Session 6

International Justice: in Whose Name?

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Armin von Bogdandy and Ingo Venzke argue that the very success of international courts has made it essential to reconsider their basic purposes. The idea that courts function simply as a dispute mechanism between consenting states, the authors believe, is obsolete, in part because international courts have acquired more autonomy and scope since their inception. What, they ask, are international courts really for? And on whose behalf do they speak?

At points in their article, the authors speak specifically to the role of the international judiciary, and they seem to call for a conscious approach to these questions on the part of those who sit on the international bench. In this session, we will have the opportunity to explore whether the theoretical questions raised by the authors have merit, and if so, whether they have practical implications for international judges.

1) The disconnection of international courts and tribunals from the usual systems of regulation, oversight and accountability found in the national context is a source of concern and skepticism for some observers. Domestic courts speak the law in the name of the people while invoking the democratic sovereign. But in whose name exactly do international courts and tribunals render decisions? Many questions have been raised about the source of their authority and their relation to notions of democracy. How do these questions affect the day-to-day work of judges?

   a) The authors note that “[i]nternational decisions are traditionally viewed as flowing from the consent of the states they address.” But they continue: “In light of the growing autonomy of some courts as well as the breadth of controversial fields in which international courts have been involved, however, there are now many constellations in which neither the original consent nor the functional goal can any longer convincingly settle legitimatory concerns” (p. 24). Do you agree with this perspective that many courts have transcended their original purpose and the agreement behind them? Do you agree with the implication that judges should be explicit and transparent about the enlarged purposes of their court, and the broader constituencies that they serve?

   b) One way to counter the “democratic deficit” of international adjudication, the authors argue, is to work more explicitly towards the creation of a global legal system. A more coherent system, they say, would offer a kind of stability and protection of basic principles that would approximate the virtues of democracy in an international context. They go so far as to say, “it is every interpreter’s task to aim at the system, not least because it serves legal equality” (p. 37). Do you agree that a more coherent system makes international law more “democratic”? And do you accept the specific responsibility that, the authors claim, belongs to international judges?
c) The authors suggest that a certain delimited form of “politicization” is healthy and necessary for international courts. They hasten to explain that “[b]y this we mean not to cherish political power-play but to suggest that multilateral spaces be used and constructed where actors can engage in meaningful political contestation, introducing their interests, explaining their convictions, and discussing their beliefs, interests, and positions” (p. 30). Do you think that international courts are already a forum for the kind of “meaningful political contestation” that they envisage (see their example on page 31 regarding the WTO)? Do you agree with the authors that judges should do more to open up more transparent and productive dialogue involving political actors?

d) According to von Bogdandy and Venzke, “international courts might not always be in a position to carry the whole burden of justifying their authority.” Consequently, domestic constitutional organs must play an important role in bringing about the effect of international decisions in municipal legal orders (p. 10). How has the support of domestic institutions played out in relation to your respective courts?

e) The authors claim, “Applications of the law in the present have to connect to the past in a way that is convincing to the future” (p. 15). A recent BIIJ participant made a similar comment: “Decisions are not only speaking to the parties in litigation but to the rest of society. They are not only speaking to the present but also to the future” (BIIJ 2012 report, p. 23). To what extent to you agree that consistency over time is a crucial attribute for international courts, even in the absence of a settled principle of stare decisis?

f) In their speculative final paragraph, the authors offer the suggestion that international courts may be established by state agreements, but that, in the end, “the starting point of democratic justifications [of the work of international courts] are the individuals whose freedom shapes the judgments” (p. 41). Do you agree? Have some international courts already moved in this direction? How should judges balance their considerations of the role and rights of states, versus the role and rights of individuals?

2) Other questions have been raised more specifically about international criminal courts and tribunals and their effectiveness in bringing about a justice that is meaningful for the victims in whose name, at least in part, they speak.

In his 2013 Distinguished Lecture delivered at Brandeis University, Prince Zeid Ra’ad Zeid Al-Hussein of Jordan delved deeply into the question of how men and women seek to restore their humanity in the wake of genocide and other atrocities. While a strong supporter of international criminal justice and an important actor in the establishment and early years of the ICC, Prince Zeid nonetheless questioned whether contemporary international criminal justice is satisfactory for those who have suffered.

a) Von Bogdandy and Venzke note, “The international criminal tribunals and the ICC … are supposed to gain legitimacy by way of ending impunity for international crimes” (p. 25). Does this “path to legitimacy” conflict with the following statement of Prince Zeid: “… should we not aspire to something more, something deeper, than merely punishing the guilty?” (p. 3). Do you agree that the infrequent expression of true remorse by those convicted reflects an essential shortcoming of international criminal justice?
b) Should victim satisfaction be a central goal of international courts and tribunals? If so, what would this mean for the way in which prosecutions and trials are carried out? Have courts with victims’ participation filled this functional gap?

3) Another set of questions concerning the authority of the international justice system emerges through an examination of the actors who animate it.

As early as 1977, Oscar Schachter observed in his article about the invisible college of international lawyers that international judgments will be more credible and authoritative when made by a broadly representative group than by an exclusive and like-minded one. “This leads to the conclusion that the professional community of international lawyers should aim at a wide international participation embracing persons from various parts of the world and from diverse political and cultural groupings” (Oscar Schacter, The Invisible College of International Lawyers, 72 Nw. U. L. Rev. 217, 1977-8).

Von Bogdandy and Venzke make a similar observation about those who serve as international judges: “The ‘community’ must not be closed and the ‘college’ must not be invisible. These are minimal safeguards and any genuine effect of legitimation can set in only when minimal preconditions for a legitimatory juridical discourse are met – above all, publicness, transparency, and adequate participation” (p. 38).

a) If the decisions of international courts and tribunals are to be accepted and acted upon, do those involved in the justice process – not only international judges, but also persons working in prosecution and defense units, registries, outreach offices, etc. – need to be representative of the populations affected by those decisions? In other words, does representativeness undergird the legitimacy of the international justice system?

b) If representativeness is deemed important, what kinds of diversity among international justice actors need to be considered, beyond nationality (mandated by most international courts and tribunals), gender (regulated by some), and professional background (also regulated by some)? What about other social and cultural identifiers that powerfully shape human thought and action, such as race, religion, ethnicity, or political ideology?

Readings
