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International Adjudication

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I. Introduction: Adjudication and International Law

Oliver Wendell Holmes famously described law as 'what the courts will do'.[1] In international law, however, the formal adjudication of a legal dispute by a court or tribunal constitutes the exception to the rule of 'auto-interpretation' of international law by States that are free to choose a mechanism for the settlement of their legal disputes.[2] Formal adjudication is only one – and usually the last – method of dispute settlement they resort to. Nevertheless, dispute resolution has never been so popular. A recent chart by the Project on International Courts and Tribunals lists no less than 125 international dispute settlement bodies, 12 of which are judicial bodies in the narrow sense still in operation.[3] In this environment, it appears less and less possible to reach a coherent international jurisprudence. Fears of the 'fragmentation' of international law abound.[4] International courts and tribunals have to undertake an ever-more difficult balancing act between different legal and moral value systems.

The optionality of recourse to adjudication in international law changes its character compared to the domestic context: Both parties need to agree, in one way or the other, before a case can be brought before an international tribunal. Certainly, such agreement can be general and in advance, but it always must be there. The same is valid with respect to

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[1] OW Holmes, 'The Path of the Law'10 Harv L Rev(1897) 457.

[2] J Collier and V Lowe, *The Settlement of Disputes in International Law* (Oxford UP, Oxford 1999) 3.

[3] The Project on International Courts and Tribunals, International Judiciary in Context, synoptic chart, Nov 2004, available at http://www.pict-pcti.org/publications/synoptic_chart.html, accessed 14 Aug 2007.

[4] *cf* M Koskenniemi and P Leino, 'Fragmentation of International Law. Postmodern Anxieties?'15 Leiden JIL(2002) 553; Report of the Study Group of the International Law Commission, finalized by M Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2007), UN Doc. A/CN.4/L.682.

enforcement: Although domestic judgments will not always be enforced, any party can rely on a third party, namely the State, to enforce a judgment. In international law, enforcement and legal settlement are often separate, and, in spite of the competences of the Security Council under Article 94 of the Charter, a third party rarely, if ever, enforces international judgments. While international adjudication is increasingly involving non-State actors, States have maintained their primacy of establishing the relevant dispute settlement mechanism.

Various approaches exist to deal with the increasing functional, but also ethical and religious differentiation of the international legal order. One approach consists in an embrace of the fragmentation of international law, because more specialized systems, such as trade law or international criminal law, can establish stronger mechanisms of adjudication. Minimalism advocates the finding of a minimal political consensus that is compatible with several moral and religious doctrines. Another escape route consists in a regionalization of adjudicatory mechanisms that benefit from a denser set of common values and principles among their members. Some liberal approaches advocate a shift from a State-centric to a human rights centric interpretation of international law. A 'critical', or postmodernist, view would further encourage international courts and tribunals to embrace the political nature of judicial choices.

This contribution intends to demonstrate that neither of these approaches alone properly describes the role of international adjudication. Minimalism identifies the problem, but fails to account for the aspirational aspects of international legal principles. While informative for the ethical evaluation and critique of the law, radical liberalism lacks cross-cultural acceptance. Fragmentation can moderate, but not solve the value clashes between different issue areas. Regionalization expresses both the universality and diversity of international legal principles, but does not even purport to apply to global cases. Postmodernism opens the perspective to the diversity of actors and stakeholders in contemporary international law, but all too often attacks a consensus that remains to be established.

A reference to background principles of the international community may help to bridge gaps in international law. But different from the picture Ronald Dworkin has drawn for domestic society,[5] the international community is deeply divided on the principles on which the international legal order should be based. At times, the debates between State rights and human rights, democracy and effectiveness cannot be solved on the basis of existing law.[6]

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[5] R Dworkin, *Law's Empire* (Belknap Press, Cambridge, Mass. 1986) 239 ff.

[6] U Fastenrath, 'Relative Normativity in International Law'4 EJIL(1993) 305 at 333.

This may be a reason why Critical Legal Studies are so vibrant in contemporary international theory.

However, different from what postmodernists claim, international adjudication does not need to end up in mere politics. Rather, it describes a process by which international adjudication can arrive at decisions both respecting the legal foundations and providing the reasons for a decision. When faced with conflicting principles or gaps in the law, the adjudicator may find a solution in the particular rational of a sub-order, from trade law to human rights law. At others, balancing of principles will provide for a solution. Where this proves impossible, a solution needs to be found that, in the opinion of the adjudicator, furthers the development of the rule of law in international relations. This contribution argues that international adjudication can maintain integrity if and to the extent the choice between different – and at times conflicting – rationales is made in a conscious and transparent manner.

II. From inter-State disputes to the adjudication of community interests

Classical international dispute settlement consists in the resolution of a dispute between two or more parties by a neutral third party, ideally a court or an arbitral tribunal, in an adversarial procedure on the basis of international law. Since the establishment of the Permanent Court of International Justice after World War I, such classical dispute settlement between States played a major role in international law. Adjudication was acceptable to States not only due to the fairness of the procedural law embodied in the Statute and Rules of the Court, but also because the point of reference for the Court was relatively clear and undisputed: providing for minimum order in the relations between States, in particular when the sovereignty of several States intersects, and supervising the interpretation and application of international law on the basis of treaties, customary law, and general principles of law (Art. 38 ICJ Statute).[7] From the beginnings of the Permanent Court of Justice, international courts are distinguished from arbitral tribunals by the permanence of the judges and the unity of the applicable law: While States can modify the terms of reference for the Court by the provisions of the *compromis*

[7] *cf* O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge UP, Cambridge 2005) 106-7.

underlying its jurisdiction, they cannot select the judges or the applicable law beyond the confines of the Statute.[8]

If States submit their disputes to a system of adjudication, however, they demand certainty that the criteria used do not take them by surprise. The strictly consensual view of the role of international tribunals informs the way judges used to interpret international law. Traditional international adjudication was thus based on the sovereignty of the State, and this approach also determined the interpretation of international legal sources according to State will. In the words of the *Lotus* case, 'restrictions on the independence of States cannot … be presumed.'[9] Traditional means of interpretation are tailored to this view.[10] Such narrowness also solves the problem of legitimacy. When a State approved a clause allowing for arbitration or adjudication, it had an idea of what the approval was about. In other words, the relative determinacy and narrowness of the rules administered by international courts and arbitral tribunals provided them a legitimacy derived from the domestic legal sphere. In the terms of the first ever judgment rendered by the Permanent Court 'the right to entering into international engagements is an attribute of State sovereignty.'[11]

Contemporary international law, however, is supposed to regulate and advance interests shared not only by States, but by humanity at large, from the protection of human rights to the environment. But the individual interests of States – and their mutual rights and obligations – do not simply submerge into these 'community interests'.[12] To the contrary, community interests need to be integrated into the classical bilateral structure with reciprocal obligations between States.[13] States remain the main subjects of international law, the law-givers as well as the law-appliers and the law-breakers. But, in a liberal interpretation, the role of States is

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[8] *cf* the distinction between adjudication and arbitration by the Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice (1920) 113.

[9] *S.S. 'Lotus'*, PCIJ, Ser. A 10, p. 18.

[10] See also *Mossul (Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne)*, Adv Op, PCIJ, Series B, No. 12 (1925), 25: '[I]f the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.'

[11] *S.S. 'Wimbledon'*, PCIJ Ser. A No. 1 (1923) 24.

[12] See B Simma, 'From Bilateralism to Community Interest in International Law'250 RdC(1994 VI) 217; C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century'281 RdC(1999) 9 at 78-79 para 33; L Henkin, *International Law: Politics and Values* (Kluwer Law International, The Hague 1995) 97-108; AL Paulus, *Die internationale Gemeinschaft im Völkerrecht* (C.H. Beck, München 2001) 250-284.

[13] See Simma, 'From Bilateralism to Community Interest', at 248.

changing: they develop into agents of common interests, with a concomitant obligation towards their own citizens to uphold and implement human rights, to prevent violence and terrorism, as well as to strive for fulfilling international obligations with regard to the global commons.[14] In other words, the 'subjective' conception of international law, ie the establishment of reciprocal rights and obligations between States, has been supplemented by an 'objective' one, in which States regulate interests common to the whole of humanity.[15] In such a conception of international law, the role of Courts and tribunals transforms into that of arbiters of international public or community interests. They must strive to interpret international legal rules and principles, and fill gaps in positive international law to advance human values and of balancing State rights and individual rights rather than only competing State interests.

The increasing crystallization and codification of international human rights, humanitarian and criminal law, but also trade law, development law and environmental law, is not limited to the regulation of inter-state relations in the narrow sense of the term, but goes beyond the 'mediatisation' of the human being and community interests by States. Two areas of international law which are gaining importance, namely international criminal law and international trade law, have created dispute settlement mechanisms of a judicial or quasi-judicial character. They exemplify the need for special régimes – but not self-contained régimes[16] – for dealing with issues going beyond inter-state relations. Regional courts such as the European Court of Justice also play an increasing role. In addition, much of international law is adjudicated by domestic courts – in particular those rules of international law that are of a self-executing character within the internal legal order.

Nevertheless, it is not by accident that the International Court of Justice continues to show a certain reticence in adjudicating rights and obligations for individual. International courts are not tamed by mechanisms of democratic control and are thus perceived as lacking democratic

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[14] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century'281 RdC(1999) 9 at 95 para 6; *cf* the 'responsibility to protect', Gareth Evans et al., *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* (IDRC, 2001), <http://www.iciss.ca/report-en.asp> (accessed 31 Jul 2007).

[15] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, Decl. of Pres. Bedajoui, ICJ Rep 1996, 271-72, para. 13.

[16] See B Simma, 'Self-Contained Regimes'16 Netherlands Ybk(1985) 111; B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law'17 EJIL(2006) 483.

legitimacy, in particular when intervening in domestic law.[17] In the probably most characteristic example, the Court did not decide, in its Advisory Opinion on the *Threat or Use of Nuclear Weapons*, on the question of whether the State interest of survival or humanitarian principles prevail when in conflict with each other. To modify the *Lotus* presumption of State sovereignty then-ICJ President Bedjaoui created the category of 'neither allowed nor forbidden' for a clash between State and individual values:

> [T]he Court does not find the threat or use of nuclear weapons to be either legal or illegal; from uncertainties surrounding the law and the facts it does not infer any freedom to take a position.[18]

Bedjaoui sees international law at a crossroads between the classical *Lotus* approach of an international order based on State sovereignty and the new, objective conception.[19] But in the absence of positive legal criteria, it appeared impossible to him to decide by *judicial fiat* whether, in case of conflict, the community interest of survival of a great number of human beings prevail over the protection of the right to survival of a single State. In other words, whereas a national society may demand from its subjects – at least in situations of armed conflict – to sacrifice themselves for the community, the international community must respect the right to survival of its State subjects.

Some judges regarded Bedjaoui's position as an inadmissible abdication of the proper role of the Court. In the words of one of his successors as President, Rosalyn Higgins, 'the judge's role is precisely to decide which of two or more competing norms is applicable in the particular circumstances.'[20] A *non liquet* – eg the impropriety or impossibility for a court or tribunal to hand down a judgment or opinion – indeed reflects the inability of a Court or Tribunal to decide a value conflict by judicial means. Classical international law of the *Lotus* variety could not come into such a situation – in the absence of a legal rule, a State was free to act whatever it pleased, even if it intersected with the sovereignty of another State. Yet, the contrary view – namely that a *non liquet* should be avoided not by the application of a formal

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[17] For such criticism, see, eg, JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford UP, Oxford 2005) at 205 ff.

[18] *Legality of the Threat or Use of Nuclear Weapons,* Decl. Bedjaoui, ICJ Rep. 1996, p. 271, para. 14.

[19] Ibid at 272, para. 16.

[20] Diss. Op. Higgins, ICJ Rep 1996, 583, at 592, para. 40.

default rule as in the *Lotus* case, but by reference to the values of the international community[21] – appears utopian.

III. The role of adjudication in the contemporary international community

Whereas even the pluralist Western democracies share a minimum set of common values, the 'international community' is, in spite of an increasing number of treaties regulating everything from the use of force to human rights and economic affairs, marked by deeply entrenched moral, ethical, religious and economical divisions that render accommodation difficult, if not, at times, impossible. International courts and tribunals have thus to undertake an ever-more difficult balancing act between different legal and moral value systems.

At the same time, the increasing diversity of international adjudication in the broadest sense of the term, ranging from classical inter-State disputes under a *compromis* before an arbitral tribunal or the ICJ via advisory opinions of the ICJ onto quasi-courts such as the WTO Dispute Settlement Body and 'hybrid' criminal tribunals such as the Special Court for Sierra Leone, are difficult to bring under one single headline. In this section, we will identify some of these approaches and ask ourselves how they cope with the pluralism of subjects, issues and institutions.

1. Fragmentation and Functionalism

In view of the diversity in contemporary adjudication, 'fragmentation' has become one of the key terms used to describe the contemporary international community. Whereas some lament – or try to re-establish[22] – the lost unity, others embrace the shift, in Niklas Luhmann's terms, 'from territoriality to functionality',[23] from a world of sovereign territorial States to a world of functional institutions. More radical representatives of this view claim that the different

[21] H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933) 123.

[22] P-M Dupuy, 'L'unité de l'ordre juridique international'297 RdC(2002) 9.

[23] N Luhmann, *Das Recht der Gesellschaft* (stw edn, Suhrkamp, Frankfurt/Main 1995) 571 ss.; N Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp, Frankfurt/Main 1997) 158-160; *cf* AL Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization' in IF Dekker and WG Werner (eds) *Governance and International Legal Theory* (Martinus Nijhoff, Leiden, Boston 2004) 59.

systems lack minimal commonality to maintain any coherent overarching system of general international law.[24]

The fragmentation of international law is accompanied by a fragmentation of adjudicatory bodies. Most of these bodies, such as the International Criminal Court, the WTO Dispute Settlement Body, or the regional human rights courts, belong to one single 'issue area', that is, they appear incapable of solving disagreements or value conflicts between different issue areas, such as trade and human rights.[25] In such an environment, international adjudication is not limited to the minimal accommodation of different State interests along the lines of State consent or acquiescence. Rather, the task of adjudicatory mechanisms is to implement the logic of the relevant sub-system. *Lacunae* in the law are not to be filled by the residual norm of State sovereignty and autonomy, as in the *Lotus* world of the past, or international 'community interests', but by the optimization of the working of the system in question. For example, in spite of attempts at the accommodation of other values, the WTO Dispute Settlement Body is called upon facilitating trade rather than furthering human rights, preserving world cultural heritage or protecting the environment. The famous doctrine of *effet utile* used by the European Court of Justice for promoting European integration at times of political reluctance and incapacitation, is a case in point for the potential of adjudication to transform an international organization and its members towards a 'community' model.[26]

While the existence of a multiplicity of international adjudicatory bodies in specialized systems is certainly to be regarded as an advance towards a more 'legalized' international system, it may become problematic when dealing with problems beyond the purview of the individual sub-system for which it was originally designed. The difficulty of the WTO Dispute Settlement Body with animal protection in the *Shrimp/Turtle*-saga is a case in point.[27] The unequal institutionalization of the different functional subsystems gives the stronger system an advantage over the weaker systems.[28] Thus, trade stands a better chance than labour

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[24] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law'25 Michigan JIL(2004) 999 at 1004-1017.

[25] See DW Leebron, 'Linkages'96 AJIL(2002) 5.

[26] See JHH Weiler, *The Constitution of Europe* (Cambridge UP, Cambridge 1999) at 22-23; *cf Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, 182.

[27] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 38 ILM (1999) 118.

[28] R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann'13 EJIL(2002) 651 at 658; Paulus, 'From Territoriality to Functionality?' at 88-95.

rights before the WTO panels, and the ICTY will tend to prefer the interests of the prosecution of international crimes over the right of the accused to a fair trial.

While this effect may be mitigated by the judges taking account of other values than those of their own subsystem, such moderation cannot solve the structural problem, namely the need for a neutral arbiter. In the absence of obligatory jurisdiction over other international tribunals, the ICJ can seldom take over a moderating role, and it may well suffer from its own biases when it gets the opportunity to finally speak. For example, in *Arrest Warrant*,[29] the Court avoided deciding the value conflict between traditional State immunity and the universality principle for the prosecution of international criminal law violations by a minimalist opinion that nevertheless showed a preference for the former. In the *Application of the Genocide Convention* case, in a hardly veiled defence of its prerogative of the interpretation of international law, the Court lectured the International Criminal Tribunal for the Former Yugoslavia for its broad theory of attribution of the acts of guerrilla groups to the State supporting them,[30] thus protecting States from responsibility for non-State terrorist groups in spite of their role in their establishment and operation.

Of course, this does not imply that judges and arbiters in 'functional' courts and tribunals are inherently biased and necessarily oblivious of other systems. In *Shrimp/Turtle*, for example, the DSB Appellate Body accepted animal protection when applied in a fair manner; in *Al-Adsani*, the European Court of Human Rights narrowly favoured State immunity over individual claims against human rights offending states.[31] Whatever one may think of the judgments reached in the two cases, it can hardly be maintained that the judges of the trade body were unaware of international environmental law or that the judges of the human rights court were oblivious of State immunity. However, such individual virtue can only be a meagre substitute for institutional fairness – which would require representation of all the interests and rights involved before the adjudicatory body.

Thus, functionalism cannot, by itself, legitimize international adjudication beyond the will of States. However, it may provide a *ratio* for the filling of *lacunae* in the law by such a tribunal. Nevertheless, in order to decide value conflicts between different issue areas, international

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[29] *Arrest Warrant of 11 April 2000 (DR Congo v Belgium)*, 2002 ICJ Rep 3.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 27 Feb 2007, available at http://www.icj-cij.org, paras 403-407.

[31] *Al-Adsani v UK* (2002) 34 EHRR 11.

tribunals need to go beyond the narrow confines of their own system to include general international law and to accommodate the concerns of other subsystems. While being itself servant of their subsystem, international tribunals are, at the same time, advocates of the general common interest. Functionalism cannot account for this role of international adjudication, a role that is becoming ever more important in the increasingly fractured system of contemporary international law.

2. Liberalism and international adjudication

The inter-State model of international community, in which individual human beings acquire rights and duties only via their national States, appears to be in trouble when not only goods and services, but also individuals are increasingly moving internationally, and where their ideas cross borders via the Internet. While States remain the only lawgivers in international law, it is increasingly shaped by non-state actors – whether in the area of law-making, by participating in law-making conferences, or in the area of implementation, when human rights organizations such as amnesty international or Human Rights Watch 'name and shame' States in breach of human rights obligations. Mass protest may be more effective these days than diplomatic interventions by State agents. Jürgen Habermas and Jacques Derrida have regarded the protests against the most recent war against Iraq as the birth of a common European (if not world-wide) public opinion.[32]

A liberal concept of international community draws the consequences of these developments by focussing on individual rights and duties. Liberals and neoliberals demand a reconstruction of international law on an interindividual basis. In the liberal perspective, individuals, not States, are the ultimate stakeholders in international law.[33] States are drawing their legitimacy from their representation of human beings. State rights must be justified before international Courts and tribunals not as aims in themselves, but in their service for individuals. Accordingly, States may lose their legitimacy – as well as their protection from foreign intervention – when they do not protect the human rights of their population.[34] Whereas more

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[32] J Habermas, *Der gespaltene Westen* (Suhrkamp, Frankfurt am Main 2004) 44.

[33] AE Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford University Press, Oxford/New York 2004); A Buchanan and RO Keohane, 'The Legitimacy of Global Governance Institutions'20 Ethics & Int'l Aff(2006) 405 at 406, 417.

[34] *cf* note 14 above and accompanying text.

moderate representatives of liberal ethics, such as John Rawls,[35] implicitly justified classical international law as allowing for multiple, diverse societies, more radical liberals demand the establishment of a 'world social order' at the international level.[36]

In their attitude towards international adjudication, liberals display a certain disregard for the 'collective' legitimacy of international courts and tribunals in favour of a more pragmatic concept of international tribunals as service providers to individuals. Thus, individualist liberalism will be oriented to individual outcomes, not collective State interest. Often, liberals will emphasize the cooperation between international and national courts and thus opt for a more general perspective, leaving a narrow inter-State view of international law. This does not imply, however, a loss of importance of international adjudication. Anne-Marie Slaughter has concluded that, at least in the postmodern West, the State as unitary actor has 'disaggregated' into its component parts.[37] Accordingly, the three branches of government are becoming separate actors at the international level, building 'transgovernmental' networks with their counterparts from other liberal States. Thus, 'transjudicial networks' of judges and lawyers play an increasing role in the professional self-awareness of courts and tribunals that establish a 'community of courts' beyond State borders.[38] Lawyers from liberal States are considered to have as much, if not more, in common with each other than with their domestic counterparts in the other branches of government.

For the anti-institutionalist, neo-liberal variety, a liberal and democratic sovereign State does not need to accept international precedents failing to meet the most basic criteria of democratic legitimacy and human rights protection.[39] For others, international adjudication will be persuasive, but only as long as it conforms to substantive liberal and democratic values. It is thus telling that many liberals emphasize (democratic) legitimacy over

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[35] J Rawls, *A Theory of Justice* (Harvard UP, Cambridge, Mass. 1971) 377 ff.; J Rawls, *The Law of Peoples* (Harvard UP, Cambridge Mass., London 1999) 37.

[36] *See* CR Beitz, *Political Theory and International Relations* (Princeton UP, Princeton 1979) at 8-9, 128; TW Pogge, *Realizing Rawls* (Cornell UP, Ithaca, London 1989), at 244 ff.; *but see* Rawls, *Theory of Justice* at 457.

[37] A-M Slaughter, *A New World Order* (Princeton UP, Princeton and Oxford 2004) 131-165; A-M Slaughter, 'International Law in a World of Liberal States'6 EJIL(1995) 503.

[38] A-M Slaughter, 'A Global Community of Courts'44 Harv Int'l LJ(2003) 191; Slaughter, *New World Order* at 68; RO Keohane, A Moravcsik and A-M Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational'54 IO(2000) 457.

[39] Goldsmith and Posner, *Limits of International Law* at 205 ff.Goldsmith and Posner, *Limits of International Law*

international legality.[40] Networks of domestic institutions are preferable to global courts and tribunals with the authority to issue decisions binding for both liberal and non-liberal States. At the same time, making the individual the main criteria for international adjudication may de-legitimize traditional inter-State adjudication, as provided, for example, by the ICJ, for the sake of consensual, mixed tribunals such as the criminal 'hybrid' tribunals in Sierra Leone or Cambodia.

While liberalism may suit States with 'liberal' values, it tends to underestimate the lasting relevance of differing value concepts not only between 'liberal' and authoritarian States.[41] Filling *lacunae* of existing law with liberal values opens international courts to the charge of political bias. International law and international adjudication aim not only at the realization of 'liberal values' such as human rights, but also – and maybe primarily – the peaceful coexistence and cooperation of different value and belief systems. The peace-making role of international arbitration and adjudication is thus in stake by distinguishing 'liberal' and other States or peoples. A one-sided reliance on liberal principles could hamper the basic mission and legitimacy of international law as a pluralist system designed for all States, not only liberal and democratic ones. If international law were tied to liberal and democratic values only, 'non-liberal' States may feel legitimized to disregard it. In other words, it may be preferable to have any international law including all States than having a perfectly liberal and democratic international law that only represents one part of the international community.

3. The postmodern critique of international adjudication

Postmodernists are deeply critical regarding the claim that international adjudication – or adjudication in general – can actually apply 'objective' law to reality. The belief of a clear direction of history towards the realization of liberal values, the idea of progress itself, is discarded; diversity and subjectivity are celebrated.[42] One may distinguish two main aspects of 'postmodernist' criticism: An 'internal' critique tries to expose the internal inconsistency of

[40] See eg Buchanan and Keohane, 'Legitimacy of Global Governance Institutions' at 406.

[41] *But see* Rawls, *The Law of Peoples* at 5 et passim (arguing for an international law applicable to liberal and 'decent' human rights abiding States only).

[42] Z Bauman, *Intimations of Postmodernity* (Routledge, London/New York 1992) at 189-196; J-F Lyotard, *La condition postmoderne: Rapport sur le savoir* (Éditions de Minuit, Paris 1979) at 8-9.

'mainstream' international law, an 'external' critique points towards the ideological and political bias of supposedly 'neutral' legal rules.[43]

According to the 'internal' critique, the indeterminacy of rules and principles precludes a definite outcome of legal analysis. International law navigates between an apology for narrow-minded State interests or power and a utopian search for a global community of values.[44] At the same time, indeterminacy enables the (ab)use of international law for political purposes hidden under the alleged objectivity of legal analysis, a process often termed 'reification'.[45] Whereas, in the internal critique, international law is presented as lacking determinate content, the external critique regards international law as a powerful tool for the attainment of political objectives. Although there is an obvious tension between these two critiques, they are not necessarily contradictory: The law can be abused because reality does not coincide with the myth of its objectivity.

Both the external and the internal critique seem to render futile any attempt, judicial or otherwise, at deriving determinate results from legal analysis independent of the ideological position of the judge. It appears futile to strive to find an overlapping consensus by applying formal sources to new cases, when the absence of consensus was at the source of the conflict. Devoid of either substance or formal procedure, international law falls prey to political abuse.

The refutation of the objectivity of law leads postmodern authors to the person of the lawyer and her social role.[46] In Martti Koskenniemi's early view, the task of the lawyer is to contribute to acceptable solutions for social problems even in the absence of legal guidance.[47] David Kennedy also suggests to regard

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[43] JHH Weiler and A Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?'8 EJIL(1997) 545, at 551-552.

[44] M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Lakimiesliiton Kustannus, Helsinki 1989) at 48 (footnote omitted).

[45] A Carty, 'Critical International Law: Recent Trends in the Theory of International Law'2 EJIL(1991) 66 at 67 note 1.

[46] Koskenniemi, *From Apology to Utopia* at 490; O Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer Law International, The Hague; London; Boston 2000) at 8 ff.; O Korhonen, 'New International Law: Silence, Defence or Deliverance'7 EJIL(1996) 1 at 4-9.

[47] Koskenniemi, *From Apology to Utopia* at 486.

> international law not as a set of rules or institutions, but as a group of professional disciplines in which people pursue projects in various quite different institutional, political, and national settings.[48]

In his more recent work, Martti Koskenniemi has proposed to regard the practice of judges and lawyers as a 'culture of formalism' that mitigates power by listening to the voices of 'the other'.[49] In this perspective, international adjudication should broaden its constituency to individuals, and, in particular, the excluded. It would not speak the voice of the powerful only, but give voice to the suppressed. However, the turn to the lawyer – and by extension the judge – raises even more questions. What is the lawyer without the application of 'the law'? Where does her authority come from, if not from legal rules and principles emanating from lawmaking procedures accepted by society?

IV. Towards a Methodology of International Adjudication

As it turns out, neither of these approaches alone properly describes the role of international adjudication. While instructive for the ethical evaluation and critique of the law, radical liberalism lacks the cross-cultural acceptance which would be necessary for reaching universality. Without universality, however, international adjudication remains unable to deal with disputes between actors of different philosophical and ethical traditions. If the goal of international adjudication remains the peaceful settlement of disputes, abandoning universality of reach would be too big a price for ideological cohesion.

While it may be correct to criticize a formalist conception of law as a mechanical application of rules in the tradition of *Montesquieu*, a return to a purely political conception of the task of the lawyer fails to grasp the point of adjudication: judicial pronouncements do not constitute *ad hoc*-compromises, but they attempt to solve disputes by the application of general and abstract standards previously agreed or acquiesced to by the members of society. It is in this detachment from the political environment, and not in the involvement in it, where the authority of rules and principles lies. An unprincipled adhocery would lead to a loss of faith in international adjudication – and ultimately to the withdrawal of consent to jurisdiction.[50]

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[48] D Kennedy, 'The Disciplines of International Law and Policy'12 Leiden JIL(1999) 9 at 83.

[49] M Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law, 1870-1960* (Cambridge University Press, Cambridge 2002) 502.

[50] Fastenrath, 'Relative Normativity' at 336. This may be even more so in adjudicative mechanisms in special fields such as international trade law, see G Abi-Saab, 'The Appellate Body and Treaty Interpretation' in G Sacerdoti, A Yanovich and J Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge UP, Cambridge 2006) 453 at 461.

Thus, international adjudication cannot, and should not, disregard the legal sources from which it derives its authority. For example, the International Court of Justice must respect the limits of its jurisdiction and cannot rule over war crimes or crimes against humanity when its jurisdiction is limited to genocide.[51] The embrace of politics would be paid dearly with the loss of judicial authority. This does not imply a denial that adjudication plays a political as well as a legal role. But it is by its judicial, not by its political authority that adjudication does so.

One way of dealing with the pluralism of international value system may lie in the application of the Rawlsian concept of an 'overlapping consensus' that accepts the lack of agreement on the philosophical and religious foundations by finding a 'political' compromise that does not affect the different concepts of legitimacy, but allows both sides to integrate a decision in their own value and belief system.[52] In the case of the International Court of Justice, such inclusiveness can be reached by fuller reasoning contained in separate and dissenting opinions.[53] Whereas the decision itself represents the compromise among the different legal views within the international legal community, individual opinions provide a comprehensive reasoning based on the diverse judicial and ethical views of the individual judges.

Of course, the difference between openly liberal concepts of adjudication and a consensual model may well be over-stated. One need to emphasize that Rawls anchors his notion of an overlapping consensus in 'reasonableness' eg the accord of these principles with the idea of public reason implicit in the traditions of a liberal democratic society.[54] For the 'law of peoples', Rawls includes the 'reasonable justness' of societies of 'decent' but non-liberal peoples, but categorically excludes authoritarian regimes as 'outlaw States'.[55] While the Rawlsian vision may thus be compatible with different religions and belief systems, it

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[51] See *Application of the Genocide Convention* (note 30), paras 147-48.

[52] J Rawls, *Political Liberalism* (Paperback edn, Columbia UP, New York 1996)133-172, in particular at 147. For the application of the overlapping consensus to the global realm see eg, T Franck, *Fairness of International Law and Institutions* (Clarendon, Oxford 1995) 14; Pogge, *Realizing Rawls* 277; BR Roth, *Governmental Illegitimacy in International Law* (Clarendon Press, Oxford 1999) 6.

[53] See Article 57 ICJ Statute; *cf* R Hofmann and T Laubner, Article 57 MN 43-58 in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice - A Commentary* (Oxford University Press Oxford 2006). For a conspicuous recent example, see *Oil Platforms (Iran v US)*, Sep. Op. Simma, ICJ Rep 2003, 161 at 324-25; see also E Jouannet, 'Le juge international face aux problèmes d'incohérence et d'instabilité du droit international'RGDIP(2004) 929.

[54] Rawls, *Political Liberalism* at 36-37; Rawls, *The Law of Peoples* at 172-73. Rationality is also a pre-condition for the ordering of international society, ibid, at 32.

[55] Rawls, *The Law of Peoples* at 5, 17, 62-63.

excludes any fundamentalism demanding a common religious (or ideological) basis for the establishment of political community. To a certain extent, consensualism thus requires the previous acceptance of a liberal idea of political community – the very consensus lacking at the international sphere.

What international adjudication is thus called to achieve may result in an even more Herculean task than Ronald Dworkin's concept of 'law as integrity' demands in a domestic legal order.[56] Dworkin 'asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process'.[57] Against criticism[58] he has maintained that the critics are short of examples to show that there are either *lacunae* in the law or that an application of his theory leads to insoluble contradictions to be filled by the political or psychological preferences of the judge rather than the general principles of the law.[59]

Within contemporary international law, however, there seems to be no shortage of examples of contradiction. Its basic principles are torn not only between the maintenance of State sovereignty and human rights, between the apology of State behaviour and the utopia of a just international order.[60] It is here where the International Court of Justice has occasionally been unable to find a broadly acceptable solution.[61] Another example is the clash between the duty of States to prosecute offenders against the core crimes of international criminal law and State or personal immunity. Both domestic and international courts and tribunals have come to contradictory conclusions, based on either State or individual rights.[62] Against this dire picture, a Dwokinian concept of international law as integrity may respond that States have never explicitly renounced their immunity with regard to international crimes or that the very concept of international crime requires the universal prosecution of alleged offenders. It may

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[56] See Dworkin, *Law's Empire* at 239-40.

[57] Ibid at 243.

[58] A Altman, 'Legal Realism, Critical Legal Studies, and Dworkin'15 Philosophy &Public Aff(1986) 215; J Waldron, 'Did Dworkin Ever Answer the Crits?' in S Hershovitz (ed) *Exploring law's empire: the jurisprudence of Ronald Dworkin* (Oxford UP, Oxford 2006) 155.

[59] R Dworkin, *Justice in Robes* (Belknap Press, Cambridge, Mass./London, England 2006) 105-116; R Dworkin, 'Response' in S Hershovitz (ed) *Exploring law's empire: the jurisprudence of Ronald Dworkin* (Oxford UP, Oxford 2006) 291 at 299 ff.

[60] *cf* Koskenniemi, *From Apology to Utopia* at 8-50.

[61] *Legality of the Threat or Use of Nuclear Weapons*, Adv Op, ICJ Rep. 1996, p. 226, at 266.

[62] *cf Arrest Warrant* (note 29); *Al-Adsani* (note 31); and *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet (No. 3),* [2000] AC 151.

also try to argue that State and individual rights can be applied in a way that avoids a clash.[63] 'Soft law' or, rather, a differentiation between different grades of authority, may help in filling lacunae in the 'hard' law of the sources triad of Article 38 ICJ Statute.[64] Nevertheless, it appears almost impossible to place both State and individual existence at the top of the scale of international legal principles.

In the absence of a global liberal and democratic society – or a free global association of liberal and democratic societies – international adjudication may thus not always be able to maintain the coherence of international law. When the balancing and accommodation of State and individual rights fails, this may require a taking of sides between State and individual rights, community and State interests. However, when done openly and transparently, international adjudication still will be able to remain faithful to the idea of the integrity of international law. In this event, judges should openly admit the indecisiveness of the sources and the clash of the underlying principles and clearly distinguish between the constraints of the law and the reasons why they adopt one rather than the other solution, prefer one rather than the other principle. From the perspective of a citizen of a liberal democratic State, such a solution cannot stem elsewhere than from an application of the principles of a liberal and democratic society at the international sphere, however recognizing, as it were, that international decision-making requires taking into account the position of 'the other'.

Thus, the judge must decide within the confines of the law. But his or her responsibility also extends to the maintenance of the integrity of the international legal system – in other words, international judges must uphold the broader idea of an international rule of law. This may cut both ways: in some cases, it may require the Court to follow a literal interpretation of the wording of a treaty where its meaning is plain. In others, gaps in the law may allow the judge to further develop the law to meet the needs of its constituents, which includes both States and humanity at large. This was the original purpose behind the inclusion of 'general principles of law' in Article 38 of the ICJ Statute.[65] In addition, in conflicts between different subsystems of international law, the competent Court or Tribunal must strive to draw a full picture of the

[63] *cf* Dworkin, *Justice in Robes* at 112, 116.

[64] Fastenrath, 'Relative Normativity' at 339-40.

[65] See A Pellet, in Zimmermann, Tomuschat and Oellers-Frahm (eds), *ICJ Statute* , Article 38 MN 27-31.

relevant legal rules to avoid realizing one legal goal at the expense of another.[66] A hint in this direction is also given by Article 31, para. 1 lit. c of the Vienna Convention on the Law of Treaties, which provides that the interpretation of a treaty must take into account 'any relevant rule of international law applicable in the relations between the parties.'[67] The Court or tribunal must also look to the broader systemic implications of its interpretation for the whole of the international community.[68] However, there may not always be a clear and unequivocal solution of dilemmas and gaps in the law. Legal principles may help to fill the gaps, but also add to the contradictions within the law.

Faced with these gaps, the task of the lawyer is not consumed by simply re-stating or formulating an existing consensus. Rather, the judge may be called to acquire a role in maintaining, and at times even establishing, the integrity of the system.[69] Jürgen Habermas once proposed to regard the conflict between human rights and the prohibition on the use of force not on the basis of contemporary law only, but of an international legal system to come.[70] Further, the Swiss Civil Code authorized the domestic judge to decide pursuant to the law she himself would put forward to avoid a *non liquet*.[71] Referring to Kant and Dworkin, Martti Koskenniemi has suggested to apply 'constitutionalism as a mindset' to find a solution as inclusive of the rights and interests at stake as possible.[72] Thereby, the judge fulfils her mandate to actually decide the dispute put before it.[73] The ultimate test will then lie in the implementation of the judgment – which is, in most cases, not directly enforced.

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[66] This has been recognized by the WTO Appellate Body in its first report, see *US – Gasoline*, WT/DS2/AB/R, III.B, at 17; see also J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?'95 AJIL(2001) 535 with ample references.

[67] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; on the relevance of this provision for the WTO DSB and the ICJ, respectively, see Abi-Saab, 'The Appellate Body and Treaty Interpretation' at 462-64; G Guillaume, 'Methods and practice of treaty interpretation by the International Court of Justice' in G Sacerdoti, A Yanovich and J Bohanes (eds) *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge UP, Cambridge 2006) 466 at 470-71.

[68] Fastenrath, 'Relative Normativity' at 337.

[69] For a similar conclusion see Jouannet, 'Le juge international' (note 69) at 943-44.

[70] J Habermas, 'Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral' in R Merkel (ed) *Der Kosovo-Krieg und das Völkerrecht* (Suhrkamp, Frankfurt 2000) 51.

[71] § 1 (2) Swiss Civil Code: 'If the law does not contain a rule, the court shall decide according to customary law and, where such law is lacking, according to the rule that he would establish as legislator.' (our transl).

[72] M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization'8 TIL(2007) 9 at 32.

[73] But see *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Rep 1997, 7, at 83 (referring the case back to the parties). The matter remains undecided until this day.

Thus, the legal methodology of international adjudication requires, in a process of three steps, all: a 'positivist' regard for the confines of the judicial task of interpreting existing legal rules; a Dworkinian look to the founding principles of an international legal order allowing for legal decisions standing on principle; and a postmodern look at the element of choice involved in any legal interpretation that enables the judge to consciously and transparently apply her own reasoned judgment.

V. Conclusion

Contemporary international adjudication has gone well beyond the limits of a traditional, quasi-arbitral system in which international judges could not exercise an independent role. But the loss of a clear reference point has left uncertainty how to cope with the newly gained independence without losing the indispensable support of the State constituency. At times, courts and tribunals confined themselves to a narrow, purely functional role, without regard to more general norms and principles. In most cases, however, they have understood their role in a broader fashion.

This contribution does not purport to propose an additional 'superior' version of adjudication. Neither does it advocate a return to a judicial minimalism that fails to account for the aspirational aspects of international adjudication, namely the establishment of an international rule of law as alternative to the law of the jungle. Proper international adjudication will have to acquire the characteristics of each of these different strands: it will fill the gaps of international law by fulfilling the goals of the concrete legal institution(s) it serves, but remain mindful of the broader implications; it will take account of the move towards individual rights and duties in the international sphere, but will not forget that Western individualism cannot be imposed on others; it will be mindful of the relevance of political circumstances when it applies legal prescriptions, but know that it derives its authority from the relevant legal sources emanating, for better or for worse, from States.

Postmodern writers have opened our eyes both to the indeterminacy and the political bias of lawyers and adjudicators. The point is, however, not to be ashamed of those underlying choices but to open them up for critique and rebuttal. In the words of John Tasioulas,

> by making explicit, and reflectively articulating, the genuine reasons on which decisions are based … self-consciously value-based adjudication can enhance, rather than corrode, the realization of the rule of law.[74]

If the adjudicator stops to pretend that the outcome of her analysis is the result of a purely objective analysis, if she admits and demonstrates the element of (conscious) choice and individual commitment, the legal enterprise wins much credibility and loses little of its normativity, understood not as a simple conformity of life to general rules but as the quest for public accountability of the exercise of power.[75]

Nevertheless, legal answers are supposed to refer to standards, rules and principles established by some kind of generally recognized formal procedure. If judges did not use those standards, that would result in arbitrariness and thereby in a dereliction of duty. But that leaves a lot of space to the imagination and creativity of the individual judge how to best apply these standards, rules and principles to the diversity and richness of life. In legal analysis self-conscious of its limits, those individual value judgments are not exercised in the closet but in the open.[76] That includes an effort to break out of the traditional bounds of international law to the public sphere towards an inclusion of private actors such as non-governmental organizations, and towards accepting and even embracing cultural diversity.

But international courts can only find a minimal consensus within their constituency, and can hardly step out of this role to become lawmakers rather than law-appliers. Global adjudication cannot escape the need for striking a balance between State and community interests, for finding a minimal common ground between different cultures and religions, or even between professional sensibilities of different issue areas, by pointing to commonly agreed standards that go beyond the self-interest of the parties and the particularities of the functional subsystem in which the judge operates. Such value judgments might allow for the very international public discourse that can build and elaborate areas of international consensus, beyond doctrinal formalism and postmodern particularism. In this way, international law is not (only) what international courts will do. But what international courts are doing will not only shape the role of international law in the international community, but also become part of the community building itself.

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[74] J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case'16 Oxford J Legal Studies(1996) 85 at 104-05.

[75] See Koskenniemi, *From Apology to Utopia* at 479.

[76] For a critique of some of the practices of the WTO DSB in this regard from within see Abi-Saab, 'The Appellate Body and Treaty Interpretation' at 461-462.