

The legitimacy of international courts: The challenge of diversity

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1 | INTRODUCTION

The emergence of an international judicial system is often perceived as a cornerstone in the process of building a ‘global’ system of governance.¹ Since the end of the Cold War, we have witnessed the rapid proliferation of international courts and tribunals (hereinafter ICs) and the progressive expansion of their scope of jurisdiction to areas as diverse as trade, the law of the sea, human rights, and international crimes (Katzenstein, 2014; Kingsbury, 2012). These ‘new-style’ ICs and quasi-judicial bodies (Alter, 2014, p. 68) allow for wider access from potential litigants, and they are more autonomous than their predecessors, operating often on a transnational rather than inter-state model (Keohane et al., 2000). In doing so, they transcend their function of mere dispute settlement mechanisms to become law making actors in their own right, with significant discretion to interpret international law (Besson, 2014, pp. 419–428).

This development has been hailed as a major shift from an international system based on politics and power toward one governed by shared rules and principles under a genuine ‘global rule of law’. Cosmopolitan-minded scholars and advocates, who dispute the place that territorial borders and national identities should have in delimiting our fundamental rights and allocating public goods, rejoice about the gradual collapse of the divides between the domestic and the international.

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Yet with the growing independence and expansion of the mandate of international judicial systems, these mechanisms have attracted attention as to their legitimacy and accountability in relation to different stakeholders. The international judiciary is no longer seen as “the least dangerous branch.”² For some critics, accepting the jurisdiction of ICs entails ceding national sovereignty to ‘foreign’ judicial powers, which have an increasing capacity to create new law. For others, the international judiciary in the absence of a global democratic constituency represents another imposition of Western values that remain alien to other cultures.

Moreover, in the current political climate, institutions of global governance, including ICs, are confronted by growing reactionary populist movements that pit democracy against internationalism. To these movements, the turn toward transnational forms of governance, legality and adjudication is perceived as a democratic dysfunction and belittled as harmful to the preservation of the identity and autonomy of a (monolithic and nationalistic) view of the polity. Regional and international human rights bodies, and the International Criminal Court (ICC), are particular targets, insofar as they typically address how states should treat individuals on their own territory. They also tend to protect marginalized minorities against the majority’s conception of the identity and values of the polity, and seek to impose rule of law constraints on the executive and legislative branches that often claim democratic support. Yet other ICs—especially in the area of trade—have also become the target of populist and sovereigntist leaders as they are seen to impose unjustified constraints on desired domestic policies.

In light of such diverging approaches, it becomes ever more crucial to inquire into the foundations of international courts’ legitimacy. To this end, a number of scholars have called for a ‘democratic’ re-conceptualization of the international judiciary (Bogdandy & Venzke, 2014; Grossman, 2013). This has generated attention to a broad range of elements, from appointment processes to procedural rules in order to guarantee judicial independence but also accountability to different stakeholders (Grossman, 2013; Pérez, 2017), typically with a focus on specific types of courts (Føllesdal et al., 2014; Hayashi & Bailliet, 2017; Hennette-Vauchez, 2015). Yet, as I will argue, by reducing the so-called ‘legitimacy deficit’ to a problem of institutional factors and representation of ‘national’ constituencies, we might be overlooking a deeper dimension of the ‘diversity challenge’—one that emerges out of the need for broader societal responsiveness and inclusion. The remaining sections aim at substantiating this contention by outlining an account of the normative legitimacy of ICs that seeks to correct some of the misconceptions inherent in the populist critique of ICs, in particular the false opposition between democracy and internationalism. The article primarily uses examples from human rights courts and international criminal tribunals, as these are the most frequent targets of critique. However, as I seek to highlight throughout, its argument is also applicable to other ICs whose work interferes deeply with domestic political processes—as is the case for dispute settlement mechanisms in international trade and investment law and to a certain extent also general international courts, such as the International Court of Justice.

I begin by outlining in more detail the dilemmas of democracy and diversity for the legitimacy of ICs and engaging critically with the rationale of state consent, which has been a predominant approach—in an increasingly integrated global setting and in a context of rising populist movements (Section 2). Section 3 considers recent attempts at re-conceptualizing ICs in more democratic terms, emphasizing shared goals and a cooperative model of domestic and international adjudication. Yet, as argued in Section 4, such calls for a turn toward a ‘democratic’ model of international adjudication have neglected an important aspect of the democratic accountability of domestic courts in many countries: the representative character for the societies they adjudicate over. This is especially important when it comes to the diversity of the judiciary with respect to gender, language, race and ethnicity. While the representation of women has been taken up

in some policy initiatives and scholarship, the broader question of why such lack of diversity poses a particular challenge beyond domestic constituencies remains largely unexplored. Section 5 then turns to some of the paths toward the broader societal responsiveness the article advocates, and in particular a clearer delineation of what the inclusion of structurally disadvantaged groups might require. Finally, Sections 6 and 7 explore two additional reasons that might support a greater reflection of societal diversity in international courts—enhancing trust as a basis for the societal legitimacy of (international) courts and increasing the quality of judicial deliberation, especially by fostering a more ‘mindful’ form of judging.

2 | THE RISE OF INTERNATIONAL COURTS AND THE LIMITS OF STATE CONSENT

The emergence of supranational political regimes substantially alters the patterns and forms of governance, as well as the role and power of ICs. In the context of a gradual decline of the state’s regulatory hegemony, ICs increasingly transcend their limited function as a mere dispute settlement mechanism to become law-making authorities. Perhaps more clearly than in any other area, we can observe these far-reaching transformations of the classical view of sovereignty in the rise of the international legal regimes of human rights. While, formally speaking, domestic constituencies retain a central role in defining the scope of individual rights incorporated to their constitutional systems, legislative developments in this area are often ill-suited to shaping social behavior and grant compliance.

On the one hand, the individual’s ability to ‘opt-out’ from, and even dispute, the constitutional framework to which they are subjected is greater, especially within integrated supranational regimes like the EU. Abortion, for example, may be prohibited in Ireland, but the Irish government may not be allowed to adopt measures intended at retaining Irish individuals who want to travel to the UK for this purpose—at least not without violating freedom of movement as a fundamental right of all EU citizens. On the other hand, the capacity of individual citizens to challenge their state policies or decisions at the international level has risen significantly. For instance, state authorities may grant permission to celebrate a famous ‘fiesta’ in the streets of a Spanish town; but individual citizens may decide to litigate against the government and appeal, if domestic courts reject their claim, to the European Court of Human Rights (ECtHR). This court might then strike down the authorization in order to safeguard the primacy of fundamental rights included in the European Convention of Human Rights such as the right to privacy, interpreted as granting protection against intolerable levels of noise.

So, in performing their adjudicative functions, ICs interpret an increasingly complex body of international norms in an authoritative form, thus transcending a mere function of dispute resolution and exercising public authority in a way that is irreducible to a state-centered representation model. Adjudication involves a significant degree of discretion in interpreting the law, and international judges cannot avoid creating law in order to settle legal disputes. They must specify “essentially contested concepts” in normative prescriptions (Gallie, 1956; Waldron, 1994), and they must “balance” rights in conflict. As a result, international judges’ decisions shape both the international and the domestic legal order, thereby challenging the supremacy of states. The effects of this are felt when international human rights courts sit in judgment over voting rights issues, when trade bodies make findings on admissible restrictions on genetically modified foods, or when investment tribunals impose limits on environmental policies or emergency measures to deal with financial crises.

Questions of legitimacy have regained prominence in the midst of these transformations. To the degree that ICs are the product of international politics, they face unique challenges to acquire the reputed status that most domestic courts usually take for granted. Normative legitimacy generally refers to the (moral) rightfulness of authority. Political theorists and sociologists typically distinguish between such a normative conception and a sociological understanding—also dubbed ‘legitimation’—i.e., the factors that shape the belief of relevant actors regarding the justification and appropriate exercise of authority (Tallberg & Zürn, 2019). Such beliefs can be unstable, as they are the outcome of a process of subjective assessment and engagement with political institutions.

While this article focuses primarily on questions of normative legitimacy, these two senses of legitimacy are not completely independent. For example, clarifying the normative grounding for beliefs about the legitimacy of ICs can boost their legitimation as “autonomous” sites of authority (Hart, 1961) in the eyes of governments and citizens. On the other hand, if an IC’s normative legitimacy is contested, this may undermine its authority (both normative and *de facto*) and effectiveness, and, ultimately, its impact in resolving conflicts and shaping domestic legal orders. For instance, take the declining legitimacy of the ICC vis-à-vis many African states and citizens and its effects. Many African representatives and individuals have come to perceive this court as biased against their continent. This creates a significant challenge for the court’s effective authority and influence, and has even led certain African ICC parties to announce their withdrawal from it.³

Legitimacy, in a sociological sense, is even more important at the international level than domestically, as ICs can only resort to coercion in a very limited way in order to compel state actors to comply with their decisions.⁴ Unless states accept their mandates and exercise of public authority as binding, domestic compliance might be limited, thus rendering the system ineffective. And as with all other international institutions, ICs “will only thrive if they are viewed as legitimate by democratic publics” (Buchanan & Keohane, 2006, p. 407). Normatively, insofar as the international judiciary generates binding rules, it becomes even more important from a democratic angle that those who are legally bound by such normative system feel that they are so “in their own name” (Nagel, 2005, p. 130).

In the orthodox intergovernmental approach, the democratic legitimacy of ICs is based on states’ consent to submit to their jurisdiction. Moreover, international adjudication is conceived of as akin to arbitration to settle disputes among two parties. Legitimacy issues on this approach are thus largely reduced to scrutinizing the ways in which consent to judicial authority is expressed, and to questions of procedural fairness—that is, whether the respective court treats the parties before it in a fair and equal manner (see, e.g., the approach in Wolfrum & Röben, 2008). But such an *indirect* democratic foundation for the exercise of public authority by the international judiciary is in tension with the new roles of ICs as relatively independent bodies with significant law-making power.⁵ In particular, the rationales for the legitimacy of *domestic* judiciaries can hardly be transposed to the emergent international judiciary, as the latter remains a highly fragmented and horizontal structure, which lacks a solid democratic foundation for its claim to supremacy.

These concerns about legitimacy have become even more pressing in the current context of rising conservative populist regimes that appeal to democratic deficits to debunk and dismantle international governance. The backlash against human rights and global governance typical of this movement also entails a backlash against international courts and quasi-judicial mechanisms. For instance, in pre- and post-Brexit Europe, a number of prominent British public figures have pledged to withdraw from the ECtHR and thereby to undo the cession of sovereignty to a ‘foreign court’ (Clapham, 2016). The USA’s attempt at undermining the ICC’s investigations on

Afghanistan and other countries through the unprecedented use of sanctions against its prosecutor, senior officials and staff has also been publicly justified as necessary to combat the actions of “an unaccountable, political institution masquerading as a legal body” against the legitimate sovereignty of a democratic state.⁶

3 | DEMOCRATIZING INTERNATIONAL COURTS: SUBSIDIARITY, ACCOUNTABILITY AND THE LIMITS OF LEGITIMACY BEYOND CONSENT

In order to tackle these alleged legitimacy deficits, several theorists have attempted to reconceptualize ICs in democratic terms beyond the consent-based model. International legal scholars stress the role that national and transnational parliaments (such as the European Union Parliament) should play as a tool for democratization of ICs (Bogdandy & Venzke, 2014; Grossman, 2013). This perspective avoids the tenuously long indirect democratic links which tend to become purely ‘nominally’⁷ democratic, and stresses instead the institutional embeddedness of ICs, and their need for on-going processes of political legitimation. The exercise of jurisdiction by ICs is thus reconceived in the context of a more fragmented account of public authority within decentralized systems of power, whose legitimacy needs to be continually re-validated (Krisch, 2017).

3.1 | Subsidiarity and deference to domestic institutions

Embedded in this push toward democratization, there is an increasing focus on questions of accountability and on the need to balance the independence of ICs and other adjudicative bodies with a “public interest” approach aimed at taming their rising power and balancing it with the principle of state sovereignty. The principle of subsidiarity offers a good example here. It is typically invoked to reclaim the centrality of the state in shaping legal understandings of international law and to account for legitimate legal pluralism in a multi-level conception of governance (De Búrca, 1999; Føllesdal, 1998; Kumm, 2009). In Europe, states’ call for subsidiarity has sought to constrain the “expansionism” of the ECtHR at the expense of domestic institutions (Madsen, 2018). Related tools include requirements that local remedies must be exhausted or the jurisprudential doctrine of the ‘margin of appreciation’—both seek to ensure deference by international judges to domestic interpretation and thus enhance the legitimacy of ICs through greater restraint (see Gruszczyński & Werner, 2014; Shany, 2005).

Tools to enhance deference are institutionalized in a number of ICs. For example, complementarity in the mandate of the ICC entails that investigations correspond first and foremost to state jurisdictions and should be triggered by the ICC only as a last resort—namely when a state refuses or is unable to investigate and prosecute crimes.⁸ In the human rights field, the ECtHR has long placed emphasis on the margin of appreciation—and apparently practices more deference in the aftermath of the recent challenges from states (see Stiansen & Voeten, 2020). However, similar suggestions in the context of the Inter-American Court of Human Rights (IACtHR) have met with strong opposition, in part due to contested claims that domestic authorities are less committed to human rights and the rule of law (Trindade, 2008, p. 390) Likewise, sustained calls for greater deference have been voiced (largely unsuccessfully) with respect to investor-state arbitration (see Burke-White & Von Staden, 2010).

In short, from this perspective, the legitimacy of ICs appears less problematic insofar as they are perceived as cooperating with and even strengthening domestic courts. Their lack of direct democratic grounding is less perceived as a concern when they supplement rather than substitute or compete with, domestic institutions. As a result, the autonomy of the international legal system is downplayed in favor of an interlocking model of public authority that remains significantly state-centered, albeit not completely consent-based. ICs' claim to legitimacy in this framework is grounded not merely in agreement among disputing parties regarding their jurisdiction, but because ICs cooperate with states in establishing a global rule of law.

Note that this subsidiarity conception remains focused on the relation of ICs with domestic judiciaries and on the role of state parliaments (Cohen et al., 2018; Føllesdal et al., 2014; Hayashi & Bailliet, 2017). Yet these and other ways⁹ to use institutional mechanisms to make ICs accountable to domestic processes risks overlooking a deeper legitimacy challenge to ICs: the lack of diversity inside and beyond state constituencies.

3.2 | Democracy, minority protection and societal responsiveness

Questions of broader societal responsiveness have so far found little attention in the discussion of international courts, even though they are crucial if courts are going to credibly serve as 'counter-majoritarian' protectors of vulnerable or marginalized groups—a core aim of judicial review and a key justification for the possibility of scrutinizing parliamentary legislation by courts (Ely, 1980).

The conception of public accountability presented above, is based on the idea of one, homogeneous people but neglects the position of vulnerable minorities and structurally disadvantaged identity groups *within* and *across* domestic constituencies. The assumption that deference to lower level adjudication fosters normative legitimacy (if only indirectly) does not hold if local judicial processes are not inclusive or fair and, as a result, fail to sufficiently protect the rights of those groups. There is a high risk that such state-centered subsidiarity and deference to dominant majorities reinforces existing divides and patterns of subordination at the sub-state level.

In the current climate of growing populist authoritarian politics, democratic backsliding (Bermeo, 2016) and renewed hostility against minority rights, this consideration is particularly relevant. For one thing: illiberal democrats operate by pitting democracy against the universal values embedded in human rights that are entrenched in many post-war constitutions as constraints on majority rule. This robust conception of rights as limits on state sovereignty is challenged in the name of a unified, unconflicted vision of "the people". Populist leaders typically deploy a politics of fear to unite and mobilize people against minority groups that are represented as threats to stability and community. In this reductionist conception of democracy as pure majoritarianism, the backlash against minority rights often takes place through many small steps, often covered by an appearance of legality: public institutions, including courts, are brought into line; executive powers are strengthened; criticism is quelled by cracking down on freedom of expression and media; authority is re-nationalized and re-centralized; and so on (Scheppelle, 2018).

The retreat of multicultural accommodations aimed at promoting a model of differentiated citizenship in diverse states offers a good example of this pattern. Initially, those policies came about to face up to the need of integrating new waves of postcolonial migration and recognizing minority rights as group rights (Torbisco Casals, 2006). Also, a number of multinational democracies adopted some form of decentralization in order to recognize self-government and other collective rights of linguistic and national minorities.¹⁰ Yet conservative agendas involving tougher immigration policies and the securitization of the relations between the state and minorities,

initiated in a context of economic crisis and threats associated to global terrorism, have worked as a pretext to revert such policies and curtail human rights of migrants and to other minority groups (Lesińska, 2014; Vertovec & Wessendorf, 2009).¹¹

In addition, claims of emergency, such as the current Covid-19 global health crisis, contribute to legal discourses that legitimize defecting on international human rights norms. The underlying claim is that there are trade-offs between human rights and legitimate collective goals such as security, or the survival of 'our' community from external or internal threats. In the face of this dilemmatic depiction,¹² the predisposition to preserving a homogenous view of the nation based upon common values increasingly leads to legislation aimed at targeting *potentially* threatening practices or ideologies that are perceived as idiosyncratic of unpopular minorities. Such legal production of political margins threatens to impose hard limitations to the exercise of human rights, pushing aside the voices of vulnerable minorities in the name of security or national interest.

As minorities see their status and rights increasingly threatened by an adverse political climate, courts (domestic and international) can represent possibilities to protect themselves and counteract regressive policy agendas. New forms of transnational minority litigation emerge, strongly intertwined with political mobilization against states that fail to protect human rights. Consider, for instance, the ongoing international judicial actions initiated by indigenous peoples to protect their historical lands from arbitrary seizure. International human rights law is invoked in recent rulings by the IACTHR and other ICs concerning complex land claims, where domestic remedies are too difficult for indigenous peoples to access. Competing historical and normative narratives of property rights and ownership entitlements that go back to the colonial era are played out in these international judicial battles. International litigation has thus become an important legal avenue for indigenous resistance to what James Tully (2000) dubs "internal colonisation". The IACHR, for instance, has issued a series of landmark judgments upholding the centrality of indigenous lands for the cultural survival and identity of these peoples, framed as part of their right to self-determination.¹³ This jurisprudence is important not just for communities that seek redress for collective human rights violations by States, but to instigate broader public legislative reform and awareness of indigenous rights.¹⁴

Cases of minority and indigenous rights are often part of global or regional strategic human rights litigation initiatives that react against states' encroachment of the human rights of members in ethnic, national, indigenous, or religious minorities (Couso et al., 2010; Torbisco-Casals, 2016a). Perhaps less directly, questions to do with societal minorities appear also in other contexts—in the ICC with respect to the crimes committed in internal conflicts, or in investment arbitration when social and environmental aspects of foreign investments are at issue, for example in cases concerning mining concessions on indigenous lands.¹⁵

As a result, international judges are playing an important role in dealing with issues of particular concern to societal minorities.¹⁶ Yet, in this context, deference to domestic constituencies may reinforce public debates that remain wedged within an oversimplified competition between protecting minority rights or guaranteeing the collective good and (or) the identity of the nation, which are portrayed as mutually excluding categories.

What these examples bring to the forefront is the critical role (and promise) of international adjudication in delimiting the divide between lawful and unlawful forms of state coercion. Issues pertaining to vulnerable groups remain obscured in the prevailing model which privileges state constituencies both in representing the diversity of the international community and in enhancing the public accountability of the international judiciary. Thus, there is a need of redefining the legitimacy of international adjudication in a way that engages issues of diversity and systemic exclusion.

4 | BEYOND CONSENT AND SUBSIDIARITY: DEMOCRACY, DIFFERENCE AND THE NEED FOR BROADER SOCIETAL REPRESENTATION

If ICs are conceived as institutions of global governance, questions of normative legitimacy should engage a broader representational ideal beyond the unitary state. Hence the need for a more substantive (non-derivative) conception—*beyond* the indirect model of democracy linked to the role of domestic parliaments and to state's consent—which can account for the transformational power of ICs as a site of resistance to attempts at subverting the foundations of the international rule of law.

This approach takes seriously the need to strive for democratic legitimacy in international courts; yet it does not start from the imagery of a unitary people at the basis of democratic processes and instead adopts a more pluralistic vision. In particular, it recognizes that one central requirement for democratic legitimacy is to address problems of structural inequality, especially with respect to disadvantaged social groups (Young, 2000). Democracy, on this account, is not achieved merely through a reliance on majority rule or even the guarantee of individual rights, but needs to give voice and influence to groups that are politically, socially, or culturally marginalized (see Benhabib, 1996). From a perspective of a politics of difference, this highlights the inherent limitations of a majority-focused conception of democracy as it underlies many of the approaches that regard state consent or parliamentary involvement as central to resolving legitimacy questions around international courts. Instead, it shifts our view to how different social groups are included and represented in the international sphere itself.

Rather than simply “reflecting” plural domestic constituencies, a more promising conception of representation should thus capture the make-up of the global society as composed by individuals organized in diverse (heterogeneous and unequal) states, groups and societies marked by growing interdependence and interaction. To this extent, ICs should seek legitimation not only vis-à-vis the state parties before them, but vis-à-vis a broader range of actors who constitute an increasingly global civil society,¹⁷ in social spaces that transcend territorial geography and state constituencies. This includes international non-governmental organizations, transnational advocacy networks, citizen alliances and global social movements, all of which collectively have an increasing influence in shaping global politics, and active roles litigating issues of intrinsic global concern, such as human rights, women's rights and environmental protection (Open Society, 2018; Woodward, 2010).

Certainly, the justification of the “counteracting” power exercised by ICs might still appear as feeble from a democratic perspective that prioritizes traits that are characteristic of those of domestic judiciaries. Yet international courts should garner legitimacy through enhancing their unique role in providing a space for the interpretation and contestation of international norms that is inclusive of the views of vulnerable communities or groups that have little chance to influence domestic legislatures (see also Benhabib, 2016). In contrast with the state consent-based approach, this conception of legitimacy focuses on ongoing forms of legitimation toward a multiplicity of social and individual agents. Especially in the current situation of backlash against democracy and human rights, this focus may transform the dynamics of existing intersecting legalities (domestic and international) that have been historically molded by dominant national groups and other privileged actors. The legitimacy of international jurisdictional authority would then derive not only from formal traits, such as states' consent, but especially from its distinctive role in restoring the agency of minority groups and upholding a more inclusive conception of a global rule of law. Considerations of subsidiarity may still apply, but the concern is not how

ICs can supplement and support states—but instead how ICs can supplement and support the individuals and groups that comprise a diverse global civil society. As a central correlate of this conception, the restricted scope of public accountability characteristic of the dominant approach should be expanded.¹⁸ ICs should not just be responsive to states as main stakeholders, but to an international community shaped by a broader plurality of actors that form a global civil society.¹⁹

From the account outlined here, ICs can garner legitimacy not so much through indirect democratic recognition and deference to domestic judiciaries, but rather from actually performing their integrative role. Strengthening their legitimacy requires broadening their responsiveness to, and engagement with, a diverse global community—not just states and national parliaments. By empowering minority groups to access international mechanisms of justice and contest state practices, ICs offer a distinctive space that contributes to reimagining law from the margins. When ICs' rulings reflect an effort to hear the voices of women, racial, ethnic, religious and other minorities, and to treat their reasons fairly, they bear a transformational potential beyond the courtroom. To the extent that they give voice and public visibility to groups that are underrepresented in mainstream democratic processes, they help overcome systemic patterns of discrimination and majoritarian prejudice. In doing so, not only is international law reshaped in ways that reflect this diversity, but international adjudication has the potential of offering a space for contestation and emancipation, restoring the subjectivity and equal status denied to members in those groups (see generally, Anagnostou, 2014; Morel, 2004; Rodríguez-Garavito & Arenas, 2005).

5 | PATHS TOWARD BROADER RESPONSIVENESS

The notion of legitimacy elucidated so far offers inclusive pathways to international justice, thus enhancing the transformational potential of ICs. As embedded in a broader practice of international law making, ICs legitimate authority depends in part on being responsive to diversity and grounded on global public reasons; namely, justifiable on normative grounds acceptable by a multiplicity of members in the international community.

This points to the need of making global institutions, including ICs, more inclusive and transparent (Macdonald, 2012). A focus on independence and impartiality—as in the traditional approach to ICs (and to domestic courts)—is insufficient for this purpose as there is no ‘neutral’ interpretation of the law that stands outside the situatedness of judges. This is not to say that tools to foster independence and impartiality are unnecessary—much to the contrary (see also Pérez, 2017). Yet alongside them, the composition of a court, and the background of the judges, are thus bound to assume central importance on the way to responsive adjudication.

Beside a stronger representation of women, the inclusion of minorities in public institutions (not only courts) had already come to the fore in states with a diverse citizenry since the late 1990s (Mansbridge, 1999; Young, 2000). The so-called “politics of presence” (Phillips, 1995), intended to reduce the systemic underrepresentation of certain identity groups, is increasingly seen as rooted in the demands of democratic legitimacy and has gained weight in domestic discourses that call for improving judicial diversity. The debate is equally relevant at the international level and can show how to increase the legitimacy of ICs. Beside the symbolic dimension of group self-identification, measures aimed at enhancing diversity in the international bench might be critical to foster a sense of shared “ownership” of the international justice system.

The fair representation of member states has long been an important requirement for ICs, but other forms of diversity have been largely overlooked in international legal scholarship. One

notable exception concerns the debate about the striking underrepresentation of women judges in ICs benches, which has gained attention in recent years and can provide the starting point for a more profound normative debate about legitimacy and diversity in the international judiciary.

As Nienke Grossman and other international feminist legal scholars have persuasively argued, such acute sex imbalance cannot be attributed to the lack of sufficiently qualified women available for such positions (Grossman, 2012, 2016a, 2016b; see also Dawuni, 2018; Hennette-Vauchez, 2015). Not only is the limited-pool argument fallacious, but part of the problem might be that judicial selection procedures lack transparency and are *not* clearly set up to select on merit. As this line of research exposes, nominations of international judges are often used to reward political loyalty or to advance political agendas—a practice which seriously impinges on the chances of women to be appointed as international judges, as international diplomacy remains very male-dominated.²⁰

The persistence of a pattern of gender under-representation negatively impacts the legitimacy of ICs, thus weakening their public authority. A key argument is that women's effective representation is essential to empowering them as valid interlocutors with genuine rights to shape the public space. Grossman appeals to international human rights instruments which endorse sex equality in order to support this claim. However, the legality-based argument of equality has limited force, as prevailing interpretations retain an individualist outlook, stressing equality of opportunity rather than equality of outcome (Torbisco-Casals, 2016b, pp. 92–99). Put differently: anti-discrimination statutes typically aim at ensuring that no overt legal impediment can prevent anyone from pursuing their ambitions, or from participating in public life. Difference-blindness remains a deeply embedded ideal, despite criticisms that it obscures systemic inter-group patterns of discrimination. As a result, sex imbalances become 'normalized', depicted as the product of individual choices or assumed as 'unintentional', thereby regarded as 'lawful'. This assumption implicitly entails that democratic legitimacy can be fulfilled in ways that are blind to group differences (and indirect forms of discrimination) as long as formal equality of opportunity (no overt discrimination) in public institutions is preserved.

Although not all sorts of inequality are troublesome, especially those deriving from people's choices, the distinctive challenges of structural inequality also hold at the international level. The concept of structural inequality stands for something other than transitory, fortuitous disadvantages that may be the product of pure bad luck or attributable to individual poor choices. As Iris M. Young put it, it involves "a set of reproduced social processes that reinforce one another to enable or constrain individual actions in many ways"; it thus consists "in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or benefits" (Young, 2001, pp. 2, 15).

The notion of 'structure' refers to a complex layering of elements (including legal and political institutions, labor and property systems, the organization of family and sexuality, etc.) in which individuals find themselves standing in a given *position*. This occurs not because structures exist as entities immune to the actions of social agents, but because they normally act from relationally constituted positions according to rules and expectations incorporated in those structures (Young, 2001, pp. 12–15). In so acting, they reproduce social systems, including patterns of subordination. Structural inequalities tend to be institutionally embedded, deeply rooted in rules, cultural symbols, and decision-making processes, so that individuals acting within this framework (even members of oppressed groups) contribute to reinforce patterns of disadvantage, often *unintentionally*. Different group hierarchies or statuses are thus reproduced which serve as carriers of subordination, triggering harmful effects that, as Owen Fiss (1976, pp. 107–177) argued, are

unlikely to be legally actionable through the individualist structure of the anti-discrimination principle.

To the extent that democracy requires that a people have the conviction that they are governing themselves, this rules out the *permanent* under-inclusion, or alienation, of certain groups from relevant decision-making processes. When effective representation fails, the chances of members of disadvantaged groups to shape the society and the rules that bind them will diminish significantly. This ultimately weakens the democratic legitimacy of the outcomes of legal and political processes, including public adjudication systems.

Tackling structural inequalities requires a group-conscious interpretation of equality and of democratic legitimacy.²¹ Against a historical background of sexism, racism, colonialism and unequal power, a minimalist account of legitimacy that ignores systemic inequalities appears deficient. This line of argument corroborates the enduring relevance of feminist, critical race, and Third-World approaches, which have revealed that the structures of international law privilege a white, European, male elite (Charlesworth et al., 1991; Chimni, 2006; Wing, 2000). Fostering inclusiveness might also require reviewing legal processes critically, identifying how they fail to consider the compounded cultural and social background of potential minority litigants.

6 | DIVERSITY AND TRUST IN INTERNATIONAL COURTS

Besides enhancing inclusiveness in the exercise of public authority as a basis for democratic legitimacy, the case for increasing diversity in ICs can be supported from other more instrumental grounds as well. I focus here on two such reasons: one related to public trust, the other to the quality of judging. Diversity is understood not only as the symbolic representation of the pluralism inherent in international society, but also of a diversity of cultural backgrounds, experiences, competences and perspectives, which are relevant to improving the outcomes of international adjudication as a (global) public service.

A certain degree of trust is necessary for legitimacy, especially from a sociological perspective,²² and research shows that fostering diversity also helps increase the levels of social trust in institutions, especially of members in identity groups which are typically excluded or alienated from the public sphere and relegated to a lower socio-cultural status.²³

Trust in this argument is not understood in the *strategic* (more unstable) sense, which has a strong rationalistic component either as an “encapsulated interest” (Hardin, 2002) or related to experience and perceptions of risk (Torbisco-Casals, 2016a). Rather, it refers to a more *generalized* sense of social trust, as faith in the ability of institutions to perform their task fairly, not arbitrarily. Such confidence appears to develop more naturally when there is an underlying assumption of shared common identity and values as part of a moral community, which grounds an expectation of adequate behavior (or institutional performance, in the case that concern us here).²⁴ At the domestic level, research increasingly shows that minority defendants (members in cultural, ethnic, gender or racially subordinated groups) tend to distrust courts, as well as police and other justice-related institutions, because they believe that they will not receive a fair and impartial treatment.²⁵

Such beliefs, and ensuing distrustful attitudes or dispositions, have typically been formed against a background of damaging collective experiences. These might be related to past injustices, which are at the origin of intergenerational traumatic relations with dominant groups (for instance, indigenous citizens in settler states); or with the persistence of patterns that are suspicious of partiality, such as the over-representation in the criminal justice system of African

Americans in the US; or with a generalized perception of denial or underestimation of issues that specifically affect a given identity group (for instance, domestic violence and sexual crimes, which have a marked gender component).

Such arguments are valid for the international judiciary, too, especially if we consider its legitimacy deficits from the perspective of non-Western states, which have had, historically, a subordinated role in creating international norms and, more generally, in international institution building. The threats of withdrawal from the ICC by state members in the African Union illustrate the negative impact of low trust levels on institutional legitimacy (Alter, Gathii, & Helfer, 2016). A broader socio-cultural sense of alienation or limited representation underlies persisting critiques, which tend to point not so much to overt discrimination or to formal issues of judicial independence, but to African perceptions that the court is a ‘Western court’ composed of judges who are prejudiced against their cultures (Vinjamuri, 2016). As a result, international criminal justice is presented as power politics, rather than actual justice²⁶; its processes and reasoning appearing as distant to the locally lived socio-legal experience, disregarding customary norms and conceptions of collective entitlements and duties.²⁷ It is telling that a core element in the ICC’s attempt to re-establish trust among African constituencies was the appointment of an African chief prosecutor, Fatou Bensouda from The Gambia, in 2012.

More generally, lack of legal understanding of their rights, intimidating court processes, or communication difficulties, which adversely impact on the ability of minorities to access and trust justice mechanisms at the local level, are reproduced in a global context beset by power imbalances and prejudiced beliefs about nations, cultures and value-systems. Often, societal actors outside of government are unable to participate in international court proceedings, which can cause serious problems for the acceptance of their outcomes—as in international investment arbitration, where these problems resulted in a push toward the broader acceptance of *amicus curiae* submissions from affected groups (Levine, 2011). Yet even when international legal mechanisms are available to them, minority litigants often display low levels of confidence in procedures where they are often represented as defendants and victims.

Establishing trust is especially urgent for an international legal system that cannot resort to coercion to ensure obedience. Low levels of trust yield lower rates of compliance, which thus might negatively impinge on the effectiveness of international rulings. Societal confidence, linked to institutional legitimacy, thus becomes critical to foster the stability and effectiveness of the whole system. Hence, broadening societal legitimation and trust in ICs through establishing a more direct relationship with a diverse global public forum might be crucial to consolidating the authority of ICs (Torbisco Casals, 2015).

To be sure, enhancing diversity on IC benches will not necessarily increase acceptance among all constituencies. For the populist governments that are among the strongest critics of international adjudication today, it may have the opposite effect—typically anti-pluralist and anti-internationalist in outlook (Mudde & Rovira Kaltwasser, 2017), they might regard more diverse courts as even greater threats. Yet greater societal responsiveness may also hold benefits for populist groups—they, too, may be ensured a voice in courts they often depict as overly ‘liberal’. On the other hand, ICs might benefit from a broader societal base to activate diverse ‘compliance constituencies’ in order to stay relevant in the face of government attempts to ignore the courts.²⁸

In short, by furthering gender and other forms of diversity, ICs may enhance their societal legitimacy through restoring the levels of confidence of disenfranchised transnational groups and states. Societal diversity does not constitute a barrier to trust if institutions can be genuinely perceived as ‘common’—that is, acting in the service of all—and generate stable communication and expectations (Putnam, 1995; Uslaner, 2012).

More than in any other sphere, individuals interact globally as bearers of distinct politically and culturally salient identities. In this sense, although trust can be promoted through good governance—for instance, through regulations that limit arbitrariness and corruption, norms of procedural fairness, etc.—institutional trust also has an interpersonal component, as all institutions have a human face. Ensuring the representation of the voices and identities that remain marginalized in building international institutions might be crucial both to restoring the bonds of trust and enhancing democratic legitimacy.

7 | MINDFUL JUDGING

International adjudication, as noted above, should partly function as a sort of judicial review, facilitating the protection and inclusion of minorities and marginalized states as genuine members of the international community. When rulings reflect an effort to hear the voices of women, or of racial, ethno-religious or national minorities, among others, and to treat their reasons fairly, they have a transformational potential, both domestically and internationally. Eventually, democratic inclusion might help to generate a virtuous cycle of inter-group trust and understanding, which makes it possible to speak of a genuine “community of equals” (Fiss, 1999). To the extent that some groups—women, minority litigants, etc.—perceive the judicial processes (and its outcomes) as biased against their identities, or not taking their perspectives and concerns seriously, it is correspondingly difficult to establish social trust as a foundation for the perceived legitimacy of ICs.

In addition, the case for more representative benches can also be supported through arguments related to the outcomes of adjudication. On some accounts, the process and *quality* of judging are negatively affected by lack of diversity (Collins et al., 2010; Hunter, 2008; Ifill, 2000; Kastellec, 2013; Rackley, 2013). This line of reasoning, however, has sparked significant contestation—after all, adjudication is typically envisioned as a neutral and technical process, and despite the great disparity of recruitment systems and institutional designs, judges (both domestic and international) are ideally portrayed as independent, competent, and impartial officials. Judgments should reflect this task of legal application, rather than their personal conceptions of justice.

Yet this idealized view of judges as almost infallible and impartial authorities, who act rationally as a safe haven from majoritarian prejudice, underestimates concerns about judicial bias and social distrust emerging from lack of diversity in the judiciary. Evidence suggests that judges—international as well as domestic—are generally part of a middle- or upper-class professional elite predominantly composed by members of dominant gender, racial and socio-cultural groups (Dawuni, 2018; Grossman, 2012). While neither such identities nor political ideology need to determine the interpretation and application of norms, there are solid empirical indications of their pervasive influence. As a result, more radically skeptical approaches, associated with American legal realism, challenge impartiality itself as a plausible ideal, together with the contention that legal application is a neutral task, untainted by politics, identity, or social morality.²⁹ But even if we reject these, the opposing ideal—a Dworkinian all-knowing and wise Hercules (Dworkin, 1986)—remains a metaphor.

Indeed, there is a risk that the homogeneous composition of the bench plays a role in reproducing social prejudices and biases in judicial rulings. The potential threat arises not only from *conscious* interest or overt prejudice or partiality of the adjudicator, but also from unconscious bias (Collins et al., 2010; Kastellec, 2013), which makes adjudicators less *mindful* when assessing the claims of members in vulnerable groups. Mindfulness in this case refers to the adjudicator's

capacity and motivation to be responsive and assess minority claimants' reasons and interests fairly, which can be impaired by the judge's position as a member of a dominant group or culture.

For instance, gender structural inequalities can be obscured when ICs privilege civil and political rights over cultural, social and economic rights, as this choice has non-neutral effects and tends to privilege male dominant social positions and values. Likewise, a judge can interpret that individual property entitlements—for example in the context of investment claims—have priority over collective land or environmental claims. Yet, if collective claims are raised by an indigenous group, such an interpretation may downgrade the value of group rights such as cultural survival over an individualist interpretation of rights that privileges a liberal political ideology. For this reason, women and minority defendants regularly complain that their interests are not adequately valued by judges who, in general, belong to privileged socio-cultural groups and are unable to empathize with their position or acknowledge the relevance of issues that require an understanding acquired primarily through personal experience.³⁰

In the context of multicultural societies, empathy plays a crucial role for judicial processes. Empathy in this case should not be understood in a strict emotional dimension—which might actually conflict with impartiality—, but a more crucial, epistemic one. As Maksymilian Del Mar (2014) stresses, empathy is not just an affective state, but has an important cognitive dimension. This dimension can be significantly abridged if the adjudicator is not critically aware of the presence of biases or prejudices in prevalent legal reasoning, or if she is insufficiently attentive to the specific issues arising from the systemic marginalization or discrimination of certain identities. For instance: white, male judges might display a lower level of what Del Mar (2014) describes as “perceptual sensitivity” toward the reasoning or arguments invoked by women or minority claimants, or they might simply attend less carefully to the relevant facts, or interpret norms in ways that ratify dominant values. As a result, their judgments can reflect stereotypes or prejudices which prevail in dominant cultural misconceptions, thus contributing to solidify them.

One illustration of this problem can be found in ECtHR jurisprudence regarding freedom of religious expression and the right to wear a Muslim headscarf. In a line of well documented cases,³¹ the Court has taken a decisive stance in favor of state-imposed restrictions on the individual right to manifest religion recognized in article 9 of the ECHR. In all these cases, the Court not only takes at face value the position of the state and avoids considering alternative interpretations of the headscarf (thus freezing its meaning as a tool of male domination, or as a symbol of religious radicalism), but the choice of the claimants to wear the headscarf is not portrayed as autonomous, even when claimants were adult women who declared that they freely decided to wear the headscarf. Ultimately, though, the argument against the right to wear the headscarf in public is based upon an unsubstantiated suspicion, as there is no actual evidence that wearing the headscarf (nor other veils or gowns) causes any harm to others, or that the defendants have been victims of indoctrination. And yet in these cases the Court took as correct the position of the State, which was based on asserting an abstract *risk* of offending others, the perils of radicalization of society (in *Leyla Sahin v. Turkey*, 2005), and of proselytism (a fear reproduced in both judgments).

The ECtHR's argument is suspicious of ethnic and gender bias, and this bias is materialized through applying a higher standard of scrutiny to practices typical of minority cultures. The Court appears to overlook the fact that many practices and customs of women in the dominant (supposedly liberal) society might have also been informed by patriarchal and discriminatory norms—which support gender hierarchies, too (Song, 2005). Unconscious systemic biases thus involve a lower level of inspection of majority practices, as they are presumed to be free choices or are simply taken as ‘normal’ within the dominant culture.

The exploration of such instances of potential bias could be taken further into the practice of other international courts. The treatment of indigenous claims is a particularly fruitful example—in investment disputes, as already mentioned, but also in the many territorial disputes that have come before international courts, including the International Court of Justice, in recent years. Critics have long pointed out that the ICJ tends to neglect indigenous views in favor of classical, state (and Western) conceptions of title to territory (see, e.g., Reisman, 1995). Framed yet more broadly, these kinds of cases might be seen as especially virulent examples of the continued preference given to categories constructed by colonial powers to the detriment of attempts at decolonizing international law thoroughly.

As legal categories are created and interpreted through a process that is not only juridical but also social and political, a more diverse international bench—beyond mere nationality representation—might help counteract the misrepresentations of minority identities and their symbols. Hence, increasing the number of women judges, and also of judges who belong to racial, cultural or ethnic minorities, can raise the standards of deliberation by adding perspectives and reasons that are typically missing in discussions among judges who belong to a privileged social and cultural group, and who may not attach enough significance to the perspectives of members in structurally subordinated groups. In the case of the headscarf, a judicial ‘politics of presence’ can lead to more mindful judging, adding what Avigail Eisenberg calls “institutional humility”³²—and making judges aware of potential unconscious bias or prejudice leading to the imposition of more stringent restrictions or duties to members in minority group.³³

The idea is well captured by Amalia Amaya’s argument that the practical reasoning of a virtuous (decision-making) agent is not merely dependent on applying a set of general principles or rules, but on showing the capacity to recognize the salient features of a given situation (Amaya, 2013). Judges drawn from a variety of cultural and social backgrounds will bring diverse perspectives to bear on critical legal issues, thus adding quality to judicial deliberation and improving the integrity of judging.

The possibility of this ‘institutional humility’ is illustrated by the dissenting opinion of Judge Tulkens in one of the ECtHR’s headscarf cases, the *Sahin* case. Being the only dissenter in the case, she rejects a paternalist approach to the legal analysis of the issue and persuasively argues against the silencing of the applicant by the Court, couched in terms of secularism and an unbalanced reliance on the affirmations of the national authorities.³⁴ By interpreting the freedom to manifest a religion as the possibility to exercise religious beliefs (individually or collectively) *without the infringement of the rights and freedoms of others and the disturbance of public order*, Judge Tulkens brings the agency of the applicant to the forefront. Instead of taking the headscarf as an aggressive symbol *per se*, she admits that wearing it *does not have a single meaning*. Hence, unless it can be proven, it should not be assumed that the individual engages in proselytizing that could undermine the convictions of others. The dissent also stresses the dangers of unconscious biases in interpretations of rights and perceptions that try to *speak for* minority groups without hearing nor dialoguing with them. In her own words: ‘[w]hat is lacking in [the Court’s] debate is the opinion of women, both those who wear the headscarf and those who choose not to’ (ibid).

8 | CONCLUSION

To sum up, international adjudication is confronted with a legitimacy challenge that cannot be tackled by merely improving indirect, state-centered forms of democratic accountability. Instead, the consolidation of ICs needs to confront the rising distrust and alienation shown by

transnational minorities and non-Western states that remain at the margins of international institutions. Cultural, gender, and ethnic divides, as crosscutting identities (both local and global) play a distinctive role in the growing critiques of global institutions as failing to represent, and be accountable to, the international community, and not just states. As suggested by the examples analyzed, criticisms are not focused on formal legal issues, but instead on who has the power to create and interpret international legal norms, which are central for global governance. Prevalent individualistic interpretations of human rights, for instance, are seen by many non-westerners as tools for the global endorsement of liberal, non-communitarian, conceptions of property and open markets. Critical scholars have thus called for an engagement of human rights theory and law with postcolonial and multicultural conceptions (Malik, 2014; Moyo, 2012; Mutua, 2001; Santos, 2020). As Peggy Levitt and Sally Merry (2011) suggest, we need a more “vernacular understanding of human rights”, more inclusive of non-secular foundations. The same could be said of other areas of international law, from economic law to territorial or maritime delimitation. To this end, we may need to transform existing ICs, as other institutions of global governance, into more inclusive, transparent and accountable ones (Macdonald, 2012) as a way of furthering a less nominal and more substantive conception of legitimacy.

Hence, the challenge of legitimacy incorporates a diversity challenge. To be sure, the lack of a global constituency adds significant complexity to the task of improving the democratic quality of institutions of global governance, including ICs. Yet, as I have argued, ICs should not just ‘reflect’, or indirectly ‘represent’, domestic constituencies in order to garner legitimacy, but rather should offer a space for contestation and de-marginalization of vulnerable groups who seek to hold states accountable for unlawful practices and human rights violations. This model of legitimacy aims at fulfilling an integrative role of the international community, composed not only by states but by civil society and individuals.

The question of inclusion brings to the fore questions about the composition of IC’s benches, which have been typically addressed from a perspective that focuses on the representation of member states and their role in appointment procedures. However, the pre-conditions under which ICs are able to act as ‘counter majoritarian’ protectors of minorities and marginalized groups become important when we think of diversity beyond the state. To be sure, some attention has been paid in recent years to the role of women in international adjudicatory bodies, due to a growing awareness of the striking sex imbalance in this domain (Grossman, 2016a, 2016b; Powderly & Chylinski, 2017; Torbisco-Casals, 2016b). Yet the emphasis on institutional and legal procedures has so far inhibited a more comprehensive study of relevant extra-institutional factors, such as the societal and cultural structures in which international judges are embedded. As a result, the broader issue of inclusion has been generally overlooked in legal scholarship.

The last part of the article has identified three normative reasons for greater responsiveness to diversity in ICs: democracy; trust; and improving the quality of the process and outcomes of adjudication. These are presented as complementary, rather than competing strands of reasoning. Legitimacy, it is argued, goes beyond the mere symbolic aspect of representation, and requires addressing issues of trust and the normative dimension of judging. Building more diverse benches seems also crucial to enhancing the quality of judicial deliberation—that is, more mindful forms of judging—as well as the legitimacy of judicial outcomes. This argument requires a shift away from the formal presupposition of international judicial neutrality toward recognizing both the democratic and epistemic added value of a more inclusive international judiciary.

The approach defended has the potential of strengthening the position of ICs in response to challenges from across the political spectrum. By broadening the realm of responsiveness and accountability, ICs might be more successful in establishing themselves as ‘shared’ democratic institutions

and their decisions be taken as authoritative. In addition, a more complex interpretation of deliberation should also take seriously into account the reasons invoked by all affected parties, both minorities and majorities. Hence, strengthening the legitimacy of international adjudication beyond state consent might contribute to strengthening the system and immunize it from democratic challenges raised by populist movements that aim at weakening the international system.

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ENDNOTES

- ¹ I use the term 'global' rather than 'international' in order to capture the scope of the analysis beyond the two-dimensional perspective that opposes the 'national' and the 'international'; instead, the changing nature of ICs and the question of legitimacy is located within broader processes of globalization.
- ² The notion of the judiciary being the 'least dangerous branch' goes back to Montesquieu and has been rehearsed by seminal US constitutionalist works, such as Alexander Hamilton's *Federalist No. 78*. It has been also coined in relation to the US Supreme Court by Bickel (1986). On an international account, see Dawson et al. (2013); Howse (2003); Zarbiyev (2012).
- ³ Burundi, South Africa, and The Gambia notified their withdrawal from the ICC in 2016, though the latter two countries later retracted their notifications and thus remained members. The African Union adopted the so-called 'ICC Withdrawal Strategy' in January 2017, see African Union Assembly (2017, paras 6, 8).
- ⁴ The literature on legitimacy and compliance in global governance is rich. For a general argument on international organizations (IOs), see: Franck (1990); Hurd (1999); Raustiala and Slaughter (2002). Evidence from a broad range of regulatory domains and levels suggests that legitimacy contributes to compliance (Zürn & Joerges, 2005).
- ⁵ To be sure, although states can formally withdraw from treaties, there are serious limitations, uncertainties and costs in the 'right to exit', which might make it problematic in practice (Helfer, 2005) as the whole 'Brexit' process has evidenced.
- ⁶ On this regard, see press statement on the ICC decision on Afghanistan ('ICC Decision on Afghanistan', 2020).
- ⁷ Robert O. Keohane (2015, pp. 3, 11–12) uses the notion 'nominal democracy' in reference to the relatively empty or hypocritical discourse of 'global democratic governance', which lacks the solidity of the domestic institutional infrastructure and ran the risk of being mostly driven by elites, largely unaccountable to an alienated 'global public'.
- ⁸ The complementary jurisdiction of the ICC is emphasized in article 1 of the Rome Statute. The principle also guides the admissibility of cases to the Court, governed mainly by article 17 of the Statute (*Rome Statute of the International Criminal Court*, 1998).
- ⁹ Selection and appointment processes have been analysed primarily in this light (see e.g., Ginsburg, 2014; Mackenzie et al., 2010).

- ¹⁰ For a comparative assessment of this trend, see Seymour and Gagnon (2012).
- ¹¹ In the US, the anti-multiculturalist rhetoric was effectively deployed by Donald Trump during his first presidential campaign against opponents to tougher anti-immigration policies. For a general discussion, see Torbisco-Casals (2016a).
- ¹² On this false dilemma, see Torbisco-Casals (2020).
- ¹³ (Case of the Mayagna (Sumo) Awaj Tingni Community v Nicaragua. Merits, reparations and costs, 2001, paras 148–151; Case of the Yakye Axa Indigenous Community v Paraguay. Merits, reparations and costs, 2005, paras 124–137; Case of the Sawhoyamaya Indigenous Community v Paraguay. Merits, reparations and costs, 2006, pp. 117–130; Case of the Saramaka People v Suriname. Preliminary objections, merits, reparations and costs, 2007, pp. 91–101; Case of the Community Garifuna de Punta Piedra & Its Members v Honduras. Merits, Reparations and Costs, 2015, pp. 166–168; Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary Objections, Merits, Reparations and Costs, 2017, pp. 115–117)
- ¹⁴ The *Lhaka Honhat Association (Our Land) v. Argentina* case (2020) sets an important precedent in terms of restitution of indigenous lands. The Court determined that Argentina must ensure that non-indigenous settlers, which have gradually encroached on indigenous territories infringing on their economic, social and cultural rights, are removed and resettled on alternate lands.
- ¹⁵ See e.g., *Chevron Corporation and Texaco Petroleum Company v. Ecuador* (n.d.), PCA Case No. 2009-23.
- ¹⁶ In Europe, the litigation over freedom of religious expression in Strasbourg has been critical in on-going cultural wars surrounding the rights of religious and ethnic minorities as well as in confrontations over the presence of religious symbols in state buildings. Yet in most cases decided by the ECtHR the ‘margin of appreciation’ doctrine has played in favor of dominant majoritarian interpretations, which in many countries involve strong restrictions on the right to manifest religion in the public sphere (*Lautsi and others v. Italy*, 2011; *Dahlab v. Switzerland*, 2001 (hereinafter “Dahlab”); *Leyla Sahin v. Turkey*, 2005 (hereinafter “Sahin”); *Dogru v. France*, 2008 (hereinafter “Dogru”); *Kervanci v. France*, 2008 (hereinafter “Kervanci”). For an analysis: Torbisco-Casals (2016a).
- ¹⁷ The notion of “global civic society” emerged in the 1990s and remains contested. In this article, the condition of global-ness of the civil society is perceived as an ensuing consequence of the trend to global governance. See Anheier et al. (2001), John Keane (2003), Kaldor (2000).
- ¹⁸ Public accountability has been described as “the hallmark of modern democratic governance” (Bovens 2005, p. 182).
- ¹⁹ See also the discussion of global democracy beyond the intergovernmental model in Archibugi et al. (2012).
- ²⁰ Grossman persuasively argues this point, and I will thus avoid rehearsing her arguments here.
- ²¹ See: <http://www.gqualcampaign.or/home/>; <http://genevagenderchampions.com>.
- ²² On this regard, see Lenard (2012).
- ²³ On the practical relevance of description representation, see also Mansbridge (1999); Williams (1998); Scherer and Curry (2010); Feenan (2008); Liu and Baird (2012).
- ²⁴ The foundation of trust in this conception has to do with accepting that others are part of our moral community (Uslaner, 2008) and thus we share common values. This normative conception presupposes a rather general optimistic outlook on human nature, which does not depend on experience and aims at being compatible with difference and disagreement. Yet, as Fukuyama and others have noticed, trust in this moralistic sense arises more easily “when a community shares a set of moral in such a way as to create regular expectations of honest behavior” (Fukuyama, 1995, p. 153).
- ²⁵ See, in the cases of the US, the UK and Latin America: Caldeira and Gibson (1992); Greene (2015). In the UK, see: Bowen (2019); Huebert and Liu (2017).
- ²⁶ The expression is taken from President Uhuru Kenyatta of Kenya. See: AT Editor (2016).
- ²⁷ This critique looks at international criminal adjudication as a damning process that, borrowing from the familiar metaphor deployed by Makau Mutua, contains an underlying divide between victims and saviors built upon a universal human rights project that is far from inclusive or value-neutral (Mutua, 2001).

- ²⁸ On the importance of domestic ‘compliance constituencies’ for international (human rights) bodies, see Simmons (2009).
- ²⁹ Realist theorists crucially pointed out that judges, too, have a personal background and a political mind, and it is arguable that factors such as their religion, education, political views, sexual preferences and ethno-cultural belonging can contaminate their reasoning. For a reconsideration of the challenges of legal realism to formalist legal philosophy, see Schauer (2013). On American legal realism doctrine, see Leiter (2007).
- ³⁰ As Anne Phillips (1995) convincingly argues, there are significant differences of experience attached to being member of an identity-group (being male or female, black or white, etc.) and one’s social position tends to influence judgments, commitments, and understandings of legal and political priorities, which are ultimately not value-neutral (Mansbridge, 1999).
- ³¹ The ECtHR has considered questions regarding restrictions on the right to manifest religion by wearing religious attire under article 9(2) of the European Convention of Human Rights (ECHR) in a varied range of cases. The reference here is on a few crucial decisions that have consolidated the Court’s general line of reasoning concerning the compatibility of headscarf bans with the right to freedom of religion and other rights recognized in the ECHR: (Dahlab v. Switzerland, 2001; Dogru v. France, 2008; Leyla Sahin v. Turkey, 2005; Kervanci v. France, 2008). I have explored this jurisprudence in Torbisco-Casals (2016a).
- ³² According to Eisenberg (2009, p. 50) “Institutional humility requires that institutions and public decision-makers have the capacity to reflect on the possible ways in which access to public debates is unequal and norms which are putatively neutral are in fact biased”.
- ³³ I have elaborated more about these constraints in Torbisco Casals (2006, chap. VI).
- ³⁴ Leyla Sahin v. Turkey (2005), Dissenting Opinion of Judge Tulkens, 44. She specifically stresses the underlying paternalism of the majority’s opinion, stressing that ‘[t]he applicant, a young university student, said—and there is nothing to suggest that she was not telling the truth—that she wore the headscarf of her own free will’.

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