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International Courts: Challenges New and Old – A Deconstruction on the Work of International Courts

Master's thesis
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Tiivistelmä - Referat – Abstract

In this Master's thesis, "International Courts: Challenges New and Old - A Deconstruction on the Work of International Courts", the aim is to critically appraise some characteristics of international courts that seem to hinder their impact and be problematic to their legitimacy. It presupposes that these features are hidden by the conventional legend-building narratives on international courts. To deconstruct this framework in which they operate, the thesis focuses on three features it argues are connected: the type of justice international courts provide; the democratic legitimacy vacuum in which they operate and the effect of fragmentation and the proliferation of international courts. The inspirations for the thesis notably stem from the remarks that other institutions have raised in popularity in tackling issues of international justice, and from the observation that the issues faced by international courts have, to some extent, remained similar for over a century. The thesis also accepts as a starting point that legal theory on the international field lags behind reality and has struggled to provide a comprehensive theoretical framework under which international courts operate.

In order to locate the questions to be asked and to provide an explanation of their need and perceived benefits, the thesis first lays out the historical context of the emergence of international courts on the international stage. This historical context is argued to be closely connected to the legend-building narratives on international courts. Next, in chapter three, inspired by the notion of micro and macro justice, the thesis then makes observations on the kind of justice international courts actually can and should aim for and the results they can achieve. It argues that international courts are limited in the type of justice they can provide, and thus unable to alone reach the goals they were created to fulfil. In chapter four, the thesis then notes that the democratic legitimacy of international courts has been considered questionable from their very appearance, an issue argued to be of relevance still today, not least to the glaring lack of a global *demos*. It is thus observed that due to the reality of the international field, international courts have had to take the role of a norm-creator. The thesis argues that none of the traditional counter-arguments to this problematic feature can be held satisfactory. Further, it is asserted that the absence of a legislative causes problems to international courts both as an interpreter and as a norm-creator.

Finally, the thesis then moves on to a more recent development in chapter five, namely legal fragmentation and the proliferation of international courts. While these make the international legal field more complex, create overlapping systems and thus potential power struggles, it is argued that this phenomenon also further affects the issue of democratic legitimacy and the justice provided by international courts. This happens notably because they lessen the control of states on the newly established norms and institutions. Further, while fragmentation might aid international courts in focusing on micro justice, it complicates their norm-creating process.

As a conclusion, the thesis summarises the problems it claims are caused by the framework in which international courts operate and how they differ from the legend-building narrative. Additionally, it restates a few possible modest paths of development to tackle each of the noted problems, although it is argued that to truly solve the encountered issues, the establishment of an international legislative would be required. Due to the research question and the multiplicity of issues treated, the methods used in the thesis are a combination of critical analysis with theoretical and historical approaches, with an end-goal to provide a critical legal study on the impact of international courts.

Avainsanat – Nyckelord – Keywords

International courts, international law, micro and macro justice, democratic legitimacy, fragmentation

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Abbreviations

DSP	Dispute Settlement Body
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1. Introduction to the topic

1.1. International courts and legal scholarship: a complicated relationship

From the end of the 19th century, prominent international lawyers began to form a new agenda on international law[1] the results of which could nowadays be summed up into a single observation: international courts represent an increasingly far-reaching and powerful group of institutions. The expansion of their reach, however, has not only been of a geographical kind, nor did it stop at the creation of one single international court. The reach of international courts has continued to grow via legal fragmentation and the emergence of transnational law, as issues are becoming more and more specific and new areas of law are being treated on an international level rather than within the boundaries of a nation-state.[2] Albeit this has been done in a non-centralized and unorganized manner, international courts have thus continuously expanded their reach on the substance-level of law. Accordingly, some have warned that this "proliferation" of international courts also entails dangers to the cohesiveness of the international legal system as a whole.[3] Whatever the truth concerning these warnings, it appears evident that the historical context of their emergence as well as the modern rhetoric used by the courts themselves showcase the magnitudes of the tasks they are charged with. These include providing justice where states fail to, the end of impunity and ensuring an enduring global peace by resolving disputes peacefully.[4]

One could justifiably determine from the evident significance and authority of international courts that it makes their continuous critical scrutiny in legal discourse necessary. However, it appears that the pitfalls of international courts, such as a lacking democratic legitimacy and related morality issues, have for long been mostly ignored by mainstream legal scholarship. Part of the reason could be that, as asserted by Martti Koskenniemi, the way we see international adjudication is rooted in the late 19th and early 20th century, which has caused a wider critical analysis to counter the legend-building narratives to be long overdue.[5] Koskenniemi is not the only prominent international lawyer to express a certain disdain for legal scholarship that is not critical; tends to provide explanations that contribute to the

[1] See e.g. von Bogdandy – Venzke 2012, p.10-11.
[2] Tuori 2014, p.22.
[3] Koskenniemi – Leino 2002, p.553-556.
[4] For an example, see the Preamble of the Rome Statute.
[5] See Koskenniemi 2007.

legend-building narrative of international courts and covers the apparent legitimacy gaps of their work. For instance, Andrea Bianchi has similarly critiqued that the traditional systemizing approaches to international law, by invoking reason and thus the law's objectivity and neutrality, tend to support the established power structures and fail to embrace a critical brand of thought.[6]

Further, in the context of international courts, one may point out that the impact of a lack of critical scrutiny is increased if we accept the following claim on the nature of judicial decision-making: courts tend to, in their judgements and behaviour, provide arguments in support of their legitimacy, authority and the correctness of their legal argumentation, rather than undermine themselves. One should find it easy to agree with the assertion since judges have a natural inclination to present themselves in the best possible light.[7] This combination of non-critical scholarship and self-legitimizing institutions would thus lead to a rather one-sided view on the work of courts. It would also render unsurprising that the legend-building narratives of the late 19th and early 20th century are still commonly accepted as reflecting the truth on the role and impact of international courts.

Yet it seems that the problem is not only the absence of critical analysis countering these legend-building narratives. In addition, it has been noted more generally that, notably due to recent developments such as the emergence of transnational law, privatisation and legal fragmentation, legal theory on international law lags behind reality because traditional concepts and frameworks fail to capture the new reality.[8] Tuori has noted that the traditional theoretical stances become especially problematic when transnational law has no connection to international treaty law, as in the case of international sports law.[9] As shall be elaborated later on in this thesis, this theoretical anachronism negatively affects international courts and their ability to perform.

One might wonder why legal scholarship has had such struggles specifically on the international level. A key reason might be that, as this thesis will demonstrate, international

[6] Bianchi 2016, p.32-33.
[7] Baum 2007, p.28-30 and von Bogdandy, Armin – Venzke, Ingo 2012, p.14.
[8] Tuori 2014, p.11-17. See also Kennedy 1985, p.211. It would appear that in addition to law, so too have legal theory and doctrine also become fragmented. Kennedy notes that they have also become weaker and less persuasive.
[9] Tuori 2014, p.23.

courts emerged specifically to build and systemize the incomplete body of international law. There is thus a certain paradox characterizing legal discourse on international law and international courts that can be observed. Material international law is imperfect or incomplete, not least due to the lack of a legislative counterpart, and thus its system's requirement for a classical doctrinal approach is emphasized. Further, the under-development of the body of international law leaves often considerable room for courts to take action, thus giving them the double role of adjudicator and law-creator. Such a norm-creating process naturally underpins the need for systemizing approaches. As noted above, legal scholarship has also struggled to construct new theoretical frameworks that would explain the current status of international law, emphasizing the persistent need for systemizing approaches. On the other hand, however, a purely doctrinal and systemizing approach may well end up simply focusing on justifying the work of courts, thus concealing the different embedded problems in the assumed truths of the legal field and making the amelioration of the system harder. Indeed, if such systemizing approaches are based on assumed truths that do not reflect legal reality, they cannot provide a serviceable theoretical framework for international courts. Instead, they end up promoting the legend-building narratives. Due to the specifics of the international field, the task for legal scholarship appears as complicated: there is an emphasized requirement of systemizing approaches, but simultaneously a glaring demand for critical scholarship.

In light of the above, and especially as this thesis' focus is the work of international courts, finding a compromise between systemizing and critical approaches appears necessary. William Twining's understanding of jurisprudence's role reflects both: the primary task of legal scholarship is explaining and helping us understand the legal world and law, yet its "most important theoretical function" is to critically examine the prevailing discourse and its implicit assumptions.[10] Similarly, it is this thesis' starting point that these approaches, explaining the current state of affairs and a critical approach, need not be mutually exclusive, but can instead be complementary. It is conceptually impossible to apply criticism without an understanding and description of the current status, and I see no reason to limit oneself to only one of the approaches in any given legal work. Nonetheless, it appears evident that there exists a demand for an elucidation of the current state and challenges of international courts and their development within a critical framework.

[10] Twining 1996, p.11-13.

Accordingly, this thesis will attempt to provide such an elucidation. It thus presupposes that the legend-building narratives anchored to the late 19th and early 20th century are outdated and inaccurate, and fail to describe the framework in which international courts operate and what they produce. The consequences of such a failure, if true, would naturally be tangible, as the inadequacies inherent in the work of international courts would be hidden. Furthermore, if legal theory lags behind reality, it also complicates the tasks of international courts. This means that it is necessary to deconstruct the international court and the narrative it is embedded in.

1.2. The research questions, contributions and structure of this thesis

As noted above and shall be elaborated in chapter two, international courts did not emerge *par hasard* but were the results of conscious efforts for conscious purposes instead. The world in which they operate has not remained static though, and the functions of an international court have also changed or at the very least diversified. As asserted, this does not mean that the legal theory on international courts is up to date. Hence, this thesis attempts to answer the call of prominent international lawyers of the like of Koskenniemi, and provide a critical analysis on the work of international courts. It is assumed that the results of such a critical analysis would provide relevant information on the weaknesses of international courts. A simplified version of the question the thesis asks would be "What do international courts actually do?".

To provide such a critical analysis, the thesis will attempt to deconstruct the theoretical framework in which international courts operate and what they provide. Within this deconstruction it shall focus on three facets: the type of justice international courts can and should provide; their democratic legitimacy and the impact fragmentation has had on their work. The three phenomena are chosen as the hypothesis of this thesis is that not only do they greatly affect the work of an international court as distinct phenomena, they are also intertwined and reinforce each other. By providing such an analysis, the more elaborated version of the question the thesis thus seeks to answer is twofold: for international courts, what challenges and theoretical inconsistencies remain from their emergence and, secondly, which have been caused by newer legal and global developments? The thesis thus

presupposes that the conventional and historical legend of how international courts operate is no longer, if it ever was, accurate.

The purpose of treating these questions is not simply criticism for its own sake, but rather the conviction that laudable goals are best served by an impact- and critically oriented strand of legal scholarship. The inspirational reasons are notably the observed partial replacement of international courts with other institutions, the emphasized importance of their legitimacy, as well as an apparent divide between the goals of international courts and their actual aptitudes and tools. It also needs to be highlighted that critically appraising these topics is of continuous importance not only due to the conventional importance of courts, but also because in the international context they appear to have been burdened with additional tasks and an expanded role. From the perspective of international courts themselves, the contributions of such a critical analysis appear as no less important. This is because, beyond its inherent value, a critical deconstruction also points to the facets that need to be improved. Ignoring the results of such an analysis could be detrimental to their impact and the progresses made. Indeed, in order to tackle criticism challenging their neutrality and place in the legal world, improving their legitimacy seems as good as any place to start.

To approach the research questions, the thesis will first start with a historical look into the specific contexts of the arrival of key international courts, with an object to illuminate the functions international courts were originally meant to fill as well as the challenges noted already at this stage. This is necessary to provide a deeper understanding of the contents of the legend-building narrative, and it requires the analysis of relevant contemporary material and legal scholarship. As the thesis presupposes that this legend-building narrative and its theoretical foundations are not accurate and therefore cause problems for international courts, the thesis then will move on to deconstruct this narrative. First, in the third chapter, the thesis analyses the type of justice it argues an international court can and should aim for. Specifically, it aims to display the discrepancy between the micro-level tools and macro-level goals that it argues is embedded in the work of international courts. To do so, it notably approaches the question with the practical example of transitional justice. The example is chosen as it epitomizes the contradictions between international courts' macro-level functions, namely ending impunity and ensuring enduring peace, and their actual capabilities. Further, it exemplifies the larger trends that seem to pose challenges to the work

of international courts, including their democratic legitimacy and the fragmentation of international law.

Next, in chapter four, the democratic legitimacy vacuum in which international courts operate is analysed and the traditional counter-arguments dealt with. The thesis argues that the legend-building narrative has caused the vacuum to be overlooked for too long and that the narrative's fundamental presuppositions in this regard are false. Further, the thesis will analyse the theoretical and practical challenges that it asserts this vacuum continues to pose to international courts. This requires the analysis of both contemporary materials supporting the established structure as well as modern theories on the practices of international courts. Then, in chapter five, the "newer" challenge of fragmentation and its implications to the work of international courts are analysed. The object of observation is the institutional aspect of fragmentation, as the thesis asserts that fragmentation has further affected the type of justice produced by international courts and their democratic legitimacy. Moreover, the thesis asserts that fragmentation further contributes to the legend-building narrative on international courts to be false. Finally, the thesis concludes with a general reassessment of the asserted theoretical and practical challenges of international courts, while reiterating possibly identified paths forward.

1.3. Methods used

For the present thesis, the necessity of using several methods arises from the complexity of the questions that are to be treated.[11] First, the thesis embraces a general critical approach as this is, as asserted above, what it views as one of the major tasks of legal scholarship to be. A critical approach is also necessary to answer the main research question. As David Kennedy notes,

"As methodology, critical theory seems to have encouraged a particular skeptical stance towards legal doctrine, a skepticism animated by a dialectical style of analysis in both historical and doctrinal work. These analytical tools -indeed this analytical stance - has been quite successful."[12]

[11] See for example Määttä 2016, s.135 and Hoffrén 2016, p.304. Using multiple methods in legal scholarship has become more common, as traditional approaches may be considered out-of-date and only using the doctrinal approach insufficient.

[12] Kennedy 1985, p.245. Kennedy, one of the key figures in critical theory in international law, further notes that a critical approach aids in gaining distance from what he calls a possibility of "false "consciousness"".

Indeed, via using dialectics[13] and comparative analysis the thesis aims to show the gap between the "legendary" and the reality of the impact of international courts. As was noted above, this thesis takes it as a starting point that there exists a demand for this type of critically aspiring comparison and analysis. Within this critical approach, a historical analysis is necessary to provide the context in which international courts emerged as well as the roles they have been thought to fulfil. In addition, it should be noted that an underlying claim of the thesis is that mainstream explanations and assumptions on the roles and work of international courts are outdated. Therefore, theoretical and philosophical approaches are used in the deconstruction this thesis provides to approach the dichotomy between the actual and desired functions and roles of international courts. Finally, to deconstruct the framework in which international courts operate and what they provide appears as necessary if one seeks to question conventional legend-building narratives.[14]

[13] See Bianchi 2016, p.80-81. The dialectical method is applied in the thesis by analysing opposite possibilities, the "legendary" role of courts on one hand and their actual impact on the other.

[14] See Balkin 1987, p.762-763. He notes that "*the deconstructive critique reminds us that our social vision and system of laws are not based upon human nature as it really is, but rather upon an interpretation of human nature, a metaphor, a privileging. We do not experience the "presence" of human nature; we experience different versions of it in the stories we tell about what we are "really like." These stories are incomplete; they are metaphors and can be deconstructed*." Further, he asserts that "*Any social theory must emphasize some human values over others. Such categorizing necessarily involves a privileging, which in turn can be deconstructed*."

2. A historical context of the emergence of international courts: the legend-building narrative

2.1. Ensuring peace and developing international law

In order to begin to deconstruct the framework in which international courts operate and what they provide, the legend-building narratives referred to above need to first be established to form a point of reference. As was asserted in the introduction, these narratives are anchored to the emergence of international courts and the theoretical groundworks laid down at the time. Accordingly, in order to comprehend how international courts should be viewed and analysed, an understanding of their nature and the historical context of their emergence should be formed. Specifically, we should be interested in what international courts were meant to provide and how. This thesis would argue that this narrative developed through three distinct steps that are analysed below in the present chapter. Importantly, these three steps are connected to the phenomena that the thesis will focus on in the deconstruction: the type of justice international courts can and should produce; the democratic legitimacy vacuum in which international courts operate and the institutional effect of fragmentation on international courts.

First, it must be recognized that the existence of any international court is a relatively recent phenomenon. The first big push towards international courts can be argued to have been the experience of the *Alabama Claims* -case of 1872. The case was decided by the tribunal of arbitration that was established in Geneva by the Treaty of Washington of 8 May 1871.[15] The issue dealt with by the tribunal was a serious one, where Britain had been accused by the United States of violating its neutrality during the American Civil War, and where the case was further embedded in a context of open hostility.[16] Since the situation was thus immensely challenging and extreme consequences remained a possibility, the arbitration process can be asserted to have been a clear success. It showed the world that via dispute resolution by neutrally appointed jurists, an effective cause of war could be removed and a catastrophe avoided, even if at the losing side was the then "world's leading nation, in the plenitude of its power" that thus could have refused to submit itself to an external organ and

[15] Articles 1 and 2 of the Treaty of Washington.
[16] Bingham 2005, p.2-3.

its jurisdiction.[17] The process and the tribunal's work should be further celebrated as they were then used as a basis for subsequent conventions and international courts.[18]

There was thus growing demand for a permanent international court quite early on, pushed for notably by different peace movements.[19] However, the first court that fulfils this criterion was introduced to the world only in 1920, i.e. after the First World War, as the Statue of the Permanent Court of International Justice (PCIJ) was accepted on the 16th of December 1920 in accordance with the Covenant of the newly established League of Nations.[20] However, it also bears noting that a few years prior to its establishment, in the 1899 Hague Peace Conference held on the initiative of the Russian Czar Nicholas II, the Permanent Court of Arbitration (PCA) had been created with the signing of the Convention on the Pacific Settlement of International Disputes.[21] While the PCA itself was a step forward in international dispute resolution, it was "exceptional, consensual and *ad hoc*", thus serving more as a waypoint on the road towards "adjudication, as opposed to arbitration".[22]

There are a few notable observations for the purposes of this thesis that should be made on the apparent context of the emergence of the PCIJ and the PCA. First, they were both established at a time where there were great tensions in international relationships and, in the case of the PCIJ, the world had bared witness to what could happen if those disputes could not be solved via diplomacy or arbitration. The connection between upholding and facilitating an enduring peace by peaceful dispute resolution and the creation of an international court is thus apparent from the very beginning of the story of international courts.[23] We shall return in chapter three on to how much of the burden of providing justice to ensure peace should reasonably be expected to be shouldered by the courts. Here it suffices to note that the goals the establishment of an international court was meant to secure showed a great level of expectations. This part of the legend-building narrative on international courts appears as particularly compelling, as international courts are seen as capable of achieving peace by producing justice.

[17] Brower 2008, p.273-274 and Article 1 of the Treaty of Washington.
[18] Bingham 2005, p.24.
[19] See von Bogdandy – Venzke 2012, p.10-11. It is unfortunate that little research has been done on the goals of the promoters of judicial settlement, see Brower 2008, p.260.
[20] Article 1 of the Statute of the Permanent Court of International Justice
[21] Article 20 of the Convention on the Pacific Settlement of International Disputes
[22] Spiermann 2005, p.4.
[23] See notably the Preamble of the Convention on the Pacific Settlement of International Disputes. The parties note being "Animated by a strong desire to work for the maintenance of general peace".

Second, it is worthy to point out that the democratic legitimacy of an international court, an issue at the centre of this thesis' objects of interests, seems to have been questioned, if not using this exact term, already at the time of the international court's first appearance. Indeed, first efforts to establish such a court had ultimately failed notably because of a disagreement on the election of judges: smaller states had argued for equal representation, while stronger states tended to require them to have permanent representatives in the courts.[24] There were also questions on whether international disputes were best suited to be resolved in a court, as they often involved questions from the realm of politics and thus nation-states feared their sovereignty to become limited.[25] However, it was also recognized that an international court was needed to develop the body of international law, which had not been possible to do with the PCA.[26]

Albert de Lapradelle, a member of the Advisory Committee in charge of drafting the PCIJ's statute, noted that the underdevelopment of international law was the most important reason why it was necessary to discuss the representation of the court in different scenarios, claiming that if international law had attained "un haut degré de perfection", the court's composition would not matter.[27] Whether true or not, this shows how the problematic status of international law, namely its underdevelopment, was noted to affect the conceived legitimacy of the court. This is because, as we shall later see, in such a situation the interpretation process becomes more complicated and, regrettably from the perspective of a court's legitimacy, it is the court that has to develop law. In a similar vein, Lapradelle also recognized that if the PCIJ wished to be capable of guaranteeing international peace, it needed to do so in a manner that paid due attention to the form of legal decisions, which might mean a different focus would be necessary with different cultures, as not doing so would endanger the acceptance of its decisions.[28] Lord Phillimore, another member of the Advisory Committee, maintained that the most important factor in forming the court and its procedures should be to build a system that guarantees the acceptance of its decisions, and he further asserted that countries would have difficulties in accepting these decisions if they

[24] Brower 2008, p.279 and Spiermann 2005, p.5.
[25] Advisory Committee, Procès-verbaux, p.45.
[26] Brower 2008, p.282-287 and Spiermann 2005, p.5.
[27] Advisory Committee, Procès-verbaux, p.534.
[28] Ibid, p.535.

had no voice in the court.[29] It was thus recognized at the time that the underdevelopment of international law and law's connection to politics presented challenges to any international court, but also that special attention should be paid to the form of legal decisions as to guarantee their acceptance by the international audience.

It needs to be highlighted that the contemporary legal scholarship and theory appear to have provided unwavering support for the emerging model. Notably, e.g. through the works of Hans Kelsen and Manley O. Hudson, it was asserted that not only was the establishment of international courts the best way to develop international law, but the concerns of the lack of a legislative were to be dismissed.[30] This was due to the asserted priority of international courts, as well as an assumed sufficiency of legislation in form of treaties. Furthermore, it was believed that through international adjudication, the essential goal of enduring international peace could indeed be achieved.[31] To be sure, it would be hard to argue that an international court capable of guaranteeing world peace should not be created merely because of the absence of a global legislative. Still, it was claimed that the evolution of international law was likely a process of continuous centralization, as this had been observed to be true on the national level.[32] However, as shall be argued in the following chapters, these theories and the assumptions on which they were based do not accurately nor credibly describe the theoretical framework in which international courts operate. As will be also asserted extensively in the deconstruction executed in the next chapters, these theoretical misjudgements have consequences to the legitimacy and work of international courts. Nonetheless, from the above it can be reasonably asserted that international courts first emerged with two tasks in mind: ensuring an enduring peace and developing the body of international law.

2.2. Fighting impunity

As might be also deducted from the above discussion, it had initially been the prevailing opinion that matters relevant to international justice were those of relations between states.[33]

[29] Ibid, p.536.
[30] See notably Kelsen 1943, p.397, 399 and 401 and Hudson 1932, p.73-74 and 80-81.
[31] Kelsen 1943, p. 397.
[32] Ibid, p. 400.
[33] Advisory Committee, Procès-verbaux, p.203-216. Note however, on p.205, De Lapradelle's remark, where he notes that in some cases private citizens might denied of justice, and wonders whether on such occasions an international court procedure should be available to them.

However, as is well-known, the creation of the PCIJ did not prevent the horrors of the Second World War. For the narrative of international courts being capable of securing an enduring international peace, this was obviously quite the blow. In its wake, the international community and the Allied Powers felt the necessity to punish the Nazi leaders, whose crimes could not be pinpointed to a specific location.[34] To avoid impunity and to show the motivation of preventing such war crimes from ever happening again, a special tribunal was established: the Charter of the International Military Tribunal stipulated that the Tribunal's jurisdiction included allocating individual criminal responsibilities and punishing persons who qualified as "major war criminals".[35] While the so-called Nuremberg trials have been criticised as reflecting a type of victor's justice and being problematic with regards to the principle of *nulla poena sine lege*, they did promote the notion that individuals too could be relevant subjects of international law, and the trials also advanced the codification and development of international criminal law.[36] Already at the time, they were also thought to possibly "encourage the establishment of a permanent tribunal with a wider jurisdiction for the trial of such crimes […] not dealt with by national tribunals."[37] An added element thus appeared to the relation of international justice and international peace, namely the punishment of individuals guilty of the gravest crimes and the prevention of such crimes.

The Second World War and its immediate aftermath thus pushed forward the agenda of an international criminal court, and from 1948 the International Law Commission (ILC) was tasked to write a draft of a statute for such a court, which eventually culminated in the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998.[38] Moreover, the world saw the emergence of a number of ad hoc international criminal courts and tribunals.[39] At the heart of the ICC's operating model, however, was a new approach to the role of an international court: the signatory-states agreed to subject themselves and their nationals to the court's jurisdiction when their own domestic courts would be either "unwilling" or "unable" to operate.[40] Here, we can observe an already familiar resonance with the underlying goals of the ICC, as it was ultimately viewed to be a decisive step in putting "an end to impunity" and "thus to contribute to the prevention of such crimes", all

[34] Wright 1947, p.39.
[35] Article 6 of the Charter of the International Military Tribunal and Schick 1947, p.771-772.
[36] Schick 1947, p.793-794 and Teitel 2003, p.73.
[37] Wright 1947, p.42.
[38] Schabas 2007, p.5-8 and 21.
[39] See e.g. the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia.
[40] Schabas 2007, p.59-60 and Article 17 of the Rome Statute of the International Criminal Court.

the while "Recognizing that such grave crimes threaten the peace, security and well-being of the world".[41] The underlying goals of ad hoc-institutes and views on their ability to attain them show a similar narrative, where retributive justice is seen as a path towards peace.[42]

While the aforementioned goals must be considered laudable, notably the approach to the ICC's jurisdiction did come with resistance and legitimacy-related issues, which have continued until today as notably the United States is not a Party to the Rome Statute.[43] Amongst the perceived problems was that a universal jurisdiction was envisioned for the Court, and the compromise that Article 12 of the Rome Statute provided still reflects some of those problematic features. Notably, it includes in the Court's jurisdiction crimes committed by nationals of State Parties no matter where they are committed. The unwillingness of some states to submit their nationals to such a court even when its goals are laudable showcases why the democratic legitimacy of an international court matters. On the other hand, the Court's resources have also been deemed insufficient to achieve its goals.[44] We shall touch on this latter topic later on when discussing what goals an international court, such as the ICC, should aim for and through which means.

From our perspective, the tools of the court are thus also of relevance here. First, it should be noted that the ICC is a criminal court, and as such its focus is mostly in the use of retributive means, i.e. penalties. While this distinction may appear self-evident, we shall come back to it later when comparing the tools and goals of international courts, as it is questionable whether retributive justice can achieve those goals alone. Second, from the point of view of democratic legitimacy, it should be noted that in determining whether a specific act is a violation of international law that constitutes a crime, the ICC relies on a number of codified international laws. However, when it comes to measuring just sentences, the Court and its judges have very large freedom of consideration.[45] As we shall see in chapter three, this may lead to questionable results if perpetrators are dealt with differently depending on whether they are sentenced on the national or the international level.

[41] Burke-White 2008, p.53-54 and Preamble of the Rome Statute.
[42] See e.g. Resolution S/RES/808 (1993) of the United Nations' Security Council
[43] Schabas 2007, p.61-65 and A/CONF.183/SR.9, para 28.
[44] Burke-White 2008, p.59.
[45] Schabas 2007, p.312.

Having said that, from the above it can be asserted that this second phase of the development of international courts saw them take on an expanded role: in addition to safeguarding peace, international courts are seen to fight impunity and prevent major crimes from happening. The legend-building narrative would thus claim that peace is achieved via criminal courts and the retributive justice they provide. In chapter three this thesis will deconstruct the type of justice produced by an international court and the kind of results we should expect it to have. Notably, it will argue that the formula of justice and peace is more complicated than the legend-building narrative claims.

2.3. Globalization and the internationalisation of private relations: a functional fragmentation

Above we have briefly touched on how international courts initially emerged and started to expand their grasp on the field of public international law. Yet, while focus on the public was the starting point for international law itself, the world has observed the rise of court-like institutions simultaneously to the expansion of private international law. As with the institutions presented above, this phenomenon should be seen as part of the wider development of the world society, in this case namely globalization and the triumph of market capitalism. As everyday life evolved to have international connections, providing international legal forums to solve arising disputes between different parties has become essential. The "organized international pursuit of objectives of economic and social development" is a conscious effort that really began after the Second World War, and notably the phenomena related to decolonization, e.g. the contractual relations between private investors and under-developed countries, "transformed relationships formerly regarded as purely private into matters of public concern".[46] Friedman described this shift of focus as moving from the law of co-existence, emphasizing sovereignty and state-centrism, towards a law of co-operation, which in turn was concerned with general welfare.[47] It should be pointed out here that notably the inter-connectivity and contradiction between stakeholders' and nation-states' interests represent a strong argument against a strict differentiation of private and public law.

[46] Friedmann 1966, p.8-9.
[47] Ibid, p.10.

Consequently, as mentioned in the introduction, a key feature of the modern developments of the international courts' mandates is that they now cover many subjects previously thought to belong to the sole jurisdiction of states. There has thus been a transfer of power from the national to the international level, raising some concerns over the democratic legitimacy of such international institutions. Some of this transfer has occurred with the support of states, their willingness to take part in the internationalisation of private law caused by viewing it as necessary notably for economic stability and growth.[48] This has quickly brought a much greater variety of legal relationships and institutions to the realm of international law.[49] However, from the perspectives of democratic legitimacy and fragmentation, an observation made in the introduction should be reiterated here: there are also autonomous legal systems or regimes, with their own regulations and dispute-settlement mechanisms, that have no connection to states' will nor treaty law.[50]

In contrast to having no international rules and adjudication concerning economic relations and dealing with them on a nation-state level, "it is preferable to deal with single sets of rules that apply to *all* countries" because it considerably decreases costs related to compliance.[51] From this pragmatic or functionalistic perspective, by the internationalisation of law problems become more easily manageable. The expansion of international law is not only due to economic benefits, however. With the internationalisations of relations, "State law loses its capacity to respond to regulatory needs" because "the social space to be regulated is no longer identical with the political space of the state".[52] This holds true whether the issues in focus are environmental, business-related or otherwise cross the boundaries of nation-states. This is the reason that has led to a functional differentiation of the law, commonly referred to as fragmentation.

A key feature of this new era of international courts is thus the fragmentation of legal issues and regimes, which has, in turn, resulted in the proliferation of regime-specific courts. By fragmentation, legal issues and regimes have become more specific, and each one of these regimes speaks its own language and views the world from its own point of view. An illustrative example of a new court-like institution could be the World Trade Organization

[48] Fogel – Lipschutz 2002, p.115-116.
[49] Friedmann 1966, p.9-10.
[50] See e.g. Tuori 2014, p.23.
[51] Fogel – Lipschutz 2002, p.119.
[52] Tuori 2014, p.18.

(WTO) and its Dispute Settlement Body (DSB). DSB applies WTO law and decides whether it has been breached, and the Dispute Settlement Understanding demands that exclusively WTO mechanisms are used to seek redress with respect to the relevant agreements.[53] The way international law is applied within the WTO is emblematic to the symptoms of legal fragmentation. While it does apply "general" international law, it does so from WTO's own perspective, which is the promotion of free trade.[54]

Another example of an institution established due to globalisation, economic development and decolonization is the International Centre for Settlement of Investment Disputes (ICSID). The initial need for ICSID came from disputes between the under-developed states and foreign investors that emerged from the nationalisation of companies by host states.[55] On the one hand, a system was necessary where foreign investors felt protected enough to stimulate economic growth. On the other, the under-developed states were understandably concerned with their sovereignty. As in the case of the ICSID[56], the compromises of different interests are not always balanced in these fragmented regimes. This is because the new regimes are the results of stakeholders holding different amounts of political power.

However, as shall be later argued more extensively, fragmentation is also needed to represent different values and principles, as its facets are similar to what we see on a municipal level represented by different legal fields. This aids international courts to focus on their core task, as adjudication becomes more specialized. The problem is that on the international level, these regimes and their dispute resolution mechanisms act autonomously, without hierarchies or the control of a political legislative. Fragmentation and its implications to international courts shall be dealt with more in-depth in chapter five. Here it suffices to note that this "third phase" of the evolution of international court-like institutions is characterized by the functional fragmentation of international law, as international courts and different regimes serve the needs of a globalized international society. It is necessary to highlight that this third stage of the development of international courts proved Kelsen wrong in a key way: centralization was not the way the international system would develop.[57] This unseen

[53] See Article 23 of the Dispute Settlement Understanding
[54] Koskenniemi – Leino 2002, p.572.
[55] See e.g. Lowenfeld 2009.
[56] See ibid, p.49. The ICSID is an instrument of the World Bank in which industrial states hold "greater voice and greater vote".
[57] See Kelsen 1943, p. 400.

development will be argued to have done more than damage the theoretical framework for international courts as proposed by the legend-building narrative. Not only does it create power struggles, but it also emphasizes an asserted democratic legitimacy vacuum and affects the type of justice that an international court can and should provide.

2.4. Conclusions

While the above historical analysis is extremely condensed, it showcases the different purposes international courts have been tasked with and their theoretical underpinnings. Understanding their objectives and provenance is necessary before we can effectively analyse their current challenges and why the assumptions made at the time were wrong. Importantly, these beliefs and theories formed during the three steps of the development of international courts are what constitute the legend-building narrative.

The two initial specific functions of an international court were apparent: not only were they seen as a way of preventing war when states had disputes, they also were argued necessary to develop the body of international law in the absence of a legislative. The Second World War displayed the insufficiency of such a state-centric approach of guaranteeing peace through justice, which through the Nuremberg trials eventually led to the creation of a number of ad hoc-institutes and the ICC. Once again, the underlying goals of these institutions showed the connection between international justice and the ensuring of international peace, although this time with the medium of retributive justice and fighting impunity instead of dispute resolution. In addition, we finally noted how globalisation and the internationalisation of relations required a shift of focus from the national-level to the international one, with the consequence of functionally differentiated international legal regimes and their respective dispute-settlement mechanisms. Here the connections between international courts, justice and international peace became overshadowed with the functionalist view that different phenomena are simply more efficiently dealt with at the international level. The consequences of fragmentation and globalization have inherently changed the framework in which international courts operate, as shall be further discussed in chapter five.

The evolutionary tale of international courts presented above appears to provide a rather cohesive and understandable picture of their roles and place in the world. This is in essence

what the legend-building narrative would lead us to believe. However, as this thesis presupposes that this narrative does not reflect the reality of international courts, the thesis will next deconstruct this framework in which international courts operate and what they provide. The necessity for such a deconstruction can be perceived already. For instance, it appears that there have been some concerns on the democratic legitimacy of international courts from their emergence, an issue that seems on first observation to have remained static for the over centennial existence of international courts. As also noted, fragmentation and the proliferation of international courts have not occurred without posing challenges, and this development was not foreseen by the scholars who supported the establishment of the first international courts despite the lack of a global legislative. Furthermore, it is increasingly clear that international courts are no guarantee to international peace. As was asserted in the introduction, from the international courts' own perspective the potential impact of such a deconstruction should be highlighted, as it might pinpoint the facets that require attention and development to increase their legitimacy and impact.

However, before tackling international courts' democratic legitimacy or the effects of fragmentation on a general level, this thesis will attempt to display the discrepancy between what is conventionally expected from an international court and what it can actually provide. The legend-building narrative would argue that international courts produce peace through justice, whether it is the retributive justice of a criminal court or resolving disputes between two states. As such, the critical approach undertaken takes a more specific character in the form of an immanent critique.[58] This dichotomy between the goals and aptitudes of an international court will be approached through the concepts of micro and macro justice. To do so, the thesis will notably use the practical example of transitional justice. This is because the thesis asserts that transitional justice is, from the perspective of international courts, a concerning modern development that epitomizes many of the current challenges faced by international courts. Therefore, in the next chapter we shall take a closer look at why international courts have lost ground and appeal in one of their traditional contexts, namely that of the transitional society.

[58] See e.g. Stahl 2013 p.7. Immanent critique takes both an external and internal view of social practices and its members' self-understandings. As such, it aims at "a transformation of such practices that encompasses both actions and self-understandings."

3. Micro vs. macro: what should a court aim for?

3.1. The struggles of complex societal contexts for international courts

3.1.1. The traditional tools of international courts and the needs of transitional societies

From the historical analysis presented above, and based on the common knowledge shared by lawyers, it would be easy to claim that courts have clear functions to fulfil. This would be in line with the legend-building narrative. It appears, however, that international courts have been struggling with their identity and with the contents of what exactly they are bringing to the table, as will be attempted to show in the present chapter. This is, or so is argued by the present thesis, in large part due to the divergences between the expectations and the tools of international courts: while they were created to fulfil many macro-level goals, they are better suited for the micro. Transitional societies and transitional justice provide a practical and illustrative example of a status and usage of courts that, at least at first glance, seems startling. Next, the thesis will provide an analysis of the nature and limits of the justice provided by international courts and their work in a transitional context, focusing on the micro and macro results that an international court can reach. Finally, as these include some core traditional facets of international courts, general observations on the work of international courts will be attempted.

Transitional justice can be characterized as consisting of all "processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"[59], while a transitional society is a society in a transition from an oppressive and chaotic past to a peaceful and democratic future characterized by a political flux.[60] Examples of such societies illustrate the variety of challenges they face, as societies such as post-Second World War Germany, post-apartheid South Africa and many post-Cold War South-American countries qualify as transitional ones. The goals of transitional justice (ensuring accountability, serving justice and achieving societal reconciliation) thus have clear similarities to those of international courts (ending impunity, providing justice and maintaining an enduring peace). Further, transitional societies appear as particularly fragile and in need of efficient judicial institutions. As transitional situations thus appear as orthodox environments for international

[59] Report of the Secretary-General S/2004/616, p.4 para 8.
[60] See Teitel 2003.

courts to operate in, one would tend to assume that international courts would be particularly in demand and well suited for such purposes. As it turns out, however, the reality of transitional societies suggests in part otherwise, as another institution, namely the truth commission, has emerged in many cases as the most popular tool used by governments to achieve the goals of transitional justice.[61] The humiliation for the courts does not end here, as some of the truth commissions' explicit typical goals are right from the courts' traditional core responsibilities, including tasks such as truth-finding, ending impunity, ensuring the accountability of perpetrators and promoting reconciliation.[62]

The immediate question that comes to mind is why have truth commissions seemingly overtaken some of the justice-related responsibilities traditionally carried by courts? This thesis would argue that the answer lies in a shift of focus and needs of transitional societies compared to the tools and capabilities of courts. First, what we need to not overlook, is that there are different needs and perceptions of justice and truth that exist in every society. Moreover, the transitional context means that these concepts of truth and justice become messier, more complex and more contested than they would be in a normal situation. Further, while in a transitional society there are, as in any given society, individual demands for truth and justice as well, transitional justice's goals reflect an aim to provide justice and truth that would benefit the society as a whole. This is notably illustrated by the abovementioned goals of societal reconciliation and truth-finding.

It must be emphasized here that this shift of focus from an individual level to a wider societal one is the cause for many of the headaches for international courts. Here, the terms micro and macro justice[63] as well as micro and macro truth[64] used by scholars are particularly illuminating. Next, this thesis will try to showcase why courts are limited in providing the macro of both, an attribute that should reflect the goals they are to aim for in their work and their share of the burden in fulfilling them.

As mentioned above, with regards to truth and justice, both an individual perception (the micro) and a larger societal one (macro) exist. In different scenarios, fulfilling the needs of

[61] See Hayner 2011, p.20 and Barahona de Brito – Gonzalez-Enriquez, p.4-9.
[62] Hayner 2011, p.20.
[63] See e.g. Lillie – Janoff-Bullman 2007, p.222.
[64] See e.g. Chapman 2009, p.104-105.

either one or the other better achieves the set goals. For example, if societal reconciliation and justice for entire populations is pursued, as it is in the case of transitional justice and transitional societies, it would be naturally better served by fulfilling the requirements set by the justice of the larger unit, the macro. Accordingly, the historical macro truth of how and why events took place would take priority over that of the micro truth experienced by individuals. In contrast, if a crime has been committed and individuals have suffered because of it, the relevance of macro decreases, and the focus is turned to the micro, the individual.

At this point, the nature of courts and trials needs to be contemplated in the micro-macro framework described above. While the emergence of the ICC and ad hoc-tribunals has been celebrated as a sign of the end of impunity, the question remains, what is the value of the justice provided by these institutions to the macro, the larger society? We observed earlier in chapter two that the ICC, like any criminal court, has a limited set of tools in the sense that it relies mostly on retributive sentences. The question we should then ask is, what does the punishment of a few individuals who were part of an oppressive system do for the perhaps hundreds of thousands of victims? What does it do for the prospects of an enduring peace, the ultimate goal which international courts are asserted to serve? In addition, we should be interested in the kind of truth that courts are able to provide. Once again it should be highlighted that these questions are of great relevance because, as we saw at the beginning of this section, the goals of international courts reflect more the macro-levels of justice and truth, and retribution has no absolute position among those goals but rather an instrumental one.

Consequently, in a transitional context, it is apparent that retributive justice is not alone on the list of demands that societies have. At the heart of this issue is that in some instances, such as in the context of a transitional society, the balance between the requirements of truth and justice, especially retributive justice, might tip in favour of the truth. This has not always been the case and the movement towards replacing justice with truth has not occurred by accident,[65] which showcases well how international institutions have to adapt to the shifts in political and moral attitudes. The reasons for this movement are multiple, however, and some of them are worthy to highlight here as well as their consequences for an international court.

[65] Teitel 2003, p.75-78.

First, if you are part of an oppressed group of victims, the trials of individuals provide you with relatively little justice.[66] Overemphasizing the responsibility of a few individuals might even blur the systemic and institutionalized nature of the oppression that has taken place. Instead, uncovering the truth and recognizing the suffering of victims, followed by appropriate remedies, hits closer to what victims and societies need.[67] Second, in the context of transitional societies, there are often innumerable crimes that have been committed, putting the judicial system under insurmountable stress and making it impractical to focus on retributive justice.[68] Third, the process of transition is not immediate, and institutions often operate in a context where major perpetrators still hold some serious political power, which makes the prospect of trials complex and potentially harmful to the goal of peace.[69] The question then becomes, should we favour peace or retributive justice, if they are at odds against each other? Further, it appears that securing a level of cooperation with the perpetrators is necessary to uncover the truth and achieve the goals of transitional justice, and this co-operation might be dependent on incentives.[70] Finally, it is increasingly apparent that other forms of justice, such as distributive justice, are in dire need in addition to retributive justice to promote enduring peace.[71] We shall return to this last observation later. Here it suffices to note that all these challenges have led to the substitution of focus from retributive justice to peace, truth and other forms of justice.

As the sufficiency and emphasis of retributive justice has thus been understandably questioned, some have looked elsewhere for the answer of what courts are actually providing for societies and individuals.[72] Instead of focusing on the retributive sentence pronounced by the court, the process' ability to lay out the truth and thus permit the healing process' beginning for the victims has been highlighted. However, it is questionable whether the courts fare well enough in this aspect with regards to the needs of transitional societies or similar complex contexts that require a macro truth to be produced. As Koskenniemi and others have observed, courts are always limited in their work to legal truth as opposed to a historical truth, and are thus incapable of painting a complete picture of the truth concerning

[66] Muvingi 2009, p.165.
[67] Hayner 2011, p.20-24 and 163.
[68] See, however, Schabas 2005, p.882. Although the number of perpetrators is a staggering one-third of Rwanda's population, the authorities persisted on holding every single perpetrator accountable and the approach of gacaca-courts was chosen.
[69] Elster 2012, p.82.
[70] Ibid, p.90-92.
[71] Ibid, p.94.
[72] Koskenniemi 2002, p.3-4.

the occurred atrocities and grasping the political realities behind them.[73] Here we find a part of the answer on the emergence of truth commissions to the detriment of courts: they fare much better in building a complete image of the society in which the crimes and continuous exploitation occurred.[74] Since this is what transitional societies are in need of, they have begun turning to truth commissions instead of courts.

If we accept as a starting point, and we should, that courts paint an incomplete historical picture of events, the prospect of upholding the notion that they do construct a larger truth and path forward needed by a society becomes problematic beyond being incomplete. Overemphasizing what occurs on a court's floor ignores the fact that it is exposed to narratives that have subjective facets and thus are not beneficial to the goals of transitional justice. This happens because the process is adversarial, where two opposite forces, the accused and the prosecutor, are presenting their interpretation of the facts and events. It is a requirement of a fair trial that the accused can present their defence, but at the same time, it does mean that the truth presented by the prosecutor, and perhaps eventually by the court, is challenged.[75] For the purposes of societal reconciliation, this is problematic as putting a spotlight on the "truth" emerging from the procedures of a trial may allow perpetrators to promote alternative truths that are detrimental to reconciliation and peace.

Unfortunately, it appears that for courts there are limited ways around this dilemma. To monopolize the truth and equating the historical with the legal truth would require the courts to effectively silence opposite voices. Then again, should the accused not be allowed to provide their alternative truths and therefore defence, the court's floor would be rendered to, as Koskenniemi calls it, a show trial.[76] While apparently for Koskenniemi the historical truth-show trial dichotomy is a paradox for a court to potentially partly solve, this thesis would argue that it is something else. The apparent impossibility for a court to provide something more than a legal truth of criminal responsibility while respecting the requirements of a fair trial is nothing more, nothing less, than an indisputable indication that courts should not wander to the realm of historical truth. Court procedures may distort, or at the very least accent, the reality or truth in either direction, that of the accused or the

[73] Ibid, p.11-14 and Roht-Arriaza 2001, p.60.
[74] Hayner 2011, p.20-21 and Koskenniemi 2002, p.11-12.
[75] Koskenniemi 2002, p.35
[76] Ibid, p.35

prosecutor, depending on the audience. In addition, as the focus is the criminal responsibility of the accused, courts naturally cannot appropriately judge the context in which the crimes took place and the necessary actions to be taken. For a society that needs to know how and what happened in order to move forward, this is naturally insufficient.

It thus seems that courts should be limited to providing a micro or legal truth in order to maximize their legitimacy. However, it must be upheld that trials of major perpetrators are beneficial if they are convicted and the trials are able to strengthen and confirm the values of the new society, thus aiding to formulate a path forward and confirm the rule of law. Arguably, these trials are also paramount to establish trust in the institutions of the transitional society in question.[77] It is important to note, however, that this advantage appears to be exclusive to local courts. International courts are often distant, both physically and conceptually, of the local society, and their rulings can thus have no similar ability to confirm the values and morals of the new society, helping to build the future. Quite the contrary, as it appears that local societies tend to express mistrust in the decisions made in foreign courts by foreign judges.[78] This is connected to the democratic legitimacy vacuum that this thesis argues affects international courts on a general level and is a direct expression of its consequences, which will be discussed in further detail in the next chapter. International courts also miss the mark on "the idea of a community governing *itself* under law" inherent in the rule of law principle, thus ignoring the negative impacts of law imposed from outside of a community.[79] It thus is apparent that the healing should come from within the societies themselves, as otherwise the empowering facets of the trials are lost.

Then again, laying the blame on major perpetrators rather than the masses may be seen as a way to allow reconciliation to happen. It would also counter some of the criticism of criminal trials, which claims they are limited in observing how the general conditions, the macro if you will, affected the margins of individual moral choice of lesser perpetrators.[80] However, if the institutional and collective responsibilities are not deciphered and brought forward in a manner that is accepted by the relevant audience, the critical goal of preventing the same from happening again becomes compromised. While these are not necessarily mutually

[77] See Teitel 2003, p.76-77. Trials by the nation-state are to be understood as part of the nation-building idea that became intrinsic to transitional justice.
[78] Roht-Arriaza 2001, p.57-58.
[79] Llewelyn – Howse 1999, p.360.
[80] Ibid, p.361.

exclusive, this should nonetheless be a conscious balancing act of the micro and macro needs that yields different results in different contexts. Based on the analysis above, however, this balancing act between the micro and macro appears as being out of the realm of possibilities for a court.

3.1.2. Focusing on other forms of justice?

Above it has been argued that courts are limited to providing a legal truth in their work in contrast to a historical one. Similarly, it was asserted that retributive justice, the traditional tool of courts, provides little justice to the macro. Then again, it was asserted that the traditional goals and expectations of international courts rely on the macro truth and justice to be achieved. It should be noted, however, that there are other forms of justice required by transitional societies which do benefit the macro in a more satisfying manner. These include distributive justice, which concerns the just allocation of resources, and restorative justice, which focuses on restoring or establishing a society based on equality. The question for international courts then becomes, could they provide these other forms of justice instead or in addition to retributive justice?

Scholars have notably noted, for example Ismael Muvingi in the case of Zimbabwe, that reaching permanent peace is impossible without the inclusion of distributive justice and that the possibility of societal eruption always exists without it.[81] While to Muvingi the punishing of perpetrators by notably international courts appears thus as an important step toward peace and justice, the fact remains that retributive justice does not correct the long-term socioeconomical exploitation that has taken place.[82] As Jon Elster eloquently summarizes it, "Policies that only address the *effects of conflict* without also considering the *causes of conflict* may fail dismally".[83] It is important to point out here that oppressive regimes cannot be dwarfed into just political oppression, they also entail marginalization with long-term effects. Going back to the terms of micro and macro truth, what is essential to note is that international courts are incapable of treating the socioeconomic factors of a transitional society, the *causes of conflict*, in a satisfactory manner when determining criminal accountability. The reason for this is apparent: if constructing the macro truth is not possible, it naturally ensues that producing appropriate justice required by that truth cannot be done

[81] Muvingi 2009, p.163-164.
[82] Ibid, p.165.
[83] Elster 2012, p.80.

either. Further, from the perspective of democratic legitimacy, if the condition for the absence of conflict is a just peace, it is a deeply political concept, and as such should not be left for an international court to produce.

On a similar note, the notion of retributive justice, as produced by courts, being the ideal form of justice has been questioned by scholars, and focusing on restorative justice has been proposed instead for some time already.[84] This view stems from similar observations to the above of the limits of both international and national criminal trials, and questions of whether the goals of criminal trials can be better achieved by changing the approach and using truth commissions.[85] While it is not the exact vocabulary used, it is clear that these approaches require the macro to be taken into focus, all the while asserting that courts are not capable of doing so. Further, the very flexibility of the requirements of restorative justice, which includes individual, communal and institutional levels and the ambiguous idea of equality, showcases how its focus differs from that of the retributive justice practiced by courts.[86] Here too, the political connotations of the justice required seem to mean that it should not be left for an international court to produce. These different considerations have moved a long way from the older view, as expressed for example by Hans Kelsen when discussing the need for international courts, according to which "It is not true that war is the consequence of unsatisfactory economic conditions".[87] It is rather evident that the context of transitional societies provides an illustrative example of how a strict separation between the public and the private in international law and in our understanding of conflicts is not pragmatic nor recommendable. However, this appears to complicate the task for international courts: peace cannot be achieved by the type of justice they provide alone, even though it is claimed by the legend-building narrative.

Finally, before going on to rethinking the role of international courts, one positive facet of the international court concerning macro justice should be brought up. While based on the above a general critique of courts could be that they are inclined to only provide micro justice, this does not always seem to be a fair description. This problem is once again related to the lacking legislative in international law. When international courts make decisions,

[84] Llewelyn – Howse 1999, p.355-357.
[85] Ibid, p.365.
[86] Ibid, p.373-74.
[87] Kelsen 1943, p.398.

they are able to advance the ideas of justice on an international level, possibly filling important vacuums. In practice, this means that general ideas that are not too strictly related to the specifics of a case travel, which might, in turn, end up benefitting the macro, even if the direct impact of a court's specific ruling does little to it. However, it might not be appropriate to overemphasize international courts as an ideal lieu for the discussion and promulgation of general ideas of law, as from the analysis above it remains clear that they are always constrained by the case at hand and cannot take the macro widely enough into consideration. It is also apparent that for transitional societies, the requirements of justice, peace and truth appear as inherently contextual, so claims of general truths should be approached with caution. This norm-creating facet of international courts shall be further discussed in chapter four.

3.2. Rethinking the goals and roles of international courts in the context of complex societies: what should international courts do?

3.2.1. A continuous need for international courts

Above a picture of the international court in the context of a transitional society is presented that does not seem flattering. We saw that courts have strong competition in the form of other institutions and that the benefits of trials appear to be closely linked to the institutions of the nation-state in transition. In addition, the international courts' main tool of retributive justice does not seem to satisfy societies most in need of justice, and the other forms of justice appear to elude the courts. As for their ability to produce a truth during their proceedings, while they fare well in producing a legal or micro truth, their ability to provide a much-needed macro truth appears to the very least questionable. As has been asserted, these truths, micro and macro, differ in nature as well as in their benefit to the transitional society. It thus seems that the formula proposed by the legend-building narrative is inaccurate. Below this thesis will attempt to propose alternative ways of framing the goals and roles of international courts, with the object of providing a more realistic overview of their share of the burden in ending impunity, achieving peace, providing justice and other macro-level goals. Attention will also be given to the concrete benefits of international courts that might be overlooked in a critical analysis.

First, it must be noted that it would be naïve to conclude from the above that in the case of transitional societies, the answer is simply to rely on local courts and other institutions. As

noted above, the local conditions are often such that its institutions are simply not up to the task. For one, it is not uncommon that some elements of the previous regime still hold substantial political power that prevents trying them in local courts.[88] Second, as described earlier, unfortunately transitional societies are also often submerged under an incalculable number of victims and cases, which, combined with often scarce resources, makes trying each of those cases in local courts in a satisfactory manner not only impractical but impossible. These observations would all point us to the unsurprising conclusion that there is a need for international courts to play a role in certain transitional situations.

The question then is not whether international courts should play a role, but rather what that role is. While it is undoubted that ending impunity on a global scale is in itself a noble cause, due to the other needs present notably in the case of transitional societies, a costs-benefits type of assessment should be made in the case of each society. What are the ultimate goals the judicial system is to serve, and which institutions better serve the reaching of these goals? Is ending impunity only a value in itself, or does it not ultimately serve the value of an enduring peace? While the exact answer to the efficient roles of institutions and specifically international courts appears to be a contextual issue, some common denominators can be found.

First, the obvious observation that international courts aren't the only relevant actors needs to be reconsidered, and we should reject the idea of one type of institution being the ultimate answer for the complex issues that, for example, transitional societies are dealing with. As can be seen from the analysis done in section 3.1, notably both national courts and truth commissions have a role to play. We should also note that *both* the micro and macro need to be considered to efficiently serve the needs of a transitional society and to achieve the goals of international courts. If we have different tools that fit different needs, they need not be mutually exclusive, but should rather all be utilized to make the system as efficient as possible. On this note, Priscilla Hayner has argued that due to the needed momentum and long-lasting procedures, courts and truth commissions cannot work in sequences but need to be used simultaneously.[89] Similarly to the utilization of both courts and other types of institutions, where international courts and local courts operate simultaneously, cooperation is necessary to increase the acceptance of the work of both. The Rwandan example shows

[88] Roht-Arriaza 2001, p.55-56.
[89] Hayner 2011, p.111.

that this is not self-evident, as it was found problematic that local courts treating smaller perpetrators faced even death penalties, while the ICTR would sentence leaders and major perpetrators to lesser penalties in better conditions.[90] While processes on several levels of both national and international courts may appear as necessary, the dangers of a lacking cohesion between the two are apparent. The challenge thus appears as using different tools in a manner that prevents them from undermining each other because otherwise the legitimacy of both the local and international courts becomes compromised. This part of the challenge of fragmentation and proliferation of courts will be discussed more in-depth later on. International courts are also in many cases dependent on the collaboration of local communities or e.g. the armed forces of the international community, for example in apprehending perpetrators, which means that they need the support and approval of states in order to be efficient.[91]

As was mentioned earlier, some have suggested that we need to move away from putting retribution and international courts on a pedestal, and focus on seemingly more impactful types of justices instead. While the idea of promoting other forms of justice and questioning the impact of retributive justice is understandable, some of the criticism seems to be misplaced. For example, Llewelyn and Howse have argued for a radical change of our perception of justice away from retribution.[92] These kinds of approaches fail to recognize that, especially in a context where perpetrators have committed abominable acts, there is a tangible value in retributive justice besides its innate function of vengeance on those that have committed terrible acts. It follows that retributive justice should not be juxtaposed with the reintegration of perpetrators and victims as done by Llewelyn and Howse.[93]

Let us elaborate on the above. As asserted, for any international court it appears that determining their ideal role is a deeply contextual issue. While for some countries truth and restoration may be the best way forward and thus suggest a limited role for courts, in others, such as the Balkans and Rwanda, it has been noted that impunity has been a key factor in the creation of new cycles of violence, thus equating to a "serious impediment to

[90] Roht-Arriaza 2001, p.59.
[91] Ibid, p.56-57.
[92] Llewelyn – Howse 1999, p.356-357. See also p.358, where the writers also assert that intellectual elites have imposed the criminal prosecution-model on other societies, such as the Balkans and Rwanda, and harshly criticize their usefulness.
[93] Ibid, p.379.

democratization".[94] In this kind of context, the retributive justice provided by international courts can prove to be of decisive importance. Instead of surrendering ourselves to one type of justice, we need to add layers to it and stop asserting that impactful justice is a simple construct. It is interesting to note that the criticism of international courts and retributive justice seems to often stem from a contempt of imposing western value-systems and ignoring local conditions,[95] yet this type of criticism falls on its own sword when it argues for a new kind of universally beneficial justice, in this case restorative justice, and ignores the benefits of retributive justice to local societies.

Indeed, while the balancing act of truth, peace and justice might in some instances suggest that the first two need to be taken better into account than has been done in the past, it does not mean that this should be done at the complete expense of justice, nor even retributive justice or international courts. There is a clear demand for retributive justice, independent from the somewhat universal moral argument stating that the impunity of major perpetrators is intolerable. It is possible to equate retribution at least to some extent with justice, and thus argue that without convictions proper closure can never be found. Notably, psychological studies have suggested that while for example monetary compensations can ease the lessened or lacking retributive justice, they cannot replace it and that on the contrary, to reduce retributive desires retributive justice is needed as well.[96] If retributive desires are not met on some level, the danger is a reignition of hostilities.[97] An important finding for the purposes of transitional justice is that while the individualization of guilt through punishment by courts is necessary for peace and reconciliation, it appears that at least in some contexts even "lenient punishments" suffice to do so.[98] The need for individualization of guilt is best explained by a contrast: if individuals are not punished, guilt becomes collectivized, which can then bring about bitterness, disappointment and even violence.[99] This is important for transitional societies because lenient punishments are easier to achieve in a transitional situation where perpetrators still hold power and simultaneously, from a moral and legal point of view, they are more acceptable than amnesties or non-prosecution.

[94] Roht-Arriaza 2001, p.56.
[95] See e.g. Llewelyn – Howse 1999, p.358.
[96] See e.g. David – Choi 2009, p.188-189.
[97] Ibid, p.161-162.
[98] Ibid, p.189.
[99] Ibid, p.183 and 189.

Further, it is also apparent that truth cannot completely replace justice, whatever its form, which is why truth commissions are in dire need of support should they fail to provide justice, such as restorative and distributive, in addition to truth. As a reminder, the highlighting of truth instead of retributive justice is done in order to secure peace.[100] However, we noted above that at least in the case of some societies, impunity and the lack of retributive justice have been major causes of the cycle of violence. It would then be intellectually incoherent to abandon retribution if it does not actually produce the sought effects. Again, it seems that international courts should play a part in transitional societies of the future, especially when national courts are not capable of providing the retributive justice required.

3.2.2. The example of the ICC on necessary macro considerations

The ICC has brought key new elements and values for transitional societies in comparison to ad hoc-tribunals. First, the mere existence of the ICC had at the outset been argued to increase the quality of investigation and prosecution in local courts.[101] The idea is that states would want to avoid their nationals being prosecuted in a foreign court, which would require for the national courts to prosecute where appropriate with a respect to due process. However, an interesting question is whether the balance of peace and justice yields the same results in nation-states and the ICC and if it doesn't, how does the ICC react? At the heart of this dilemma is the assertion that ending impunity is not only a value in itself, but it serves notably the goal of peace as well. As noted, the ICC's jurisdiction is complimentary and only kicks in when local courts are either incapable or unwilling to prosecute. At the time of the emergence of the ICC, e.g. the question of amnesty was left unanswered.[102]

Today, it is generally accepted that amnesties or immunities, at least to major perpetrators, will not be respected by the ICC.[103] However, in between amnesty and long-term imprisonment, there are different approaches possible which leave room for interpretation for the ICC. There are conflicting arguments to take into consideration in that interpretation. First, there exists a duty to punish perpetrators of grave crimes. Second, a successful conviction might in fact accelerate a transition because it would signal the condemnation of

[100] See e.g. Hayner 2011, p.111-112. The ICTY and its procedures didn't appear to change the fact that different versions of the roots of the conflict were taught, which was feared to potentially incite violence.
[101] Roht-Arriaza 2001, p.61.
[102] Hayner 2011, p.110.
[103] Ibid, p.115-116.

the old regime by the international community, and it isn't thus evident that prosecutions would only prolong such transitions. There is thus inherent value in condemning criminals in an international court. Further, overemphasizing restorative justice puts no limits to impunity, which appears intolerable. However, opposite arguments appear as equally convincing. Restorative approaches appear as having a long-term way of looking at justice and peace, at the centre of which is a prosperous nation. Still, in situations where local communities prefer to accelerate the peace process at the partial expense of retributive justice, should an international court have a moral right for retribution nonetheless? To ensure the perceived legitimacy and fairness of the ICC, this thesis would argue that the latter arguments need to be properly taken into account. The focus should not be only on the perpetrators, but on the relevant society and its needs. Then again, from the perspective of the ICC's legitimacy, could perpetrators of the same kind of act be treated differently based on the societal conditions and needs of the nations where those acts were committed? The variety of arguments to consider illustrates the complexity of the ICC's task. It is also illustrative of the theoretical complexity of an international court's task when macro considerations are taken into account. If, however, the goals of the ICC are taken seriously, including macro-level considerations appears as necessary to enhance its impact and legitimacy.

3.2.3. Conclusion on the role of international courts in transitional contexts

The goals of transitional justice and international courts are concrete and thus their achievements can be observed. To that end, the analysis that has been done here is based on the instrumental value of the justice and work of courts to achieve those goals. Because of the grandeur of those goals, the instrumental value might appear overly weak. On that note, Naomi Roht-Arriaza has noted that the conceived failures in Rwanda and Bosnia might be linked to the grand expectations, rather than the work of the courts themselves.[104] In other words, international courts should be not be expected to reach macro justice, macro truth or peace alone, or they are doomed to fail. However, it should also be noted that this sort of comparison might appear to be unfair in other ways as well, as there is an intrinsic value in condemning perpetrators of heinous crimes, signalling that the world will tolerate oppressive systems no longer.[105] Nevertheless, as transitional justice has turned the corner on merely

[104] Roht-Arriaza 2001, p.59-60.
[105] On the difference between intrinsic value and instrumental value of justice, see e.g. Elster 2012, p.80.

seeking to promote individual criminal accountability to notably achieving peace, the insufficiency of courts in doing so is now apparent.[106]

Based on the analysis above, at least in the case of a transitional society where we place societal reconciliation, peace and the future at the top of our goals, it would seem that the role of international courts should be a limited supporting one: to determine the individual criminal responsibility of key perpetrators. While the justice provided by the courts may not be complete, this micro justice appears as nonetheless essential. There is inherent value in condemning criminals by the international community, but the way it is framed is key. Reaching for more, namely macro justice and truth, may be counterproductive, turning the court's floor into a show trial and risking the acceptance of its decision. Burdening international courts with unattainable macro-level expectations also sets them up to fail in the eyes of local societies. At the same time, it seems clear that the movement away from retributive justice and international courts towards truth commissions has partly overlooked the value of retributive justice, micro justice and international courts to the goals of transitional justice and societies, while simultaneously overestimated the impact of other institutions.

While this sort of analysis has a clear critical objective and result, it is important to note that to lay out how international courts actually fare in reaching their goals in transitional contexts is necessary because these contexts are linked to the reasons why international courts originally emerged. Placing excessive weight on them in the pursuit of sustainable peace for example is problematic if it means that the other more efficient ways of reaching those macro-level goals are then ignored. It is also arguably beneficial for courts themselves if they are not overburdened in the completion of different goals because they can then focus on the core of their work, micro justice and truth, without the added pressure. As an illustrative example, by promoting and understanding phenomena such as distributive and restorative justice and their importance to preventing new cycles of violence, the deterrent and retributive facets of international criminal trials do not have to shoulder the prevention of atrocities alone.

[106] Teitel 2003, p.80.

Finally, fighting impunity is, based on the above analysis, without a doubt necessary for peace, but it is no guarantee of it. With reference to the historical development of transitional justice, its goals and the deserved criticism previous arrangements have generated, it appears that to be efficient and supportive of democratization and the rule of law, a major challenge for international courts and transitional societies will be recognizing the nuances of the local requirements, the micro and the macro. It is increasingly evident that for turbulent societies, there is no one solution as to what the exact role of international courts should be, but it is apparent that that role should be mostly limited in providing micro justice and truth, as this is what they fare best in. Next, in the final section of this chapter, some general remarks on the challenges of international courts based on the observations made thus far shall be discussed.

3.3. Final remarks on micro and macro justice

The understanding and usage of the concepts of micro and macro justice are useful beyond the specific context of a transitional society. If the goal of any international court is for example to ensure a continuous global peace or any other such broad macro-level goal, surely ensuring justice to the macro would serve this purpose the best. As was shown extensively in chapter two of this thesis, international courts have not only been burdened with such immense goals, they were initially created to be the key institutions in achieving them. It would then ensue that these goals require forms of macro justice, such as restitutive and distributive justice, to be attained by international courts. As it stands, however, or so it has been asserted, providing macro justice or truth has not been the strong suit of international courts. It thus appears that the legend-building narrative creates unrealistic expectations for international courts. If we accept these assertions, there are two plausible paths forward. Either the goals we view international courts to have should be revisited, or the arsenal of their mandates should be expanded to cover the macro elements required. As other institutions have been shown to fare better in this aspect and the elements of macro justice have a stark political connotation, this thesis would argue that this means that we should not expect too much macro justice from international courts, especially due to their lacking democratic legitimacy. As history has repeatedly shown, the existence of effective international courts cannot in itself prevent the potential of a crisis created by bad policies or societal realities.

Additionally, burdening international courts with the reaching of macro justice and truth appears as potentially detrimental to their legitimacy and impact. Transnational justice and the emergence of truth commissions represent well the causes behind fragmentation and the proliferation of court-like institutions, to which we shall return later on. Here, it suffices to point out that when traditional institutions and fields of law are not able to answer the problems societies face all the while claiming to be the ultimate solutions, relevant actors will find new ones to replace them. As Koskenniemi and Leino note, "Special regimes and new organs are parts of an attempt to advance beyond the political present that in one way or another has been revealed unsatisfactory."[107] For existing international courts, the continuous struggle will thus be to remain relevant, that is to prove their value for relevant actors. One should add that this might mean, as the concepts of micro and macro justice show us, that they need to pick their battles well and recognize where other institutions might better serve the goals that need to be achieved. However, while it appears from the above analysis that no black and white truth exist, if the goals of international courts reflect more the idea of benefitting the macro, but their tools are better suited for the micro, either one or the other should be reconfigured. For international courts, the risks of ignoring this issue and a persisting ambiguity are apparent in the analysis made in this chapter: transitional societies have already started to turn towards other institutions. The immanent critique applied in this chapter thus portrays some reasons for recalibrating both the self-understandings and actions of international courts concerning the justice they can and should produce. In the next chapter, this thesis will notably attempt to show more in-depth how the micro-macro facets of international courts are connected to the democratic legitimacy vacuum in which they operate.

[107] Koskenniemi – Leino 2002, p.578.

4. The democratic legitimacy vacuum in which international courts operate

4.1. Separation of powers as a benchmark

In the above chapter, the limitations of international courts in relation to providing macro justice and truth were discussed. For the legitimacy of international courts, these observations are of relevance in two key ways. First, their suitability as lawmakers appears questionable. Secondly, a potential defence that underlines their laudable macro-level goals as a reason to look past any democratic legitimacy issue becomes unjustified. In this chapter, the democratic legitimacy vacuum in which this thesis argues international courts operate will be discussed in further detail. The subject is of key importance for international courts, as problems relating to their legitimacy may naturally hinder their impact and thus the reaching of any goals they have.

To understand the vacuum, some basic notions of political theory need to be discussed first. Normally, in a democratic society, we are accustomed to observing different branches of government serve different functions. The roots of this idea, which is called the separation of powers, are in distant history and it is what we view today as the normal mode of governance.[108] With that said, there is still today constant discussion on what the doctrine means in practical and particular situations and it has different manifestations in different contexts.[109] However, on a general note it can be said that from the publication of Montesquieu's "De l'Esprit des Loix", this separation of powers has taken the three-dimensional form we recognize in today's societies, where the legislative, the judiciary and the executive are respectively separated.[110] The necessity of this separation is evident when we consider the alternative form of governance: if this separation would not be observed in a modern nation-state but the same institution or person would hold multiple forms and functions of power, we would be quick to judge it a tyranny and incompatible with the concepts of democracy, legitimacy and liberty.[111] For a free and democratic society, the separation of powers appears thus as indispensable.

[108] Vile 1998, p.23.
[109] Ibid, p.23. For an example of the doctrine in action, see Vile 1998, p.193-232.
[110] Ibid, p.94-97.
[111] For a "pure doctrine" on the concept of separation of powers which the writer considers a "benchmark", see ibid, p.14.

Next, this thesis will attempt to show that this separation is not followed on the international level and that it poses great difficulties for the legitimacy, work and impact of international courts. First, an overview of the current situation is presented along with typical arguments defending it. The thesis will argue that these defences cannot be considered satisfactory, especially due to the elapsed time since the establishment of international courts. Then the challenges the persisting situation poses to the decision-making of international courts will be discussed. Finally, possible consequences the situation causes will be analysed and future developments proposed.

4.2. A long persisting problem

4.2.1. The vacuum and its counter-arguments

Compared to the description of the separation of powers above, when we expand our gaze from the nation-state, the picture changes. On the international level, we quickly note that the logic of the separation of powers as presented is not followed. While international courts exist and they apply international law, they have no similar opposite force that fills the function of the legislative as on the nation-state level. On a practical note, this means that they do not have a democratically elected opposite force that could intervene when norms and interpretations are moving towards an unwarranted direction. Instead, on the international level courts act without their legislative counterpart. The problem can be made further apparent by considering what happens to the vacuum left by the lacking legislative: courts act as both adjudicator and norm-creator.[112] What is important to note here is that from the historical analysis presented in the introduction, it was shown that this norm-creating facet of an international court was in fact a key reason in the felt need to create such a court in the first place.[113] We should thus not be surprised that, indeed, international courts do make law. Nonetheless, at first glance it would thus appear that international courts operate in a democratic legitimacy vacuum.

Despite the assertion above, there are naturally arguments that can be put forward to question whether international courts actually suffer from a democratic legitimacy deficiency. For instance, it could be argued that because there is no real enforcer on the international level, the impact of any problem in their democratic legitimacy is minimal. While strictly speaking

[112] von Bogdandy – Venzke 2012, p.13-14 and 19-21.
[113] Brower 2008, p.282-287 and Spiermann 2005, p.5.

there is indeed no global enforcer, it does not mean that there would be a substantial difference in the enforcement of the decisions of international courts compared to the courts of nation-states. First, while there is no global enforcer, this does not mean that the decisions of international courts are not enforced. For example in the case of the ICC, States Parties are obliged to assist and co-operate with the court, but should they not show willingness to have the sentenced individuals serve the sentence in their own prisons, the sentence is served in the Netherlands.[114] Second, even without an enforcer, international courts decide on the rights and transgressions of different actors, which de facto affects the legal or factual positions of these actors.[115] The actual difference between the impact of international and local courts appears as narrow, thus failing to convince us to ignore any issues of democratic legitimacy affecting the first.

However, one could argue on the contrary that the fact that international courts' decisions are widely implemented, accepted and supported by states means that there is no problem in the courts' legitimacy, rendering questioning their democratic legitimacy to a futile theoretical exercise. This claim would be connected to a traditional explanation of the authority of international courts, which suggests that there is no democratic legitimacy problem to begin with, as consent is flown from states and their legislatives, which themselves have been democratically elected. However, as others have noted, this or any other similar counter-argument can no longer be considered satisfactory.[116] This traditional defence and its weaknesses nonetheless deserve some attention.

To understand the problem in this last counter-argument above, let us consider the way local legislatives participate in the processes concerning international law. This can be approached from at least two relevant angles: 1) the creation of international treaty-based law and 2) the establishment and work of international courts. On the first point, it could be asserted that the control via democratic representation in the negotiations of international agreements is a limited one. It has been convincingly shown by others that national parliaments' positions during the negotiations of an international treaty can be weak.[117] This is because compared to national legislation, they rely much on the work of the executive, different experts and an

[114] Schabas 2007, p.320-321 and article 86 of the Rome Statute.
[115] von Bogdandy – Venzke 2012, p.18.
[116] Ibid, p.8.
[117] Ibid, p.20.

insider-elite, thus lacking information and the possibility to actively participate.[118] Further, international agreements are typically formulated in vague terms to enhance the possibility of a political consensus.[119] One might also add that international power politics may also present situations, especially for smaller and poorer nations, where the political ammunition to affect the content of a treaty appears as limited.[120]

In addition to this negotiation phase, we need to consider the period after the treaty has been adopted. It has been pointed out, notably by von Bogdandy and Venzke, that after a treaty becomes binding, it is out of the hands of the national parliaments.[121] The idea behind this observation is that from that point on, the existence and contents of such a treaty are to be determined by courts. This is naturally enforced by the above observation according to which international arguments are drafted in vague terms. Once again, this complete transfer to the realm of courts can be argued to be caused by the lacking legislative counterpart, and von Bogdandy and Venzke emphasize that the effect is further enforced by the unrealism of treaty withdrawal.[122] One should however point out that, while difficult, it is still possible to both renegotiate and withdraw from many international agreements, as was recently notoriously done by the United States in 2020 concerning the Paris Agreement and by Turkey in 2021 concerning the Istanbul Convention. Nevertheless, even when slightly softening von Bogdandy's and Venzke's assertions, a picture appears where the control exercised by a democratic majority on international law is a limited one, both during the drafting of international agreements and after their transfer to the world of courts.

When approaching the question from the second angle, the control the national legislatives have over international courts' establishment and work, the balance does not seem to change. First, in accordance with the doctrine of separation of powers, any court should work independently of any political control. A type of control could be exercised by a legislative by developing the substance of law, but this is not the case on the international level. The focus of the democratic legitimacy should then be turned onto the creation of an international court, and the moment where nation-states subject themselves to its authority. As we saw

[118] Ibid, p.20.
[119] Tuori 2014, p. 19.
[120] See e.g. Lowenfeld 2009, p.54. The World Bank went ahead with the ICSID Convention despite significant opposition from Latin American countries and the Philippines. See also Paulus 2008, p.198 and 206.
[121] von Bogdandy – Venzke 2012, p.21.
[122] Ibid, p.21.

above, however, the democratic control exercised by national parliaments when negotiating international conventions is limited. On this note, an additional feature concerning the courts themselves should be mentioned: international courts tend to create their own procedural law.[123] This quality associated with international courts appears as a double-edged sword. While it makes them potentially once again escape the democratic control exercised by national parliaments, it also offers them the opportunity to develop such law to lessen the impact of the lacking legislative counterpart and thus increase their legitimacy. We shall later see what these developments might entail.

In defence of international courts, one might be also tempted to refer to their benefits. It would be possible to argue that as the role of international courts is crucial and their goals noble, possible democratic legitimacy issues should not be overweighed in comparison. These would be connected to the functionalist legend-building narrative presented earlier in chapter two, namely that international courts are indispensable to the goals of enabling an enduring peace and ending the impunity of major perpetrators by providing justice. Indeed, what relevance should we give to alleged democratic legitimacy concerns, if at stake are international peace and punishing major perpetrators? However, as we repeatedly noted in chapter three, international courts cannot achieve their immense macro-level goals alone, but instead are dependent on local cooperation and the success of other institutions in providing macro justice and reaching their goals. Further, as it shall be argued more extensively later on, the impact of their decisions and thus the reaching of their grand goals is impeded if their legitimacy is questioned, and this is hardly offset by simply referencing a common good. While such a functionalist narrative may be an important part of the argumentation in support of the legitimacy of international courts, it should raise our suspicions if too much weight on the explanation for a transfer of power and authority is put on "a greater good" as suggested by the legend-building narrative.

4.2.2. The primacy of the adjudicative?

Despite the above remarks or perhaps due to them, it should once again be pointed out that while there were and remain some concerns over the democratic legitimacy of international courts, the established model did not come without support nor by accident. Some key legal thinkers have argued in favour of the primacy of courts all the while suggesting that what

[123] Chercheneff – Sorel 2019, para. 1.

has been described above as a democratic legitimacy vacuum is in fact quite natural. Jochen von Bernstorff has observed on the work of Hans Kelsen that the latter saw international courts as the necessary and primary tool for ensuring the goals of international law, namely an enduring global peace.[124] The "centralization of law-making" was seen by Kelsen only as a possible next step because he argued that the opposite, actually starting with the creation of a global legislative, was too problematic as he warned about overestimating the functions of both legislation and the legislative.[125]

In a similar vein of endorsing the created structure, Manley O. Hudson maintained that notably the treaties enacted by states provided a large enough body of law from which to draw, and saw no real danger in the lack of a global legislative, even as he recognized that one would probably not be created in the near future.[126] However, as the international court emerged precisely to develop the body of international law which was observed to be incomplete, one would tend to question Manley's assertion on the sufficiency of the existing international legislation. For him, however, the international court's position in the development of law was a supportive one, building a body of case-law, secondary to that of the international legislation.[127] Here too this thesis is inclined to a different interpretation: case-law and precedents are not something extra-legal or secondary, they are law. This is especially true in a case where one of the core reasons for the creation of international courts was their norm-creating ability.

Nonetheless, it has thus been asserted that the legislative follows the adjudicative. However, as a century has elapsed since the creation of an international court, one tends to wonder when this should be expected to happen. This thesis would suggest that Kelsen's assertions on the natural sequence of events were too heavily based on observations made on the development of the legal systems of nation-states.[128] The creation of international courts to develop the body of international law had not been done before, yet he still made strong assertions based on the evolvement of law in smaller and different units. To the very least, these assertions were made in an era where the world and international law appeared as much

[124] Kelsen 1943, p. 397 and von Bernstorff 2015, p.35-38.
[125] von Bernstorff 2015, p.38 and Kelsen 1943, p.401.
[126] Hudson 1932, p.73-74.
[127] Ibid, p.80-81.
[128] Kelsen 1943, p.400.

simpler and more cohesive, ignoring that the situation might not persist as globalization and fragmentation accelerated.

In addition, what needs also to be taken into account is that there are relevant differences between a nation-state and the international community. For instance, on the international level there appears to be no distinguishable *demos*, which on the nation-state level is the basis of a democratically elected legislative. These differences, in addition to the considerable amount of elapsed time, make it questionable whether we can assume that the same logic will be observed on the international level as has been the case on a national level. Further, it should be pointed out that Kelsen's view of the primacy of courts appeared to stem from an asserted capacity to produce peace,[129] which was rendered questionable in chapter three by analysing the type of justice provided by international courts. It is of course probable that the nature of peace and conflict Kelsen had in mind was quite different, one that focused strictly on inter-state relations.[130] It should, however, be reiterated here that his view on the causes of conflict appears today as obsolete, going as far as denying the role of economic conditions as a cause of war.[131]As is asserted throughout this thesis, however, international courts are no guarantee to peace or any other goal which requires macro justice to be achieved, which demands us to increase the focus given to their legitimacy.

4.2.3. Re-enforcing tendencies and conclusions drawn

The issue is not merely this problematic context in which international courts operate. There are also different tendencies in the legal world that hide the problem. First, we noted in the introduction that international courts tend to provide arguments that support their legitimacy and authority rather than question themselves. Second, it was also noted that the legend-building narratives on the work of international courts based on their emergence are still common, causing the call for critical studies this thesis seeks to answer. In addition, a Marxian critique of reification of institutions is illuminative here. As Bianchi notes, we tend to speak of international institutions, such as international courts, in an impersonal manner, giving them a life-like character.[132] For example in this thesis, terms like "the Court" or "the Tribunal" are used. While these descriptions are accurate, this trend conceals the fact that

[129] von Bernstorff 2015, p.36.
[130] See e.g. ibid, p.44.
[131] Kelsen 1943, p.398.
[132] Bianchi 2016, p.84-85.

there are individuals and different agendas behind these institutions and that the institutions do not act on their own. By the reification of international courts, the danger is to hide the contingent as something universal and to hide the domain of action in which courts and the individuals that form them take part. We will see examples of how this takes effect in an international court's work in the next section of this chapter. Nevertheless, as the demystifying of a court's work is performed, the democratic legitimacy issues can be made more apparent as different choices are distinguished.

As a conclusion, it seems evident from the above analysis that there is a problem, it is not new and neither is its recognition.[133] While it has been recognized as a generally applicable rule on the nation-state level that the judicial tends to come temporally before the legislative, this thesis argues that there is little reason for us to expect the same pattern to be followed internationally. It may very well be that the international community is fundamentally different in its nature, and a similar pattern of events will not occur as has been observed on a state level. An argument of this thesis is that on the global level, there simply is no similar *demos* as there exists on the national level. We should thus not expect the global trajectory to follow the lines of democratic states. Further, already when establishing the PCIJ it was recognized that "the independence of the judicial authority vis-à-vis the political power appears more and more one of the essential guarantees of liberty and internal peace" and that the same should hold true on the international level.[134] On the same note it was recognized that while "life precedes law", an international organ that would be in charge of regulating would be needed to guarantee "peace and prosperity of each and all".[135] The separation of powers was thus recognized as necessary for peace and prosperity, the very goals international courts are argued to promote and achieve. The only problem is that a democratically elected regulator has not been created and that, as repeatedly asserted above, international courts tend to not only apply and interpret but also create the law in its absence.

Finally, it needs to be recognized that the understandings based on which international courts emerged differ in a few fundamental ways from what has been presented in this thesis. It is perhaps why the democratic legitimacy vacuum was not seen as too important. Notably, part of the justification for overlooking the issue of a lacking legislative was shown to be the

[133] Note however, that it seems that "a reasonable amount of attention" on legitimacy by the international community is apparently only fairly recent. See Takamura 2012, p.4.
[134] Advisory Committee, Procès-verbaux, p.8
[135] Ibid, p.9

alleged capacity by international courts to achieve peace through justice, as claimed by the legend-building narrative. As we saw in chapter three, however, it appears today evident that this requires the production of macro justice, and thus cannot be achieved by international courts alone. Similarly, it was noted in chapter three that the causes of conflict are deeply contextual, thus possibly escaping the type of justice international courts are capable of providing. This is assertion differs naturally for example from the one promoted by Kelsen, where economic conditions could not be the cause of war.[136] The discrepancy between the legend-building narrative and the deconstruction produced in chapter three demand our attention. After more than a hundred years, the problem cannot thus be swept away by simply maintaining that a legislative will follow nor by the other conventional legitimizing arguments. Instead, this renewed understanding on the work of international courts needs to be used to assess the democratic legitimacy vacuum in which they operate. Therefore, the challenges the situation presents to international courts in their own work are discussed next.

4.3. Practical and theoretical challenges for an international court's decision-making

As asserted in chapter two and above, the challenges to the democratic legitimacy of an international court have been noted from their very emergence to the international scene. It is thus apparent that international courts should be conscious and self-aware of this shortcoming. While international courts should naturally not be expected to undermine themselves, and perhaps especially for that very reason, we should still analyse what consequences the problem of lacking democratic legitimacy has or should have on their decision-making. In the following section, this thesis argues that this goes beyond theoretical and systemic coherence.

An eternal question for legal scholarship is what do courts actually do when they make decisions. The methods of interpretation of international law were called by Hans Morgenthau the branch of science most in need of reform in 1940.[137] This was because he recognized that the methods of interpretation were brought from common law and Roman law, neglecting the fact that the interpretation of international law differed from them in fundamental ways.[138] Below this thesis shall argue that a big difference and cause for

[136] Kelsen 1943, p.398.
[137] Morgenthau 1940, p.281.
[138] Ibid, p.281-282.

headache on the international level compared to the national one is the democratic legitimacy vacuum in which courts operate, which is still of relevance today.

Here one of Morgenthau's observations is so pivotal to our purposes that it requires being quoted in its entirety:

"*At the base of any legal system there lies a body of principles which incorporate the guiding ideas of justice and order to be expounded by the rules of law. The intelligibility of any legal system depends upon the recognition of such a set of fundamental principles which constitute the ethical substance of the legal system, and shed their illuminating light upon each particular rule of law."*[139]

On the national level, guidance for interpretation may be searched notably from constitutions and what Morgenthau called "a highly integrated public opinion" to discover the nature of these principles.[140] Yet interpretation should also occur, in addition to these principles rooted in law, within the motivational forces of law, whether they be economic, sociological or power-related.[141]

This guidance is much harder to grasp on the international level. Morgenthau himself, from a position of criticism towards the traditional positivist approach to international law, notes the difficulty in ascertaining these principles and moral values to aid interpretation in the context of international law, all the while noting how important this exercise would be.[142] The difficulty arises from key differences between the municipal and the international, three of which should once again be highlighted. First, there is no global constitution that would codify the higher principles. Second, there is no international legislative through which law would emerge in a manner that would elucidate its underlying moral and ethical connections. Third, in order to enhance the achievement of political compromises, the contents of the written sources were asserted to be drafted in vague terms, thus offering little insight as to which direction interpretation should go. On the international level, it thus appears that there exists a significant risk of a tendency to propose local values as universal ones when interpreting norms. For law and courts that aim for global impact and legitimacy, this does not bode well.

[139] Ibid, p.268.
[140] Ibid, p.268.
[141] Ibid, p.269-270.
[142] Ibid, p.268 and 280-282.

Then again, we briefly touched on the Second World War and how it developed the concept of individual criminal accountability in international law. The aftermath of Nazi Germany also showed that adhering to a strict version of legal positivism is hard to stomach, as it might put the principle of legal certainty against justice. Famously, from this observation was born the Radbruch formula: if the contradiction between a law and justice is intolerable, then justice should precede, and when equality is "deliberately betrayed", law lacks the very nature of law.[143] From then on, strict positivist approaches have seemed to be incompatible with law's other purposes, such as providing justice.

Going back to the question of what occurs during interpretation, it appears that the idea of a "right" interpretation has not only not been completely abandoned, it is actually still sustained by courts.[144] Yet international courts emerged specifically to develop the body of international law, which was considered to be imperfect, so how could it be possible that the act of interpretation would be merely reduced to locating the right answer? The answer of course is that it is not possible, but there is a reason why the idea is still promoted. If the norm-creating facet of a court would be highlighted, it would render the democratic legitimacy vacuum more apparent and make it easier to question the authority and legitimacy of a court. Here it is also important to depart from Hudson's argument presented earlier, according to which the building of a body of case-law by an international court would have a mere supporting function. Precedents are not used as mere aids of interpretation, they act as independent sources of law. Their law-making features should thus not be understated, although it is perhaps understandable that, given the asserted legitimacy issues, this is attempted.

As has been asserted, international courts were specifically created and continue to deliberately influence legal discourse. While this would on first observation seem to go completely against the concept of separation of powers, it must be highlighted that law-making via judicial decisions is also an essential and critical part of what international courts do, as the alternative would mean that legal decisions would not be justified.[145] This in turn would naturally render criticism and wider legal discourse impossible. Further, if legal

[143] Radbruch 1946 (2006), p.7
[144] von Bogdandy – Venzke 2012, p.14.
[145] Ibid, p.15.

decisions were not properly justified and reasoned, it would endanger legal certainty, the provision of which is an essential task of any court.[146] Nevertheless, no matter the quality of the legal reasoning, it cannot alone surmount an appearance of problematic legitimacy.

Here, at the risk of being obvious, it must be noted that from the perspective of the decision-making of an international court, a difficult contradiction seems to appear. International courts act in an environment where they are required to develop the body of law. This task is of course much more difficult to separate from the notion of politics as merely finding the right norm and applying it to a specific situation. Yet the desirability of a court of political nature is questioned and frowned upon as it goes against the basic assumptions of the separation of powers. To call a court political would be considered an insult and a challenge of its legitimacy. International courts are thus put into a dire situation with seemingly no way out. They should act instead of a legislative and political counterpart, while simultaneously hiding this political side of their work. For an institution of which a considerable level of transparency is required, the situation is less than ideal.

One is then tempted to look at the quality of the law made by courts. Once again, we need to go back to the concepts of micro and macro justice and note that courts are inherently constrained by the case at hand. Therefore, this thesis has argued that they cannot take into account all the relevant perspectives and arguments that would be considered by a political legislative when engaging in norm-creation. For this reason, when taking part into the norm-creation, a court's ability to provide norms that would fulfil the requirements of the generality of law and take all relevant macro justice considerations into account is limited. It should be noted that the generality of law is considered to be the "first desideratum" of any system of rules, demanding that there exist rules to cover real-life situations so that each situation need not be decided on "an ad hoc basis".[147] Indeed, this task would be better left to a democratic legislative that is naturally better suited for providing justice that reflects macro perspectives. There is thus a certain gap that cannot be filled by courts' law-making, one that has been argued to make international courts "long for politico-legislative counterparts."[148] Moreover, this defect in the work of international courts is further enforced

[146] Ibid, p.15.
[147] Fuller 1969, p.39 and 46. It is noteworthy that Fuller observes, albeit in a municipal context, that the failure to produce regulation adhering to the generality of law has been caused by attempting to do so via adjudicative ways.
[148] von Bogdandy – Venzke 2012, p.31.

by the phenomenon of proliferation of international courts. As Armin von Bogdandy and Ingo Venzke have noted, the fragmentation of international law and courts, and therefore the development of international law by international courts, is problematic in light of the democratic generality of law.[149] In the next chapter, these connections between the law-making facets of international courts, fragmentation and the quality of the norms produced by courts shall be discussed in more detail. Here it suffices to note that the democratic legitimacy vacuum appears to cause the substance of the law to remain less than ideal.

There are however significant benefits to the law-making that is done by international courts that should be highlighted here. Due to globalization, the international society evolves faster than ever, and international law-making by agreements can naturally not keep up. This was true for Kelsen already, who saw the law-making feature of courts and considerations of "equity" and "notions of justice" as necessary for the reformation of law[150], but it is perhaps even truer today. However, the limits of such law-making must be noted here. As asserted, being constrained by the case they are dealing with, international courts are not capable of having the macro-level discourse required by law's generality or the production of macro justice. Further, Kelsen did not contribute to solving the methodological issues of interpretation nor the legitimacy concerns that replacing a political legislative with a judiciary would induce.[151] Jochen von Bernstorff has also noted that Kelsen's theory of international judicial decision-making was contradictory with him being a proponent of liberal democracy in two ways: not only does it strengthen overtly the international judiciary over the political, but it also privileges the international to the national.[152]

The theory on the interpretation done by international courts appears as incomplete even amongst the most renowned judicial minds. Jürgen Habermas and Robert Alexy have debated the nature of judicial decision-making in a manner that is also of relevance here. Habermas, from a perspective that seems to promote the democratic legitimacy of courts and insisting on separate powers of legislative and adjudicative, has been concerned about leaving too much room for judges when making legal decisions on the basis of "general practical discourse", as according to him decisions and interpretations should be based on

[149] Ibid, p.23.
[150] von Bernstorff 2015, p.41-42.
[151] Ibid, p.42-43.
[152] Ibid, p.43-44. See also Kelsen 1943, p.397-398, where he alternates between the legal and political as having priority over the economic.

precedents and the will behind norms.[153] Alexy on the opposite has argued, when discussing the dual nature of law, that this is not a recommendable position. Instead, he seconds the special case thesis, which puts much weight on argumentation, with moral arguments having priority, and the idea of legal rationality.[154] The basis of the superiority of moral arguments appears to stem from their universality.[155] A similar critique could be applied here as on Hans Kelsen's contradictory arguments[156]: how can a court be at the same time impartial and rational, and at the same time decide which moral, in contrast to legal, arguments should have priority?

As William Twining puts it, "Globalization does not imply homogenization".[157]A theoretical example should be put forward to explain the above criticism. If, when interpreting a norm, I arrive at a conclusion that cannot be proved as illogical, but someone else arrives to another conclusion on the same matter that is equally sound, which one of us can evoke reason or morality in our defence against the other? This is a key weakness of promoting the primacy of moral arguments, as it stands in stark contrast with legal certainty. The claim here is not that law loses its claim to moral correctness, but simply that those morals become harder to locate when there is no similar political process as on the national level that could illuminate what the foundational morals behind the law are. Therefore, this thesis would suggest that the proposition to leave, when deciphering the meaning and existence of a norm, a paramount importance to moral argumentation would equate to giving too much power to courts. Further, putting a veil of rationality to this sort of moral argumentation that is not tied to institutionalized morals should be considered too straining on legal certainty. This is especially relevant as Morgenthau's observation on the difficulty of obtaining moral guidance from relevant materials still stands true to international law. However, in the context of an international court, this thesis would argue that to base an interpretation on the will behind the norm, in contrast to underlying moral values, as proposed by Habermas might not be a simple thing to do either. This is due to two primary reasons, both of which, similarly to the moral values underlying laws, are related to the democratic legitimacy vacuum.

[153] Habermas 1999, p.447.
[154] Alexy 2010, p.179.
[155] Ibid, p.179.
[156] See Kelsen 1943, p.399, where he talks of an international court as an impartial authority.
[157] Twining 1996, p.40.

Let us consider Article 38 of the Statute of the International Court of Justice (ICJ) and its list of applicable sources of law. The list consists of international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions and legal scholarship. First, as for the primary source, written treaty law, there are a few typical characteristics that make the determination of the will behind norms complicated. Treaties could be defined as political compromises, which means that they often contain conflicting interests. While compromises appear as necessary, consolidating opposite values puts the interpreter of a norm into a difficult position.[158] Further, many treaties were made a long time ago, making a static interpretation based on the original will of the parties impractical. Secondly, as for the other sources of law, there is no one entity from who's will the norms emerge, making the determination and use of such will in judicial decision-making difficult. Once again, an international court seems to be put into a complicated position.

As a summary of the section above, the lack of a legislative poses a few distinct challenges to international courts. First, while judicial law-making appears in part necessary and useful, it cannot replace the macro-level considerations of a politically elected legislative, and thus its legitimacy suffers from it. This should also naturally affect the quality of the norms that are produced by international courts. Second, it poses challenges to the interpretation of norms, as courts cannot rely on universal or other guiding principles similarly to the national level. This is further complicated by the goal of appearing legitimate and transparent. As we saw above, the theoretical framework in which international courts are supposed to operate appears as incomplete and flawed. This thesis would argue that much of this is caused by the democratic legitimacy vacuum combined with the qualities of an international court, namely its unsuitability for producing considerations adhering to macro justice. In the final section of the present chapter, the consequences and possible developments in relation to democratic legitimacy are assessed.

[158] See for example the preamble of the Cartagena Protocol on Biosafety to the Convention Biological Diversity. The Protocol recognizes the importance of biodiversity and the dangers to it, yet at the same time it emphasizes that trade and environment agreements should be mutually supportive. The Protocol also is not subordinated to any other agreement, but at the same time does not aim at changing the obligations or rights that Parties have under any other international agreement. For an interpreter, the actual will of the legislation is hard to decipher.

4.4. Conclusion: On consequences and developments

4.4.1. More than theoretical consequences

As others have noted, the answer hardly is to persist that international courts' decisions would be illegal or illegitimate on the basis of the lacking legislative; that international courts should blindly follow the will of the states nor that international courts should be dismantled.[159] As international courts have a clear demand and ultimately protect the democracies of nation-states, the goal of legal scholarship should then, in addition to the legitimate criticism, propose solutions on how this vacuum could be best filled. Nevertheless, above a challenging environment was described, and next a few potential paths forward are discussed.

First, one should stress the possible tangible consequences if the situation persists. It seems unlikely that a complete return to the nation-state level will occur, which puts a set of heavy expectations on the development of the international system. The two-fold observation of Lord Phillimore on the establishment of an international court should once again be highlighted: 1) it is of primary importance to build a system that makes the decisions of the court widely accepted and 2) this is hard to do if nations feel that they are not represented by the court.[160] It should thus be an unsurprising observation that, on occasion, either international courts' decisions are not accepted, or their jurisdiction is altogether denied due to reasons related to the institutions' democratic legitimacy. As we observed in chapter three, the acceptance of international courts' decisions has been poor at times. The reason was apparent: the judges were considered foreign, the courts often distant. In fact, the general democratic legitimacy vacuum apparent in the international field has been argued to be the single most important obstacle for the prospects of efficient general international law.[161] For example in the case of the ICC, it has been asserted that it is lacking in democratic legitimacy and that, importantly from our perspective, improving its legitimacy could be a key factor in getting new states to submit themselves to its jurisdiction.[162] For a court that seeks global jurisdiction and impact, improving democratic legitimacy thus appears as an important step.

[159] von Bogdandy – Venzke 2012, p.9-10.
[160] Advisory Committee, Procès-verbaux, p.536.
[161] Paulus 2008, p.199.
[162] Takemura 2012, p.3-4.

From the point of view of international courts themselves, beyond the inherent value of legitimacy and a court's impact, an important question would be whether there are other consequences if the democratic legitimacy vacuum persists. Here we should return to the observations made in chapter three when discussing macro justice in the context of transitional justice and an international court's capacity in helping to achieve its goals. We noted that international courts had been partly replaced by other institutions. It was asserted that here was a prime example of legal fragmentation: if international institutions are deemed to be unsatisfactory, the relevant actors will end up rejecting them in favour of others. Further, in the context of transitional societies, we noted how important the coexistence and cooperation of both international courts and national institutions are and how dependent international courts are on this cooperation. If the democratic legitimacy vacuum is considered too wide, this cooperation becomes endangered. For example, the impact of the ICTY was greatly affected by the view in Serbia of it being a political institution, a NATO construct.[163] This thesis would thus assert that ultimately, if an international court suffers from legitimacy issues that are not fixed, it does not only risk the acceptance of its decisions, but it also risks losing its relevance while other institutions prevail.

In addition to these issues related to the impact of international courts, we have also noted in the present chapter that the decision-making process of an international court is complicated by the lack of a legislative on the international level. This was asserted to be caused by two features. First, the interpretation process was shown to lay on less clear grounds both theoretically and in practice, as both the direct and supportive material from which to draw their interpretation was fewer and of lesser quality than in the case of a national court. Secondly, international courts were shown to be simultaneously supposed to participate in law-making while remaining apolitical. It was asserted that when performing this task, international courts are constrained by the cases they are dealing with and thus are not able to properly gauge the macro-level considerations necessary for satisfactory law. It was thus asserted that for these reasons international courts are in desperate need of a political counterpart. Further, if the production of law adhering to the principle of generality and demands of macro justice is left to international courts and they remain limited in providing it, this would mean that the international community's capacity to produce such law and justice is equally limited.

[163] Roht – Arriaza 2001, p.57-58.

It should be mentioned that one could be tempted to argue for democratic legitimacy to be of more importance in "traditional" roles of international courts, such as producing peace through justice. However, there has been great concern notably on the development of democratic legitimacy of the WTO, with an aim to have a "more inclusive view of those who are entitled to influence the shape of the system".[164] Further, as seen in the historical analysis presented in chapter two, the influence of international courts has shifted from exceptional circumstances towards a more pervasive one on the everyday life of individuals.[165] Indeed, the connection of democratic legitimacy and the values and goals promoted by international courts should be considered here. If courts are viewed to speak in the name of some while omitting others, it jeopardizes not only the enduring international peace but also other goals that international courts and institutions have. Lacking democratic legitimacy is an open call for challenges of the neutrality of international law, be it private or public, making such separation unnecessary for the purposes of this thesis.[166] In order to counter the possible degradation of international courts' legitimacy and thus the reaching of important global goals, the democratic legitimacy vacuum is thus a pervasive issue that needs to be solved.

4.4.2. Possible solutions

As has been argued in this chapter, the traditional counter-arguments to the problems presented by the lacking legislative cannot completely offset our worries. Further, it was asserted that the theories on the decision-making of international courts provide no sufficient answer as to how courts should build their interpretation. It naturally follows that we should look at possible remedies for the problem. To look for possible ameliorations of the legitimacy of international courts is of paramount importance since legitimacy consists of the reasons why authority should be accepted by subjects.[167] In this case, the argued legitimacy vacuum is caused by the lack of an international legislative. Similarly, the struggles legal scholarship has had in building a credible and complete theory on international courts' decision-making appears to be caused by the same problem. The immediate answer would thus be the creation of such an international elected legislative.

[164] Howse – Nicolaidis 2003, p.74-75.
[165] See also von Bernstorff 2015, p.48.
[166] See e.g. Bianchi 2016, p.205-226 and Koskenniemi 2016, p.104-105. Newer approaches specifically question the neutrality and objectivity of international law.
[167] Takemura 2012, p.5.

However, this does not seem politically plausible in the current climate nor in any near future.[168] There nevertheless seems to exist possible solutions to at the very least decrease the problem in the meantime, some of which are discussed below.

The first proposed solution focuses on the judges that form an international court, their election (and thus the representation of different nation-states and legal cultures), their impartiality and their independence. The idea here is that while the lack of a responsive political system means that the courts operate without a legislative counter-part, the voices of different political interest groups could still be heard by enhancing participation in the election of judges.[169] In this regard, supranational parliamentarism offers the only election method which sufficiently increases the democratic legitimacy by ultimately putting individual citizens at the centre of the process, and does not only refer itself to the will of states. An example of such a beneficial development has been asserted to be the election of judges by the Parliamentary Assembly of the Council of Europe to the European Court of Human Rights.[170] Additionally, by focusing on the rules dealing with election, the impartiality and independence of judges have been asserted to be increased, notably by ruling out possibilities of re-election and thus possible political dependencies.[171] It must be noted, however, that while independence and impartiality are manifestly important, they are of independent value to democratic legitimacy, and cannot act as substitutes of it.

Another path of development would entail going back to an older idea of a well-educated judge, with a slight twist however: should the democratic legitimacy vacuum be a problem where no current solution seems to work, the self-awareness of international courts of this weakness could ultimately be the most efficient tool. This is due to the observation that international courts tend to create their own procedural law. While this may allow an international court to develop beyond what was meant by its creators, it also provides opportunities. It was asserted that a key facet of the acceptance of the decisions of an international institution was that relevant states feel that their voices are hard. In addition, it

[168] In essence, this would entail the creation of a global citizenship and a global democracy. The level of compromise and transfer of power required make this an improbable development in the state-centric global politics of today.
[169] It is noteworthy that parties may be able to choose a judge of their own nationality in the ICJ, see Article 31 of the Statute of the International Court of Justice.
[170] von Bogdandy – Venzke 2012, p.34-36.
[171] Ibid, p.32-33.

also matters how the court's processes are portrayed to the relevant public.[172] By creating processes that take these voices into account and make sure that information flows, the problems concerning legitimacy could then be diminished. Accordingly, increasing the publicness and transparency of an international court's processes has been highlighted by legal scholars.[173] An interesting trend related to increased publicness is *Amici Curiae*: recognizing the need for third parties to intervene in a case, even if such parties have no straight connection to the specific case.[174] In addition to increasing a court's legitimacy, essentially such procedures could permit an international court to better be able to gauge the macro perspective when making its decisions. Here it should be noted that filling the democratic legitimacy vacuum is in the best interest of international courts themselves. This is because, as presented in section 4.4.1 above, not doing so would risk their impact and place among relevant actors.

Being conscious of the democratic legitimacy vacuum and of the deficiencies in their processes and abilities could prevent international courts from pronouncing universal rules or morals where there are none. In relation to the idea of a well-educated judge, it should also be noted that the legitimacy of any international court has many facets. For example, the ICC's legitimacy has been questioned based on the alleged failure to apply the rules universally, focusing overtly on Africa instead.[175] Compounding such other challenges of legitimacy with lacking democratic legitimacy makes the acceptance of an international court's decision that much harder. For international courts, this increases the appeal of increasing their democratic legitimacy by developing their procedural law.

Finally, it should be noted that none of the aforementioned proposals solve the issue at heart, and they would be recommendable to implement even if there were no democratic legitimacy concerns to start with. On the international level, however, a system is still in place where the separation of powers is not followed. Courts do not only apply the law, they also participate in the making of it. While, as an example, bringing more transparency and involvement may increase a court's legitimacy, the ultimate challenge remains and the concerns expressed by Habermas on the amount of leniency in a judge's decision-making are still valid. Yet what choices do courts have? They have to make decisions and provide

[172] See Roht-Arriaza 2001, p.58. One of the issues with the ICTY was the "lack of access to information from and about the Tribunal".
[173] von Bogdandy – Venzke 2012, p.25-27.
[174] Ibid, p.27-30.
[175] Takemura 2012, p.10.

justifications. As asserted, the problem is as old as international courts themselves, without persuasive answers on the horizon. For now, it appears that we have to content ourselves with improving these facets of an international court's legitimacy, with little to propose with regards to facilitating the court's interpretation processes. In the next chapter, we shall look at a newer trend that appears to compound these problems relating to the work of international courts and thus the whole international system, namely fragmentation and the proliferation of international courts.

5. Fragmentation and the proliferation of international courts

5.1. A challenging trend

In addition to asserting that the establishment of international courts was more direly needed than a legislative for the development and functioning of international law, Kelsen predicted a centralization of international law and courts.[176] While there were and still remain compelling arguments for why the establishment of international courts was the most efficient way to initially develop international law, the second prediction has not come to fruition.[177] Instead, a multiplicity of specific regimes can be observed, each having its own judiciary and no hierarchical relations between them. In this chapter, this thesis will attempt to portray how this phenomenon called fragmentation has further complicated the framework in which international courts operate. The focus is on the institutional level, in contrast to a substantive one. It should be noted that this is the opposite of what the ILC provided in its report, which dismissed many concerns related to the effects of fragmentation but focused on the effects of the fragmentation of the substance of international law.[178] The approach stems from the focus of this thesis, international courts, as well as the assertion that this institutional aspect of fragmentation creates a potential for conflict more fundamental from the conflict of norms, namely a conflict of authority. Due to the purposes of this thesis, special attention shall be given to how fragmentation is connected to the democratic legitimacy vacuum and the type of justice international courts produce.

Koskenniemi and Leino have noted how the idea of a coherent international legal system is an old tenet of international lawyers, and that the fear of fragmentation or loss of control and coherence reflects typical postmodernist concerns related to the effects of globalization.[179] Yet there is no denying that via legal fragmentation and the proliferation of international courts, legal regimes have become more and more specific and distinct from each other. In addition to different regimes having their own adjudicatory mechanisms and developing their own language, the effect on the coherence of the international system is enforced by the lack of any hierarchically superior institution.[180] Further, because these regimes are not differentiated territorially but functionally, competitions of authority and jurisdiction are

[176] von Bernstorff 2015, p.38 and 45.
[177] Ibid, p.45.
[178] See ILC report A/CN.4/L.682, p.247-249.
[179] Koskenniemi – Leino 2002, p.556.
[180] von Bernstorff 2015, p.45-46.

bound to appear. This is because, in a functionally fragmented legal world, problems can often be framed in a multitude of ways.[181] It is evident that this tendency to create superimposed legal systems makes navigating international law harder and creates a potential for conflict between regimes, causing concerns to the system's legitimacy from the perspective of a legal subject.

Furthermore, the connection between fragmentation and the democratic legitimacy vacuum presented in chapter four needs to be considered here. For instance, as asserted above, fragmentation and the proliferation of courts were not foreseen by advocates of a strong international judicial who downplayed the significance of the absence of an international legislative. This observation is of momentous importance because fragmentation can be asserted to have further aggravated the negative impacts of the existing democratic legitimacy vacuum. For instance, in some cases the initial connection international law can be said to have with the democracies of nation-states appears to be lost. This is because, via fragmentation and notably the emergence of transnational law, law emerges that has no direct background in international treaty law and may even originate from "autonomous operation of denationalized social subsystems", i.e. the private sector.[182]

On the other hand, it has been observed that the lack of a legislative is one of the very reasons behind fragmentation and the proliferation of international courts.[183] This is because in such a context, and without any hierarchically superior court, different regimes are bound to develop separately from each other. This can be further demonstrated by comparison with the national level. A nation-state's law is separated into different areas, so why is the problem not similar there? The answer lies in the existence of a legislative that does not only look at each area as a distinct regime, but rather develops law as a coherent system. By such a legislative control, fundamental contradictions and separate paths of development can be avoided. If such control does not exist, as is the case on the international level, each regime would still develop, but separately from the others.

Furthermore, fragmentation appears to have weakened arguments that initially dismissed the problems related to the democratic legitimacy vacuum. Notably, von Bernstorff has noted

[181] A famous example is the MOX Plant-Case. See ILC report A/CN.4/L.682, p.12-13.
[182] See e.g. Tuori 2014, p.21-23.
[183] ILC report A/CN.4/L.682, p.10.

that the three arguments to support Kelsen's view on the small importance of the absence of a legislative do not apply in a fragmented legal world. First, the substance of the law is no longer of peace and war, but far more implicative to the everyday lives of people.[184] This notably means that the justifications of exceptional circumstances and momentous consequences lose their credibility. Second, without a hierarchical structure, the trust in a formalized judicial know-how does not apply as it normally would, because issues and expertise are more and more specific but the questions subject to interpretation in courts often require a wide understanding of the law.[185] This means that biases to some systems are bound to appear, and this negative effect is often further enforced by the lack of possibilities to appeal and no control exercised by a higher court.[186] Third, von Bernstorff notes that due to fragmentation much of the decision-making happens outside the scrutinizing view of the public, thus adding another layer on the courts' legitimacy issues.[187] One reason for the need of filling the democratic legitimacy vacuum on the international level thus is that not only has it not narrowed, it appears to have become wider and more apparent via fragmentation.

Consequently, von Bernstorff further argues the case for an international legislative, or the problem caused by the lack there-of, in a manner that resonates with the observations made by this thesis: "In a fragmented judicial set-up it is only through cross-sectorial political institutions that a one-sided sectorial regime rationale could be effectively channelled and controlled by new legislation."[188] In other words, as courts' perspectives are too narrow and presumably differ from each other, they cannot promote legislation that would be cohesive from a macro perspective. While the proliferation of international courts may be interpreted as a sign of their dynamic capability of producing new norms,[189] this defect affects the quality of the norms produced.

Indeed, going back to the dichotomy between micro and macro justice and the justice produced by an international court, fragmentation presents new features to this relationship as well. As we noted in chapter three, failing to provide the justice sought by the relevant actors will cause them to look for new ways of attaining it.[190] Should the justice produced

[184] von Bernstorff 2015, p.48.
[185] Ibid, p.48-49.
[186] Ibid, p. 49.
[187] Ibid, p. 49.
[188] Ibid, p.49.
[189] Ibid, p.45.
[190] For a similar observation, see Koskenniemi – Leino 2002, p.578.

by an international court and regime be disappointing, new regimes may emerge. This should not be seen as a negative development from the perspective of impactful justice. However, here we should also once again differentiate between a court as a norm-interpreter and as a norm-creator. First, when it comes to an international court as norm-interpreter, this thesis would argue that fragmentation can be beneficial for its impact, as it allows courts to focus on their area of expertise and thus micro justice. It must be asserted that, at its best, fragmentation leads to a division of responsibilities that helps each institution focus on their core competence without having to carry alone the burden brought by goals reflecting macro justice. From this narrow perspective, fragmentation may be seen as a welcomed development for international courts and the international legal system. The more sophisticated the world society evolves, the more emphasized the need for specialized adjudication becomes. Indeed, it has been observed that pluralism and fragmentation into different regimes allow focusing on specific concerns.[191] However, we shall see in the next section that fragmented regimes may be in trouble when these concerns point in different directions. Further, this interpretation from a specific perspective means that the traditional concepts and categories of international law may acquire new context-specific meanings, causing damage to international law's cohesiveness.

To be sure, the situation is less ideal when we consider an international court as a norm-creator in a fragmented legal world. As mentioned above, due to the plurality of international courts, the creation of cohesive legislation by them appears impossible.[192] Further, the prevalent model goes against democratic theory demanding that norm-creation is left to one single democratic legislative.[193] This is because, unsurprisingly, it is the only way of guaranteeing that the norm-creation process includes all relevant and sometimes colliding perspectives.[194] Once again we note additional reasons why international courts are limited as lawmakers and as providers of macro justice.

The problem can be further elaborated by focusing on the type of norms international courts create. When international courts develop law, which law are we talking about? Here the relevant categories to be separated are general international law and regime-specific

[191] ILC report A/CN.4/L.682, p.247.
[192] See e.g. von Bernstorff 2015, p.49.
[193] von Bogdandy – Venzke 2012, p. 23.
[194] Ibid, p. 23.

international law. Because of the biases each regime has, its law-making cannot sufficiently consider other related fields or general international law when taking part in the norm-creation of its specific field.[195] While such law would be beneficial for its own purposes, it might be contradictory to that of others. On the other hand, norm-creation that involves general international law or other regimes can be asserted to be problematic for the very same bias: it could, due to the particular perspective from which each international court looks at legal issues, hijack general international law for the purposes of the said regime.[196]

However, the question remains whether we should be so quick to deem the law-making facet of an international court and fragmentation a combination hazardous for the cohesiveness and development of international law. As asserted above, the norms international courts interpret originate from a growing number of sources. In this context, the law-making ability of an international court combined with the legal discourse different actors participate in offers a potential way to advance coherence and legal certainty. Then again, the justifiable fear remains that such law-making might be in contradiction between different international courts, causing further damage to the coherence of international law and legal certainty. There, a struggle for the right to state the law risks emerging. It thus appears that the answer on the ideal role of courts in the development of international law in a fragmented legal world depends on our assessment of the nature of international courts. Therefore, the next section will focus on the desirability of clear fragmentation compared to that of overlapping fragmentation based on observations on the power struggle between international courts.

5.2. A struggle for power? Between clear and overlapping fragmentation and a way out of conflicts

It can be asserted that the continuous efforts to bring cohesiveness into international law have remained unsuccessful, and that we should be critical of the notion that an image of a hierarchical and cohesive international law would reflect the political reality.[197] Notably, Koskenniemi and Leino claim that the participants to the dialogue on fragmentation, whether representatives of a special regime or the ICJ, are all taking part in an institutional power struggle of hegemony.[198] Here, the observed struggle is not about where one system ends

[195] ILC report A/CN.4/L.682, p.11.
[196] Koskenniemi – Leino 2002, p.562.
[197] Ibid, p.556-562.
[198] Ibid, p.556-562.

and the other begins or about a complicated interpretative process where different laws have to be consolidated. It is rather about who has the final authority to state the law in a given context.

Indeed, this struggle can be observed between numerous international courts and other institutions. For instance, a type of competition and fragmentation was at plain sight between the ICJ and the ICTY, when the latter overruled on some considerations of the former, and consequentially denied any hierarchical structure between the two which would have made it necessary to follow the ICJ's rulings.[199] While it is easy to understand the call for unity of opinions or interpretations of the same legal questions, Koskenniemi and Leino point out that it is, probably due to the different sensibilities of the ICTY, precisely the point to challenge the ICJ and its preferences.[200] As it has been asserted that ICJ could be the organ capable of ensuring the "unity" of international law,[201] such deviations from its rulings show the piercing force of fragmentation. For Tuori, these types of struggles are testimonials of regimes of international law becoming transnational law.[202]

It must be emphasized that these conflicts of authority between regimes are not one-offs, as they are caused by the fundamental overlapping of the respective functions of different international regimes and their courts. Notably, the European Court of Justice (ECJ) has been noted to be on a general note in competition with the European Court of Human Rights (ECHR).[203] This is due to the fact that both the ECJ and the ECHR are the supreme adjudicators of their respective systems, and while as such both guard similar fundamental rights in partially the same area, their hierarchical relationship is horizontal.[204] Together these conflicts demonstrate that fragmentation has created superimposed and jurisdictionally competitive legal systems with their own adjudicatory mechanisms, a phenomenon bound to cause unclarities as to which international court, or other institution, should have the final say in any given matter.

[199] See for example Čelebići case, para. 24 and Koskenniemi – Leino 2002, p.565-566.
[200] Koskenniemi – Leino 2002, p.566-567.
[201] Tuori 2014, p.33.
[202] Ibid, p.33.
[203] Lavranos 2008, p.218.
[204] Ibid, p.226 and 230.

Thus, for international courts, a challenging yet pivotal question is how should these moments of collision of legal regimes be dealt with. The issue has been considered notably by von Bernstorff. In his proposition, fuelled by a fear of domination of international law created by the most efficient legal regimes, he asserts that in situations where a court is deciding on a case where a conflict exists with another regime of international law, this said court should simply refuse to make a decision on the matter.[205] He goes on to argue that this would force states to develop the legal order.[206] He thus appears to support an extreme version of clear fragmentation. While this may solve the fear of an efficient judicial sector dominating the general substance of international law, his assertion seems problematic on at least two key fronts. First, it is questionable whether there exist cases for which the normative questions are limited to one specific regime of international law,[207] essentially causing a general halt in cases treated by international courts. Second, this ignores a fundamental function of a court, which is to provide justice and legal certainty. From the perspective of a legal subject, his solution does not seem convincing.

Interestingly, Koskenniemi and Leino note similarly that, from the perspective of challenges presented by fragmentation to the coherence of international law, "fully self-contained regimes may seem to pose less of a threat than semi-autonomous ones that apply concepts of general law but do this from a special perspective."[208] The problem is not that new areas of law appear, but that they utilize the "general" international law as support in a manner that is inconsistent with traditional approaches and interpretations.[209] Ingrained in this type of a "radical pluralistic" view is the notion of courts being biased based and adopting the perspective which corresponds to the reason of their establishment.[210] Another way of portraying the asserted incompatibility of different regimes would be to highlight their natural evolution towards autonomous social systems, separate from the will of any institutional actor.[211]

[205] von Bernstorff 2015, p.50.
[206] Ibid, p.50.
[207] Ibid, p.46. He himself notes that "many cases which are being decided by sectorial judicial institutions deal with constellations, in which conflicts between norms from within and outside that specific legal regime occur."
[208] Koskenniemi – Leino 2002, p.561.
[209] Ibid, p.561.
[210] For a similar Kelsenian radical pluralistic view, see Tuori 2014, p.35.
[211] Tuori 2014, p.36.

The above perspectives on the nature of fragmentation reflect preferences to a clear fragmentation of international law in contrast to an overlapping one. With the first type of fragmentation, the object would be to aim solely at what Tuori calls "local coherence", while the second would also allow to advance "total coherence"[212]. By focusing on local coherence, scholars may aim to provide theoretical frameworks that limit the damage done by power struggles notably to general international law. However, doing so they are not able to solve the issues of separate development and offer no convincing solution to inter-regime conflict-resolution, while these conflicts are demonstrably occurring. Furthermore, the complexity of legal questions begs the question of whether a problem can always be sufficiently condensed to neatly fit into one regime, never mind the possibility of interpretation without using general international law. The realism of strictly separated regimes appears questionable: as the globalized world, so too is legal reality expressive of cooperation, discourse and overlapping.[213] Finally, from the perspective of macro justice and international courts' norm-creation, the need for such inter-regime discourse appears as paramount, regardless of the forum in which it takes place. Otherwise the macro perspective, which was deemed as necessary for the goals of international courts to be reached, will remain out of reach.

One needs to also note that international treaty law, i.e. the Vienna Convention on the Law of Treaties (VCLT),[214] demands to take all relevant rules of international law into consideration in a treaty's interpretation process, not just regime-specific ones. This would indicate that not only would clear fragmentation be practically impossible and detrimental, it would also be in contradiction with the most important treaty relating to the interpretation of international law.

As such, opposite possibilities need to be explored. There are arguments in favour of overlapping fragmentation and enhancing total coherence as well. For one, it is questionable whether we should see international courts only as participants in a battle of authority or hegemony. As an example of advancing the total coherence of international law, the above competition between the ECHR and the ECJ was at least partially and temporally solved when the ECHR adopted the so-called *Solange* approach.[215] According to it, "as long as the

[212] Ibid, p.16.
[213] Ibid, p.41-42.
[214] Article 31 (3) (c) of the VCLT.
[215] See Lavranos 2008, p.233 and Bosphorus v. Ireland, paras 155-156.

level of fundamental rights protection within the EU is not manifestly deficient", the ECHR will refrain from using its jurisdiction to challenge EU law and the ECJ's interpretations.[216] This represents a way of increasing the total coherence of international law, in which is ingrained the belief that the issues inherent in an overlapping fragmentation where regimes are not fully self-contained can be rendered smaller via dialogue and specific approaches to potential conflicts. Nikolaos Lavranos goes as far as arguing that the approach could be used more generally to tackle problems related to fragmentation and the proliferation of international courts.[217] Yet supporting this kind of an approach does require a lot of trust in the willingness of international courts to refrain from using their jurisdiction.[218] If we share the view of Koskenniemi and Leino, where international courts appeared to take part in an institutional power struggle to hegemony, the *Solange* approach appears as problematic. Indeed, it could allow a "strong" international court to use a potential use of its jurisdiction as a way of developing and controlling other regimes, thus making von Bernstorff's fear a reality.

However, similarly to what Lavranos is calling for, Tuori has noted that on the international level not only power struggles are observable, but signs of dialogue and overlapping are apparent as well.[219] Based on this, he makes an assertion that does not appear to be a radical one: it claims no unity in law but highlights the potential of a discursive meta-principle.[220] However, Tuori himself notes that the possibilities of such a discursive principle are dependent on a certain uniformity on the "legal-cultural level".[221] Furthermore, it should be pointed out that such an approach cannot offer satisfactory answers to situations where this discourse does not lead to a desirable solution, as no formal unity in law exists. For such a discursive meta-principle to work, it would thus require a high level of benevolence from international courts.

From the perspective of minimizing the problems caused by fragmentation and the proliferation of international courts, it is therefore necessary to highlight the benefits of such inter-institutional legal discourse from the courts' perspective. Beyond advancing the total

[216] Lavranos 2008, p.233
[217] Ibid, p.235.
[218] See e.g. ibid, p.235. Lavranos himself notes that the application of *Solange* depends on the "attitude and readiness" of international courts.
[219] Tuori 2014, p.49.
[220] Ibid, p.49.
[221] Ibid, p.49.

coherence of the legal system, advocating such inter-regime discourse would appear beneficial in relation to the other findings of this thesis: it would allow for the wider perspective necessary in norm-creation to be taken better into account, thus lessening the impact of a lacking legislative. Second, e.g. in the context of a transitional society, the coordinated simultaneous use of different institutions has been asserted to benefit their respective impacts.[222] This is what we noted in chapter three, arguing that different institutions serving different needs does not necessarily equate to an adversary for individual international courts, but the opposite. Via inter-institutional discourse and cooperation, the possibility of providing macro justice increases, thus decreasing the likelihood of considering an international court's work a failure. Third, it is necessary to highlight the destructive nature of inter-regime power struggles from the courts' perspectives. While taking their focus from their core task, i.e. providing justice, they delegitimize the justice provided by international courts as a whole. Notably, no overlapping or inter-regime discourse would emphasize opportunities for forum shopping, a phenomenon created by fragmentation that is awkward for the legitimacy of international law.[223] Furthermore, disputes of authority appear to damage the impact of the work of international courts. Beyond causing damage to the international structure's legitimacy as a whole, international courts and their impact have been generally noted to have suffered by struggles with institutions such as truth commissions, notably caused by unharmonized objectives and fear of conflicting interests.[224]

As the example of the ECHR and ECJ showed us, finding common ground does not appear to be unfeasible. The limits of the discursive meta-principle proposed by Tuori are apparent though, especially as it remains quiet on the exact contents of an inter-regime discursion. Resolving such conflicts of authority via legal discourse is viable and feasible where there exist possibilities for harmonization of objectives and interests. It remains a blunt tool, however, when the regimes, which operate in the same social and territorial space,[225] are in a more fundamental contradiction with each other. For how should legal discourse find common ground, let's say, between economic and environmental law? Their respective underlying values are markedly different. For such conflicts of authority, beyond the

[222] Hayner 2011, p.113
[223] ILC report A/CN.4/L.682, p.247.
[224] Hayner 2011, p.111-113 and 119.
[225] Tuori 2014, p.26-27.

practicality of it, it also remains questionable whether their resolution *should* be left for inter-regime discourse. The moral and value connotations such a decision would have would require for it to have a high degree of democratic legitimacy as well as the macro perspective to be considered. As has been asserted throughout this thesis, however, this is a quality international courts lack.

5.3. About consequences and approaches

It could be seen as surprising how positive a spin Koskenniemi and Leino are putting on fragmentation and the proliferation of international courts, referring to it as "a rather theoretical, even esoteric" or "unavoidable minor problem".[226] However, one could argue in their defence that their criticism is to a large part directed towards the ICJ and it trying to position itself on the top of a hierarchical structure of international law.[227] Nevertheless, at the heart of the issue of fragmentation and the proliferation of international courts is that a problem or situation can be framed in many different ways and thus in the specific terminology of each of these regimes. As fragmented regimes, they thus work with different underlying assumptions and logic. Which regime should then pave way for the other, and how and by whom is that decision made? It should not be arbitrary in which language a legal decision is made, because it has an enormous impact on which values are promoted over others. Furthermore, such a potential arbitrary preference of one regime over another would be questionable from a moral perspective.[228] As the ILC concluded in its report, hierarchical conflicts between regimes should not be solved by any technical approach, instead, due to their political connection, "they require a legislative".[229]

Once again, we note the connection between democratic legitimacy and fragmentation. For example, whether a question is considered to belong more to the field of human rights law, economic law or environmental law will affect the substance of the relevant legal decision itself. The substance of the justice produced by any legal system can hardly be considered a merely theoretical or minor problem. Koskenniemi's and Leino's dismissive stance reflects a consideration that is limited to the perspective of international lawyers, where fragmentation is an issue of norm interpretation and conflict that is caused by the necessity

[226] Koskenniemi – Leino 2002, p.574-575.
[227] Ibid, p.575-576.
[228] See Fuller 1969, p.39-40. While Fuller talks about existing contradictory rules, the same effect could be argued to be caused by contradictory regimes.
[229] ILC report A/CN.4/L.682, p.245.

of pluralism.[230] Here it is important to note that courts are to provide justice and legal certainty for legal subjects. From the point of view of such a subject, differing and competing legal regimes and institutions are in clear contradiction of these goals, especially so when no hierarchy between them is established by a legislative. This is problematic from the perspective of the legitimacy of international courts' decisions.

Based on the observations made above in this chapter, different approaches offer little consolation or hope for those fearing further loss of cohesiveness of international law. First, fragmentation appears necessary to allow for different interests to be considered. Second, siding to view international courts purely as participants to a battle of authority, and thus promoting purely local coherence, brings no tangible solution to the problems brought by fragmentation and the proliferation of international courts to the total coherence of the international system.[231] It is also questionable whether the idea of fully autonomous regimes corresponds with legal reality. However, as the ILC's report on fragmentation and the proliferation of international courts concedes, "In conditions of social complexity, it is pointless to insist on formal unity."[232] This may be so, but it appears that formal unity is not required to counter at least some of the problems encountered. A discursive meta-principle appeared to allow to widen the perspectives to be considered by international courts, decreasing the loss of coherence of the international system and improving the impact of international courts. Then again, leaving the resolution of conflicts of authority to inter-institutional legal discourse risks taking an unjustified leap of faith, as it appears that there exists no one single formula that could solve conflicts between functionally differentiated regimes.

Finally, it is apparent that international law and courts are tools amongst others, and should the conventional wisdoms prove to not be efficient tools, the practical actors will choose something that fits their needs better.[233] This is also what we observed when the international courts' ability to fulfil the needs of macro justice in the context of a transitional society was analysed, and it should not be seen as a solely negative development. Fragmentation appears

[230] This was also the conclusion the ILC's report, indicating that pluralism is necessary, and that the tool-box provided by notably the VCLT can help in the complicated interpretative processes caused by fragmentation. See ILC report A/CN.4/L.682, p.248-249.
[231] See Tuori 2014, p.37 for a similar assertion.
[232] ILC report A/CN.4/L.682, p.15.
[233] Koskenniemi – Leino 2002, p.560.

thus as conscious and deliberate, not coincidental or erroneous. For international courts, fragmentation and the proliferation of international courts is an additional reason to fix remaining legitimacy and impact-related issues. Not only does it emphasize the issues related to their democratic legitimacy and norm-creating, but it offers the relevant actors other ways to seek the justice they are looking for if international courts fail to provide.

6. Final remarks

6.1. Conclusion: a problematic framework

Above this thesis considered three themes in order to deconstruct the framework in which international courts operate: the kind of justice international courts can and should provide; the democratic legitimacy vacuum in which they operate and the phenomenon of fragmentation and proliferation of international courts. This thesis asserted that each of them causes problems to international courts on their own, and additionally claimed that these three distinct features interact and reinforce each other. First, however, in order to provide an explanation of the conventionally argued benefits of international courts and their demand, the thesis started with analysing the historical context of the emergence of international courts. This historical context was asserted to have laid the foundations for the legend-building narrative on international courts. It was observed that they initially came in with hefty expectations. International courts were seen as tools necessary for preventing war, ensuring peace and fighting impunity, all the while building the body of international law. Furthermore, it was noted that via globalization the functions of international courts diversified, as phenomena became more easily treated on the international level.

Next, in chapter three we turned our focus to what is actually provided by international courts. It was argued that because international courts are constrained by the case they are dealing with, they are limited in the type of justice and truth they can provide. Accordingly, a distinction was made between micro and macro justice and truth, where the first's focus was on an individual level and the second's on a larger societal one. Through the example of transitional justice, it was asserted that the macro-level goals international courts have require the production of macro-level justice. Further, it was asserted that this failure to recognize the type of justice required and the incapacity of international courts in reaching it, e.g. in transitional societies, was an example of the essence of fragmentation: where the type of justice provided by international courts does not cut it, relevant actors turn to other institutions instead. A key observation thus emerged that resonates with the hypothesis of the thesis: there is a discrepancy between the goals international courts were created to reach and their actual aptitudes.

We then turned our focus to the democratic legitimacy vacuum in which international courts operate. It was argued that this context was no accident. Indeed, as Kelsen notes on the

primacy of international courts, "It is the line of least resistance".[234] The statement was not a display of irony, but an expression of how legal development could be better achieved on the international level via courts. At the same time, it exposes the reason for the criticism of this facet of international courts: as courts act as norm-creators, it conceals the fact that they take on a political role and thus do away with the principle of separation of powers. Through a critical analysis of this context, it was asserted that no convincing counter-argument could offset the concerns created by the absence of a democratic legislative. Notably, the findings of chapter three indicated that international courts cannot guarantee peace, an assertion that was central to why the absence of a legislative was initially seen as a minor deficiency.

In addition to portraying this unsatisfying context, we noted that it causes theoretical and practical problems to the courts' decision-making. First, it was asserted that because of their natural inclination to be better suited for micro justice, the quality of the law made by courts cannot adhere to the requirements of the generality of the law nor of macro justice. This argument or finding should be of crucial importance for the development of international courts, as it was argued that macro justice and the generality of law were necessary for both the acceptance of the work of international courts and the reaching of their goals. Further, because an openly political court would be considered illegitimate, it was asserted that international courts have to hide this norm-creating facet in their work. Finally, it was shown how the lack of a legislative complicates an international court's interpretative processes, as both moral and other normative support is harder to locate.

In chapter five, the thesis considered how fragmentation and the proliferation of international courts have further transformed the framework in which international courts operate. First, it was observed that functional fragmentation can be considered to have weakened the cohesiveness of international law. Perhaps more importantly, it was also observed to eventually lead to a competition of authority between different regimes. Both of these aspects can be asserted to have complicated the environment in which international courts operate on their own. Second, these effects were considered in light of the findings of this thesis. Fragmentation was asserted to further aggravate concerns of democratic legitimacy, all the while undoing the arguments prominent scholars have used to support the lack of a legislative. In relation to the justice produced by an international court, it was asserted that

[234] Kelsen 1943, p.399.

fragmentation may help international courts in producing micro justice, as it allowed for specific concerns to be considered. Further, pluralism was argued as necessary in a globalized world which demands specialized adjudication. However, the problems of fragmentation were asserted to become apparent when these concerns point into different directions. This was also why fragmentation appeared possibly problematic in light of norm-creation by international courts: either norms are created from a narrow regime-specific perspective, or they end up hijacking general international law or other regimes for their own purposes. Ultimately, the eventual consequence of fragmentation was highlighted: it offers possibilities for the emergence of new regimes, should the existing ones prove inefficient.

Therefore, it appears that the thesis' hypothesis can be asserted to have been at least partially proven. The three phenomena were each shown to cause problems for international courts on their own, but they were also apparent connections between them that reinforced their negative impact. Furthermore, the results of this deconstruction differ fundamentally from the legend-building narrative on international courts. Such a critical analysis of the framework in which international courts operate and what they provide could be seen as part of a wider questioning of what and whose interests international law actually serves. The project of international law could be framed as one of democratization, international peace and rationality, as we saw was the case when international courts emerged. However, especially newer inquiries have proposed that international law would also be an instrument of domination and imperialism; that it has made sure that European or Western values and interests are protected and expanded.[235] To tackle such criticism, improving international courts' legitimacy would be a key step. Indeed, while demystifying a court's work could be of value to questioning the current state of affairs, it can then naturally, and perhaps more importantly, also lead to favourable developments.

Hence, in addition to showing and portraying the problematic facets above, a few possible paths of development were proposed by the thesis. First, it was asserted that international courts should focus on what they do best, namely providing micro justice, as there was a clear demand for it. Furthermore, international courts would benefit from recognizing the type of justice they can produce as well as the contributions of other institutions. Reaching for more than they can chew risks their legitimacy and impact. It was also asserted that

[235] See e.g. Koskenniemi 2016, p.104-105.

highlighting international courts' capacity to reach macro goals alone should be avoided, as high expectations were bound to render them to disappointments. The immanent critique applied thus sought to demonstrate the benefits of recalibrating both the self-understanding and actions of international courts in relation to the justice they provide. Second, it was asserted that while the democratic legitimacy vacuum cannot be removed, its effects can be limited. Such developments included focusing on judges and their elections; the combination of well-educated judges and the international courts' capacity to create their own procedural law and, finally, increasing publicness and transparency by, for example, *Amici Curiae*. Third, it was shown that there is reason to believe that via adopting an inter-regime discursive meta-principle, as advocated by Tuori and Lavranos, and focusing on the detrimental effects of power struggles, some of the negative effects of fragmentation's institutional facets could be diminished. These included solving conflicts of authority and avoiding forum shopping. However, this was asserted to require some congruence of objectives and a high level of legal-cultural uniformity. Finally, while such a development might be politically unfeasible and unrealistic, one cannot help but notice that most of the struggles the described framework causes would be swept away by the establishment of an international legislative. Without that possibility, international courts have to content themselves with finding ways of diminishing the observed difficulties, even if it appears to be increasingly difficult. In doing so, legal scholarship has a paramount role.

6.2. Future research questions and observations on possible shortcomings of the thesis

Providing an analysis of the framework in which international courts operate is a wide task, and as such some important questions that have arisen have to be left for future research. Some noteworthy questions concern notably the implications some of the phenomena analysed above have to the moral dimension in law. Specifically, whether legal fragmentation, the emergence of transnational law and the democratic legitimacy vacuum mean that we are bound to follow a strict version of legal positivism in the international field. This is because, based on the observation made notably on the effects of the democratic legitimacy vacuum, a problematic philosophical dilemma emerges: if morals have a place in the interpretation of international law, does more difference in moral attitudes mean fewer possibilities for the expansion of international law or conversely, does more international law signify a standardization of moral attitudes? It would also perhaps be relevant to

approach the morality of international law by using Lon Fuller's criteria more widely than has been done here.[236] In addition to such a moral or philosophical approach, the democratic legitimacy vacuum and the absence of some notable states from key international courts would point towards the importance of research that asks whether, in the face of international law, some states and their citizens are more equal than others.

Finally, this thesis operated under a challenging and encompassing research question that it attempted to answer with a critically oriented analysis. As such, it risks presenting the work of international courts as too much of a black and white issue. Here, it would be important to stress that the underlying goal of such a critical approach is not the delegitimization or undermining of international courts. It is rather the conviction that, due to their considerable importance, we must make sure that their impact and the progress made are not risked by the failure to recognize and deal with any weaknesses they might have.

[236] See Fuller 1969, p.33-41. Through the allegory of Rex, Fuller argues for eight different ways that the morality of law could be left wanting. Although notably the question of the generality of law as produced by international courts has been discussed here, it would be of additional value to analyse, e.g., whether the promulgation of international law is satisfactory from a moralistic point of view, and what are the moral consequences of potentionally contradictory rules caused by fragmentation.