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## Democracy, Justice and Legitimacy of International Courts

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## Democracy, Justice, and the Legitimacy of International Courts

MORTIMER N. S. SELLERS

### I Introduction

This chapter will consider whether democracy plays or ever should play a role in measuring or advancing the legitimacy of international courts. "Legitimacy" here signifies the status of being correct according to some external standard or – more specifically – being correct in the light of the most *appropriate* standard for evaluating the practice in question.<sup>1</sup> International courts are legitimate when they meet the external standards that actually apply to them. "Legitimacy," understood in this way, gives rise to two related but not entirely congruent discourses focusing on *actual* or "real" legitimacy on the one hand and *sociological* or "apparent" legitimacy on the other. *Actual* legitimacy is achieved by actually fulfilling the appropriate external standards of legitimacy. *Sociological* legitimacy is achieved by persuading the subjects of an institution or practice to believe or act *as if* a rule or system is legitimate in fact.<sup>2</sup> Reviewing the nature of legitimacy and the purpose of international law will reveal that

<sup>1</sup> See, e.g., M. N. S. Sellers, "The actual validity of law," *American Journal of Jurisprudence*, 37 (1992), 283; Mortimer N. S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (London: Palgrave Macmillan, 2006).

<sup>2</sup> For a good recent discussion of Legitimacy, see J. Tasioulas, "The legitimacy of international law" in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010) at 97 ff. and A. Buchanan, "The legitimacy of international law" in *ibid.*, at 79 ff. See also Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010); Hilary Charlesworth and Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy* (Cambridge University Press, 2010); Lucas H. Meyer (ed.), *Legitimacy, Justice, and Public International Law* (Cambridge University Press, 2009); Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (New York: United Nations, 2001); Jean-Marc Coicaud, *Légitimité et politique. Contributions à l'étude, du droit et de la responsabilité politique* (Presses Universitaires de France, 1997); Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).

although democracy in its broadest sense is of vital importance to any just world order, democracy plays a small, subsidiary, and almost entirely instrumental role in supporting the legitimacy of international courts.

The usual standard for assessing the actual legitimacy of law and legal institutions is their effectiveness in securing or advancing justice.<sup>3</sup> The *actual* legitimacy of international courts depends on the court's efficacy in advancing justice *in fact*. The *sociological* legitimacy of international courts, in contrast, depends on their subjects *believing* or accepting that the courts advance justice in fact. The second standard often depends on the first because people more readily act as if institutions are legitimate when the institutions in question actually are legitimate in fact. But the obverse is also often true: Institutions really do become more legitimate when they can secure the obedience of those whose actions they purport to coordinate, adjudicate, or rule. Sociological legitimacy is particularly significant whenever *effectiveness* plays a role in the actual legitimacy of international courts. Effective institutions may deserve our support, even when in some other respects they fail to meet the external standards against which we most properly evaluate them.

Democracy plays at best a subsidiary and contingent role in the legitimacy of international courts because democracy has almost no direct connection with justice. Given its majoritarian bias, democratic control over the judiciary may often present a threat to judicial independence and impartiality and therefore to the legitimacy of the judiciary. Democracy's value to judges in international courts arises less from any direct contribution that democracy makes to the *actual* legitimacy of courts, than from the support the illusion of "democracy" may sometimes give to judicial influence and effectiveness. Democracy or the impression of democracy contributes to the legitimacy of international courts when it does so at all, less through any effects that democracy itself may have on justice or judicial procedure than from the indirect support that apparent democracy may give to judicial independence and impartiality, by securing broader public support for judicial decisions that are legitimate on other grounds.

This discussion will make ten primary points: (1) *Legitimacy* signifies conformity to the appropriate external standard. (2) *Democracy* signifies decision making by majority rule. (3) International law strives for legitimacy by claiming to realize international *Justice*, (4) through the *Rule of Law*.

<sup>3</sup> See, e.g., Constitution of the United States of America (1787) Preamble. Cf. Declaration of Independence of the United States of America (1776).

(5) The nature of the judicial role therefore depends to a large extent on the structure and legitimacy of the *Legal System* in which the judges find themselves, (6) but above all on *Fidelity* to the basic principles of international law. (7) Democracy threatens both the *Impartiality* and (8) the *Independence* of international courts. (9) Therefore although *Diversity* may bring broader knowledge and experience to the bench, (10) the *Selection* of judges should concentrate primarily on securing just, learned, and independent magistrates. Democracy has many virtues, but maintaining an effective and impartial judiciary is not prominent among them – without some mechanism to secure the moderating virtues of learning, rationality, and fidelity to justice.

## II Legitimacy

By “legitimacy” I mean the status of being correct according to the appropriate standard for evaluating the practice in question. “Legitimacy” must be distinguished from “legality,” which signifies correctness according to the internal standards proposed by the legal system itself. For example, in discussing international relations, politicians and scholars sometimes argue that invasions, interventions, or other acts of state are “illegal, but legitimate” – signifying that although the acts in question fail to meet one standard (lawfulness), they satisfy some other standard that more properly governs international relations.<sup>4</sup> This is paradoxical because proponents of international law almost always assert that law itself is the standard that ought to govern international relations. But this assertion only applies to law and legal systems that are themselves legitimate, and therefore a source of authority. When legal systems fail this test, their subjects lose their duty and inclination to obey the law.<sup>5</sup>

Public acts can be legitimate, though illegal, if they meet the standards that justify acting illegally, or when the legal system fails to meet the standards that would justify its authority to rule. This has some relevance for international courts, whose primary purpose is usually understood to be deciding all cases “in accordance with international law.”<sup>6</sup> Those courts and tribunals that most accurately decide cases in accordance with

<sup>4</sup> See, e.g., The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000).

<sup>5</sup> See M. N. S. Sellers, “Law, reason, and emotion,” *Archiv für Rechts-und Sozialphilosophie*, 101 (2015), p. 71.

<sup>6</sup> *Statute of the International Court of Justice* at Art. 38.

international law would then be legitimate, according to this standard. Those courts that are less successful in finding and applying international law would be less legitimate. But lawfulness may not always be the best standard by which to measure the legitimacy of international courts. Whether fidelity to law is in fact the most appropriate standard of judicial legitimacy will depend to a large extent on the underlying legitimacy of the legal systems that the judges and courts exist to serve. When the system itself is illegitimate, the duty of judges to apply the law's internal logic in good faith will be significantly reduced.

This necessary recourse to first principles means that courts can be or become legitimate in three ways. First, courts may be legitimate because they faithfully apply and interpret the valid (and therefore legitimate) laws of a legitimate legal system. Second, courts may be legitimate because they disregard or misinterpret the pernicious laws of an illegitimate legal system to make the laws more just and effective. Third, courts may be legitimate because, although the legal system they serve is not fully just or effective, they offer the best available resource for dispute resolution and social coordination, even though they remain flawed and imperfect institutions. Let us call these *systemic* legitimacy, *personal* legitimacy, and *opportunistic* legitimacy. All three of these variants or legitimacy are forms of *actual* legitimacy, but opportunistic legitimacy will often arise from *sociological* legitimacy, when circumstances give rise to de facto obedience that does not necessarily rest on an underlying systemic justification.

It is in the nature of law that it claims to be just.<sup>7</sup> All legal systems make the explicit or implicit claim to be just and are legitimate only to the extent that they actually do so. Given this universal standard of legitimacy for assessing all law and legal systems, evaluating the legitimacy of legal institutions is not particularly difficult. Does this proposed law, law court, or legal institution serve the law's general purpose of justice? If so, then it is legitimate. If not, the law or legal institution's status becomes much more problematic. Courts serve the useful purpose of providing authoritative judgments in disputed cases and decisive interpretations of disputed laws. They gain legitimacy by doing so well, which is to say, by playing their role in a way that ultimately advances substantive justice in the society and legal system that they exist to serve.

<sup>7</sup> See M. N. S. Sellers, "The value and purpose of law," *University of Baltimore Law Review*, 33 (2004), 145.

### III Democracy

*Democracy* is a word that has come to have favorable connotations in many communities and therefore lost much of its meaning in ordinary discourse, as different factions alter and misapply the term to advance their own ends. In its central and original sense, "democracy" signifies rule by the majority of the members of a given community, usually through mass votes by large assemblies gathered in *fora* or *agorai* for the purpose of making decisions, as in ancient Greece or Rome. By extension, the use of the word *democracy* has expanded to embrace other values and activities that favor or are supposed to favor the people or popular control, as in the democratic pretensions of the "Deutsche Demokratische Republik" or the "democratic" self-criticism sessions of the Chinese Communist Party. But whichever conception of democracy is in play, democracy, like any other value or procedure, confers legitimacy only to the extent that it is or advances the appropriate standard for the practice in question.

"Democracy" in the broadest and most general sense may sometimes be extended beyond its central meaning as the direct plebiscitary decision making of large public assemblies to the more refined representative "democracy" of the Western republics, to the socialist "democracy" of the old Warsaw Pact, or to the redistributive "democracy" of the Bolivarian Revolution. All these and many other extended conceptions of democracy will only be legitimate to the extent that they meet the appropriate standard for the institutions that they purport to serve. In the case of international courts, both the obvious standard of fidelity to international law, and the deeper and more fundamental standard of fidelity to international justice, have very little direct association with democracy, in any sense of that word. Thus any contribution that democracy makes toward the legitimacy of international law will be oblique and instrumental. Democratic practices and procedures make international courts more legitimate only to the extent that they advance the purposes that justify international courts in the first place.<sup>8</sup>

The most obvious way in which courts could be made to be more democratic would be to subject the judges to popular election or reelection by popular vote. This method of selection is unusual, but does exist in several American states. For example, judges on the Supreme Court of

<sup>8</sup> Cf. N. Grossman, "The normative legitimacy of international courts," *Temple Law Review*, 86 (2013), 61.

the State of Alabama are elected for six-year terms in partisan contested elections.<sup>9</sup> This has the effect of making the court highly responsive to popular opinion in all its decisions and therefore often capricious or unjust.<sup>10</sup> International courts and tribunals sometimes attempt a modified form of judicial elections, in which the States Parties to multilateral treaties vote on the choice of judges, acting in the name of their subjects. For example, the Statute of the International Court of Justice provides that “the members of the court shall be elected by the General Assembly and by the Security Council.”<sup>11</sup> As judges are eligible for reelection this makes them responsive to the views of the governments that select them.<sup>12</sup> The doubtful legitimacy of the governments of many states extends to undermine the legitimacy of the judges that they help select.

International courts might also be seen as more “democratic” in a certain sense if their membership were seen to reflect the general composition of international society.<sup>13</sup> For example, the Statute of the International Court of Justice provides that “in the body as a whole the representation of the main forms of civilization and the principal legal systems of the world shall be assured.”<sup>14</sup> The implication here is that although judges should be “independent” and “jurisconsults of recognized competence,” who are “elected regardless of their nationality,”<sup>15</sup> they should also be collectively familiar with all aspects of the world and its various legal systems and as much as possible “look like” the subjects of their jurisdiction.<sup>16</sup> This representative aspect of the judicial role is almost never presented as primary or decisive, nor is it particularly democratic in the usual sense of that word, but it does reflect a general desire that courts seem to retain a connection with ordinary people – and has a very strong influence on the actual composition of most international courts and tribunals.

<sup>9</sup> *Constitution of Alabama*, (1901) Art. VI Section 152.

<sup>10</sup> See, e.g., Roy Moore and John Perry, *So Help Me God: The Ten Commandments, Judicial Tyranny, and the Battle for Religious Freedom* (Los Angeles, CA: WorldNetDaily, 2009) for an example of the reasoning of elected judges, in response to popular prejudice and religious enthusiasm.

<sup>11</sup> *Statute of the International Court of Justice*, Art. 4.1 cf. Art. 8. <sup>12</sup> *Ibid.*, Art. 13.

<sup>13</sup> For this very oblique form of democracy, see F. Michelman, “The Supreme Court, 1985 Term – Foreword: Traces of Self-Government,” *Harvard Law Review*, 100 (1986), 4.

<sup>14</sup> *Statute of the International Court of Justice*, Art. 9. <sup>15</sup> *Ibid.*, Art. 2.

<sup>16</sup> Cf. Barack Obama, *Remarks by the President on Nominating Judge Sonia Sotomayor to the United States Supreme Court* (26 May 2009).

## IV Justice

The two most obvious standards of judicial legitimacy are justice and the rule of law. Although closely connected, these two values are not synonymous, and neither has a very close relationship with democracy, in any usual sense of that word. By "justice" I mean the best disposition of rights and duties, benefits, and burdens in society to serve the collective and individual well-being of all its members.<sup>17</sup> Law is (or claims to be) the set of public rules that realizes justice in practice. Thus international law is, or claims to be, as Henry Wheaton explained it, following Hugo Grotius, Emer de Vattel, and James Madison: "those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations."<sup>18</sup> Such claims may be false, but when they are false, the law loses its legitimacy. International law derives its legitimacy from its claim to realize international justice, and international courts derive their legitimacy from their claim to realize justice through international law.

Although the obvious and standard measure for the legitimacy of any legal system is justice, the same is not as clearly and directly true of judges. The systemic role that judges play within the broader legal system may often make their fidelity to law more important than direct appeals to justice. The great principle of judicial independence was first established in the modern world to constrain the discretion of princes.<sup>19</sup> When James I asserted that his reason and sense of justice were just as good or better than that of any learned judge, Sir Edward Coke responded that the "artificial reason" of judges and the law, acquired by "long study and experience" is more accurate and just than that of the most educated monarch.<sup>20</sup> This became the foundation of the principles of judicial independence and judicial authority that drive the modern rise of international courts and tribunals. Courts base their claims to authority on the supposed knowledge and impartiality of their judges and legal procedures.

<sup>17</sup> Cf. M. N. S. Sellers, "The justice of international law," *Transnational Legal Theory*, 3 (2012), 297.

<sup>18</sup> Henry Wheaton, *Elements of International Law*, edited by Richard Henry Dana Jr., 8th edition (Boston, 1866) at 20.

<sup>19</sup> *Act of Settlement* (1701). See *The Statutes of the Realm 1695-1701*, vol. 7 (1820) at pp. 636-8.

<sup>20</sup> Sir Edward Coke, *Reports*, XII 64-5.



Justice justifies judges when judges and courts make justice real through their decisions. The greatest problem for international law as for any legal system is how best to clarify the law in practice. The basic principles of international law were settled long ago when Grotius, Vattel, and Wheaton transferred the liberal principles of liberty, equality, and fraternity from individuals to the international community of states.<sup>21</sup> The problem arises in applying these fundamental principles of justice as they express themselves in more specific rules of law. In the absence of an international supreme court, Henry Wheaton found evidence of the law in text writers of authority, treaties, ordinances of particular states, adjudications of international tribunals, in history, and in the written opinions of public officials and jurists.<sup>22</sup> This widely shared method of interpretive specification reappears in the Statute of the International Court of Justice.

The "artificial justice" of the courts provides or should provide the best available approximation and practical application of abstract justice to concrete situations. In most legal systems courts have the support of legislation, codes, elections, and other instruments of practical deliberation that are absent in international society. This makes direct recourse to first principles more necessary, more frequent, and more difficult in international courts and tribunals than is the case in most other systems of law. Courts, whose function it is to decide cases in accordance with international law must look for "evidence" of practices accepted as law and work forward from "the general principles of law recognized by civilized nations."<sup>23</sup> This gives judges in international tribunals a more creative and philosophical role and more intimate relationship with justice than would be appropriate in municipal courts of law.

## V The Rule of Law

The concept of the rule of law, or "*imperium legum*," is as often confused and even deliberately misstated in international affairs as it is in much

<sup>21</sup> See Emer de Vattel, *Le Droit des Gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* (Neuchâtel and London, 1758).

<sup>22</sup> Henry Wheaton, *The Elements of International Law*, edited by Richard Henry Dana, Jr. 8th ed., (Boston, 1866).

<sup>23</sup> *Statute of the International Court of Justice*, Art. 38. Wheaton thought that "an almost perpetual succession of treaties" would "go very far toward proving what the law is on a disputed point," above at 21.

legal scholarship.<sup>24</sup> “The rule of law” signifies the effort to limit arbitrary government by law and therefore implies constitutionalism and limited government, constrained to serve justice and the common good.<sup>25</sup> This offers the avenue through which democracy first entered political respectability. A well-constructed polity should include and make use of the people that it rules and harness their knowledge and insights in discovering and developing its laws. Laws established without public consultation will overlook the welfare of those excluded. The “artificial reason” of a just legal system should incorporate the wisdom of the people as a whole to forestall the domination of any particular faction on individual.

The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well paid, so that they can apply the law without fear or favor. Judges secure in their salaries and tenure in office, who believe the law to be just, will do their best to uphold law’s authority, not least because their own status and prestige depends on the legal system’s standing in society. The origins and method of selection of judges, although important, pale in significance next to the importance for judicial effectiveness of the judges’ security in office, once chosen. Judges liberated from external control have the opportunity to serve justice and the legal system as duty requires. Subordinated judges, whatever their origins, will serve the interests of those who control their advancement, retention, and salary. Without independent judges, there can be no rule of law.

The effort to restrain arbitrary authority by subjecting power and government to the law requires independent judges. But it also requires the development of other effective deliberative procedures – the institutional checks and balances of enlightened constitutional government.<sup>26</sup> This connects the judiciary in most rule-of-law states with democracy (in its broadest sense) by encouraging deference to laws developed in consultation with the people, often through the participation of elected representative assemblies, or elected executive officers.<sup>27</sup>

<sup>24</sup> For a discussion and bibliography see James R. Silkenat, James E. Hickey, Jr., and Peter D. Barenboim (eds.), *The Legal Doctrines of the Rule of Law and Legal State (Rechtsstaat)* (New York: Springer, 2014).

<sup>25</sup> See M. N. S. Sellers, “What is the rule of law and why is it so important?” in *ibid*, p. 1.

<sup>26</sup> See Mortimer N. S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (London: Palgrave Macmillan, 2006).

<sup>27</sup> See Mortimer N.S. Sellers and Tadeusz Tomaszewski (eds.), *The Rule of Law in Comparative Perspective* (New York: Springer, 2010).

Judges interpreting the laws of substantially just legal systems will often implement the decisions of representative legislatures, which bring a useful element of democratic deliberation to the development and clarification of the laws.<sup>28</sup>

This raises the question of where to find deliberative controls in the disorganized and fragmented society of international relations. International actors seeking to regulate their behavior according to international law must look to the "general principles of law recognized by civilized nations."<sup>29</sup> This standard of "civilization" signifies those states and governments that attempt in good faith to implement the rule of law in their domestic and international relations. The conventions, practice, opinions, and judicial decisions of such states have a salience and legitimacy that is absent in the views and decisions of arbitrary and illiberal states and their courts. Thus the legitimacy of international institutions and courts may depend in large part on their association with or derivation from the better-organized institutions of the more legitimate governments of states. Judges selected or reselected by illegitimate state governments fail to achieve legitimacy themselves. Doctrines developed or advanced by arbitrary governments will lack authority in international law.

## VI The Judicial Role

The proper role of judges in any legal system depends to a large extent on the nature of the legal system itself. Judges should decide cases "in accordance with international law," only if the international legal system itself is substantially just. To the extent that international law or the international legal system is substantially unjust, judges should strive to correct it. Thus justice remains the ultimate measure of judicial legitimacy, tempered by such rule-of-law virtues as fidelity, impartiality, and independence, all of which play a greater role than democracy both in the actual and in the sociological legitimacy of international courts. Judges should be faithful to the law if the legal system itself is substantially just. Judges should be impartial between the parties. And judges should be independent enough to preserve their capacity for fidelity, impartiality,

<sup>28</sup> James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997). Cf. Gregory H. Fox and Brad R. Roth (eds.) *Democratic Governance and International Law* (Cambridge University Press, 2000).

<sup>29</sup> *Statute of the International Court of Justice*, Art. 39 (c).

and justice. The greatest function of democracy is to clarify what the majority of the people want, but the people do not always want justice, and democracy can also be capricious, partial, and deeply unjust.

Hugo Grotius believed the basis of society and therefore of international law to be good faith ("*bona fides*"). Applied to the judicial role, this means that judges should look to the necessary rules of any just society, as discovered by reference first to the considered views of the most civilized states ("*moratiores*"), then to consent, then to practice, as evidence of what the law requires. These standards, reflected and preserved in Article 38 of the Statute of the International Court of Justice, encourage the judicial virtue of fidelity to settled law. Judges owe a measure of deference to previous judicial decisions and the opinions of the most highly qualified publicists that may set them at odds with public opinion or even their own less-considered sense of justice. Legal certainty is itself an element of justice that may justify respect for even poor or mistaken precedents in the interest of stability and justified expectations. Democracy asks the people what they want. Legitimacy demands justice. The two standards do not always coincide.

The judicial virtue of impartiality requires judges to decide cases according to the appropriate legal standard, rather than their own interests or affinities or those of any other party. Democratic decision making (however defined) is not well suited to this purpose. Large groups of people are seldom as impartial or learned or well-trained as experienced judges, which is why the judiciary is necessary. Subjecting judges to elections would make them subordinate to the interests and opinions of the majority at the expense of all others. Defining or selecting judges as the representatives of particular parties or factions in society would encourage them to advance the interests of those groups, against justice and the welfare of society as a whole. Encouraging judges to follow public opinion would undermine their fidelity to law. Thus direct democracy, representative democracy, virtual democracy, and interest-group democracy all share the disadvantage of putting will above judgment. Only deliberative democracy sets out to advance justice, but does so most effectively indirectly, through legislation, rather than directly in the adjudication of particular cases.

The single greatest source of protection for judicial legitimacy is judicial independence. Not all independent judges live up to their duties of justice and impartiality, but without independence judges will never be impartial or legitimate, because subordination will corrupt their decisions. The democratic selection of judges, although often arbitrary

and ill-considered, will not necessarily destroy judicial independence or legitimacy, so long as judges serve long terms and cannot be reselected or removed by popular vote. The tenure of judicial offices and personal safety and security of judges and their families are therefore more important to upholding judicial impartiality than their mode of selection. This applies as much to international courts as it does anywhere else. When judicial terms are too short or judges are subject to reselection or removal or are personally insecure, then judicial independence is compromised and with it the impartiality and therefore the legitimacy of the bench.

## VII Diversity

The Statute of the International Court of Justice requires that no two of judges on the Court be nationals of the same state<sup>30</sup> and that "the body as a whole" represent "the main forms of civilization and the principle legal systems of the world."<sup>31</sup> This indicates a desire for diversity and representativeness among the judges of the court that does not necessarily advance the Statute's more fundamental commitment that judges have "high moral character" and "recognized competence in international law."<sup>32</sup> Although diversity is not democracy, this emphasis on representation indicates an underlying belief that courts should to some extent mirror those subject to their jurisdiction, even in traits that have no conceivable connection to the learning, temperament, or impartiality that characterize the best judges on any court, international or domestic.

Diversity and representation among judges contribute to the *sociological* legitimacy of international courts by giving as many of the court's subjects as possible the impression that their group and opinions are respected and taken into account by the court and the polity as a whole. This benefit may be entirely unrelated to the actual performance or impartiality of the court in executing its function. Those subject to the jurisdiction of courts may feel comforted and included to see judges that share their contingent (and legally irrelevant) characteristics such as physical appearance, nationality, language, or religion. This benefit of diversity is not necessarily or universally the case. Sometimes judges may gain sociological legitimacy by seeming to be entirely outside all ordinary social categories – dedicated members of a special priesthood or profession like the Roman college of *fetiales*. Yet although it is not particularly

<sup>30</sup> *Statute of the International Court of Justice*, Art 3 (1).

<sup>31</sup> *Ibid.*, at Art. 9.

<sup>32</sup> *Ibid.*, at Art. 2.

democratic in the most accurate sense of the word, diversity on the bench may sometimes advance a court or tribunal's sociological legitimacy, by making it seem less alien to its subjects.

Diversity on the bench may also advance an international court or tribunal's *actual* legitimacy by bringing insights and sensitivity to judicial deliberation that would otherwise be absent from the decision-making process. Different "forms of civilization" and "legal systems of the world" arise in geographical and cultural settings whose needs and perceptions should be taken into account in realizing international justice. The same is true of differences within society. A court or any other forum of public deliberation on which no women serve will be more likely to overlook the needs and insights of women (for example) than a court on which women are present. A court made up entirely of city-dwellers will overlook the needs and insights of those who live in the countryside. A court of Europeans will overlook or not fully appreciate the circumstances beyond Europe – and so forth. This lack of understanding undermines the *actual* legitimacy of the court. International courts or tribunals whose duty it is to realize justice through international law will be less able to do so if their judges collectively have the same shared narrow background and experiences.

The primary duties of judges to justice and the rule of law precludes a conception of diversity through which judges would be thought to "represent" any particular constituency or group of people. Courts and tribunals with necessarily limited numbers of judges on them will never in any case be able to reflect the full diversity and variety of international society. But it does seem likely that diversity in gender, ethnicity, religion, and other notable markers of origin and geography will advance the sociological and even the actual legitimacy of international courts and tribunals. This seems likely, first, because courts in which judges "look like" the societies they serve may enjoy greater sympathy and compliance, and second, because the different experience and knowledge of judges from varied backgrounds may in fact contribute to the better understanding of the court as a whole, which might otherwise overlook or undervalue important aspects of the case. Diversity is not equivalent to democracy, but it shares with democracy the useful perception that broader participation and input often brings greater accuracy to decisions of any kind.

### VIII Selection

The selection of judges plays a significant role in securing the actual legitimacy of courts and tribunals. The primary virtues of judges are

impartiality, learning, and fidelity to the law and justice. When selection secures judges who exhibit these characteristics, then the legitimacy of courts in question will increase. Democratic selection is not well suited to this purpose – but apparent representation in the form of actual judicial diversity may bring real benefits to the bench. Monolithic courts will be less well informed than more diverse arrays of judges, making judicial diversity desirable, so long as those selected share a common commitment to impartiality, justice, and the law. This raises the question how to secure such judges, whose presence will do more than anything else to secure both the actual and the sociological legitimacy of international courts.

The most striking limitation of international society is the absence of effective procedures to interpret or enforce the law. “the great question therefore is” – for international society as for any other society – “What combination of powers . . . or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance.”<sup>33</sup> International society has well established the fundamental principles and rules of international law and justice in a series of treaties, declarations, and universally respected writings, such as the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the books of Henry Wheaton and Emer de Vattel. The law is settled, but its interpretation and enforcement remain haphazard and incomplete. The decisions of the International Court of Justice (for example) have no binding force except between the parties and in respect of that particular case.<sup>34</sup>

The current world of international adjudication contains a plethora of international courts and tribunals, asserting simultaneous and often overlapping jurisdiction over all aspects of international law.<sup>35</sup> This makes the selection of courts as much an issue as the selection of judges. International courts and tribunals will have varying degrees of actual and sociological legitimacy, depending on their composition, their prior

<sup>33</sup> See John Adams, *A Defence of the Constitutions of Government of the United States of America* (Dilly, 1787) at vol. I, p.128.

<sup>34</sup> *Statute of the International Court of Justice*, Art. 59.

<sup>35</sup> See, e.g., *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi. General Assembly A/CN.4/L.682 (13 April, 2006).

decisions, their provenance, and their stability, among other factors. Many decisions about international law are made by domestic or regional courts and tribunals, such as the U.S. Supreme Court or the European Court of Justice. These too are players in the competition for international legitimacy and may have better methods of judicial selection and greater legitimate authority than treaty-based international courts and tribunals.

Democracy may sometimes play an indirect role both in the selection of the most appropriate courts to govern international disputes and the legitimacy of the courts themselves, once chosen. Although the direct election of judges tends to undermine judicial independence and legitimacy, judges chosen through the quasi-democratic procedures of liberal representative republics have always enjoyed more actual and sociological legitimacy than those selected through other procedures of appointment.<sup>36</sup> This constitutionalist advantage depends primarily on the security that liberal constitutions guarantee to judges in their tenure in office,<sup>37</sup> but liberal constitutions also usually maintain the checks and balances between the different representatives of the people as they participate in judicial selection.<sup>38</sup> The legitimacy and therefore the authority and effectiveness of international courts and tribunals becomes severely compromised when their tenure of office is too short, or the process that selects judges depends too directly on the participation of the undemocratic and illiberal (and therefore illegitimate and unjust) governments of poorly constituted states.

## IX Conclusion

Democracy plays at best an indirect and supporting role in measuring or advancing the legitimacy of international courts and tribunals. The more appropriate standard of legitimacy for international courts arises from their effective advancement of international law and justice. This does not mean that democracy in its broadest sense is not of vital importance to any just world order, but rather that the requisite virtues of judges transcend and sometimes supersede democracy. Judges should

<sup>36</sup> See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997).

<sup>37</sup> "Quamdiu se bene gesserint" or "during good behavior" according to the locution of the *Constitution of the United States* (1787), Art. III, sec. 1.

<sup>38</sup> E.g. *Ibid.*, Art. II, sec. 2.



be learned, independent, impartial, and just – all attributes more or less unconnected with democracy. Democracy plays a role only inasmuch as the spirit of democracy reinforces an equal concern for all those subject to the law, which may have implications for the selection and diversity of judges to serve on international courts and tribunals. Justice is the standard against which the world measures the legitimacy of international law and the courts that support it. Justice depends on respecting the dignity, liberty, and interests of all persons and peoples – not just the majority or most powerful among them.

Judges should be the servants of the law and justice, and their legitimacy arises from their effectiveness in fulfilling this function. Democracy is not in any of its forms a direct or particularly useful source of judicial legitimacy, although it may in some cases be helpful identifying or developing the law. Although the claim or illusion of “democracy” may perhaps at times serve a useful purpose in encouraging support for judges and courts, helping to enhance their effectiveness and independence and therefore their legitimacy, this is at best an indirect benefit. The primary value of “democracy” to the legitimacy of international courts is the benefit that the word itself has in reminding judges that they serve all of society – not only the elites that train and select them. Democracy in international courts should be less a process than a principle – the belief that every state, society, and person should matter to judges, as they fight to maintain the just and impartial *imperium* of the international rule of law.