] authority remains their main way to guarantee the effectiveness of decisions. Authority relationships are broadly more prevalent in global governance, especially because one can identify

9 ILA Committee on Accountability of International Organisations, "Report of the Seventy first Conference, Berlin 2004. Accountability of International Organisations: Final Report", 5, available at <https://www.ila-hq.org/index.php/committees>, accessed 6 December 2019.

10 Weber, M. (1980) [1921], *Wirtschaft und Gesellschaft* (5th ed.). Tubingen: Mohr Siebeck, 28.

11 *Ibid.*, 28–29.

12 *Ibid.*, 28.

13 *Ibid.*, 122.

14 Particular reference is made to a question raised by H.L.A. Hart in his *Concept of Law*. In chapter IX, Hart is attempting to differentiate the reasons why one follows legal rules. He recognizes the exercise of power – of the coercive element – by legal rules, but also that one follows legal rules because its authority is recognized. The fundamental issue he raises is whether this recognition of the authority cannot somewhat be mistaken by a moral obligation to follow the legal rule. Hart, H.L.A. (2012), *The Concept of Law*. Oxford: Oxford University Press, 203.

15 Zürn, *supra* note 1.

various situations where States and other social actors follow obligations created by international institutions that go against their "stated interests".[16] International authority, therefore, is founded on the fact that these are obligations that are followed without the exercise of coercion or persuasion,[17] and are fundamentally based on an idea and presumption that their execution is done in favour of a common good.[18] More importantly, in this context, is the recognition of authority's normative impact and the fact that when exercised it may create obligations, duties — and eventually rights — for those under it.[19] Yet the concept of authority has to be further refined to allow one to grasp in fuller detail its content and how it occurs when exercised by international organizations.

In Max Weber's conceptualization, it is also necessary to assume that the actors act in accordance with authorities' commands based on reasons.[20] As we have previously indicated, it matters to know the quality and type of authority being exercised by international economic organizations. For this reason, Michael Zürn's understanding of both reflexive and public authority is instrumental for gauging how IOs exercise their authority. An initial question that drives the search for an appropriate conception of public authority at the international level is the following question: if at the basis of an authority relationship there has to be an *interest* or *reason* for the addressee of a command to follow it, how is that transposed to the international? In other words, why would a State follow the authority of an international organization, especially considering that States themselves may have all sorts of different means to contest such authority?[21] This is the question that leads Zürn to develop the concept of a reflexive public authority. Such a concept builds on two different approaches of authority: the contracted and the inscribed authority. The former is "reason-based" and sees authority as based on different forms of contract.[22] Authority exists when one party sees the command of another as "legitimate" and from it derives "an obligation to obey".[23] The latter approach regards

16 *Ibid*., 37.
17 Zürn, M. (2007), "From Constitutional Authority to Loosely Coupled Spheres of Liquid Authority: A Reflexive Approach", *International Theory*, 9(2), 261–285, 263–264.
18 Zürn, *supra* note 1, 37.
19 Roughan, N. (2013), *Authorities. Conflicts, Cooperation and Transnational Legal Theory*. Oxford: Oxford University Press, 20–21.
20 *Ibid.*, 263.
21 Zürn, *supra* note 1, 39.
22 *Ibid.,* 41.
23 *Ibid*.

authority as being formed through processes of socialization of agents and identifies authority as a "relationship in which habits are activated and reproduced by actors"[24]. Authority is, therefore, the capacity to, through discourse and practice, induce certain behaviours on others.[25] Reflexive authority comprises elements of these two approaches to conclude that authority is founded on a "logic of action other than the logic of appropriateness or the logic of consequentiality"[26].

Ultimately, according to Zürn, reflexive authority is materialized in two different forms: epistemic authority and political authority.[27] The former corresponds to the authority to make interpretations and the latter to make decisions.[28] Political authority means the identification of a specific institution capable of making "enforceable" decisions in respect of a "collective".[29] Generally, international institutions make their way through asserting their political authority through the establishment of mechanisms of majority voting or by the consistent "exercise of dominance by a hegemonic power"[30]. By exercising political authority, international institutions exert direct or indirect influence over the domestic politics of its members.[31] On the other hand, epistemic authority is the capacity through interpretation to condition others' behaviours.[32] It relies on the assumption that knowledge is unequally distributed and that those exercising it have not only expert knowledge in a certain field but also some degree of moral integrity.[33] As Zürn argues, the epistemic authority has become very much institutionalized with global governance, with many international organizations exercising it.[34] These two forms of authority are instrumental in understanding how international organizations, for instance, condition the behaviour of States and peoples. It also points to the potential means they may use to create new obligations for them informally.

From their creation until today, international organizations' constant impact on policy-making, economic design, and law-making in various countries has only increased. This practice alone would justify speaking of

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24 *Ibid.*, 43.
25 *Ibid.*
26 *Ibid.*, 45.
27 *Ibid.*
28 *Ibid.*, 50–51.
29 *Ibid.*, 51.
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*, 52.
33 *Ibid.*
34 *Ibid.*, 52–53.

the *public* character of the authority they exercise. Yet there remain theoretical challenges as to why their authority would be considered of a public nature, whereas other private organizations having the same kind of impact on domestic affairs will not be considered to exercise public authority. This has formed the object of inquiry of authors in both law and political sciences and has been central to the development of many contemporary theories seeking to restrain the activity of these organizations based on public law principles.

III. Democracy as Public Value for International Institutions

Before delving into whether IOs, in comparison to international courts, are capable of provoking such transformations, one needs to ask the question of whether democratic generalities are indeed necessary for contemporary international law to function correctly. This brings back the question about what role democracy plays or should play in international law and politics. If one argues that IOs exercise public authority in the sense that their decisions and activities have far-reaching consequences, then it becomes again important to discuss the conditions under which there can be a reconcilement between individual and democratic self-determination in the international context. Amongst the many principles of public law that attempt to solve such tension is the principle of democracy itself. The concept of democracy is one that is hard to define, and which has throughout history, found a variety of expressions.[35] Some of these have adapted to a modern context where international standards are taken into account, and which allows for a more significant consideration of "social, political and cultural diversity", such as the idea of a consociational democracy.[36] Yet all of these theories will lack, in one way or another, elements for a general holistic explanation of the scheme wherein international institutions and individual entities intent to assert their legal and political positions. In this respect, a question remains as to whether "the democratic legitimacy of international institutions must be built upon the democratic mechanisms of their members"[37].

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35 For a general overview of such expressions, see Schmidt, M.G. (2006), *Demokratietheorien. Eine Einführung* (3rd ed.). Wiesbaden: VS Verlag für Sozialwissenschaften. Also, Cartledge, P. (2016), *Democracy. A Life.* Oxford: Oxford University Press.

36 Von Bogdandy and Venzke, *supra* note 3, 146.

37 *Ibid.*

In light of the fact that IOs exercise in no small degree some executive or almost government functions, it does not seem unsurprising that the concept of democracy appears as a decisive element. By and large, governments act in the international sphere based on a legitimate mandate given to them by their people.[38] This does not mean, however, that there does not remain a sizeable democratic deficit in international law — in particular considering democracy is not the main objective of international law itself —, especially within a context of globalization and fragmentation.[39] To the extent that governments have the freedom to act internationally, they manage many times to create circumstances that ignore the very will of their constituencies. Parliamentary control sometimes is not enough to constrain the actions of governments, given many of the current international legal instruments used nowadays are either informal[40] or do not constitute proper hard law.[41] Parliaments are left aside in many critical decision-making processes. Reliance on domestic mechanisms to guarantee the democratic character of international law does not appear as of yet an outstanding option.[42]

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38 As Thomas Franck has pointed out, in fact, most States see that only democratic countries are able to properly validate their actions in global governance, which prompts the thinking about the emergence of an international right to democratic governance. Franck, T. (1992), "The Emerging Right to Democratic Governance", *American Journal of International Law* 86(1), 46–91, 47.

39 Wheatley, S. (2011), "A Democratic Rule of International Law", *European Journal of International Law* 22(2), 525–548, 528; Also, Bast, J. (2009), "Das Demokratiedefizit fragmentierter internationalisierung" In: H. Brunkhorst (ed.), *Demokratie in der Weltgesellschaft*. Baden-Baden: Nomos, 185–193, 190–191.

40 See Pawlyn, J. *et al.* (eds) (2012), *Informal International Law-making*. Oxford: Oxford University Press.

41 On the problem of how the "relative" normativity of many legal instruments impact the relations between international actors and how it fundamentally defines the structure of international law, see, the still classic, Weil, P. (1983), "Towards Relative Normativity in International Law?", *American Journal of International Law* 77(3), 413–442.

42 Although Franck pointed out to the constant (and consistent) move towards requiring that governments be democratic in order to have their will properly validated at the international level, there remains effective mechanisms to guarantee that such a requirement becomes a method to asserting the formation of a proper democratic space in international law, especially when considering the modes of governance of many international organizations, such as the UN, the WB or the IMF. Also, as James Crawford has pointed out, from its beginning, international law never made of democracy a central value: Crawford, J. (2013), "Chance, Order and Change: The Course of International Law", *Collected Courses of the Hague Academy of International Law* 365, 279–283. This is also the opinion of Hillary

IV. The Role of International Institutions in Democratizing the International Public

A. The Potential for International Institutions to Create Public and Democratic Generalities

It is difficult to compare ICs and IOs, especially considering their variety in terms of structure and subjects with which they deal. Nevertheless, in terms of how much they can accomplish considering their roles within the legal order, there is room to assess under which conditions they can, in the lack of proper "powers" at the international plane, create democratic conditions for the exercise of their own activities; And consequently how much can they contribute to the development of a global public sphere and a proper international democratic generality. This chapter argues that international courts have less of a potential to create democratic generalities when compared to IOs. It will be argued that it is not the ICs function to act as catalysers of democratic publics in international law. However, this does not mean that they should not act, to the extent possible, in such a way as to promote such values.

Nevertheless, the very nature of their functions requires them to take on a more restrictive approach when acting, even if by exercising their typical activities ICs end up creating law – a function typically outside the scope of their actions. On the other hand, IOs are much better placed to create the conditions for a democratic generality at the international level. Their forum-like structure and their proneness to politicization make them an adequate place to attempt such a transformation. Therefore, a theory of democracy and public authority that is applied to these institutions appears to have a larger chance of success.[43] Moreover, the single fact that IOs are organizations focused on specific issues with a broad range of members grants them a much wider reach than international courts. In this sense, even though there may be suggestions that procedural transformations may place courts in a more "democratic" position, they are not as well placed as IOs to perform some fundamental changes in the international social order. This should not, however, ignore the fact that international courts play a crucial role in stabilizing institutions within such

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Charlesworth: Charlesworth, H. (2015), "Democracy and International Law", *Collected Courses of the Hague Academy of International Law* 371, 70–74.

43 See von Bogdandy, A. *et al.* (eds) (2010), *The Exercise of International Public Authority by International Institutions: advancing international institutional law*. Heidelberg: Springer.

social order. As previously mentioned, decisions by courts have the power to reinforce the position of individual institutions within society. In doing so, they also have an essential role in determining the axiological spectrum of social order. It is precisely within this context that one ought to assess the conditions in which these different institutions — courts and international organizations — can generate democracy in international law.

B. The Potential of International Courts

The question of how to provide elements sufficient to develop or justify the democratic character of international law has for a long time had a central place in theoretical and doctrinal discussions within the field of international law.[44] One issue is central to the question as to whether international courts can effect changes in the international public is the effect of the fragmentation of international law and politics as a challenge to democratic generality they would hope to create.

International courts do, however, have a strong potential for institutionalizing a field of international law, as it has already been largely demonstrated in international economic law. This can be seen already in some work of the PCIJ. Interestingly, the PCIJ saw that international law offered good instruments to tackle issues concerning economic questions of States, but that its effect, again, ought to be restricted to the parties.

> "But it would be scarcely accurate to say that only questions of international law may form the subject of a decision of the Court. It should be recalled in this respect that paragraph 2 of Article 36 of the Statute provides that States may recognize as compulsory the jurisdiction of the Court in legal disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". And Article 13 of the Covenant includes disputes of the sort above mentioned — "among those which are generally suitable for submission to arbitration or judicial settlement". Clearly, amongst others, disputes concerning pure matters of fact are contemplated, for the States concerned may agree that the fact to be established would

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44 See, for instance, Lauterpacht, H. (1937), "Règles générales du droit de la paix", *Collected Courses of the Hague Academy of International Law* 62; Alter, K. (2014), *The New Terrain of International Law. Courts, Politics and Rights*. Princeton: Princeton University Press; Grossmann *et al.*, *supra* note 3; and also von Bogdandy and Venzke, *supra* note 3.

> constitute a breach of an international obligation; it is unnecessary to add that the facts the existence of which the Court has to establish may be of any kind".[45]

In any case, the elements derived from such a public law theory must still be translated into mechanisms allowing for greater inclusion of other interested parties in the proceedings leading to the court's decision.[46] These mechanisms, however, do not merely include measures to allow for third-party participation in the proceedings, such as *amicus curiae*, or interventions. They also include the need to provide *reasons* for a decision as a fundamental element to guarantee democratic legitimacy.[47] For instance, an argument runs in the sense that there is the necessity of revising how international courts' judges are selected, with a view of making such a selection more open and transparent.[48] One can see that these mechanisms bear importance for moments not necessarily related to the judicial process itself, but also for the whole process of constructing the court's very identity within the international legal order. Many of the criteria — transparency, political inclusion, etc. — devised by these theories,[49] are mostly translated into procedural mechanisms which would ultimately grant a reasonable level of democratic legitimacy to the courts' decisions bear strong similarities to those set up, for instance, by the Global Administrative Law to determine the legitimacy of IOs' decisions.[50] However, it remains an undeniable fact that in international law, international courts derive their legitimacy primarily from their constituent treaties and the normative instruments they base their decisions on. After all, it is mostly by the type and quality of their work that international courts establish themselves socially. This is also the case, for international courts in many aspects perform a counter-majoritarian function similar to constitutional

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45 *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, Judgement of 12 July 1929, P.C.I.J. (ser. A) No. 20, 19.

46 Grossmann *et al.*, *supra* note 3, 18–19.

47 This brings back the discussion about the exercise of authority by international courts. As it has been shown above reasons are a crucial element in determining whether an entity exercises authority over another. This is and should be no different with international courts. For an informative discussion of this within courts, see von Bogdandy and Venzke, *supra* note 3, 109–110.

48 *Ibid.*, 158–161.

49 *Ibid.*, 136–137.

50 This is based largely on the criteria of transparency and participation.

courts or supreme courts, at the international level.[51] That means that international courts need not necessarily respond to the same demands as legislatures or even executive bodies, but rather should remain attached to the law and find the grounds for justifying the legitimacy of its decisions. It remains mostly unconvincing that by providing procedural conditions for a broader public to either influence the selection of judges or participate in the proceedings would guarantee the democratic legitimacy of these courts.

It could be the fact that creating the conditions for more political inclusion and deliberation would not be sufficient to justify the exercise of public authority by international courts democratically. In addition, fragmentation of international law poses a further challenge to the creation of a democratic generality. After all, democratic legitimacy may not be the necessary condition to guarantee that courts' decisions are seen as legitimate in themselves. Instead, some form of justified "self-determination"[52] might be how ICs confirm their authority to a wider public, especially a public that is directly affected by its decisions. Even if a concept of legitimacy based on the idea of "self-determination" may also be translated into procedural measures,[53] it still cannot be said to provide a general democratic legitimacy. In this respect, even if considered as a means to justify the court's authority, participation in the proceedings or in the instances defining its structure, procedural mechanisms meant to reinforce the democratic legitimacy of an international court can only be said to be so insofar as they allow for interested parties to more effectively affect the court's work. It does not create a democratic generality, but slightly smaller social pockets, which themselves can be democratic and are composed of those somehow affected by the court's activities. Thus, the hope of constructing a social order corresponding to a democratic space based on the work of an international court is somewhat limited.

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51 In general, Constitutional and Supreme Courts exercise an important countermajoritarian function, in that they are bound to interpret the constitution, regardless of whatever may be stated in public opinion or in the other powers.

52 Möllers, C. (2015), *Die drei Gewalten. Legitimation der Gewaltengliederung in Verfassungsstaat, europäischer Integration und Internationalisierung*. Weilerwist: Velbrück Wissenschaft, 51. And Möllers, C. (2005), *Gewaltengliederung. Legitimation und Dogmatik im nationalen und internationalen Rechtsvergleich*. Tübingen: Mohr Siebeck.

53 Möllers (2015), *supra* note 52, 52.

This limited political space created by each international court risks deepening a long-occurring process of fragmentation, instead of hindering it. In fact, not only this would reinforce processes of fragmentation, but would also enhance a potential asymmetry between the work done by the courts and the outcomes produced by it. A solution has been offered to tackle this issue and that of the construction of a broader democratic public. It comes from an interpretation of Article 31 (3) c of the Vienna Convention on the Law of Treaties (VCLT).[54] In this context, a systemic interpretation, along the lines of the cited article of the VCLT could serve as a way to counter this lack of unity. This would also allow for the cognition of a potentially democratic public. However, this recourse to the interpretation technique suggested in the Vienna convention seems unlikely to solve the problem of democratic generality; especially if one considers that the public made explicit by this interpretative exercise would be one made after the decision-making takes place, *a posteriori*. Furthermore, attempting to reconcile principles of democracy with the exercise of public authority by international courts, actually risks their excessive politicization within their fields and might end up deepening the distance between different international courts, and between the courts and their addressees.

In other words, if courts do open themselves up for more involvement of actors, the degree of participation not only not change the condition of those affected, but it may end up revealing a more profound problem of democratic representation in the international plane. The level of participation will never equal the effects of the decision. For as much as there may be more participation in the various instances leading to decision-making, it will never be as far-reaching as the effects of such decision-makings may be. Given there is no means of justifying or deciding on proper representation by actors at the international level, one can say that the outcomes may even be "good", but they surely cannot be said to be "democratic". That is to say that even if, for example, non-governmental organizations were allowed to intervene in proceedings in the form of *amicus curiae*, the effects of the judicial decision cannot be said to have been more legitimate just because there was more representation of "civil society". In this particular case, no one knows "who" these civil society representatives represent.

54 Bogdandy and Venzke, *supra* note 3, 189–192.

C. The Potential of International Organizations

A public law approach may be more useful as a normative argument for international institutions other than international courts, in particular to international organizations — and potentially even more for those concerned with the world economy. The democratic principle —applied to international organizations takes on a different dimension, and the procedural adaptations made would be undoubtedly different.[55] In this context, a public law theory applied to the activities of international organizations has the potential to effectively create the conditions for the development of a democratic generality affecting decision-making. It seems more reasonable to require a democratic legitimation of their activities, especially within a context where, given the functions of international organizations — especially those of supervision and administration.[56] Public participation, transparency, amongst other principles, could indeed reinforce the process of "politicization" these organizations are going through.[57] Even though international courts may create law, the question remains about whether their acts need to be "democratically" justified. As opposed to other international institutions, international courts may be the institutions that at this point, need the least to seek democratic legitimacy. They should rather focus on guaranteeing their functional and normative legitimacy instead.

As mentioned above, comparing different types of international institutions may be very difficult. Nevertheless, there is great value in attempting to see how in their various roles, they may aid in the development of democratic publics that support in legitimizing the decision making processes. In this context, this sub-section argues that IOs dispose of much more autonomy in the execution of their activities and therefore not only should constitute more the object of a democratic legitimation analysis but also have the potential, thus, of creating a more substantial democratic generality.[58] Moreover, IOs present a much better space for politicization, which also creates better conditions for the creation of a democratic generality.[59] These are two main points that will be raised to argue that IOs have

55 Charlesworth, *supra* note 42, 107.
56 This is very well shown in von Bogdandy *et al.*, *supra* note 2.
57 Zürn, M. and Ecker-Ehrhardt, M. (eds) (2013), *Die Politisierung der Weltpolitik*. Frankfurt am Main: Suhrkamp. In particular, the chapter written by the authors "Die Politisierung der Weltpolitik".
58 *Ibid.*, 347–348.
59 *Ibid.*, 365.

a better chance of creating an international democratic space than international courts.

Even if within the constraints of the internal rules of such organizations — constitutive agreement, internal regulations, etc. — the degree of autonomy of IOs remains relatively high. Whether this can be said to represent an institutional position or a mere transposition of collective wills remains the object of much debate in scholarship.[60] Nonetheless, the fact that IOs are capable of acting with a considerable amount of autonomy in the international political space is beyond doubt. Against this backdrop, it is far more plausible to argue that IOs exercise international public authority and that this has to come with some legitimation that goes beyond mere rules of international law.[61] This is especially true once one recognizes that the significant interlocutors of IOs nowadays are not necessarily the States, even though we are not yet capable of speaking of an international *demos* or international political citizenry.[62]

There is another side to this story, and many still see IOs as the vehicles of great powers. Nancy Fraser, for example, recognizes that the construction of a transnational public sphere is rendered rather difficult given IOs still are the place of institutionalized forms of hegemony.[63] This is a hegemony, however, that in the present context, "operates through a post-Westphalian model of disaggregated sovereignty"[64]. Other authors have conducted empirical work to show how great powers (in particular the United

60 On this, see Lagrange, E. (2002), *La Représentation Institutionnelle dans l'Ordre International. Une contribution à la théorie de la personnalité morale des organisations internationales*. Alphen aan den Rijn: Kluwer Law International. Also, somehow showing how international organizations in general are still somehow limited in their actions by internal rules: Klabbers, J. (2015), *An Introduction to International Organizations Law*. Cambridge: Cambridge University Press. From a political science perspective, see Hawkings, D.G. *et al.* (2006), *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press; Johnson, T. (2014), *Organizational Progeny. Why Governments are Losing Control over the Proliferating Structures of Global Governance*. Oxford: Oxford University Press; Abbott, K.W. *et al.* (2015), *International Organizations as Orchestrators.* Cambridge: Cambridge University Press.

61 From a discourse theory perspective on this topic, see Goldmann, M. (2015), *Internationale öffentliche Gewalt*. Heidelberg: Springer. A more traditional take on the matter is Brölmann, C. (2007), *The Institutional Veil in Public International Law*. London: Hart.

62 Fraser, N. (2010), *Scales of Justice. Reimagining Political Space in a Globalizing World*. New York: Columbia University Press, 85.

63 *Ibid.*, 86.

64 *Ibid.*, 87.

States) have been very successful in guiding international institutions to attain their interests.[65]

Nevertheless, the fact that, historically, IOs have opened themselves up for the participation of actors other than States cannot be denied, with some becoming participants of the IO's central activities. The ILO is such an example, where not only States, but also employers' associations and trade unions participate in the law-making processes.[66] Moreover, despite being given a looser or weaker status, civil society representatives can, for instance, effectively affect how specific procedures are transformed within the World Bank.[67] This goes to show that IOs have already been continuously integrating different actors into their decision-making process, thus rendering such processes wider in scope in terms of participation.

With such opening of participation, there also come the demands of these new actors which include, for example, that such processes be conducted transparently. These new claims have an impact in the structure of the organization and the way the organization behaves. Yet, what does this say about the potential of IOs to create democratic generalities? One very interesting aspect is that participation of different actors in IOs is not forcefully guided by the interest they have in one case with which the IO is dealing. IOs are generally oriented in their behaviour by their constitutive object, which is contained in their constitutive agreement. It is an interest in this "object" that drives other actors to demand participation in decision-making in IOs. Also, the reach of IOs actions is far more comprehensive than those of international courts. They are bound to their legal mandate and accountable — in simple terms — to their constituents. This means that, as previously stated, their mandates have to be continuously interpreted to reflect their current social position within the international sphere and to "justify" their actions before their members and those upon whom their actions will have some effect. This alone should be enough reason to argue that, considering democracy as a good value, these organizations should be made more democratic. Besides, once the democratic principle is materialised in these IOs, given their more extensive reach, the chances they might create a larger democratic public are greater than those of ICs. This "virtuous" circle depends, however, mainly on the will of State

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65 A good example of this sort is Lavelle, K.C. (2011), *Legislating International Organizations: The US Congress, the IMF and the World Bank*. Oxford: Oxford University Press.

66 ILO Constitution, Article 3(1).

67 For this, see http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies, accessed 29 January 2020.

members to conduct the necessary structural changes in these IOs, allowing for this transformation to happen. This dependency, however, shows how IOs are also still very much at the will of States, despite being better placed than international courts to create democratic publics. Arguing that they have a better chance of creating democratic generalities does not necessarily mean they will do so.

In this respect, it is important to have a historical glimpse at what was understood as being the powers of international organizations, at the beginning of the 20th century. The PCIJ, for example, had already provided some thoughts on what could be the powers of IOs, in assessing the commission for the Danube. It recognized that if it cannot reach "central economic centres" its work loses its object —, which also shows that the court already identified a broader potential for the IO in the international social order. The organization was "economic" in its essence also.

> "It is also certain, as has been shown above, that the European Commission of the Danube possesses and has possessed since 1865, at all events some powers upon the Galatz-Braila sector, that is to say powers exercised in favour of sea-going shipping. Indeed, commercial shipping loses its whole object if it cannot reach economic centres; so that sea-going shipping on the Danube must be able to reach the terminal port of such shipping. This view is especially indicated because, before 1921, the fluvial Danube was not effectively internationalized, so that the régime of freedom of navigation, as far as the (*jusque dans le*) port of Braila, could before the war only be assumed by the European Commission of the Danube, in so far as that duty rested with an international organization".[68]

The second point to be raised is that of the potential of IOs to become ever more politicized. In short, by dealing with matters interesting to a variety of populations, IOs have become not only the vehicles of States for the construction of international public policies but also the object of peoples in their political discourses. IOs have increasingly positioned themselves politically not only at the international level but also in domestic settings. As opposed to being mere "functional" structures, IOs take political positions when deciding on particular public policies, regardless of the position of their Member States. IOs decisions nowadays have remarkable dis-

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68 *Jurisdiction of European Commission of Danube Between Galatz and Braila*, Advisory Opinion of 8 December 1927, P.C.I.J. (ser. B) No. 14, 57.

tributive effects, even when they deal with very technical issues.[69] Therefore, a variety of actors, either in the forms of activism, organized civil society groups, or even individuals, claim a larger space in IOs structure.

Michael Zürn and Matthias Ecker-Ehrhardt have come up with two different conditions for politicization: 1) a legitimation deficit (*Legitimationsdefizits*) and 2) a regulation deficit (*Regelungsdefizit*).[70] These two types of the problem appear as the main requirements for the processes of politicization of IOs and significantly contribute to the claim of actors other than States to take part in the IOs activities.[71] Once one looks at the wide-range effects of IOs activities and the problems posed by these types of deficit that they generate when acting, it is possible to see how IOs have a better chance at creating democratic generalities. After all, the public willing to subject itself to a more democratic structure within IOs is already there. What needs to be done is the construction of the proper institutional mechanisms for this public to take effective part in the decision-making processes. Therefore, we can see that certain conditions, such as the existence of a proper democratic public, are already given in respect of IOs.

Conclusion

The present chapter looked at how the authority of modern IOs has, together with that of ICs, raised the fundamental question as to how and whether democracy ought to be considered a decisive factor in their structuration. It compared the capacity of both international organizations and international courts to generate democratic generalities and to guide their activities on the basis of such generalities. In doing so, it showcased the difficulties these institutions have in articulating their relationship with international law with a general principle of democracy. It did, however, point to the fact that courts may have less to do or say about democracy at the international level than expected. Of all these international institutions known today, perhaps international organizations remain the most apt to induce the creation of democratic generalities — irrespective of the fact that one sees them as being *good* or *bad* institutions — or potentially more prone to the application of such a principle of democracy as an analytical

69 Zürn and Ecker-Ehrhardt, *supra* note 57, 335.
70 *Ibid.*, 346.
71 *Ibid.*

tool to assess their activities. Nevertheless, it so remains the fact that IOs reconstruct — sometimes by taking a "positivist" stance concerning their constitutive agreements — the normative spaces they inhabit and how international law, both general and specific domains, affect the way they behave in relation to their members and those affected by their actions. International courts seem to have less of an alternative or control in that respect. If democracy can be used as a lens through which one can look at the work of international organizations, it is less though the case to assess international courts' activities.