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Cross-Judging Revisited

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CROSS-JUDGING REVISITED

ROBERT HOWSE AND RUTI TEITEL*

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I. INTRODUCTION

The articles by Follesdal,¹ Ulfstein,² Benvenisti and Downs,³ and Nollkaemper,⁴ presented as part of the Nineteenth Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium at NYU School of Law and collected in this issue of the *NYU Journal of International Law and Politics*, provide a vivid illustration of the range of normative, empirical and doctrinal issues raised by the phenomenon of “cross-judging” that we identified and addressed in our original 2009 article in this Journal (referred to throughout as *Cross-Judging*).⁵ The articles show that studying how different international and regional (and indeed domestic) tribunals relate to each others’ rulings and processes can shed light on the question of the legitimacy of international adjudication, as well as the ways in which international adjudication has effects in the world, taking us “beyond compliance”; in addition, stud-

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1. Andreas Follesdal, *To Guide and Guard International Judges*, 46 N.Y.U. J. INT’L L. & POL. 793 (2014).

2. Geir Ulfstein, *International Courts and Judges: Independence, Interaction, and Legitimacy*, 46 N.Y.U. J. INT’L L. & POL. 849 (2014).

3. Eyal Benvenisti & George W. Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 N.Y.U. J. INT’L L. & POL. 741 (2014).

4. André Nollkaemper, *Concerted Adjudication in Cases of Shared Responsibility*, 46 N.Y.U. J. INT’L L. & POL. 809 (2014).

5. Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT’L L. & POL. 959 (2009).

ying cross-judging can illuminate some of the dimensions of the relationship between domestic democratic sovereignty and international legal order.

II. THE CENTRALITY OF INTERPRETATION

Andreas Follesdal rightly identifies the central legal task of international courts and tribunals as that of interpretation; this is the overall context in which the practice of cross-judging ought to be assessed. The judges, as he writes, face “a complex set of somewhat vague legal norms, standards, and objectives.”⁶ Instead of attempting to taxonomize international courts according to specialized regimes and functions, Follesdal rightly argues that we should focus on the common challenge of interpreting complex normative material in individual cases. The very task confounds notions that legitimacy can be guarded by keeping international courts on a short leash, controlling narrowly “discretion.” Indeed, as Follesdal shrewdly notes, especially in multilateral regimes, legal evolution through treaty amendment is a “cumbersome” process.⁷ Thus, courts have a special responsibility for keeping the treaty norms meaningful, including in light of the general evolution of international and related specialized regimes. Cross-judging plays an important part in the discharge of this responsibility.

Follesdal asks how courts might be guided in the practice of cross-judging. He correctly notes that when international courts invoke the decisions of other judicial instances, it is frequently on the basis of the intrinsic persuasiveness of their reasoning. Follesdal worries, however, that unless courts develop some kind of theory or standard about the suitability of referencing other judicial instances, the choice of sources may appear arbitrary. Here, we believe this risk might be controlled in a different way, through the explicit explanation of the relevance to the issue before the court of the other instance’s ruling. In a Dworkinian fashion, the court ought to provide a conception of the law it is interpreting that defines the universe of relevant normative material that it will take into account.

This point relates to Follesdal’s remarks concerning accountability. We agree with his call for “more publicity about

6. Follesdal, *supra* note 1, at 796.

7. *Id.* at 798.

the actual ‘balancing’ of various objectives and norms.”⁸ While it is entirely meritorious to call for improvements in selection processes for international judges—as long as there are obvious questions about bias, corruption, or political influence—it is really the outputs that will matter decisively to the tribunal’s legitimacy.

III. CROSS-JUDGING AND THE SOURCES OF JUDICIAL AUTHORITY

While Geir Ulfstein begins by vetting formalistic, positivist conceptions of international tribunals as agents or trustees of states, he quickly proceeds to a broader and more substantive view of legitimate judicial authority. Ulfstein emphasizes the importance of international courts following “recognized principles of interpretation in international law” and shows that international courts play a role in global governance and the systemic integrity of international law that operates quasi-autonomously from the interests of the particular states that have created their jurisdiction.⁹ As we have emphasized in earlier writing, international courts do not simply address themselves to states, and their legitimacy and efficacy depends upon the judgment of non-state actors to a significant extent—including NGOs, victims of human rights abuses, investors, traders, and not least members of the professional community of international jurists, which operates increasingly independently of traditional state institutions such as foreign offices. Since judicial power and the sources of its legitimacy are not the same as for legislative or executive power, legitimacy may depend significantly upon the recognition that a court is operating in a judicial way—giving coherent public reasons for its decisions, acting impartially, following proper processes, and so forth. Such judgments are understandably the province of other jurists who recognize the court in question as acting in an appropriately judicial way. Indeed, this kind of mutual recognition is one of the functions that cross-judging plays in the legitimation of international judicial authority. One of the striking aspects of international judicial authority that points to the unreality of a formal delegation model is *Kompetenz-Kompetenz*—the assertion by the tribunals of the competence to determine

8. *Id.* at 807.

9. Ulfstein, *supra* note 3, at 856.

the scope of their own competences, a characteristic common to tribunals as different as the International Criminal Tribunal for the Former Yugoslavia (*Prosecutor v. Tadic*)¹⁰ and the WTO Appellate Body (*India-Balance of Payments*).¹¹ Courts identify regime values or goals that make them responsible to non-state actors: for example, private traders in the case of the WTO panel *S. 301*,¹² or the families of the “disappeared” in the case of the “Right to Accountability” jurisprudence of the Inter-American Court of Human Rights.¹³

Echoing our observation in previous work, including *Cross-Judging*, that there is an important ex-post democratic control on international courts and tribunals by virtue of the fact that the meaning and impact of their rulings will be shaped or reshaped through implementation by domestic authorities, including domestic courts, Ulfstein notes: “National courts may point to the significance of local conditions or through well-reasoned opinions try to persuade ICs [International Courts] to choose a different interpretation. A more general practice by national courts may amount to subsequent state practice that ICs must take into account.”¹⁴ This confirms our view that attention to cross-judging must extend to the interaction of international and domestic courts, a phenomenon that has not been closely studied hitherto.

Our proposition here is also strongly confirmed by the analysis of Eyal Benvenisti and George Downs. Theirs is one effort to apply the basic intuition that cross-judging between different levels of courts, and not just horizontally between international tribunals, contributes importantly to legitimacy. In particular, Benvenisti and Downs argue that there can be democratic distortions or accountability deficits both in domestic regulation and in international regimes, and that dialogue be-

10. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

11. Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (Aug. 23, 1999).

12. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

13. See Ruti Teitel, *Transitional Justice and Judicial Activism—A Right to Accountability?* (Aug. 15, 2013), available at <http://law.huji.ac.il/upload/accountabilitytelavivedits.pdf>.

14. Ulfstein, *supra* note 2, at 857.

tween international and domestic courts can help to counter these political failures at both levels. But we also note that this vision of checks and balances extends beyond the dialogue between courts, and also includes that between courts and other institutions of governance. Here, we strongly agree with their view that the *Kadi* decisions of the European Court of Justice, often considered defensively by international jurists as a threat to the international rule of law, should instead be viewed favorably, as correcting elements of unaccountability in international decisionmaking (the U.N. Security Council). As Benvenisti and Downs show, the *Kadi* rulings and related judgments in other jurisdictions had a tangible effect on the behavior of the Security Council and related political actors, leading to measures that would create some kind of accountability and review process in connection with the Security Council sanctions regimes and its blacklisting practices in respect of individuals suspected of financing terrorism. Benvenisti and Downs also point to the value of “judicial efforts to generalize and rationalize the international legal landscape,” giving the example of linking trade obligations with human rights concerns;¹⁵ while specialized, purportedly self-contained regimes often suffer from the lack of ability of political and bureaucratic actors to speak to one another across regimes (the WTO and the U.N. human rights organs is a clear example), courts have a peculiar advantage in crossing these divides by viewing international law as an integrated system, where norms are interconnected and mediated by evolving principles of the system in general. In this respect, Follesdal is absolutely correct that international courts should not limit themselves to the supposed intentions of the drafters of specialized treaty regimes in the way in which they interpret treaties; certainly not to the point of failing to engage with relevant normative material from other regimes that the drafters might not have anticipated in advance to bear upon the particular specialized regime in question. By choosing the idiom of international law to effect the governance of specialized areas, drafters of treaty

15. Benvenisti & Downs, *supra* note 3, at 780; see also ROBERT HOWSE & RUTI G. TEITEL, BEYOND THE DIVIDE: THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE WORLD TRADE ORGANIZATION (Dialogue on Globalization, Occasional Paper No. 30, 2007), available at <http://library.fes.de/pdf-files/iez/global/04572.pdf>.

regimes make a conscious choice to step outside the parochial technical idiom of their particular epistemic communities, and enter a broader normative universe, one increasingly shaped by considerations of humanity, and the need for human- not state-centered judgment, regardless of the specialized content of the norms being considered.¹⁶

While we find many of the insights of Benvenisti and Downs to be persuasive, and view their article as making a very significant contribution to understanding both how cross-judging works and its important normative functions, we would partly dissent from their conclusion that national courts engage with international tribunals from the motivation “of domestic interests and concerns” rather than “utopian globalism.”¹⁷ This need not always be the case. In the *Kadi* case—which, as noted, Benvenisti and Downs analyze very well—it is arguable that the fundamental human rights principles invoked by the European Court of Justice were also fundamental principles of the international legal system as a whole, including the United Nations itself. Thus, the intervention of the *Kadi* court was not ultimately premised upon guarding interests and concerns at the sub-international level, but upon the affirmation of universal values that had been betrayed by the United Nations in this case. Nevertheless, we agree with Benvenisti and Downs that domestic interests and concerns may be underrepresented in the international law formation process and that domestic courts can play an important corrective role.

IV. ARBITRATION

An important issue raised by Follesdal is whether arbitral tribunals should be regarded as having the same role of systemic integration of international law through cross-judging as instances that are more apt to be described as courts (and here we would clearly include, for example, WTO judicial organs in the latter category). Given that in investor-state arbitrations, for example, arbitrators exercise public authority in the sense articulated by Armin von Bogdandy and Ingo Venzke, where their rulings determine the legitimate bounds of state regulation, one must question the notion that they should be

16. RUTI G. TEITEL, *HUMANITY'S LAW* (2011).

17. Benvenisti & Downs, *supra* note 3, at 791.

regarded as “judges for hire” with responsibilities only to the parties that pay them and not to broader constituencies affected by their rulings. International commercial arbitration may, of course, require a different analysis. But the narrow view that some arbitrators take of their role¹⁸ seems not only blind to the fact that these tribunals in the investor-state context are applying core norms of public international law, and thus like it or not, are affecting the evolution of these norms (state responsibility, etc.) but also are quite possibly motivated by an overriding concern to appear slavishly beholden to those who pay them, and from whom they want to get paying work in the future.

V. PARALLEL AND OVERLAPPING PROCEEDINGS

Parallel and overlapping proceedings—where claims that relate to similar or the same subject matters, and in some cases also by the same complainants are before more than one forum—raise particular kinds of cross-judging challenges. These are tackled by André Nollkaemper. Nollkaemper suggests that the function of cross-judging in these cases may be rather different or more specific than its general interpretative function as discussed above (and which was the focus of our original article). Cross-judging may be a means of preventing conflicting outcomes from different fora in related or parallel disputes or of achieving judicial economy (*res judicata* of various kinds: Nollkaemper usually gives the example of the ICJ reliance on fact-finding by the ICTY in the *Bosnia v. Serbia* case).¹⁹ We find promising Nollkaemper’s invitation to “construe a principle of comity that should govern the relations between multiple courts.”²⁰ Conceptually, we would ground this comity on the notion of mutual recognition we discussed above—the idea that jurists recognize one another as authentic practitioners of judicial authority, associated with the qualities of independence, impartiality, giving of reasons, due process, and re-

18. See *Glamis Gold, Ltd. v. United States*, Award (NAFTA Arb. Trib. June 8, 2009), available at <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>; Follesdal, *supra* note 2, at 7–8 (quoting *Romak S.A. (Switz.) v. Uzbekistan*, PCA Case No. AA280 ¶ 171 (Perm. Ct. Arb. 2009)).

19. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 47, ¶ 255 (Feb. 26).

20. Nollkaemper, *supra* note 4, at 845.

lated features identified for example by Anne-Marie Slaughter and Laurence Helfer in their classic article in the *Yale Law Journal*.²¹ We see this kind of comity as based on the specificity of right as a form of normativity, and thus different from the traditional state-centric version of comity between sovereigns. Finally, Nollkaemper suggests that consolidated proceedings may lead to better solutions than cross-judging in some situations of overlap, parallel proceedings, and potential duplication, and even conflict.²² Such proceedings merit closer study, in a variety of contexts including the WTO, human rights tribunals, and investor-state dispute settlement (e.g., the collective action of holders of Argentine bonds is a wonderful case study in the complexities of applying the class action concept in international litigation).²³ Some of the considerations that may complicate or impede consolidation in individual cases include the fact that it is rare that a single international tribunal can hear claims of both states and individuals and that while having a similar claim against the defending party, different actors may also have competing or conflicting interests among themselves. For example, different firms affected by the behavior of a single host state may also be competitors in global markets, and therefore be very reluctant to have sensitive commercial information shared even among their counsel.

VI. CONCLUSION

In general, the articles discussed in this Comment tend to vindicate our questioning in *Cross-Judging* that the proliferation of international and regional courts and tribunals must lead to inherent fragmentation anxiety—a worry that horizontality and multiplicity may simply increase incoherence and weaken international law. The issues raised by *Cross-Judging* are tractable to rational legal analysis and the relationships between different courts and tribunals can be studied and their patterns determined and evaluated: Lack of hierarchy does not mean lack of normative rationality or anarchy.

21. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273 (1997).

22. Nollkaemper, *supra* note 4.

23. *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, <https://icsid.worldbank.org/ICSID/FrontServlet>.