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Solomonic Judgments and the Legitimacy of the International Court of Justice

Nienke Grossman

On January 27, 2014, the International Court of Justice issued its ruling in *Maritime Dispute (Peru v. Chile)*.¹ Peru requested the Court delimit the maritime boundary between the two states in the form of an equidistance line, arguing that no maritime boundary agreement was in force between the two states. Chile, on the other hand, asserted that the maritime boundary was fully delimited by a 1952 treaty between the parties, and it consisted of a parallel of latitude extending westward from a point on the coast out to a distance of at least 200 nautical miles. The Court determined that a tacit maritime boundary existed, which neither Party argued, and that it consisted of a line of latitude extending 80 nautical miles from the coast, followed by an equidistance line up to 200 nautical miles.² The Court's judgment was widely described as "Solomonic."³

The term "Solomonic" dates to the Biblical story of King Solomon. Two women each claimed to be the mother of the same infant, and the king declared it should be cut in half.⁴ Although King Solomon used this provisional judgment to determine the identity of and grant custody to the biological mother, Solomonic judgments are generally understood as the "split-the-baby" provisional approach. Solomonic or compromise judgments reject the winner-take-all approach that characterizes most modern common law adjudication.⁵ Rather than recognizing legal rights or duties as belonging to one party alone, a Solomonic court finds ways to split the issues or allocate remedies somewhat evenly. A Solomonic judgment may represent a point within a set of reasonable legal outcomes whereby the Court has awarded each of the litigating parties some, but not all, of what they seek. On the other hand, sometimes Solomonic courts may

¹ *Maritime Dispute (Peru v. Chile)* (2014), at <http://www.icj-cij.org/docket/files/137/17930.pdf>. The author, who is an Associate Professor at the University of Baltimore School of Law, served as a Legal Advisor to the Government of Chile in this dispute. She wrote this article in her personal capacity, and the views expressed are her own and do not necessarily represent the views of the Chilean Government. She is grateful for excellent suggestions and feedback from the editors and participants in the University of Baltimore School of Law/PluriCourts joint symposium on International Courts and Legitimacy.

² *Ibid.*, 67, para. 196

³ See, e.g., *Peru-Chile Deal Will Strengthen Economies*, World Affairs (4 Feb. 2014), at <http://www.worldaffairsjournal.org/blog/juan-de-onis/chile-peru-deal-will-strengthen-economies>; *Maritime Dispute between Peru and Chile Ends in a Tie More or Less*, The World Daily Blog (28 January 2014), at http://www.thestar.com/news/the_world_daily/2014/02/maritime_dispute_between_peru_and_chile_ends_in_a_tie__more_or_less.html; *Pragmatism wins the day in ICJ's Maritime Dispute Ruling Involving Peru and Chile*, Arent Fox (27 Jan. 2014), at <http://www.arentfox.com/newsroom/alerts/pragmatism-wins-day-icjs-maritime-dispute-ruling-involving-peru-and-chile#.VaQbrLtRGM8>.

⁴ *The New Annotated Bible with the Apocrypha* (Oxford: Oxford University Press, 1994), p. 16-28.

⁵ Jacob Jaconelli, 'Solomonic Justice and the Common Law', *Oxford Journal of Legal Studies* 12 (1992), 480.

prioritize pleasing and displeasing the litigating parties in relatively equal amounts over deciding disputes in strict accordance with the relevant law. They may prize Solomonism over law.

Peru v. Chile is not the Court's first judgment deemed "Solomonic". Rather, the term is frequently used to describe ICJ judgments.⁶ The implications of Solomonic decision-making for the Court's legitimacy, however, are under-explored. A legitimate court possesses justified authority, and its rulings are worthy of respect and ought to be followed, even when against the perceived interests of a particular party. Normatively legitimate courts possess the "right to rule," while sociologically legitimate courts are perceived to have it.⁷ While normative legitimacy is prescriptive and derived from philosophical and theoretical approaches, sociological legitimacy is agent-relative, dynamic and subjective.⁸ Source-, procedure- and result-oriented factors may affect the legitimacy of an institution.⁹ This Chapter explores the relationship between legitimacy and Solomonic judgments. It suggests that Solomonic decision-making is a potential danger to the normative legitimacy of the ICJ when it exceeds the scope of States' delegated authority and because it is inherently biased against parties with significantly stronger legal cases. Judgments aimed at splitting the baby may result in unsound legal reasoning, and they do not assist those normatively addressed to better comply with the law.¹⁰ The perception that the Court is acting in a Solomonic fashion, even when it may not be, may harm its sociological legitimacy, or States' perceptions of its justified authority when it detracts from the Court's adjudicatory function. On the other hand, perceptions that the Court is making

⁶ See, e.g., V. Dimitrijevic and M. Milanovic, 'The strange story of the Bosnian Genocide case', *Leiden Journal of International Law* 21 (2008), 85 (discussing the Bosnian Genocide case); L. F. Damrosch, 'The impact of the Nicaragua case on the court and its role: harmful, helpful or in between?', *Leiden Journal of International Law* 25 (2012), 145 (referring to Bosnian Genocide and Oil Platforms case); 'Testing the Effectiveness of the International Court of Justice: The Nuclear Weapons Case', *American Society of International Law Proceedings* 91 (1997), 8 (analyzing the Nuclear Weapons case); Tom Ginsburg and Richard McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', *William & Mary Law Review* 45 (2004), n. 247 (discussing the Haya de la Torre case).

⁷ D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (Berlin: Springer-Verlag, 2008), p. 313; A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions', in L. H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009), p. 29; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law* 93 (1999), 604.

⁸ Bodansky, 'The Concept of Legitimacy in International Law', p. 313; Nienke Grossman, 'Legitimacy and International Adjudicative Bodies', *George Washington International Law Review* 41 (2009), 116.

⁹ R. Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in R. Wolfrum and V. Roben (eds.), *Legitimacy in International Law* (Berlin Heidelberg: Springer-Verlag, 2008), p. 6.

¹⁰ The latter idea is drawn from Joseph Raz's service conception of authority. See below, part IV.

decisions that are rooted in law and also Solomonic may enhance the Court's effectiveness, and thereby, sociological legitimacy.

I. *Delegated Authority*

The legitimacy of the ICJ rests, in significant part, on the consent of states to its jurisdiction and the Court's acting within the confines of state consent.¹¹ The ICJ lacks the authority to bind sovereign and independent States without their consent, or to make decisions that are *ultra vires*, or exceed the limits of delegated authority. Both the ICJ and its predecessor, the Permanent Court of International Justice, have emphasized the importance of consent. For example, in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the Court wrote: "the Court's jurisdiction is based on the consent of the parties and is confined to the extent accepted by them."¹² To the extent that Solomonic judgments exceed the scope of delegated authority, they threaten the Court's legitimacy.

The United Nations Charter and the Court's Statute establish the function of the Court and prescribe the limits of its authority. According to the Charter, the ICJ is the United Nations' "principal judicial organ."¹³ In the first paragraph of the ICJ Statute's Article 38, States specified that the Court's "function is to decide in accordance with international law" disputes submitted to it.¹⁴ The Court must apply conventions, customary international law, general principles of law, and as a subsidiary means for the determination of rules of law, judicial decisions and the teachings of highly qualified publicists. The second paragraph of Article 38 states that the Court may decide a case *ex aequo et bono* "if the parties agree thereto."¹⁵

These instruments demonstrate that States distinguished between adjudicative and other functions when establishing the ICJ, and they provide insights into what States authorized the Court to do. States charged the Court with adjudication, as distinguished from political or other

¹¹ Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', p. 605.

¹² *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections*, ICJ Reports (2011) 124-125, para. 131 (citing *Armed Activities on the Territory of the Congo*); see also *Status of the Eastern Carelia, Advisory Opinion*, P.C.I.J. 1923 (ser. B) No. 5, para. 33 ("It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures*, ICJ Reports (2002) 219, para. 57 ("one of the fundamental principles of its Statute is that it cannot decide a dispute between states without the consent of those States to its jurisdiction.").

¹³ Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 3 Bevans 1153; 59 Stat 1031; TS 993, art. 92.

¹⁴ Statute of the International Court of Justice, 26 June 1945, in force 24 October 1945, 3 Bevans 1179; 59 Stat 1031; TS 993; 39 AJIL Supp. 215, art. 38.

¹⁵ Article 38(2) of the UN Charter.

roles. Filing a case at the ICJ is supposed to bring a dispute among states into the adjudicative realm, which is characterized by the application of law to a set of facts. The ICJ is a place for judicial settlement, and not for other kinds of dispute resolution, such as conciliation or mediation. The Court is to decide cases “in accordance with international law.”

Just as the Court’s foundational instruments distinguish between adjudicative and other functions, so too have scholars and ICJ judges. For example, Cesare P.R. Romano, Karen Alter and Yuval Shany recently wrote that international adjudication is a “law-based way of reaching a final decision” and that the “law-based nature of adjudicative decision-making distinguishes adjudication from other processes, such as political decision-making and mediation.”¹⁶ In the same vein, ICJ Judge Weeramantry opined in the *Lockerbie* case that the ICJ, “by virtue of its nature and constitution applies to the matter before it the concepts, the criteria and the methodology of the judicial process which other organs of the United Nations are naturally not obliged to do. The concepts it uses are juridical concepts, its criteria are standards of legality, its method is that of legal proof.”¹⁷ The point is that a judicial process is characterized by unique “concepts,” “criteria” and “methodology.” Consequently, the Court may issue a compromise or Solomonic judgment and still act consistent with the authority delegated to it by States in two situations: (1) if the parties express consent to such an approach concerning a particular case, or (2) if the law requires or allows the Court to incorporate a Solomonic approach into its reasoning.

The second paragraph of Article 38 of the ICJ Statute provides for one circumstance where the Court may issue judgments that prize Solomonic results over law. The Court may decide a case *ex aequo et bono* “if the parties agree.” The literal translation of *ex aequo et bono* is “from equity and goodness.”¹⁸ The Oxford Guide to Latin in International Law adds that it is a “manner of deciding a case pending before a tribunal with reference to the principles of fairness and justice in preference to any principle of positive law.”¹⁹ Ian Brownlie wrote that it “involves elements of compromise and conciliation.”²⁰ Resolution *ex aequo et bono* is generally considered distinct from equity, despite that *aequo* literally means “equity.”²¹ Equity is concerned with fairness, fair dealing, and principles of justice, but it is considered “a part of the

¹⁶ C. P.R. Romano, K. J. Alter, and Y. Shany, ‘Mapping International Adjudicative Bodies, the Issues, and Players’, in C. P.R. Romano, K. J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014), p. 4-5.

¹⁷ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, ICJ Reports (1992) 56 (Dissenting Opinion of Judge Weeramantry).

¹⁸ A. Fellmeth and M. Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2009), p. 91.

¹⁹ *Ibid.*

²⁰ I. Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed. 2008), p. 26, p. 720. *See also Cayuga Indians (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 171, 183 (Perm. Ct. Arb. 1925) (referring to *ex aequo et bono* as calling for “a degree of compromise”).

²¹ *See, e.g., Cayuga Indians (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 171, 183 (Perm. Ct. Arb. 1925).

normal judicial function,”²² while *ex aequo et bono* “may not be easy to reconcile with the judicial character” of the ICJ.²³ The ICJ drew the distinction between equity and *ex aequo et bono* in the *North Sea Continental Shelf Cases*:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.²⁴

The adjudicative function must consider the justice of the result, but it is constrained by the substantive legal context. *Ex aequo et bono*, on the other hand, operates beyond the normal scope of the judicial function.

Equity, which the Court may resort to as a general principle of law pursuant to Article 38(1)(c) of the Court's Statute, is intended to “correct the law's generality by filling gaps in the law, by adjusting conflicts and tensions among legal provisions, and by making exceptions in cases in which the rule leads to unanticipated results.”²⁵ If relevant law on a disputed point exists and was intended to apply to the facts at hand, equity's role is limited to situations where application of the law works an unacceptable injustice. *Ex aequo et bono*, on the other hand, disfavors positive law, and is driven by judges' notions of what is good or fair. Just as the members of the Court in the *North Sea Continental Shelf Cases* understood the two concepts to differ, so too did the drafters of the ICJ Statute; that is why they required explicit consent by litigants to its application.

What about when the law is unclear or when a gap exists in the law? Is the use of Solomonic judgments authorized by States in such circumstances? Prosper Weil argues that once States consent to the jurisdiction of a tribunal, they confer on it “the normative and quasi-legislative power necessary” to settle the dispute.²⁶ The tribunal must rule because the States are asking for judicial resolution, even if the law is unclear or riddled with gaps. A lack of law or clarity on a particular issue may be remedied, suggests Weil, either by recourse to general principles of law, found in national legal systems, equity, or through application of the *Lotus* principle – States

²² *Ibid.*; B. A. Garner (ed.), Definition of ‘Equity’, *Black's Law Dictionary* (St. Paul, Minn.: West Group, 2001), p. 241; Brownlie, ‘Principles of Public International Law’, p. 25-6.

²³ Brownlie, ‘Principles of Public International Law’, p. 720.

²⁴ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)* ICJ Reports (1969) 3, para. 88.

²⁵ L. B. Solum, ‘Equity and the Rule of Law’, in I. Shapiro (ed.), *Nomos XXXVI* (New York University Press, 1994), p. 124.

²⁶ Prosper Weil, “‘The Court Cannot Conclude Definitively...’ Non Liqueur Revisited”, *Columbia Journal of Transnational Law* 36 (1998), 115.

may engage in conduct which is neither prohibited nor required by international law.²⁷ Yet nowhere does Weil argue that equity and *ex aequo et bono* are equivalent or coextensive, nor does he suggest that equity requires compromise judgments. Rather, equity, understood as fairness, fair dealing and principles of justice, may require the Court to recognize that one litigant has the significantly stronger or weaker case, not to split the entitlements or the remedies equally. Finally, because they required states to authorize decisions *ex aequo et bono* pursuant to Article 38(2), the drafters of the Statute could not have intended the Court to fill gaps in the law through judgments which prioritize compromise over law.

Does the law permit or mandate compromise or Solomonic decision-making in any other contexts? In other words, in what circumstances might treaties or customary international law require or allow a Solomonic approach? Maritime boundary delimitation is probably a good candidate. The delimitation of the continental shelf is to be done “in order to achieve an equitable solution,” pursuant to the United Nations Convention on the Law of the Sea.²⁸ When the Court uses equidistance lines in the process of delimiting the continental shelf in the absence of a binding treaty, it frequently splits maritime spaces equally. Nonetheless, the Court’s analysis does not stop once it generates an equidistance line. It is also required to consider relevant circumstances which may require adjustment or shifting of the line, including existing agreements, and finally, whether the shares of the relevant area are markedly disproportionate to the relevant coasts.²⁹ And UNCLOS states that the Court is to achieve an equitable solution “on the basis of international law” as found in Article 38 of the ICJ Statute. In other words, even in the area of maritime boundary delimitation, the Court’s articulated methodology requires it to consider non-geographical circumstances with legal weight. At least in theory, pre-existing positive law may strongly influence how the baby is split, distinguishing it from a pure *ex aequo et bono* approach.

What about Solomonic judgments for the sake of peace? If they are rooted in generally accepted legal discourse, Solomonic judgments to promote reconciliation among the parties may not exceed the scope of States’ consent to the Court’s authority. Solomonic judgments can help to maintain and nurture social relationships or aid in reconciliation of litigating parties.³⁰ States created the United Nations, of which the ICJ is a part, to “save succeeding generations from the

²⁷ Weil, ‘The Court Cannot Conclude Definitively’, 11-12; *see also* D. Bodansky, ‘*Non liquet* and the incompleteness of international law’, in L. Boisson de Chazournes and P. Sands (eds.), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999), p. 159-66.

²⁸ *See, e.g.*, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 U.N.T.S. 3, art. 83. “1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

²⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports (2012) 624, paras. 190-93, 219.

³⁰ N.E. Simmonds, ‘Book Review of Random justice: on lotteries and legal decision-making’ (N. Duxbury), *Cambridge Law Journal* 60 (2001), 216; Jaconelli, ‘Solomonic Justice and the Common Law’, 484-5.

scourge of war.”³¹ The Court cannot ignore the implications of its rulings on the ground or engage in formalistic, decontextualized reasoning. Issuing decisions which depart from strong political consensus, such as took place in the *South-West Africa Cases*, can result in searing critiques and calls for reform, and harm perceptions of legitimacy of the Court.³²

Yet, as Joseph Jaconelli explained in regards to domestic common law courts, Solomonic judgments for the purpose of reconciliation alone “would be a denial of the judicial role conceived as an adjudicatory role. It would be entirely improper for a court to form the view that *p* is the legally required result, and for it then to decree *q* in the interests of conciliation.”³³ The ICJ was created as a “judicial organ” and its function is to “decide in accordance with international law.”³⁴ The Court serves the cause of peace by the exercise of its jurisdiction, through application of law. In this vein, the Court noted in the *United States Consular and Diplomatic Staff in Tehran* case, that “the resolution of... legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.”³⁵ Other forums exist for other kinds of dispute settlement. If the Court takes on a purely conciliatory role, it eliminates the option of judicial dispute resolution, an important mechanism for protecting and promoting peace. The Court cannot be blind to political concerns if it seeks to be influential and effective. At the same time, it must be guided by reasonable interpretations of existing law and State consent to retain its legitimacy.

Unless States explicitly inform the Court of their desire to have a case decided *ex aequo et bono* or international law on a particular issue requires or allows a compromise judgment, States have not authorized the Court to adopt a Solomonic approach. To the extent the Court decides cases in accordance with principles not consented to by the litigating parties, it acts *ultra vires* and thereby threatens its own normative legitimacy. Although the Court must be sensitive to political concerns in its decision-making, the Court’s reasoning must be consistent with reasonable interpretations of the relevant legal norms.

The judgment in *Peru v. Chile* is a powerful example of the Court exceeding the authority delegated to it, and thereby potentially harming its own normative legitimacy. The judgment appears to skirt around the law and selectively choose a couple of tangentially relevant facts to achieve a compromise result, a dispute-resolution method litigating states did not agree to *ab initio*. Rather than adopting the position of one of the Parties – either an agreement existed reaching to 200 nautical miles or there was no agreement out to any length – the Court split the baby. Chile got what it wanted out to 80 nautical miles, and Peru got what it wanted from 80 to 200 nautical miles.

³¹ Preamble of the UN Charter.

³² See, e.g., R. Falk, *Reviving the World Court* (Charlottesville: University Press of Virginia, 1986), p. xiii, xv.

³³ Jaconelli, ‘Solomonic Justice and the Common Law’, 484.

³⁴ Article 92 of the United Nations Charter; Article 28 of the Statute of the International Court of Justice.

³⁵ *United States Consular and Diplomatic Staff in Tehran (United States v. Iran)* ICJ Reports (1980) 22, para. 40.

Although the Court acknowledged that “[t]he establishment of a permanent maritime boundary is a matter of grave importance”, and the law requires that “[e]vidence of a tacit legal agreement must be compelling”,³⁶ it spent many pages seeking to uncover the nature and extent of that very agreement. Judge Donoghue, though she voted in favor of the Judgment, acknowledged in her Declaration that the Parties “did not address the existence or terms of such an agreement.”³⁷ Others expressed similar concerns.³⁸ The evidence the Court pointed to in determining the length of the tacitly agreed boundary was flimsy at best. The Court made only little mention of 80 nautical miles in its reasoning. It noted that the “biological limit” of the Humboldt Current, which supports marine life, was 80 to 100 nautical miles off the coast in the summer (and 200 to 250 nautical miles in the winter!).³⁹ And species being taken in the 1950s were up to around 60 nautical miles from the coast.⁴⁰ Yet it acknowledged the Parties’ references to 200 nautical miles in various documents, in anticipation of marine life to be found in those areas, and to protect against third party long-distance fishing. Without explanation, the Court declared: “It does not see as of great significance their knowledge of the likely or possible extent of the resources out to 200 nautical miles...”⁴¹

In response to this problematic reasoning, then-ICJ president Judge Peter Tomka, wrote separately: “In my view, there is insufficient evidence to conclude that the agreed maritime boundary extends only to 80 nautical miles. The evidence rather points to a different conclusion.”⁴² In fact, several of the judges who voted both for and against the 80 nautical mile turning point questioned the sufficiency of the evidence on this issue. For example, Judge Skontikov, who voted in favor, asserted that “the determination of the figure of 80 nautical miles... does not seem to be supported by the evidence which the Court found relevant.”⁴³ Judge Donoghue noted that neither Party proposed that only an initial segment of the boundary had been settled by agreement and that the remainder would be delimited in accordance with customary international law,⁴⁴ arguably making it difficult to justify a segmented delimitation line. Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego-Vicuña wrote that the majority “labours to argue” for an 80 nautical mile end point to the agreed maritime boundary.⁴⁵

³⁶ *Maritime Dispute (Peru v. Chile)* 37, para. 91.

³⁷ *Ibid.* Declaration of Judge Donoghue.

³⁸ *See., e.g., ibid.* Dissenting Opinion Judge Sebutinde, para. 3 (noting that “neither Party asserts the existence of a tacit agreement”); *see also* Separate Opinion of Judge Owada, para. 6 (“the Judgment states quite categorically that the Parties acknowledge in the 1954 Agreement the existence of a maritime boundary for all purposes between them, without showing how and when such agreement came about and what concretely this agreement consists in.”).

³⁹ *Maritime Dispute (Peru v. Chile)* 40, para. 105.

⁴⁰ *Ibid.*, 40, para. 108.

⁴¹ *Ibid.*, 42, para. 109.

⁴² *Ibid.*, Separate Opinion of Judge Peter Tomka, para. 3;

⁴³ *Ibid.*, Declaration of Judge Skotnikov.

⁴⁴ *Ibid.*, Declaration of Judge Donoghue.

⁴⁵ *Ibid.*, Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari, and Judge *ad hoc* Orrego-Vicuña, para. 2.

One strains without success to find any well-supported legal justification for the 80 nautical mile turning point in the maritime boundary in the Court's reasoning. Rather, it appears that the majority of the Court sought to please and displease the Parties about equally. If the Court's analysis of the law and facts aimed at achieving a compromise judgment rather than following established legal principles, it exceeded the scope of its delegated authority. Chile and Peru did not ask the Court to decide the case *ex aequo et bono*, yet it is at least arguable that the Court did.

II. Bias

A biased court is illegitimate. For a court to possess justified authority, it must give both sides equal opportunity to make their arguments, and it must consider them without preexisting bias toward any litigating party.⁴⁶ *Audi alteram partem*, literally "listen to the other side"⁴⁷ is essential to legitimate adjudication. According to the ICJ, such principles "are integral constituents of the rule of law and justice."⁴⁸ In the same vein, the provisions of the ICJ Statute and Rules of Procedure on evidentiary matters are "devised to guarantee the sound administration of justice, while respecting the equality of the parties."⁴⁹

When a claimant has particularly weak or strong claims, Solomonic courts are inherently biased. If the ICJ seeks to please and displease the litigating parties equally in such cases, it does not faithfully apply the law. For example, if State X sues State Y, but State X has weak claims, a Solomonic court will always award State X more than it deserves. Alternatively stated, a court that splits the baby, in spite of what the law requires, is biased against a respondent whenever a claimant raises a weak claim. A strong respondent will always be worse off before such a court than the *status quo ante*. Conversely, a Solomonic court is partial to State Y whenever State X has a strong claim. State X will get less than what it deserves before a Solomonic court.

Are there times when a Solomonic judgment is not biased against one of the litigating parties? In the common law domestic context, Joseph Jaconelli queried whether Solomonic

⁴⁶ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* ICJ Reports (1973) 179, para. 34 (quoting *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against Unesco, Advisory Opinion* ICJ Reports (1956) 77) ("The principle of equality of the parties follows from the requirements of good administration of justice."); Martin Shapiro, *Courts: A Comparative and Political Analysis* (Univ. of Chicago Press, 1981), p. 1 (discussing the "ideal type" of courts, "involving (1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong").

⁴⁷ Fellmeth and Horwitz, 'Guide to Latin in International Law', p. 41.

⁴⁸ *Order on Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* ICJ Reports (1995) 325 (Dissenting Opinion of Judge Weeramantry).

⁴⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* ICJ Reports (1986) 39, para. 59.

judgments may be beneficial when the evidence and arguments advanced are in equipoise.⁵⁰ In a winner-take-all scenario, the Court has a 50 per cent chance of getting the case entirely wrong, but in a compromise judgment split down the middle, the Court has a 100 per cent certainty of getting the case half right.⁵¹ Perhaps it is preferable to get a case half right than entirely wrong? The problem with this approach is that States have not authorized the ICJ to use it pursuant to the ICJ Statute. Neither the Statute nor the caselaw of the Court indicates that in cases where the legal arguments and facts are in equipoise, the Court should simply rule down the middle. Alternatively, one could argue that when the Court is faced with what appear to be arguments of equal weight, the judicial role requires it, instead, to consider who bears the burden of proof and the burden of persuasion in a particular case. If the arguments advanced are of equal weight or the facts adduced are insufficient, then the burden of proof “break[s] the impasse” by requiring a court to decide against the party who bears the burden.⁵² Splitting the pie evenly is not an authorized approach to adjudicating a claimant’s weak case.

A Solomonic approach may endanger the ICJ’s legitimacy because it is inherently biased and unfair in cases where the Parties’ legal arguments are particularly weak or strong. Through the lens of the *Peru v. Chile* case, if the Court sought a compromise judgment, it was inherently biased against Chile if Chile had a much stronger legal case, or against Peru if Peru had a much stronger legal case. The party with the better *status quo ante*, here Chile, would have more to lose from the get go, while the party with the worse *status quo ante*, here Peru, would have the most to gain, regardless of the power of their legal arguments. Using a Solomonic approach, the Court would always award more than what is due to the weaker party.

III. *Sound Legal Argumentation*

Solomonic judgments threaten the legitimacy of the ICJ when they lack the hallmarks of sound legal reasoning. For a court to be perceived as legitimate its rulings must both generally accord with the interests and values of those normatively addressed (States), as well as reflect the predominant legal discourse.⁵³ Both “political and discursive constraints” play an important role in cabinining judicial decision-making on international courts.⁵⁴ Reasoning that does not stay within accepted bounds or refuses to engage with them substantively may raise doubts about whether the Court is acting within its delegated authority, its impartiality and competence, thereby threatening its legitimacy.

⁵⁰ Jaconelli, ‘Solomonic Justice and the Common Law’, 484-5.

⁵¹ *Ibid.* 485.

⁵² M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Leiden: Martinus Nijhoff, 1996), p. 30, 85 (“The rule generally applied by the Court with respect to the burden of proof is the basic rule according to which the party who asserts a fact is responsible for providing proof thereof. This rule has consistently been applied by the Court in cases before it...”) (citations omitted).

⁵³ Grossman, ‘Legitimacy and International Adjudicative Bodies’, 149.

⁵⁴ A.M. Slaughter and L. Helfer, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’, *California Law Review* 93 (2005), 930.

In *The Power of Legitimacy Among Nations*, Tom Franck described characteristics of rules which affect their legitimacy, or ability to pull States to compliance.⁵⁵ Although his focus is on the rules themselves, if courts consistently issue rulings without these characteristics, they risk losing their authority over time. These characteristics include “determinacy” and “coherence.” Determinacy refers to a rule’s “clarity of meaning,” as well as “the extent to which the rule’s communicative power exerts its own dynamic pull toward compliance.”⁵⁶ The ICJ can help to enhance the determinacy of a rule by serving as a “credible interpreter.”⁵⁷ “Coherence legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.”⁵⁸ The idea is that the application of a rule to a set of facts should be principled and consistent.

Solomonic courts are hard pressed to issue determinate and coherent judgments. The Court does not admit that it is issuing a compromise judgment. Instead, it seeks to couch its compromise judgments in the language of relevant positive law. What results is the weak, misguided or muddled interpretation or application of the underlying binding positive law in the service of a Solomonic judgment. As a result, compromise judgments neither clarify the underlying positive legal norm, nor do they result in consistent judgments. The Court’s legal reasoning and the underlying norms may suffer to reach a compromise judgment.

Some might argue that coherence is less important at the ICJ because Article 59 of the ICJ Statute specifies that the Court’s decisions are binding only on the parties in a particular case.⁵⁹ But the statements of law articulated in each case are expected by most, including former ICJ presidents, to have a much more enduring and clarifying impact. For example, former ICJ judge and president, Manfred Lachs, commented:

[Y]ou do not only decide the dispute between state A and state B, you perform an educational function. You indicate to states A and B how their dispute should be solved, but you also give a wider background to all nations so that similar issues, or related issues, should be solved in a similar way.⁶⁰

Nagendra Singh, another of the Court’s former presidents, asserted that judges “generalise and enunciate principles of jurisprudence which would serve as a guide to prevent future disputes and to the establishment of a regime of law.”⁶¹ And other courts and policymakers in states are aware of and may consider the ICJ’s statements on international law as they rule on important

⁵⁵ T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990).

⁵⁶ *Ibid.*, 84-5.

⁵⁷ *Ibid.*, 86-7.

⁵⁸ *Ibid.*, 147-48.

⁵⁹ Article 59 of the Statute of the International Court of Justice (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

⁶⁰ G. Sturgess and P. Chubb, *Judging the World: Law and Politics in the World’s Leading Courts* (Butterworths, 1988), p. 89.

⁶¹ *Ibid.*, p. 90.

international legal issues. The point is that a court that muddies rules rather than clarifying them both weakens the compliance pull of the relevant rule and makes a poor case for its own authority as a law declaring body.

Returning to *Peru v. Chile*, the judgment arguably muddied legal rules, rather than clarifying and promoting coherent application of the law. It takes great pains to attempt to discover the nature and extent of a tacit agreement, when evidence of such agreements must be “compelling.” And the fragile basis upon which the Court found that the agreement reached only 80 nautical miles does little to guide future litigants concerning how much evidence is necessary to establish the content of a tacit maritime boundary agreement. Also, the judgment calls into question, at least to some extent, the deference which the Court will have to pre-existing maritime boundary agreements, or to the requirement of *pacta sunt servanda*, treaties are observed, of course assuming a pre-existing treaty was at issue in this case. Perhaps *pacta sunt servanda* now applies with less force when one of the parties argues that the status quo disfavors it.

IV. A Razian Critique

Solomonic judging threatens the Court’s legitimacy when the Court fails to do a better job of assisting states in complying with their legal obligations than they would in its absence. Joseph Raz’s service conception of authority provides a normative account of when authority is justified.⁶² In recent years, scholars have examined Raz’s scholarship in the context of the legitimacy of international law and international courts.⁶³ Although his is only one normative theory of legitimacy, it is an influential one.

Raz proposes that authority is justified only when (1) it takes into account reasons that independently apply to the subjects of its directives and are relevant in the circumstances (“dependence thesis”), and (2) the subjects are more likely to comply with reasons that apply to them independently by accepting and implementing the authority’s directives than by attempting to follow these reasons on their own (“normal justification thesis”).⁶⁴ In other words, an authority is justified when its subjects do a better job of complying with their obligations by doing what the authority says than they would in the authority’s absence.

A Solomonic approach to judging may be inconsistent with the service conception of authority. By issuing Solomonic judgments when not required or allowed by law, the ICJ is not helping states better to comply with their legal obligations than they would in its absence, even if it might help states reach a politically palatable resolution in a specific dispute. If the Court

⁶² J. Raz, *The Morality of Freedom* (Oxford University Press, 2012), p. 63.

⁶³ E.g., L. H. Meyer and P. Sanklecha, ‘Introduction’, in L. H. Meyer, (ed.), *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009), p. 5-8; J. Tasioulas, ‘Parochialism and the Legitimacy of International Law’, in M.N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press, 2012), pp. 100-111; N. Grossman, ‘The Normative Legitimacy of International Courts’, *Temple Law Review* 86 (2013), 61, 97.

⁶⁴ Raz, ‘The Morality of Freedom’, p. 47, 53.

ignored or watered down pre-existing positive law in *Peru v. Chile*, it cannot be said to have helped the litigating states better to comply with it. Instead, Solomonic judgments can skirt around the law inside the Peace Palace and may discourage states from strict adherence to law outside its doors. To the extent that States perceive the Court as Solomonic, they have fewer incentives to comply with international law at all. Instead, it may be to States' strategic benefit to stretch and even break law in an effort to establish the boundaries of legal argumentation in anticipation of a case being filed. In the same vein, in their framing of issues in written and oral pleadings before the Court, States have incentives to exaggerate their claims or include essentially meritless claims along with strong claims to give the Court something to rule against them on.

Similarly, a Solomonic ICJ may encourage states to refrain from subjecting themselves to the Court's jurisdiction in the first place, vigorously to contest jurisdiction and possibly to withdraw from the Court's compulsory jurisdiction, further undermining its authority. Simply, potential respondents who believe the law is on their side are better off staying out of, challenging or leaving the Court's jurisdiction than subjecting themselves to Solomonic decision-making.⁶⁵ States may have many reasons to consent to jurisdiction, even if it means they may lose cases from time to time. The Court provides adjudicatory services should political negotiations fail. If States are committed to the implementation of a particular legal regime, regardless of their interests in a particular case, submitting to judicial oversight makes sense. But States have little incentive to subject themselves to the Court's jurisdiction if their legal case is strong and their opponent's is weak. And if the Court's rulings do not serve to promote and protect the specific

⁶⁵ For example, Colombia withdrew from the Pact of Bogotá, a treaty providing the ICJ with compulsory jurisdiction over its dispute with Nicaragua, in response to the ICJ's judgment in *Nicaragua v. Colombia*, issued in November 2012, a judgment which was also characterized as Solomonic by many. *La Nación's* headline the day the judgment was issued was "ICJ in Solomonic judgment gives more sea to Nicaragua and all the keys to Colombia." *CIJ en fallo salomónico dio más mar a Nicaragua y todos los cayos a Colombia*, *La Nación Mundo* (19 November 2012) (author's translation) at http://www.nacion.com/mundo/CIJ-fallo-salomonico-Nicaragua-Colombia_0_1306269542.html. A Chilean former president, Eduardo Frei, characterized that decision as "solomonic" shortly after it was issued. *Rebeldía de Colombia salpica diferendo Perú-Chile*, *El Universal* (30 November 2012), at <http://www.eluniversal.com/internacional/121130/rebeldia-de-colombia-salpica-diferendo-peru-chile>. Frei added, "En nuestro caso, nosotros no podemos aceptar un fallo que no se funde en los tratados y los acuerdos internacionales que Chile ha firmado'..." ("In our case, we cannot accept a ruling which is not founded on treaties and international agreements that Chile has signed'...")(author's translation). *Ibid.* See also *Eduardo Frei muestra preocupación por fallo "salomónico" de La Haya en caso Nicaragua-Colombia: El ex presidente dijo que esto puede significar que "todos los países" van al tribunal internacional "porque siempre les va a tocar algo" tras un fallo*, *La Tercera* (26 November 2012)("Eduardo Frei shows concern for the 'Solomonic' judgment of the Hague in the Nicaragua-Colombia case: The ex president said this could mean that "all the countries' go to the international tribunal 'because they will always get something' through a judgment") (author's translation), available at <http://www.latercera.com/noticia/politica/2012/11/674-495350-9-eduardo-frei-muestra-preocupacion-por-fallo-salomonico-de-la-haya-en-caso.shtml>.

legal regimes, a normative commitment to a particular area of law is not served by membership in the Court. Because Solomonic decisions are highly contextual, they rarely provide principles to guide state behavior prospectively or serve to develop the law.

From a Razian perspective, Solomonic courts fail the service conception of authority test, unless the law itself mandates or allows a Solomonic approach. A Solomonic ICJ does not help the litigating parties better to comply with the law, because the Court is either not being faithful to it or diluting its force in favor of splitting the pie. Further, Solomonic courts may fail to articulate useful legal principles to guide State behavior prospectively and may even encourage disobedience of international legal norms outside the courtroom.

V. *Perceptions of Solomonism and Sociological Legitimacy*

What impact does the perception of Solomonic judging have on the sociological legitimacy of the ICJ? To the extent states and others believe the Court is sacrificing law in favor of splitting the pie, Solomonism may threaten perceptions of justified authority, regardless of the accuracy of those beliefs. If the Court's constituencies are convinced that the Court is making decisions divorced from legal rules in order to please and displease the litigating parties in relatively equal amounts, sociological legitimacy is likely to decline, even if normative legitimacy remains intact. States may question a Solomonic court's fairness and whether it is serving an adjudicatory or conciliatory function. Rather than being hailed before a lawless Court, states with strong claims and defenses may prefer to challenge or limit the Court's jurisdiction in the future, or to refrain from opting for the Court's compulsory jurisdiction in the first place. On the other hand, to the extent the Court's Solomonic judgments fall within a set of reasonable legal outcomes, such decisions may enhance the Court's sociological legitimacy. For domestic political purposes, states may value the Court's attempts to appease both sides in a dispute, which may lead to greater compliance with its judgments, and thereby, increased effectiveness – assuming the two concepts are linked.⁶⁶ More research is needed to improve our understanding of the relationship between Solomonic judging and sociological legitimacy.

The Court can take concrete steps to avoid charges that its decision-making is unduly or inappropriately Solomonic, even if its judges do not believe it is. For example, the Court can tie its reasoning more explicitly and more concretely to underlying legal rules and to its previous decisions. It can be more transparent and public about what motivates its decision-making, and it can engage both scholars and states more deeply about what it means to be the “primary judicial organ” of the United Nations and how decision-making takes place at the Court. These measures could help to strengthen the sociological legitimacy of the Court by responding to concerns about judgments which appear to prize splitting the pie over relevant law.

VI. *Conclusion*

This Chapter raises new questions about the many judgments labelled “Solomonic” in the International Court of Justice. While some Solomonic judgments may be divorced from law,

⁶⁶ See, in this volume, Yuval Shany's chapter discussing the complex and dynamic relationship between legitimacy and effectiveness.

others may be deeply embedded in it. The *Peru v. Chile* Judgment is just one in a plethora of judgments issued by the ICJ. Whether Solomonic judgments unmoored from law or perceived as such are an aberration or a common occurrence in the Court's jurisprudence is a question that deserves more thought and analysis, taking into account a wide range of the Court's decisions over time. And there may be implications for legitimacy even when a Solomonic judgment is justified or allowed by law.

This Chapter is a first step in understanding the impact of Solomonic judgments on the Court's legitimacy. Solomonic decisions may present a threat to the ICJ's legitimacy, yet they are underexplored and undertheorized in the scholarship about the Court. This Chapter identifies a number of ways that Solomonic judgments may affect the Court's legitimacy. If the Court chooses to pursue a Solomonic route when States do not consent to it or when the law does not require or allow it, the Court acts *ultra vires*. It is neither appropriately exercising its judicial function, nor deciding in accordance with international law. A Solomonic Court is inherently biased against the litigant with a significantly stronger legal argument, and does no better – and perhaps even worse – at getting states to comply with law than they would on their own. Also, the stretching of positive law and logical reasoning to achieve compromise judgments can render the law vague and incoherent. If judgments are unique to the particular facts at hand, the articulated law loses much of its force. When states believe the Court's judgments are divorced from law in the service of Solomonism, even when they may not be, its sociological legitimacy is endangered. On the other hand, to the extent that Solomonic judgments rooted in law enhance compliance and effectiveness, they may positively impact sociological legitimacy. The relationship between compliance, effectiveness and sociological legitimacy requires further theorizing and empirical testing.

Future scholarship on this topic must continue to recognize that Solomon's suggestion to "split the baby" was a device intended to achieve proper application of the law. It was a provisional judgment, not a final one. King Solomon sought to determine which woman was the mother of the baby because the law demanded that the baby be returned to her. To protect and enhance its legitimacy, the ICJ too must take care to be faithful to the true intent of Solomon by applying law within the bounds of justice, rather than seeking to achieve a particularized notion of justice outside the bounds of the law. And it must be understood to be doing so.