

ARTICLES

LEGITIMACY IN INTERNATIONAL LAW: FOCUS ON THE LEGITIMACY OF INTERNATIONAL COURTS

JUAN-PABLO PEREZ-LEON-ACEVEDO*

ABSTRACT

The idea or notion of legitimacy has usually been invoked when discussing various aspects of international law and its diverse institutions, such as international courts. Regarding international courts, a wide array of international actors, ranging from heads of state to diverse media sectors, have invoked legitimacy to, harshly or constructively, criticize or endorse the law and, especially, the practice of international courts such as the International Court of Justice. Against this background, the present article aims to answer the following research question: What could be a conceptually sound framework to assess the legitimacy of international law, especially that of international courts? By adopting a primarily normative-oriented approach and relying on relevant scholarship, it is argued herein that the said framework should combine two important components. First, legitimacy ought to be considered at a triple level, namely, legitimacy concerning the origin, procedure, and outcomes of international law, particularly (within this article's scope), the law and practice of international courts. Second, this should be substantially complemented and enriched by the application of legitimacy standards such as human rights. Thus, overall, this framework could be useful for determining whether and to what extent the law and, especially, the practice of an international court can be regarded as legitimate.

* Dr. Pérez-León-Acevedo is completing a second doctoral degree (DPhil in Law) at the University of Oxford. He serves as a tutor in international law and a moot court coach at Oxford, and as a tutor in tort law at the University of Reading and in criminal law at the University of Southampton. He is also a master's thesis supervisor and grader at the University of Oslo and an Associate Editor of the International Journal of Human Rights. He previously taught tort law at the University of Oxford and participated as a tutor in the Stanford in Oxford Program and has served as a lecturer and thesis supervisor at several European universities. He holds a PhD from Åbo Akademi University (Finland), an LL.M from Columbia University, and an LL.B. from the Pontifical Catholic University of Peru. His professional experience includes service with the International Criminal Court, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the United Nations, the University of Oslo, and the Peruvian Ministry of Foreign Affairs, including work on proceedings before the International Court of Justice.

I. INTRODUCTION

In general, the notion of legitimacy has usually been invoked in discussions of diverse aspects of international law and its myriad institutions. For instance, with regard to the use of force, the assessment of actions under the umbrella of humanitarian intervention and/or the responsibility to protect—including strikes launched by the North Atlantic Treaty Organization in Serbia in 1999, or Libya in 2011—have involved not only doctrinal considerations of lawfulness or legality under international law but also, and importantly, whether and to what extent those actions (and/or omissions) can be considered as legitimate.¹

At a more institutionally oriented level in international law, a wide array of international actors has invoked legitimacy to harshly (most often) or constructively criticize or endorse the law and, especially, the practice of international courts. Among others, this group of actors has included heads of state and other high-ranking state officers regarding the International Criminal Court.²

Diverse voices have also questioned, to varying degrees, the legitimacy of the International Court of Justice, involving different levels and types of legitimacy-related critical remarks ranging from high-level state officers, some

1. See generally Deepak Bhojwani, *Responsibility to Protect Issues of Legality and Legitimacy*, 46 ECON. & POL. WKLY. 28-30 (2012) (analyzing the tension between legality and legitimacy in humanitarian intervention and contending that legitimacy assessments under the Responsibility to Protect framework must complement, rather than replace, evaluations of formal legality under international law); Edward Newman, *The Responsibility to Protect, multilateralism and international legitimacy*, in- THE RESPONSIBILITY TO PROTECT, NORMATIVE THEORY AND GLOBAL GOVERNANCE 125-43 (Ramesh Thakur and William Maley eds., 2015); DAVID HARRIS & SANDESH SIVAKUMARAN, CASES AND MATERIALS ON INTERNATIONAL LAW 799-813 (9th ed. 2020); Edward Newman, *Illegal but Legitimate? The UK's Doctrine of Humanitarian Intervention*, EUR. CTR. FOR RESP. TO PROTECT (ECR2P) FRESH PERSPS. (Apr. 12, 2021), <https://ecr2p.leeds.ac.uk/illegal-but-legitimate-the-uks-doctrine-of-humanitarian-intervention/> [<https://perma.cc/92HS-L45D>]; Juan-Pablo Perez-Leon-Acevedo, *Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union*, 16 AFR. HUM. RTS. L.J. 476 (2016).

2. See generally Mark Caldwell, *African Union criticizes International Criminal Court*, DEUTSCHE WELLE (Nov. 19, 2015), <https://www.dw.com/en/african-union-criticizes-international-criminal-court-at-member-states-meeting/a-18862799> [<https://perma.cc/J9TP-864N>] (reporting on African Union leaders' criticism of the International Criminal Court as disproportionately targeting African states and reflecting broader tensions between the Court's prosecutorial practices and state sovereignty concerns); *Imposing Sanctions on the International Criminal Court*, WHITE HOUSE (Feb. 6, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-sanctions-on-the-international-criminal-court/> [<https://perma.cc/D3MK-P2AF>]; BBC NEWS, *President Donald Trump sanctions International Criminal Court* (YouTube, Feb. 7, 2025), <https://www.youtube.com/watch?v=E2019XVJF0I> [<https://perma.cc/9R6V-PETS>]; *Hungary says it will withdraw from ICC as Israel's Netanyahu visits*, ALJAZEERA (Apr. 3, 2025), <https://www.aljazeera.com/news/2025/4/3/hungary-says-it-will-withdraw-from-icc-as-israels-netanyahu-visits> [<https://perma.cc/WS82-TETM>].

media sectors, and academics.³

In this scenario set by claims of lack of legitimacy of international courts such as the International Court of Justice, the present article aims to answer the following main research question: What could be a conceptually sound framework to assess the legitimacy of international law, especially that of international courts? By adopting a primarily normative-oriented approach and relying on relevant scholarship, it is argued herein that the said framework should combine two important components. First, legitimacy ought to be considered at a triple level, namely, legitimacy concerning the origin, procedure, and results of international law, in particular (within this article's scope), the law and practice of international courts. Second, this should be substantially complemented and enriched by the application of legitimacy standards such as human rights.

Overall, this framework could be useful for determining whether and to what extent the law and, especially, the practice of an international court can be regarded as legitimate. Illustrative references mainly concern the practice of the International Court of Justice. Thus, this article relies on and/or is connected to relevant academic literature that has examined the legitimacy of international

3. See generally Bethan McKernan, *Israeli officials accuse international court of justice of antisemitic bias*, GUARDIAN (Jan. 26, 2024, at 12:51 EST), <https://www.theguardian.com/world/2024/jan/26/israeli-officials-accuse-international-court-of-justice-of-antisemitic-bias#:~:text=Israeli%20officials%20accuse%20international%20court,Israel%20Gaza%20war%20%7C%20The%20Guardian> [<https://perma.cc/YFM4-MZ9A>] (reporting on Israeli officials' allegations that the International Court of Justice exhibited antisemitic bias in its handling of proceedings concerning the Israel-Gaza conflict, and reflecting state-level challenges to the Court's impartiality and moral authority); see generally Gerald M. Steinberg, *The ICJ is not a court - opinion*, JERUSALEM POST (Feb. 2, 2024, at 10:44 ET), <https://www.jpost.com/opinion/article-784576> [<https://perma.cc/2QRV-PF5V>] (arguing that the ICJ functions as a politicized body rather than an impartial judicial forum, thereby undermining its credibility and legitimacy in disputes involving Israel and other states); Brooke Goldstein & Gerard Filitti, *The ICJ is illegitimate, but it is an existential threat to Israel - opinion*, JERUSALEM POST (Jan. 12, 2024), <https://www.jpost.com/opinion/article-781784> [<https://perma.cc/8YWS-YVLZ>]; see generally Dina Lupin, *Looking for an African perspective on the ICJ's Climate Advisory Opinion*, COLUM. L. SCH.: CLIMATE L.: SABIN CTR. Blog (Oct. 2, 2025), <https://blogs.law.columbia.edu/climate-change/2025/10/02/looking-for-an-african-perspective-on-the-icjs-climate-advisory-opinion/> [<https://perma.cc/3MVC-PACE>] (examining African scholars' and policymakers' responses to the ICJ's forthcoming Climate Change Advisory Opinion, highlighting regional concerns about equitable participation and representativeness in shaping international adjudicatory legitimacy).

law⁴ and/or, more specifically, the legitimacy of international courts.⁵

To answer the main research question and unpack the argument, the present article comprises the following parts. Section II presents the conceptual or theoretical context in which legitimacy plays a role, as well as a working definition of legitimacy of a primarily normative nature. Having in mind international courts, section III examines legitimacy at a triple level: origin legitimacy, procedural legitimacy, and outcome legitimacy. Section IV argues that human rights can serve as a standard for assessing the legitimacy of international courts. Thus, it examines legitimacy standards and human rights in general, as well as justifies human rights as a legitimacy standard. Finally, section V contains the conclusion.

II. CONCEPTUAL CONTEXT AND A DEFINITION OF LEGITIMACY

A. Conceptual Context

This sub-section enquires into the conceptual context in which legitimacy operates, to, in later sections, approach the “legitimacy” conceptual framework itself employed. It should first be noted that supranational (judicial) institutions like the International Court of Justice and decisions thereof have been called to be more or less “legitimate” and there have been “legitimacy crises” of international institutions caused by, *inter alia*, their “democratic deficit.”⁶ Yet,

4. See generally Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596, 596-624 (1999) (analyzing the concept of legitimacy in international governance, distinguishing between normative, sociological, and pragmatic dimensions, and arguing that international environmental law's effectiveness depends on maintaining both procedural and substantive legitimacy) [hereinafter *The Legitimacy of International Governance*]; Daniel Bodansky, *Legitimacy*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 704, 704-24 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 1st ed. 2008) [hereinafter *Legitimacy*]; MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, LEGITIMACY IN INTERNATIONAL LAW (Rüdiger Wolfrum & Volker Röben eds., 2008); Rüdiger Wolfrum, *Legitimacy in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ON-LINE VERSION (Anne Peters & Rüdiger Wolfrum eds., 2011).

5. See generally Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013) (developing a normative framework for assessing the legitimacy of international courts, emphasizing the importance of representativeness, procedural fairness, and accountability in sustaining their moral and political authority); THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES (Andreas Føllesdal, Johan Karlsson Schaffer & Geir Ulfstein eds., 2015); LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS (Nobuo Hayashi & Cecilia Bailliet eds., 2017); LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018); INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT: QUESTIONS OF LEGITIMACY (Christina Voigt ed., 2019); Juan-Pablo Perez-Leon-Acevedo, *The Inter American Court of Human Rights: The Legitimacy of International Courts and Tribunals*, by Natalia Torres, 40 NORD. J. HUM. RIGHTS 503 (2022) (reviewing Natalia Torres Zúñiga, THE INTER AMERICAN COURT OF HUMAN RIGHTS: THE LEGITIMACY OF INTERNATIONAL COURTS AND TRIBUNALS (2022)).

6. *Legitimacy*, *supra* note 4, at 705.

the term “legitimacy” has a specific meaning in legal or political theory and sociology, which usually contrasts with more colloquial usages of “legitimacy” by international law practitioners and scholars.

A second point to bear in mind is that, while legitimacy may go beyond international law itself or be regarded as indeterminate, it remains a conceptual framework that, if approached carefully, “can prove illuminating for international law scholarship and practice,” and legal thinking can also contribute to interdisciplinary discussions on legitimacy.⁷ Indeed, “legitimacy” etymologically comes from the Latin “*legitimus* (lawful), as derived from *lex* (law).”⁸

A third consideration is that legitimacy can be better understood when contrasted with other governance bases—such as rational persuasion and power—since legitimacy lies somewhere in between the other two.⁹ Unlike persuasion, legitimacy implies deference or obedience, namely, acting not because the act is right “on the merits [. . .] but simply because another has directed it.”¹⁰ Nevertheless, legitimacy also differs from compulsion, which, like legitimacy, includes obedience.¹¹ That is, legitimacy has a normative quality, which means that an institution with legitimate authority has “the right to rule” and its subjects are correspondingly obligated to obey.¹²

A fourth aspect to take into account is that legitimacy as a meta-concept applies to diverse objects in international law: systems, institutions, actions, norms, and actors.¹³ While a specific decision may be controversial, it could be justified when rendered by a legitimate institution.¹⁴ Moreover, legitimacy crucially involves subjects who should support these objects—namely, and traditionally, states as the main subjects of international law.¹⁵ Nonetheless, legitimacy subjects also include individuals since their status as subjects of international law has gained considerable strength. Some have even suggested that, morally if not formally, individuals are the true subjects of international law.¹⁶

Finally, the notion or idea of legitimacy interacts with other concepts, such as “effectiveness,” to assess international institutions like the International

7. James Crawford, *The Problems of Legitimacy-Speak*, 98 PROCEEDINGS OF THE ASIL ANNUAL MEETING 271, 271, 273 (2004); Christopher Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729, 732 (2014).

8. *Id.* at 734.

9. *Legitimacy*, *supra* note 4, 706-07.

10. *Id.* at 707.

11. *Id.* at 708.

12. *Id.*

13. See KATHARINA COLEMAN, INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 20-23 (2007).

14. Thomas, *supra* note 7, at 746.

15. *Id.* at 747.

16. Thomas, *supra* note 7, at 747; Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL'Y 15, 23 (2006).

Court of Justice.¹⁷ These institutions often lack both the democratic legitimation held by national institutions and the strong law-enforcement mechanisms available domestically, requiring supranational institutions to seek “legitimacy-enhancing and effectiveness-bolstering factors to perform their functions” satisfactorily.¹⁸ A more legitimate international court is expected to work more effectively and a more effective international court may be regarded as more legitimate.¹⁹ While international courts can strategically use legitimacy to enhance their effectiveness (achieving their goals), effectiveness can become a legitimacy-enhancing factor when judicial goals or their impact are legitimate and when the court is accepted and supported.²⁰ Sometimes, however, legitimacy-detracting and effectiveness-decreasing factors may be mutually undermining or they “may pull in opposite directions.”²¹

B. A Definition of Legitimacy

Tailored to the international system, in 1990, Thomas Franck seminally defined “legitimacy” as “a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”²² Such a definition contains two legitimacy dimensions: i) the first is a *normative*, objective, or moral dimension; and ii) the second is a *sociological*, social, subjective, empirical, or descriptive dimension. These dimensions have been recognized by scholars assessing the legitimacy of both international law²³ and international courts,²⁴ including the International Court of Justice.²⁵

17. See Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, 354-71.

18. *Id.* at 354.

19. *Id.*

20. *Id.* at 370.

21. *Id.* at 363, 370.

22. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

23. See, e.g., Shotaro Hamamoto, *Legitimacy of International Adjudication*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW ONLINE VERSION, ¶ 6 (Hélène Ruiz-Fabri, ed., 2020); Johan Schaffer, Andreas Føllesdal & Geir Ulfstein, *International human rights and the challenge of legitimacy*, in THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES, *supra* note 5, at 1, 13-14.

24. See, e.g., Harlan Cohen et al., *Legitimacy and International Courts: A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 1, 3-4; Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 13-14; Silje Langvatn & Theresa Squatrito, *Conceptualising and Measuring the Legitimacy of International Criminal Tribunals*, in LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 5, at 41, 43-44.

25. Nienke Grossman, *Solomonic Judgments and the Legitimacy of the International Court of Justice*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 43, 43-61; Neil Nupur, *Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the*

Normative legitimacy concerns whether there are “good reasons” why an institution “should have the right to make the decisions it does,” which is a question of political philosophy.²⁶ It asks whether an authority claim is objectively well-founded, and thus whether an institution such as the International Court of Justice is legitimate if good reasons support its claims to authority.²⁷ Normative legitimacy is framed “in terms of who has the ‘right to rule,’” namely, in how an actor’s power exercised over another can be justified normatively or morally.²⁸ Indeed, “whether an institution *objectively* has a right to rule,”—that is, whether its claim is somehow true—determines normative legitimacy, focusing on the ruler’s qualities such as expertise, transparency, and democratic pedigree that can justify its authority morally.²⁹ Thus, normative legitimacy concerns whether an international court “objectively fulfils normative standards.”³⁰

Sociological legitimacy, whose study Max Weber started,³¹ asks whether the authority of an institution is factually “accepted by those whom it purports to govern,” including states or individuals, and is a question in sociology and political science.³² That is “whether actors *subjectively* believe that an institution has a right to rule,” focusing on the attitudes of the ruled actors rather than on the qualities of the ruler.³³ It hence inquires whether an international court is believed or perceived to be legitimate.³⁴

Although these two legitimacy dimensions are conceptually distinct, they are interrelated.³⁵ Subjects frequently consider that they possess justifiable or good reasons for regarding certain authorities as (il)legitimate. If an agent possesses a reason to believe that others also endorse a norm, based on *inter alia* legitimacy perceptions, they may determine whether that subject is morally motivated or obligated to comply.³⁶ The two legitimacy dimensions cannot be completely detached from each other, and they overlap in several ways.³⁷ Clarifying the normative grounds for beliefs regarding the legitimacy of

‘Invisible’ *International Supreme Court*, 18 L. & PRAC. INT. CTS. & TRIBUNALS 145 (2019); Roger-Claude Liwanga & Casandra Turner, *Demystifying the Legitimacy of International Tribunals: Case Study of the International Court of Justice and Its Decisions on Armed Activities in the Congo*, 35 EMORY INT’L L. REV. 413 (2021).

26. *Legitimacy*, *supra* note 4, at 709.

27. *The Legitimacy of International Governance*, *supra* note 4, at 601.

28. Thomas, *supra* note 7, at 738.

29. Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVE ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 321, 327 (Jeffrey Dunoff & Mark Pollack eds., 2013).

30. Langvatn & Squatrito, *supra* note 24, at 43.

31. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31-38, 212-301 (Guenther Roth & Claus Wittich eds., 1968).

32. *Legitimacy*, *supra* note 4, at 709.

33. Bodansky, *supra* note 29, at 327.

34. Langvatn & Squatrito, *supra* note 24, at 43.

35. *The Legitimacy of International Governance*, *supra* note 4, at 601-02.

36. Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 13.

37. Langvatn & Squatrito, *supra* note 24, at 43-44.

international courts can enhance their legitimation as, in Hart's terms,³⁸ "autonomous" authority sites in the eyes of states and individuals.³⁹ In turn, the contestation of an international court's normative legitimacy may affect its *de facto* and normative authority, undermining its mandate.⁴⁰

The present article mainly, but not exclusively, focuses on normative legitimacy for these reasons. First, normative legitimacy can provide objective standards for assessing international courts and determining whether they deserve the "right to rule."⁴¹ This can help to identify deficits of international courts and what can or should be done to strengthen them.⁴² Second, normative legitimacy "can influence sociological legitimacy [. . .] and thereby, the extent to which we undergird or undercut the work of international courts."⁴³ Third, normative legitimacy is conceptually prior to sociological legitimacy, since the latter presupposes the former; however, that an institution is sociologically legitimate on the basis of tradition or charisma does not necessarily mean that its authority claim is well-founded, as Nazi Germany tragically illustrates.⁴⁴ And fourth, normative legitimacy is intrinsically related to legal studies and to the question of legal authority. Additionally, it is "central to the description and evaluation of the exercise of power through law."⁴⁵ Conversely, sociological legitimacy lacks a legal or moral framework to which believers subscribe.⁴⁶ Certain normative legitimacy accounts, which also incorporate sociological elements, can be useful for better approaching supranational judicial authority.⁴⁷ For example, under Joseph Raz's normal justification thesis, an institution has (legitimate) authority over a subject if the latter "accepts the directives of the alleged authority as authoritatively binding and tries to follow them" rather than proceeding independently.⁴⁸

To avoid confusion, "legal legitimacy" should not be used when it is meant "legality"; simply "legality" ought to be employed in those cases.⁴⁹ Accurate terminological usage is useful for properly assessing the practice of international courts. For example, the International Court of Justice in *Armed Activities on*

38. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) (explaining that a legal system's legitimacy arises not merely from coercive enforcement but from the internal acceptance of its rules and authority as rightful by those subject to them).

39. Neus Torbisco-Casals, *The Legitimacy of International Courts: The Challenge of Diversity*, 52 J. SOC. PHIL. 491, 494 (2022).

40. *Id.*

41. Grossman, *supra* note 5, at 63-64.

42. *Id.* at 64.

43. *Id.*

44. *Legitimacy*, *supra* note 4, at 709.

45. Thomas, *supra* note 7, at 740.

46. *Id.* at 741.

47. See Steven Wheatley, *On the Legitimate Authority of International Human Rights Bodies*, in *THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES* *supra* note 5, at 84, 95.

48. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (1986).

49. Langvatn & Squatrito, *supra* note 24, at 44.

the Territory of the Congo (New Application) (Democratic Republic of Congo v. Rwanda) was decided in a *legally* correct manner, namely, the Court dismissed the case due to Rwanda's lack of recognition of the contentious jurisdiction of the International Court of Justice.⁵⁰ Nevertheless, this was arguably *illegitimate*, since victims of mass atrocities, who could have ultimately benefited from reparations ordered for the Democratic Republic of the Congo through state redistribution, were precluded from receiving them.⁵¹

In turn, while theorists appropriately refer to legitimacy as content-independent to affirm that a legitimate authority can bind its subjects regardless of the content of its decisions, others speak of authority.⁵² The latter would allow room for how acceptable and legal "the lower levels have to be without losing its legitimacy and legal character."⁵³ Legitimacy can manifest in degrees.⁵⁴

Regarding the relationship between legitimacy and reparations, in general, reparations can enhance the legitimacy of states and, *mutatis mutandis*, international institutions such as international courts.⁵⁵ This "legitimizing" effect can additionally spill over to other actors beyond (direct) reparation claimants or beneficiaries.⁵⁶ An adequate legitimacy theory should account for the possibility that reparations may bolster the legitimacy of states and other international law subjects vis-à-vis "persons or groups who were the target of injustice," and beyond them, producing both personal and general legitimizing reparative effects.⁵⁷

Reparations are, arguably, central to legitimacy. This is because rectification of wrongful acts is essential to a state's process of becoming "itself fully legitimate," which, *mutatis mutandis*, can also apply to—or involve—international courts.⁵⁸ Theoretical legitimacy considerations concerning reparations explain how reparations impact the right to rule held by a subject of international law over those affected; they also allow for an appreciation of how that subject can be—or can become—(more) legitimate.⁵⁹

50. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6 (Feb. 3).

51. Liwanga & Turner, *supra* note 25, at 420. On reparations for serious violations of international law, see, e.g., Juan-Pablo Pérez-León-Acevedo, *Non-compensatory Reparation Modalities in United Nations Legal Sources: Focus on Gross Violations of Human Rights*, in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE: 2022, 155 (Giuliana Ziccardi Capaldo ed., 2023); Juan-Pablo Pérez-León-Acevedo, *Compensation in Cases of Mass Atrocities at the International Court of Justice and the International Criminal Court*, 22 LAW & PRAC. INT'L CTS. & TRIBUNALS 30 (2023).

52. See RAZ, *supra* note 48; *Legitimacy*, *supra* note 4, at 708; see John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 805 (1997).

53. Langvatn & Squatrito, *supra* note 24, at 53.

54. *Id.* at 54.

55. Stephen Galoob & Stephen Winter, *Injustice, Reparation, and Legitimacy*, in 5 OXFORD STUDIES IN POLITICAL PHILOSOPHY, 65 (David Sobel Peter Vallentyne & Steven Wall eds., 2019).

56. *Id.*

57. *Id.* at 65, 72-73.

58. JOHN SIMMONS, BOUNDARIES OF AUTHORITY 247 (2016).

59. Galoob & Winter, *supra* note 55, at 89.

While the International Court of Justice under Article 38(1) of its Statute decides “in accordance with international law such disputes as are submitted to it,” its mandate arguably exceeds dispute settlement and includes international law development.⁶⁰ Concerning the latter, however, the International Court of Justice has been said to be constrained, which impacts its normative legitimacy; namely, constraints that (may) affect such legitimacy include: i) the existence of conflicting judicial interpretations of the *res judicata* doctrine; ii) the inapplicability of the *stare decisis* doctrine; iii) the fact that the contentious jurisdiction of the International Court of Justice involves only inter-state proceedings, excluding individuals; and iv) the underdeveloped jurisprudence of the International Court of Justice in the fields of international human rights law and international humanitarian law.⁶¹

Constraints that (may) undermine the sociological legitimacy of an international court, such as the International Court of Justice, may involve, for instance: i) a state’s displeasure that can be manifested through its non-participation in proceedings at the International Court of Justice; ii) compliance with the judgments of the International Court of Justice that are subject to the state’s will (including state’s repudiation); iii) issues related to the election of the judges of the International Court of Justice; and iv) withdrawal from the contentious jurisdiction of the International Court of Justice.⁶²

In turn, the so-called “Solomonic” judgments of the International Court of Justice can negatively affect its legitimacy.⁶³ Furthermore, even some judges of the International Court of Justice occasionally voice their frustration about “missed opportunities” to develop the reparation jurisprudence of the International Court of Justice,⁶⁴ which affects “the authority and persuasiveness that its Judgments command in the field of international law.”⁶⁵

III. TRIPLE LEVEL OF LEGITIMACY

Under a mixed conception of legitimacy, which approaches an authority’s legitimacy as a combination of qualities,⁶⁶ authors have considered that the normative and sociological dimensions of legitimacy can apply at a triple level: i) a first level corresponds to *origin*, source, or pedigree legitimacy; ii) a second level consists of *procedural* or input legitimacy; and iii) a third level is *outcome*,

60. Nucup, *supra* note 25, at 151.

61. *Id.* at 152-55.

62. *Id.* at 147-50.

63. Grossman, *supra* note 25, at 45.

64. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment, 2022 I.C.J. 145, ¶ 2 (Feb. 9) (separate opinion of Yusuf, J.).

65. *Id.* ¶ 28.

66. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405, 409 (2006); Langvatn & Squatrito, *supra* note 24, at 50.

result, or output legitimacy.⁶⁷ These three categories are the “building blocks of institutional legitimacy,” and hence, strength in one legitimacy level may “compensate for weakness in another aspect.”⁶⁸ Additionally, the degree of legitimacy of an international court at each level can fluctuate over time.⁶⁹

A. Origin Legitimacy

Origin legitimacy first inquires how an international court came into existence, including an assessment of its creation by “sufficiently right agents” and in a manner consistent with recognized procedural traditions and sufficiently just.⁷⁰ When an international court is created by a competent “body” such as a group of states or an international organization’s organ in a fair, lawful, and proper way, it possesses an “initial source legitimacy capital,” which legitimizes its operations.⁷¹ Its designation as an “international court” and its incorporation into international governance structures, particularly in areas such as international human rights law, further legitimizes its establishment.⁷²

Origin legitimacy has closely been related to legitimization through state consent: (1) specific consent to certain decisions or obligations via, for example, treaty ratification, adoption of a resolution of the United Nations, or acceptance of the jurisdiction of the International Court of Justice over a case; and (2) general consent to an existing governance system, for example, ratification of the United Nations Charter that establishes quasi-legislative and adjudicatory institutions.⁷³ While specific state consent is static and linked to a specific obligation, general state consent is (more) dynamic since a newly established governance system develops its own legal life through the formulation of obligations.⁷⁴

State consent in principle suffices to legitimize a specific measure, even for a continuing obligation, if the substance and scope of the obligation remain the same.⁷⁵ However, the legitimizing effects of the original consent may factually fade over time, despite international law’s assumption that a single original consent can establish continuous obligations.⁷⁶ The renunciation and/or withdrawal of an obligation that changed, namely, the *rebus sic stantibus* clause, and review processes are mechanisms to re-establish legitimacy if an obligation

67. E.g., *The Legitimacy of International Governance*, *supra* note 4, at 612; Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra* note 4, at 1, 6-7; Langvatn & Squatrito, *supra* note 24, at 51; Grossman, *supra* note 25, at 45; Shany, *supra* note 17, at 357.

68. Shany, *supra* note 17, at 359.

69. *Id.* at 360.

70. Langvatn & Squatrito, *supra* note 24, at 51-52.

71. Shany, *supra* note 17, at 357.

72. *Id.* at 357-58.

73. *The Legitimacy of International Governance*, *supra* note 4, at 604.

74. Wolfrum, *supra* note 67, at 9.

75. *Id.*

76. *Id.*

becomes illegitimate.⁷⁷

International treaty law relies on a consensual basis, and international treaties are the main source of international law.⁷⁸ While agreements reached by non-democratic states may challenge the legitimacy of international law, especially in areas involving international human rights law, the situation of customary international law changes depending on the considered legitimizing source.⁷⁹ Under social contract theory, general consent can strongly legitimize treaty-based mechanisms, even those involving non-consensus decision-making, if an international regime remains within its constitutional limits (“legality” or “legal legitimacy”) and its outcomes bind consenting states.⁸⁰

State consent has traditionally been a relatively solid foundation for international law and institutions thereof.⁸¹ Nevertheless, it has increasingly been considered insufficient due to, for example, the need for more flexible and expeditious law-making approaches that do not depend on state consensus and the growing participation of other international law subjects, such as individuals, beyond purely inter-state relationships, for whom state consent may provide limited legitimization.⁸²

Whether state consent remains an adequate basis for legitimizing international institutions may be questioned, particularly regarding human rights issues, since, increasingly, the decisions of those institutions directly affect individuals.⁸³ General consent may be insufficient to address legitimacy crises of international institutions such as the United Nations or bodies thereof, since the autonomy to surrender is greater under general consent than under specific consent mechanisms.⁸⁴

It has been questioned whether democracy can complement or replace state consent, based on considerations of states as free and equal (like individuals) and on the “one state, one vote rule” as a manifestation of the sovereign equality principle, a fundamental international law axiom.⁸⁵ Article 2(1) of the United Nations Charter recognises the latter: “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. The Organization is based on the principle of the sovereign equality of all its Members.”⁸⁶ However, such an approach has been challenged due to the lack of intrinsic reasons to treat states as equals because of (1) their disparity in power, population, and wealth; (2) the absence of a global legislature; and (3) the lack of a (truly) global “demos” or “shared sense of

77. *Id.*

78. *Id.* at 7.

79. *Id.* at 7-8.

80. *The Legitimacy of International Governance*, *supra* note 4, at 609.

81. *Id.* at 606.

82. *Id.*

83. Wolfrum, *supra* note 67, at 10-12, 16.

84. *The Legitimacy of International Governance*, *supra* note 4, at 609.

85. *Id.* at 614.

86. U.N. Charter art. 2, ¶ 1.

community.”⁸⁷ Some authors have rejected general state consent as too limited and complete global democracy as excessive for legitimizing global governance institutions.⁸⁸

The legitimacy of international courts, in democratic terms, is grounded in state consent to submit to supranational jurisdiction, which was traditionally conceived as “arbitration” to settle disputes between two parties, and hence legitimacy matters would mainly consist in scrutinizing how consent to international judicial authority is conveyed.⁸⁹ Nevertheless, such indirect democratic bases for the exercise of public authority by international courts do not fully encapsulate the new roles of international courts as relatively autonomous institutions holding “significant law-making power.”⁹⁰ Furthermore, rationales supporting the legitimacy of national courts cannot easily be extrapolated to international courts, as the latter remain highly fragmented and horizontally structured. Additionally, robust democratic bases for their supremacy claims are still missing, all of which is more pressing amidst conservative populist waves that aggressively challenge international institutions for their democratic deficits.⁹¹

All in all, the legitimacy of, for instance, the International Court of Justice substantially rests on state consent to its jurisdiction and to its work within these confines: the International Court of Justice cannot bind independent and sovereign states without their consent, nor can it render *ultra vires* decisions exceeding its delegated authority.⁹² As the International Court of Justice has recognised, its jurisdiction is “based on the consent of the parties and is confined to the extent accepted by them.”⁹³ The International Court of Justice has also determined that even the *erga omnes* or *jus cogens* character of an international law rule cannot provide a jurisdictional basis itself since Article 36 of the Statute of the International Court of Justice requires the consent of states parties to exercise its jurisdiction over a dispute, as well as the fact that *erga omnes* obligations and *jus cogens* rules, on the one hand, and the rule of consent to jurisdiction, on the other one, are different categories.⁹⁴

The consensual element for the exercise of jurisdiction is clearly present in the first three paragraphs of Article 36 of the Statute of the International Court

87. *The Legitimacy of International Governance*, *supra* note 4, at 614-17.

88. Buchanan & Keohane, *supra* note 66, at 413, 416; Euan MacDonald, *Human Rights, Legitimacy, and Global Governance*, in *THE STRUGGLE FOR HUMAN RIGHTS: ESSAYS IN HONOUR OF PHILIP ALSTON* 70 (Nehal Bhuta et al. eds., 2021).

89. Torbisco-Casals, *supra* note 39, at 494.

90. *Id.*

91. *Id.*

92. Grossman, *supra* note 25, at 45.

93. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, ¶ 88 (Feb. 3); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 131 (Apr. 1).

94. East Timor (Portugal v. Australia), Judgment, 1995 I.C.J., 90, ¶ 29 (June 30); Armed Activities on the Territory of the Congo (New Application: 2002), 2006 I.C.J. ¶ 64.

of Justice:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.⁹⁵

Otherwise, the International Court of Justice would go too far. That is, the Court would be involved in law-making as if it were amending its Statute, which only states can do by expressing consent.⁹⁶ Moreover, judgments exceeding the delegated authority of the International Court of Justice can threaten its legitimacy as they go beyond the original state consent, despite claims of state consent to jurisdiction as conferring a “normative and quasi-legislative power” to an international court for dispute settlement.⁹⁷

B. Procedural Legitimacy

Procedural legitimacy derives from the process by which “decisions are made, including factors such as transparency, participation, and representation,” and inquires, *inter alia*, whether decisions come from democratic processes or involve proper deliberation and whether civil society sufficiently participated.⁹⁸ Thus, it involves that the procedure is consistent with the law and recognized traditions, as well as being just or fair enough.⁹⁹ Authority can be legitimate

95. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

96. Armed Activities on the Territory of the Congo (New Application: 2002), 2006 I.C.J. ¶ 13 (separate opinion of Dugard, J.); *see also* Carlos Espósito, *Human Rights, in THE CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE* 508 (Carlos Espósito & Kate Parlett eds., 2023).

97. Grossman, *supra* note 25, at 45-47; Prosper Weil, “*The Court Cannot Conclude Definitively . . .*” *Non Liqueur Revisited*, 36 COLUM. J. TRANSNAT’L L. 109, 115 (1997).

98. Bodansky, *supra* note 29, at 330.

99. Langvatn & Squatrito, *supra* note 24, at 51.

when it involves fair procedures, and judicial authority has (partially) been legitimised procedurally when, for instance, parties can fully exercise their rights to be heard, confront witnesses, and be judged by an impartial adjudicator.¹⁰⁰

Under procedural legitimacy, the legitimacy of an authority depends on exercising its power through adequate and fair procedures, including procedural rules governing institutional establishment or composition, as well as decision-making.¹⁰¹ Manners to potentially enhance the procedural legitimacy of an international court include: i) having judges craft their reasoning based on the previous jurisprudence of the same international court, which indicates that norms rather than (excessive) discretion determine their decision; and ii) the reduction in dissent among judges, especially in controversial decisions when a united front is pivotal or highly advisable.¹⁰² The International Court of Justice in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (hereinafter *Corfu Channel case*)¹⁰³ has been said to use rhetoric to establish that its decision was consistent with international law, which would exemplify that there is always space for judicial discretion.¹⁰⁴

Determining the purposes or goals of an international court is important to establish whether its proceedings are so unjust that they undermine its legitimacy, albeit its strong origin and results.¹⁰⁵ If providing victims of human rights and international humanitarian law violations with a voice is a main aim of an international court, this affects how the sufficient procedural justice threshold is interpreted; for example, procedural representation or participation of victims would be advisable or required.¹⁰⁶

Procedural legitimacy has been associated with legality (“legal legitimacy”), which connects “an institution’s continuing authority to its original basis in state consent.”¹⁰⁷ While, for instance, the authority of the International Court of Justice derives from its Statute and is consented to by member states of the United Nations (“origin legitimacy”), its “continuing authority depends on its acting in accordance with the Statute.”¹⁰⁸ This means its actions against or outside the Statute would lack (procedural) legitimacy.¹⁰⁹ However, whether the decisions of an international court constitute justified interpretations of the law, consented to by states and consistent with applicable

100. *The Legitimacy of International Governance*, *supra* note 4, at 612.

101. Franck, *supra* note 22, at 91; Wolfrum, *supra* note 4, ¶ 7.

102. Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 470-71 (2013).

103. *The Corfu Channel Case (UK of Gr. Brit. and N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. 4 (Apr. 9).

104. *See* Dothan, *supra* note 102, at 469.

105. *See* Langvatn & Squatrito, *supra* note 24, at 56.

106. *Id.*

107. *The Legitimacy of International Governance*, *supra* note 4, at 605.

108. *Id.*

109. *Id.*

rules, is sometimes difficult to establish.¹¹⁰

Since legality obliges an international institution to stay within its original mandate limits and under established decision-making proceedings, legality induces “legitimacy through procedure.”¹¹¹ As international institutions, such as international courts, have assumed governance functions, they should adhere to principles of the rule of law, including judicial review.¹¹² Legality limits the power of international institutions.¹¹³ Legality adopts an internal perspective of procedural legitimacy, namely that institutional actions are justified if they are consistent with rules on “who can exercise authority, according to what procedures, and subject to what restrictions.”¹¹⁴

As legality does not fully determine whether the governance arrangements of an international court, for example, the institution’s composition and decision-making mechanisms, are legitimate themselves,¹¹⁵ it has been discussed whether “standard” democratic features such as fair proceedings (for instance, political equality, universal and majority voting), transparency, public participation, and accountability can be alternative or complementary procedural legitimacy bases.¹¹⁶

These features can and have been, *mutatis mutandis*, extrapolated from the national to the international level, constituting an important source of procedural legitimacy; however, their application also presents challenges: for example, even in open international meetings, very few members of the public can participate.¹¹⁷ Despite the underlying democratic values of international institutions, their connection with people remains mediated and remote.¹¹⁸ Yet individuals have increasingly assumed a prominent role in international dispute settlement.¹¹⁹

For instance, concerning reparations rendered by international courts, explicit reasons justifying awards are arguably necessary to safeguard due process against judicial abuse, negligence, or overreach.¹²⁰ Such a justification may demand “judicial modesty” plus some reasonable support, as suitable reparation measures may be difficult to determine.¹²¹ A key due process component is the judicial motivation of awards, especially when these orders may be regarded as an exercise of expansive powers “to intervene in state

110. *Id.* at 606.

111. Wolfrum, *supra* note 4, ¶ 23.

112. *Id.* ¶ 23-24.

113. Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT’L L. & INT’L RELS. 139, 154 (2004).

114. *The Legitimacy of International Governance*, *supra* note 4, at 608.

115. *Id.*

116. *Id.* at 605, 613, 617.

117. *Id.* at 613, 617.

118. Wolfrum, *supra* note 4, ¶ 18.

119. *Id.* ¶ 20.

120. David L. Attanasio, *Extraordinary Reparations, Legitimacy, and the Inter-American Court*, 37 U. PA. J. INT’L L. 813, 861 (2016).

121. *Id.*

policy.”¹²²

Pursuant to Article 92 of the United Nations Charter, “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”¹²³ In turn, under Article 38(1) of its Statute:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹²⁴

Member states have tasked the International Court of Justice with judicial adjudication, namely, the application of international law to the facts of a case, which differs from political or other functions, such as mediation.¹²⁵ This has been acknowledged by some judges of the International Court of Justice.¹²⁶ Different factors can contribute to the procedural legitimacy of international courts, such as the International Court of Justice.

The first factor to be considered is fairness and unbiasedness, namely, whether parties can equally express their arguments and have their cases heard throughout the proceedings. This is implemented *inter alia* via clear procedural rules of the International Court of Justice on inter-party documentary exchange and party’s submissions of motions, as well as procedural modifications jointly proposed by the parties under Article 101 of the Rules of the International Court of Justice.¹²⁷ Article 101 reads as follows:

The parties to a case may jointly propose particular modifications or

122. *Id.* at 871.

123. U.N. Charter art. 92.

124. Statute of the International Court of Justice art. 38 ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

125. LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 141; *see also* Cesare P.R. Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, in THE OXFORD HANDBOOK OF INT’L ADJUDICATION 3, 4-5 (2014).

126. Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, Ord., 1992 I.C.J. 50, 56 (Weeramantry, J., dissenting) (Apr. 14).

127. Liwanga & Turner, *supra* note 25, at 426-27.

additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or by a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case.¹²⁸

Unbiased judicial personnel at the International Court of Justice are crucial to guarantee the principles of judicial impartiality and independence.¹²⁹ Another factor to consider is the sound interpretation and application of international law in the specific dispute. For example, should an international court often and inconsistently interpret and apply the principle of integral reparations for violations of human rights, the parties may reject awards, and potential parties may abstain from submitting their disputes to that court.¹³⁰

A final factor to regard is transparency, which allows litigating parties to know whether an international court conducts fair and unbiased proceedings and properly interprets applicable law. This can be implemented through public hearings, public information on judges and parties, and well-reasoned judgments.¹³¹

Since fairness, justice and equity considerations require international courts such as the International Court of Justice to generally recognize that a party has a (much) stronger or weaker case rather than split remedies or rights equally, “Solomonic judgments” should be avoided unless the parties explicitly manifested their intention to have their dispute *ex aequo et bono* settled, which also enables international courts like the International Court of Justice to adopt *ultra vires* decisions.¹³² Indeed, Article 38(2) of the Statute of the International Court of Justice states that “[t]his provision [Article 38] shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”¹³³ In any event, the International Court of Justice may still appease the losing party through rhetoric, for instance, while the International Court of Justice rhetorically criticized the United States of America and supported the claims of Iran in *Oil Platforms (Islamic Republic of Iran v. United States of America)*,¹³⁴ its decision suited American interests.¹³⁵

Importantly, it should be mentioned that, sometimes, the Judges of the International Court of Justice, through separate or dissenting votes, have severely criticized how the majority of the Court interpreted or applied the law. For instance, Judge Patrick Robinson in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (hereinafter *Armed*

128. Rules of Court, 1978 I.C.J. Acts & Docs. 8, art. 101.

129. Liwanga & Turner, *supra* note 25, at 427.

130. *Id.* at 428.

131. *Id.* at 428-29.

132. Grossman, *supra* note 25, at 49, 51, 61.

133. Statute of International Court of Justice art. 38 ¶ 2, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

134. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161 (Nov. 6).

135. Dothan, *supra* note 102, at 461-62.

Activities) expressed that “the reliance placed by the Court on the EECC’s [Eritrea-Ethiopia Claims Commission] Award is wholly misplaced [. . .] the Court should have become more active and more engaged in fixing compensation by introducing its own determination of the extent and valuation of the damage or injury.”¹³⁶ Judge Peter Tomka also remarked that, under Article 56(1) of the Statute of the International Court of Justice, “‘the judgment shall state the reasons on which it is based’ [. . .] I doubt that the reader will be able to understand how the Court arrived at the particular amounts of compensation for various heads of damages.”¹³⁷ In fleshing out this provision, Article 95 of the Rules of Court establishes that:

1. The judgment, which shall state whether it is given by the Court or by a Chamber, shall contain: the date on which it is read; the names of the judges participating in it; the names of the parties; the names of the agents, counsel and advocates of the parties; a summary of the proceedings; the submissions of the parties; a statement of the facts; the reasons in point of law; the operative provisions of the judgment; the decision, if any, in regard to costs; the number and names of the judges constituting the majority; a statement as to the text of the judgment which is authoritative.
2. Any judge who so desires may attach an individual opinion to the judgment, whether dissenting from the majority or not; a judge who wishes to record concurrence or dissent without stating reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.¹³⁸

C. Result Legitimacy

Result legitimacy¹³⁹ derives from governance results, namely, whether a regime, *inter alia*, effectively solves problems, reaches equitable outcomes, maintains stability, or respects human rights.¹⁴⁰ The success of an authority can be legitimized through the production of desired results, such as international peace, which explains why the League of Nations lost legitimacy and, thus, people would accept the decisions of an international institution if they consider that such institution “has generally done a good job and therefore is justified in its right to govern.”¹⁴¹ An influential normative account of output-based legitimacy is Joseph Raz’s “service conception of authority,” which asserts that

136. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, 2022 I.C.J. 145, 166, 181 (Feb. 9) (separate opinion by Robinson, J.).

137. *Id.* at 142 (separate opinion by Tomka, J.).

138. *Rules of Court, 1978 I.C.J. Acts & Docs* 8, art. ¶ 9.

139. Result legitimacy is also referred to as “output-based legitimacy.” See Bodansky, *supra* note 29, at 330.

140. *Id.*

141. *The Legitimacy of International Governance*, *supra* note 4, at 612.

“authorities are legitimate only if their directives enable their subjects to better conform to reason.”¹⁴²

Thus, result legitimacy concerns the outcomes produced by an international institution, which should support and strengthen the institution’s purposes, provided that such purposes should also be morally justifiable or sufficiently fair.¹⁴³ For instance, result legitimacy may arise: (1) when the case selection and judgments of an international court support, enhance, or are consistent with its purposes (effectiveness); (2) when the case selection and decisions of an international court are morally justifiable or sufficiently just; and (3) when the broader effects of an international court’s practices, such as norm projection and impact on victims or their communities, are morally justifiable or sufficiently just.¹⁴⁴ Examples of results include norm projection, human rights protection, and reparations.¹⁴⁵

Unlike origin and procedural legitimacy, which are assessed independently of the support for or opposition to a judicial decision, result legitimacy is not content-independent, as it evaluates whether international courts’ decisions are compatible “with applicable legal norms and substantive standards of justice.”¹⁴⁶ Furthermore, a goal-based approach to the effectiveness of international courts, namely, the fulfilment of goals of an international court established by “their mandate providers . . . and other relevant constituencies,” may overlap with the result legitimacy of an international court.¹⁴⁷

Expertise has been regarded as a source of result legitimacy, which sharply contrasts with democratic-related legitimacy justifications such as public participation.¹⁴⁸ Expert decision-making relies on: (1) decisions in question have better and worse answers; (2) some persons have expertise or special knowledge about those answers; and (3) non-experts can identify individuals possessing such knowledge, which usually is the most complicated aspect since “expert” identification can be debated.¹⁴⁹

Because states and other international law subjects, including individuals, hold diverse interests and different perceptions of what “successful” results are, they, rather than experts, should decide what to do.¹⁵⁰ Furthermore, even concerning pure “expert” components of international decision-making, uncertainties may preclude an answer; however, expertise can be useful for decision-making about issues with no significant value-related disagreement and where subjects share the same goals, namely, “an institution’s problem-

142. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1018 (2006).

143. Langvatn & Squatrito, *supra* note 24, at 51, 61.

144. *Id.* at 51-52.

145. *Id.* at 62, 64.

146. Shany, *supra* note 17, at 358-59.

147. *Id.* at 361, 363.

148. *The Legitimacy of International Governance*, *supra* note 4, at 620.

149. *Id.*

150. *Id.* at 621.

solving effectiveness can give it legitimacy [. . .] since the outcomes can leave everyone better off, they can provide a basis for a regime's substantive legitimacy."¹⁵¹

Because expert opinion plays a central role in international law, human rights treaty bodies rely on internationally recognized experts as a legitimacy-inducing mechanism, which, in turn, requires greater transparency in expert selection.¹⁵² While expert opinion as a legitimacy basis of international governance is less rooted in state consent and moves away from national democratic governance templates, expertise is indeed part of the identity of the international judicial bench and acts as a source of its legitimacy.¹⁵³

At the International Court of Justice, the aftermaths of cases such as *South West Africa (Liberia v. South Africa)*¹⁵⁴ and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹⁵⁵ have plausibly evidenced that result legitimacy concerns "can seriously affect the acceptance of the court's authority by important constituencies."¹⁵⁶ If key decisions of international courts are perceived as fundamentally unfair or without proper legal foundations, their legitimacy can be seriously compromised, even if the international court was properly established and followed fair proceedings, especially when outcome-related issues occur frequently.¹⁵⁷

Should an international court be aware of the high risk of judgment rejection by target audiences or of politically problematic cases for its adjudication, it may decide not to exercise jurisdiction or find the case inadmissible to dodge legitimacy damages.¹⁵⁸ To avoid outcomes that could affect the legitimacy of the International Court of Justice, this international court has sometimes seemingly avoided exercising its jurisdiction by finding a lack of jurisdiction when it had foreseen non-compliance with a potential judgment.¹⁵⁹

For example, as part of the merits judgment or as a separate judgment, reparation outcomes impact the legitimacy of an international court and, thus, the court may try to design or "manipulate" reparations ordered in manners to preserve its legitimacy.¹⁶⁰ Under "just satisfaction," which is included in Article 41 of the European Convention on Human Rights, the European Court of Human Rights usually orders states to pay compensatory amounts that are

151. *Id.* at 622-23.

152. LEGITIMACY IN INTERNATIONAL LAW, *supra* note 4, at 24.

153. Wolfrum, *Legitimacy in International Law*, *supra* note 4, ¶ 27; see IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE? (Freya Baetens ed., 2020).

154. *South West Africa (Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6 (July 18).

155. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14 (June 27).

156. Shany, *supra* note 17, at 7.

157. *Id.* at 7-8.

158. Dothan, *supra* note 102, at 473.

159. *Id.*

160. *Id.* at 471.

generally low and do not financially burden most states, which often pay these amounts timely, and, also, very low amounts may indicate that the court does not regard the violation(s) as particularly serious, which may help reduce state resistance to comply with the award.¹⁶¹ The referred Article 41 indicates that: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” While the International Court of Justice in *Corfu Channel* found that the United Kingdom violated international law, it did not ask the United Kingdom to take any action.¹⁶² This, coincidentally, reduced the risk of criticism against the judgment portion, which was arguably based on flimsy legal grounds.¹⁶³

Award outcomes in the emerging reparation jurisprudence of the International Court of Justice reveal remarkably large differences between the compensatory amounts requested by the applicant state and those ordered by the International Court of Justice, which may cast doubt on the result legitimacy of the International Court of Justice. While Costa Rica requested the International Court of Justice order Nicaragua to pay US\$ 6,708,776.96 plus US\$ 522,733.19 (pre-judgment interest) for environmental damages in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, the International Court of Justice only awarded US\$ 378,890.59 (pre-judgment interest included).¹⁶⁴ This showcases the discrepancy, as the final award was only 5.24% of the requested amount.

Furthermore, the International Court of Justice in *Armed Activities* ordered Uganda to pay the US\$ 325,000,000 “global sum.”¹⁶⁵ This was substantially lower than the requested US\$ 13,478,122,950 for compensation, plus US\$ 125 million for satisfaction of non-material damage, sought by the Democratic Republic of Congo in a scenario involving large-scale and serious violations of the prohibition on the use of force, international human rights law, and international humanitarian law.¹⁶⁶ This award totalled 2.39% of the requested amount. Such a problematic outcome in *Armed Activities* has been further exposed by the critical separate or dissenting opinions of the Judges of the International Court of Justice, especially considering that this case concerned mass atrocities.¹⁶⁷

161. *Id.* at 471-72.

162. The *Corfu Channel* Case (UK of Gr. Brit. and N. Ir. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

163. Dothan, *supra* note 102, at 472-73.

164. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2018, I.C.J. 15 ¶¶ 20, 156 (Feb. 2).

165. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, 2022 I.C.J. 145, ¶ 405 (Feb. 9).

166. *Id.* ¶ 45.

167. *Id.* ¶ 9 (separate opinion by Tomka, J.); *Id.* ¶¶ 5, 15, 39-40 (separate opinion by Robinson, J.); *Id.* ¶¶ 1-2, 24 (Daude, J., dissenting).

Beyond purely quantitative considerations, supranational judicial reparations for serious violations of international law rules, including international human rights law, may be legitimate if they aim to redress social bonds, especially if the international court expressly establishes that the said violations affected the trust of victims in the state and finds that the reparation measures could redress that breached trust.¹⁶⁸

IV. HUMAN RIGHTS AS A POTENTIAL STANDARD TO ASSESS THE LEGITIMACY OF INTERNATIONAL COURTS

A. Legitimacy Standards

The international system, in Hart's terms, may still be relatively "primitive."¹⁶⁹ However, there is arguably a true international community in which its members, overall, accept being governed by common rules, following Ronald Dworkin's characterization.¹⁷⁰ In this scenario, the issue of legitimacy of international institutions raises the question of, normatively (and descriptively), what standards are used and/or should be used to evaluate such legitimacy.¹⁷¹ Legitimacy involves identifying appropriate standards to examine the law and practice of international courts.¹⁷²

Based on scholarship¹⁷³ and the practice of the organs of the United Nations,¹⁷⁴ the rule of law, democracy, and human rights can be identified as standards to assess the legitimacy of international institutions, including international courts such as the International Court of Justice.¹⁷⁵ While this sub-

168. Attanasio, *supra* note 120, at 861.

169. HART, *supra* note 38, at 209.

170. RONALD DWORKIN, LAW'S EMPIRE 196-214 (1986).

171. Bodansky, *supra* note 29, at 322.

172. Mortimer Sellers, *Democracy, Justice, and the Legitimacy of International Courts*, in LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 5, at 338, 340.

173. E.g., *The Legitimacy of International Governance*, *supra* note 4; Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Geir Ulfstein, *Institutions and Competences*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 45-80 (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009) [hereinafter *Institutions and Competences*]; Geir Ulfstein, *The International Judiciary*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra*, at 126-52 [hereinafter *The International Judiciary*]; Antje Wiener et al., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law* 1 GLOB. CONSTITUTIONALISM 1 (2012); Bodansky, *supra* note 29.

174. E.g., U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, ¶¶ 133-52, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*]; Human Rights Council Res. 19/36, U.N. Doc. A/HRC/RES/19/36 (Apr. 19, 2012); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, U.N. Doc. S/2004/616, (Aug. 23, 2004) [hereinafter *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*].

175. See Grossman, *supra* note 5.

section briefly examines the rule of law and democracy, human rights as a legitimacy standard are discussed later.

Although the rule of law concept is very broad, it concerns the regulation of a community under law and justice rather than power.¹⁷⁶ International law sources also recognize the rule of law as a fundamental guiding principle.¹⁷⁷ It involves that persons can know the law rules and abide by them, plus “the law should be such that people will be able to be guided by it.”¹⁷⁸ The rule of law is a principle of national and international governance where international law subjects—such as states, international institutions, and individuals—are “accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,” and these laws are consistent with international human rights law.¹⁷⁹

From these definitional components of the rule of law, scholars have mainly derived elements applied to legitimacy assessments of international institutions, including international courts. These elements include: i) adherence to law supremacy, namely, power governed by the law and no arbitrary power; ii) equality before the law; iii) independent and impartial courts established by law, which *inter alia* protect rights; iv) separation of powers; v) judicial review; vi) non-retroactive laws, consistent decisions and legal predictability; and vii) procedural principles for decision-making such as due process, fair hearings, equal access to justice, expertise, transparency, and accountability.¹⁸⁰ Although the rule of law conceptually differs from “justice,”¹⁸¹ they are closely related.¹⁸² Some practices of the International Court of Justice have directly engaged with elements of the rule of law, such as the judicial review of the legality of the actions of the United Nations Security Council.¹⁸³

Democracy relies on the governed individuals’ consent manifested via free and periodic elections where leaders and policies can be changed, involving

176. *Institutions and Competences*, *supra* note 173, at 59.

177. *E.g.*, U.N. GAOR, 77th Sess., UN Doc A/RES/62/70, (Jan. 8, 2001); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

178. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 213 (1st ed. 1979).

179. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

180. *See Institutions and Competences*, *supra* note 173, 60-70; *The International Judiciary*, *supra* note 173, 127-46; JAMES CRAWFORD, *CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW*, *GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 24-25 (2013); Tullio Treves, *Aspects of Legitimacy of Decisions of International Courts and Tribunals*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra* note 4, at 173-77; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 174, ¶ 6.

181. RAZ, *supra* note 178, at 210-11.

182. Sellers, *supra* note 172, at 347.

183. Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, Ord., 1992 I.C.J. 50, 54-59 (Apr. 14) (Weeramantry, J., dissenting); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. and Herz. v. Serb. And Montenegro), Order, 1993 I.C.J. 3 (Apr. 8).

“fair procedures (universal suffrage, majority voting, political equality),” and plausibly producing “the best results.”¹⁸⁴ In international law, “democracy” means: i) the same as at the national level, namely, a government system based on majority voting and universal elections; ii) inter-state political equality, including the ‘one state, one vote’ rule; and iii) open government features, especially public participation and transparency.¹⁸⁵

Despite the democratic deficit of international institutions, binding international decisions ought to be ideally undertaken by democratic and accountable bodies with members directly elected and should be “supported by public debate, transparency,” participation of civil society actors, and due power allocation between supranational institutions and domestic bodies.¹⁸⁶ With regard to democratic control, international courts must be independent of political control by states and international organizations in their judicial functions.¹⁸⁷

However, the appropriateness of democracy for assessing the legitimacy of international institutions has been questioned.¹⁸⁸ “Building blocks” such as inclusion, public debate, or transparency have been suggested instead, which can be associated with democracy.¹⁸⁹ Yet, democracy has gained importance in international law, *inter alia*, to realize human rights.¹⁹⁰ The practice of United Nations bodies evidences so.¹⁹¹ Certain practices of the United Nations have concerned democracy-related issues or democracy-connected legal sources.¹⁹²

B. Justification of Human Rights as a Legitimacy Standard

1. On Human Rights

In general, human rights can be conceived as: i) given rights that an individual is entitled to because of being a human being, which is the main human rights orthodoxy (“natural scholars”); ii) political values chosen by liberal societies, established via societal agreement (“deliberative scholars”); iii) rightful claims to redress injustices (“protest scholars”); and/or iv) a powerful

184. *The Legitimacy of International Governance*, *supra* note 4, at 613.

185. *Id.*

186. *Institutions and Competences*, *supra* note 173, at 55, 57.

187. *The International Judiciary*, *supra* note 173, at 147.

188. *E.g.*, Bodansky, *supra* note 29, at 330; Andreas Follesdal, *Constitutionalization, Not Democratization: How to Assess the Legitimacy of International Courts*, in *LEGITIMACY AND INTERNATIONAL COURTS*, *supra* note 5, at 307-37; Sellers, *supra* note 172, at 352.

189. Follesdal, *supra* note 188, at 337.

190. de Wet, *supra* note 173, at 63.

191. *E.g.*, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary General*, *supra* note 174, ¶¶ 148-52.

192. *E.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 136-38 (July 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

language to voice political claims (“discourse scholars”).¹⁹³

At a more specific level, human rights arguably constitute a subset of “universal moral rights” protecting fundamental human rights interests against political institutions’ (non-intervention),¹⁹⁴ leading to a duty bearer’s obligation to respect them vis-à-vis the holder of human rights.¹⁹⁵ These rights can become “legal human rights,” namely, general and fundamental moral interests legally recognized as important enough to produce moral duties.¹⁹⁶

As a matter of law, international human rights law guarantees rights (usually *erga omnes*) to individuals subject to the jurisdiction of a state and (arguably) vis-à-vis international organizations, obliging states and (plausibly) international organizations to protect them as “human rights.”¹⁹⁷ Based on human dignity, which international human rights law recognizes, human rights convey the entitlement of the holder and the obligation of the duty bearer, protecting individuals and communities,¹⁹⁸ limiting state sovereignty,¹⁹⁹ and being recognized in international law because of their universality and importance.²⁰⁰

As international human rights law acknowledges,²⁰¹ there is a minimum core of human rights that cannot be violated in any circumstance, including the right to life, freedom from torture, and freedom from slavery.²⁰² They are seriously breached when international crimes, whose prohibition constitutes *jus cogens*, are committed, linked or not to armed conflicts.²⁰³

Under international human rights law, human rights are civil, political, and socio-economic rights of individuals and groups recognized in treaties, customary law and other international law sources, originally referred to in the Charter of the United Nations and developed in the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the

193. Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1, 2-4 (2010).

194. Samantha Besson, *The Legitimate Authority of International Human Rights*, in THE LEGITIMACY OF INTERNATIONAL HUMAN RIGHTS REGIMES: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES, *supra* note 5, at 32, 48.

195. Joseph Raz, *On the Nature of Rights*, 93 MIND 194, 195 (1984).

196. Besson, *supra* note 194, at 51.

197. *Id.* at 54.

198. Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39, 45-46, 49-50 (2008).

199. Joseph Raz, *Human Rights without Foundations*, in THE PHILOSOPHY OF INTERNATIONAL LAW 321, 328-33 (Samantha Besson & John Tasioulas eds., 2010).

200. Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L LEGAL THEORY 31, 39 (2010) https://scholarship.law.columbia.edu/faculty_scholarship/1607 [<https://perma.cc/E6PG-SCQ2>]; Wheatley, *supra* note 47, at 96.

201. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art 15, Nov. 4, 1950, 213 U.N.T.S. 221.

202. Grossman, *supra* note 5, at 97-98.

203. *Id.* at 98-99.

International Covenant on Economic, Social and Cultural Rights (“International Bill of Rights”), as well as regional instruments such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.²⁰⁴

Non-human rights courts, such as the International Court of Justice in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, have used diverse human rights generations, disproving that only certain types of human rights (usually civil and political) are justiciable and confirming their application also during armed conflicts.²⁰⁵ Human rights have had spillover effects in inter-state adjudication, including the fact that, despite not being parties to international human rights law, states have benefited from the effects of its due process rights, such as procedural equality before the court, the right to be heard, and independent and impartial adjudicators.²⁰⁶

2. Justification

The following grounds can justify human rights as a legitimacy standard. First, under legitimacy literature, including political philosophy and global constitutionalism approaches, human rights are a standard to assess the legitimacy of international law and institutions thereof, including international courts. Human rights, particularly minimum core rights such as the right to life and freedom from torture, fall between morality and justice, and are useful for judging the law.²⁰⁷ Human rights are legitimacy benchmarks and necessary standards for the legitimacy of international law.²⁰⁸

The legitimacy of supranational authority depends on its respect for human dignity.²⁰⁹ Human rights can challenge authority, as they could delimit the legitimacy conditions for authority; as well as they are appropriate for “interventionist accounts” or actions of international institutions vis-à-vis states,

204. Thomas Buergenthal, *Human Rights*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ON-LINE VERSION, *supra* note 4, ¶¶ 1, 8-10.

205. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 88, 102-13, 130-36 (July 9); Martin Scheinin, *How and Why to Assess the Relevance of Human Rights Norms in ‘Other’ International Courts*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS 1, 22 (Martin Scheinin ed., 2019); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 ¶ 216 (Dec. 19).

206. Scheinin, *supra* note 205, at 17.

207. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1978); Seyla Benhabib, *The Legitimacy of Human Rights* 137 *DAEDALUS* 94, 102 (2008), <https://campuspress-test.yale.edu/seylabenhabib/files/2016/05/The-Legitimacy-of-Human-Rights-1q8rszd.pdf> [<https://perma.cc/C69L-38BA>].

208. See JOHN RAWLS, *THE LAW OF PEOPLES* 65 (1993); John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36, 65 (1993); John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 *AM. J. JURIS.* 1, 8-9 (2013).

209. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 191-218 (2011); Tasioulas, *supra* note 208, at 10.

thereby limiting the latter's sovereignty.²¹⁰ International law developments have signalled a transition from an international system focused on inter-state peace to one in which human rights are a primary goal.²¹¹

Regardless of their specific mandate, international courts, which decide international disputes and promote normative regimes like human rights, gain legitimacy by helping states better meet their human rights obligations; they cannot be legitimate when facilitating violations of those obligations perpetrated by states.²¹² Human rights provide key legitimacy elements to global governance institutions.²¹³ Even though international organizations cannot generally become parties to human rights treaties, they have increasingly focused on human rights, leading to an emerging international constitutional order.²¹⁴

International institutions, such as international courts, are increasingly affecting individuals' human rights.²¹⁵ International dispute settlement should meet minimum international human rights law standards because it not only protects the interests of states, but also increasingly protects general human interests, such as the protection of human rights.²¹⁶ International treaties that are linked to the settlement of international disputes usually pursue normative objectives, for example, the protection of human rights.²¹⁷

Since the protection of human rights is fundamental in both domestic and international law, the best national (procedural) standards of human rights protection should, analogously, guide international courts.²¹⁸ When human rights violations are not protected by national law, international courts can step in.²¹⁹ The elevated status of human rights in the international legal system is legally grounded, *inter alia*, in certain provisions of the United Nations Charter.²²⁰ This includes Article 1(3), namely, the purpose of the United Nations: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ."²²¹

Second, human rights closely interact with other legitimacy standards, such as the rule of law and democracy, when evaluating the legitimacy of international institutions like international courts. Scholars²²² and the practice of

210. See for related or similar considerations, RAZ, *supra* note 48, at 46; Raz, *supra* note 199, at 331; Wheatley, *supra* note 47, at 95-96.

211. Buchanan, *supra* note 198, at 39.

212. Grossman, *supra* note 5, at 104.

213. Schaffer, Føllesdal & Ulfstein, *supra* note 23, at 18-19.

214. *Institutions and Competences*, *supra* note 173, at 77.

215. *Id.*; Wolfrum, *supra* note 4, ¶ 16.

216. *The International Judiciary*, *supra* note 173, at 128, 132.

217. *Id.* at 132.

218. *Id.* at 148, 151-52.

219. *Id.* at 152.

220. de Wet, *supra* note 173, at 57.

221. U.N. Charter art. 1 ¶ 3; see also U.N. Charter arts. 55-56, 62, 68.

222. See, e.g., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Wiener et al., *supra* note 173.

the United Nations²²³ have approached these three concepts jointly. The (international) rule of law has traditionally respected human rights,²²⁴ included human rights protection by independent courts,²²⁵ and considered the consistency of the international judicial mandate with international human rights law.²²⁶

Human rights and democracy: i) are co-original and interrelated;²²⁷ ii) are expressions of the same autonomy notion, or have equal status, and (empirically) democracy can hardly be realized when human rights are breached; and iii) where there is no democracy, human rights are usually violated.²²⁸ With regard to, for example, reparations for mass atrocities, scholars have invoked links between the rule of law and victims' human rights to reparations²²⁹ and the resulting enhancement of the legitimacy of international courts.²³⁰

Third, human rights can be a legitimizing factor when international law and its institutions address fragmentation issues. Human rights and/or international human rights law foster convergence²³¹ and coherence of the international legal order.²³² They can be a vector for reasserting the role of the International Court of Justice in discussions on fragmentation and convergence.²³³ Fragmentation may threaten the legitimacy of international courts.²³⁴

Regarding substantive fragmentation, since an international court is not isolated, its reliance on, for instance, sources of substantive international human rights law can lead to convergence.²³⁵ "Non-human rights" courts, like the

223. E.g., G.A. Res. 60/1, ¶¶ 119-120, 135 (Oct. 24, 2005); G.A. Res. 57/221, ¶ 7 (Feb. 27, 2003); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, *supra* note 174, ¶¶ 6, 25.

224. James Crawford, *International Law and the Rule of Law*, 24 ADELAIDE L. REV. 3, 6 (2003).

225. *Institutions and Competences*, *supra* note 173, at 60.

226. Prosecutor v. Tadić, IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 42-48 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

227. Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766-67 (2001).

228. Schaffer Føllesdal & Ulfstein, *supra* note 23, at 19.

229. Heidy Rombouts, Pietro Sardaro & Stef Vandeginste, *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in OUT OF THE ASHES: REPARATIONS FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 346 (Koen de Feyter et al., eds., 2005).

230. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 85-86 (3rd ed. 2015).

231. Mads Andenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, in A FAREWELL TO FRAGMENTATION 3 (Mads Andenas & Eirik Bjorge eds., 2015).

232. See Mads Andenas & Ludovica Chiussi, *Cohesion, Convergence and Coherence of International Law*, in GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 18 (Mads Andenas et al. eds., 2019).

233. Andenas & Bjorge, *supra* note 231, at 3.

234. Scheinin, *supra* note 205, at 4.

235. Andenas & Bjorge, *supra* note 231, at 5.

International Court of Justice, may adjudicate inter-state disputes in which human rights treaties are central.²³⁶

Regarding institutional fragmentation, Sir Christopher Greenwood, a former Judge of the International Court of Justice, remarked in *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo)* (hereinafter *Diallo*): “‘international law is not a series of fragmented specialist and self-contained bodies of law [. . .] it is a single, unified system of law and each international court can, and should, draw on’ the jurisprudence of other international courts.”²³⁷ For instance, within an inter-institutional communicative framework grounded on, *inter alia*, relationships between Article 38(1)(c) (“general principles of law”) of the Statute of the International Court of Justice, and the international judiciary, human rights-origin principles such as non-discrimination apply across international courts.²³⁸

With regard to methodological fragmentation,²³⁹ attention should be brought to systemic integration found in: i) Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which establishes that, in interpreting a treaty, “There shall be taken into account, together with the context: [. . .] (c) any relevant rules of international law applicable in the relations between the parties”; as well as ii) the work of the United Nations International Law Commission.²⁴⁰ Systemic integration enables international institutions, such as international courts, to use “external” international human rights law sources for interpretation purposes even when the institution’s instruments are silent on human rights; however, the degree of this depends on the specific mandate of each international court.²⁴¹ Additionally, the instruments of international courts may contain provisions requesting that the court’s interpretation and application of its own law be consistent with international human rights law, thereby promoting integration.²⁴²

Regarding practice, Martti Koskenniemi, commenting on the International Court of Justice’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*²⁴³, noted that the Court can reconstitute an international law field “in

236. Scheinin, *Taking Stock: Relevance of Human Rights Norms in “Other” International Courts*, in HUMAN RIGHTS NORMS IN ‘OTHER’ INTERNATIONAL COURTS, *supra* note 205, at 440.

237. Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 324, 391, ¶ 8 (June 19) (declaration by Greenwood, J.).

238. Andenas & Chiussi, *supra* note 232, at 18-19.

239. Andenas & Bjorge, *supra* note 231, at 8-12.

240. Int’l L. Comm’n, Fragmentation of International Law-Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 17-19, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

241. Scheinin, *supra* note 236, at 441-42.

242. *E.g.*, Rome Statute of the International Criminal Court art. 21(3), July 17, 1998, 2187 U.N.T.S. 90; *see generally*, PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 165 (2013) (analyzing the use of human rights law to ensure coherence among international courts).

243. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

the language of [for example] human rights.”²⁴⁴ International human rights law has also enriched treaty interpretation methods across supranational adjudicatory bodies.²⁴⁵

Fourth, human rights underlie and manifest the status of individuals as subjects of international law. Such a status has been increasingly recognised, although states remain the primary or full-fledged international law subjects, and the status of individuals is derived or limited.²⁴⁶ Such international legal personality has two dimensions that can be exercised before international courts: i) the existence of a passive dimension, namely, individuals are accountable for international crimes; and ii) the existence of an active dimension, under which individuals may exercise their rights,²⁴⁷ including the right of access to justice, the right to participation in judicial proceedings, and the right to reparations for the harm suffered.²⁴⁸

The legitimacy of international law and its institutions may depend, *inter alia*, on the enhanced role of individuals in international dispute settlement.²⁴⁹ The exclusion of individuals from proceedings in which their entitlements and interests are adjudicated may threaten the authority of international courts.²⁵⁰ In this regard, Article 34(1) of the Statute of the International Court of Justice is problematic as it excludes individuals from the contentious jurisdiction of the Court due to the fact that “Only states may be parties in cases before the Court.”²⁵¹

Fifth, human rights underlie what victims of mass atrocities claim and want to receive. For victims, reparations usually constitute the most tangible manifestation of states’ efforts to redress the harms they have suffered, which explains why reparations potentially have the most direct impact on victims and why they are pivotal to transitional justice.²⁵² For instance, empirical research on reparations for victims of mass atrocities before international courts, especially the International Criminal Court, demonstrates that victims both

244. MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 142 (2011).

245. *See, e.g.*, EIRIK BJØRGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* (2014).

246. MALCOLM N. SHAW, *INTERNATIONAL LAW* 238-39 (9th ed. 2021); JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 111 (9th ed. 2019).

247. SHAW, *supra* note 246, at 238-39; THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 317-18 (2006).

248. *See* ANTÔNIO-AUGUSTO CANÇADO-TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* (2011).

249. Wolfrum, *supra* note 4, at ¶ 15.

250. Grossman, *supra* note 5, at 95-96.

251. Statute of the International Court of Justice art. 34, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

252. PABLO DE GREIFF, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 2 (Pablo de Greiff, ed., 2006); Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, ¶ 43, U.N. Doc. A/67/368, (Sep. 13, 2012).

expect and want reparations.²⁵³

In *Armed Activities* at the International Court of Justice, Judge Nawaf Salam indeed referred to the United Nations General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as “victim oriented.”²⁵⁴

Finally, human rights as a standard of legitimacy correspond to the increasing use of international human rights law and/or the filing of human rights-related cases before the International Court of Justice. This includes both cases involving the human rights of individuals—for example, *Diallo*²⁵⁵ and cases concerning large-scale and serious human rights violations, for instance, *Armed Activities*.²⁵⁶ The latter category may be constitutive of international crimes, including genocide, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.²⁵⁷

V. CONCLUSION

As applied to international courts such as the International Court of Justice, legitimacy has two interrelated dimensions: i) a normative dimension, namely, whether an international court possesses the right to rule under normative standards; and ii) a sociological dimension, namely, whether those ruled by an international court believe that this court is legitimate. This article mainly (but not exclusively) followed the former.

Additionally, and crucially, legitimacy involves three levels. First, origin legitimacy, namely, how the international court itself and its jurisdiction over a dispute were established. It involves specific and general state consent, and the scope thereof, potentially complemented by adapted alternative bases, such as democracy. Second, procedural legitimacy, namely, whether the proceedings and decision-making of an international court are consistent with due process guarantees and are sufficiently fair. It involves legality, which requires that the practice of an international court be consistent with its law, plus features such as fairness, transparency, public participation, and accountability. Third, result legitimacy, namely, whether the outcomes (decisions) of an international court

253. STEPHEN CODY ET AL., THE VICTIMS' COURT? A STUDY OF 622 VICTIM PARTICIPANTS AT THE INTERNATIONAL CRIMINAL COURT 2-3 (2015), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf> [<https://perma.cc/3KXF-2NPJ>].

254. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2002 I.C.J. 185, 190, ¶ 20 (Feb. 9) (declaration by Salam, J.).

255. *See, e.g., Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, Judgment, 2010 I.C.J. 639 (Nov. 30).

256. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 (Dec. 19).

257. *See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26).

are consistent with its objectives and fair enough. It concerns the effectiveness, norm projection, and expertise of an international court.

At a more specific stage, the above framework applies through legitimacy standards. Human rights are employed herein as the legitimacy standard because: i) they can be an objective, normative criterion to assess the law and practice of international courts such as the International Court of Justice; ii) they interact with other legitimacy standards such as the rule of law and democracy; iii) they can be a legitimizing factor when international courts face fragmentation issues; iv) they underlie and express the status of individuals as subjects of international law; v) they underlie the expectations of victims; and vi) they correspond to the increasing involvement of “non-human rights” international courts such as the International Court of Justice with international human rights law. In turn, human rights-based outcomes may have legitimizing effects for both states and international courts.

Last but not least, the two figures below aim to illustrate how the above-analysed triple level of legitimacy (origin, procedural, and outcome legitimacy) and human rights as a legitimacy standard can interact in order to assess whether and to what extent the law/practice of an international court and/or the international court itself can be considered to be legitimate.

ANNEX

Figure 1: Axis diagram showing the interaction between triple-level legitimacy and human rights as a legitimacy standard

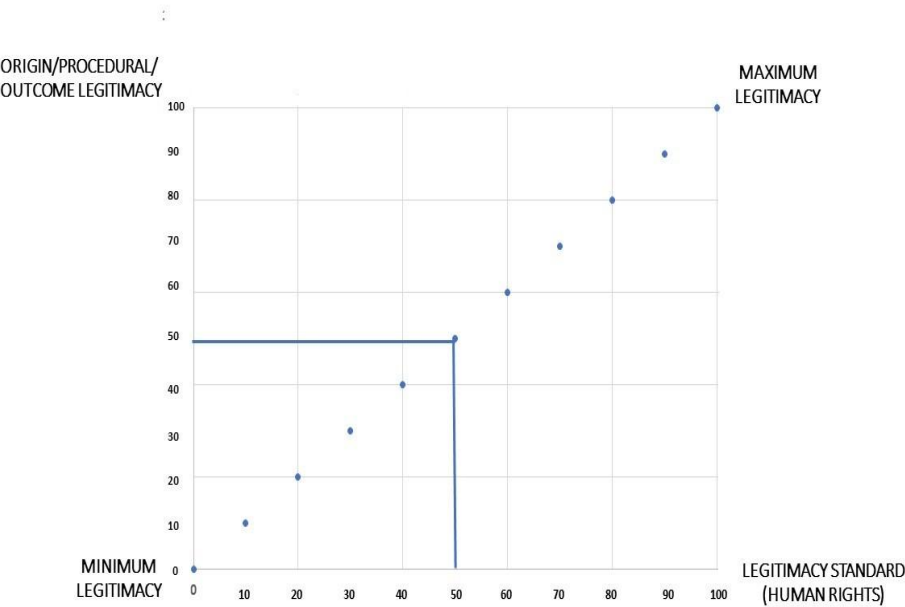


Figure 2: Double-entry chart illustrating potential correlations between triple-level legitimacy and human rights as a legitimacy standard

Level Standard	Origin Legitimacy	Procedural Legitimacy	Outcome Legitimacy
Human Rights	0 - 100	0 - 100	0 - 100
Average / Final score			0 - 100