A RULE OF LAW VIEW ON THE RELATIONS OF INTERNATIONAL COURTS AND TRIBUNALS

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ABSTRACT

The article questions the manner in which international courts and tribunals (ICTs) currently approach the normative production of regimes outside their own, which can best be described as an attitude of polite indifference. It argues that such attitude on the part of ICTs is detrimental to the formal rule of law at the international plane, and in turn undermines the capacity of ICTs to coordinate the actions of the addressees that they have in common. It further makes the claim that the extent to which ICTs advance the formal rule of law at the international plane can be one of the relevant normative factors in the broader assessment of their legitimacy. Against this backdrop, the article offers a tentative ideal framework for the relations of ICTs and their underlying regimes which is attuned to furthering the formal rule of law. To do so, it draws inspiration from the restraints that political public reason theories prescribe for the public domain, and specifies principles of cooperation for ICTs, envisaged as a community of international legal institutions.

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I. INTRODUCTION

To date, inquiry into the normative legitimacy (or legitimate authority) of international courts and tribunals (ICTs)[1] has largely looked at each body

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individually, without regard to the interactions between them. Such a view cannot account for the fact that when multiple authorities operate at the same time, their relations may affect their respective claims to authority. Even when authors have examined legitimacy from a relational perspective, they have tended to stop short of articulating normative criteria for assessing which types of interactions are justified and which not.

To begin filling this gap, this article argues that relations between ICTs that further the coherence of international law in line with the requirements of the formal rule of law constitute a relevant legitimating factor for ICTs. This claim is modest in at least three respects that distinguish it from constitutional claims on international law. First, the essence of the claim is that acting along the lines prescribed above is conducive to international law working better as law—that is, as a set of rules capable of guiding its addressees. Second, nothing in the claim above implies a unitary view of international law. Quite to the contrary, the type of considerations put forward as relevant among ICTs is as modest as those that underlie the prescriptions of private international law, together with issues of conflict of laws between state legal systems, which constitute still the textbook example of distinct legal systems. Finally, while my argument is that ICTs *should* take into account as part of their decision-making process how their decisions affect the functioning of international law, this consideration is only one among other factors that can affect their legitimacy.

Against this backdrop, the article then offers a tentative ideal framework for the interaction among ICTs and their underlying regimes, which is attuned to furthering the formal rule of law at the international plane. In doing so, this article draws inspiration from the restraints that political public reason theories prescribe for the public domain in order to specify principles of cooperation for ICTs

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PluriCourts Workshop on the Political and Legal Theory of International Courts and Tribunals where an earlier version of this article was presented, as well as the editors to this special issue for their comments. A number of the arguments in this article were developed in the context of the author's doctoral dissertation, while part of the ProDoc Project 'International Law for a Global Economy' at the University of Geneva, funded by the Swiss National Science Foundation. Mistakes remain entirely mine.

1. This includes both international adjudicating bodies as defined by Karen Alter and other quasi-judicial and monitoring bodies, entrusted with the interpretation and implementation of an international treaty. While the decisions of such institutions are not mandatory in law, their activity is juris-generative and their position *vis-à-vis* their addressees is such as to warrant their inclusion. KAREN J. ALTER, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 64 (Cesare P. R. Romano et al. eds., 2014) ("Today's ICs . . . have compulsory jurisdiction and they allow non-state actors to initiate litigation."); YANNICK RADI, LA STANDARDISATION ET LE DROIT INTERNATIONAL: CONTOURS D'UNE THÉORIE DIALECTIQUE DE LA FORMATION DU DROIT 231–41 (2013); Andrei Marmor, *Soft Law, Authoritative Advice, and Nonbinding Agreements*, OXFORD J. OF LEGAL STUD. (forthcoming) ("[S]oft law . . . is not negligible and sometimes surprisingly effective."); Fuad Zarbiyev, *Saying Credibly What the Law Is: On Marks of Authority in International Law*, 9 J. INT'L DISP. SETTLEMENT 291, 300 (2018) ("[D]ue to the independence, impartiality and adversarial nature of judicial and quasi-judicial proceedings, statements of international law offered in such proceedings tend to be equated with international law itself.").

envisaged as a community of international legal institutions; it draws primarily on the theory of "justice as impartiality" developed by Brian Barry.

This article proceeds in two parts. Part II briefly recalls the manner in which ICTs typically interact among themselves. On this basis, it provides a criticism of the current practice as potentially undermining the formal rule of law at the international plane. Having laid this critical groundwork, Part III puts forward an ideal model for the interaction of ICTs that is capable of furthering the formal rule of international law. While the article uses examples predominantly from the field of international economic law, most of the arguments put forward may be considered relevant beyond this field of international law.

II. INTERACTION OF ICTS, RULE OF LAW, AND (LEGITIMATE) AUTHORITY

In a recent study, Nicole Roughan examined the relational aspect of legitimate authority in view of the reality that many bodies claim authority over the same addressees and certain of these addressees' activities, which results in "domain" overlap.[2] One could think, Roughan tells us, of scenarios analysing the relations among different state authorities, state and indigenous peoples' authorities, state and international authorities, or, as is the focus of this paper, different international law authorities. Roughan further points out that in such situations of interaction, "the presence of multiple authorities may defeat or limit the ability of each authority to successfully coordinate subjects or achieve other goals, which would be better served if the authorities either found a way to work together, or established working hierarchies or exclusive spheres of operation."[3] In such situations of domain overlap, these authorities are in a position of relativity. On this basis, Roughan's core normative proposition is that one aspect of the assessment of the extent to which a particular authority is legitimate requires an inquiry into the relations that it establishes with other authorities and the extent to which these relations are justified.[4]

This Part uses Roughan's analytical lens to examine the relations among ICTs. It defines the situations in which the domains of ICTs overlap and presents the ways in which ICTs tend to approach the normative production of other regimes,[5] including that of other ICTs (further referred to as external norms), in such situations. Normatively, this Part argues that the current approach is likely to be detrimental to the potential of each ICT to coordinate its addressees, thus laying the ground for the search of a normatively more desirable approach in Part III.

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2. NICOLE ROUGHAN, AUTHORITIES: CONFLICTS, COOPERATION AND TRANSNATIONAL LEGAL THEORIES 3 (2013).

3. *Id.* at 45–47.

4. *Id.* at 138.

5. The definition of "regimes" follows the one offered by Margaret Young, who defines them as "sets of norms, decision-making processes and *organisations* coalescing around functional issue-areas." Margaret Young, *Introduction: The Productive Friction between Regimes*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 6 (Margaret Young ed., 2012) (emphasis in original).

A. ICTs' Shared Domains and Interaction: Polite Indifference?

ICTs often find themselves in situations of domain overlap. Leaving ICTs operating in different regions aside, ICTs, almost by definition, share at least part of the states over which they claim authority; thus, they, by their nature, share at least part of their addressees. Also, given that activities in the real world rarely fall neatly under the purview of only one field of international law, ICTs, especially ones that are embedded in a particular regime, tend to claim authority over the same activities, at least occasionally.[6]

The clearest situation of domain overlap that results from this position of ICTs is when they face parallel proceedings based on the same facts—i.e., where their jurisdictions can be said to overlap. The *MOX Plant*[7] case has become something of a go-to example for this scenario. In more recent years, one could also point, among many others, to the *Yukos* cases before the European Court of Human Rights (ECtHR) and various investment tribunals[8] or the World Trade Organization (WTO) and investment proceedings relating to tobacco control.[9]

Domains of ICTs overlap beyond cases of parallel proceedings too. These cases arise when norms of one regime bear (or are claimed to bear) on a dispute before an ICT from another regime—i.e. when they can provide grounds for ICTs' reasoning on the question whether the claim before it is well-founded.[10] This situation also constitutes a case of domain overlap. In this case, norms that are in force between the state parties are relevant to the dispute and thus are, save for express language to the contrary, part of the applicable law to that dispute.[11] This

6. The focus of this paper will be primarily on the interaction between regime-specific ICTs and norms, rather than their respective approaches to general international norms. On the distinction between regime-embedded and regime-independent ICTs see Harlan Grant Cohen et al., *Legitimacy and International Courts – A Framework*, *in* LEGITIMACY AND INTERNATIONAL COURTS 1, 23–27 (Harlan Grant Cohen et al. eds., 2018).

7. *See, e.g.*, MOX Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 2001, 95; MOX Plant (Ir. v. U.K.), Order No. 3 of June 24, 2003, 42 I.L.M. 1187 (Perm. Ct. Arb. 2003); Case C-459/03, Comm'n v. Ireland, 2006 E.C.R. I-4635.

8. *See, e.g.*,Yukos Universal Limited v. The Russian Federation, PCA Case No. AA 227 (Perm. Ct. Arb. 2014); OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Eur. Ct. H.R. (2014).

9. Panel Report, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Doc. WT/DS467/23 (adopted Aug. 28, 2018); Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12 (Perm. Ct. Arb. 2015); Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

10. This question is conceptually and practically different from the question of ICTs' jurisdictional scope. The distinction is between the norm used as a basis for the claim (the cause of action) and the norms applicable to decide whether such a claim is well-founded. Only the first is a matter of jurisdiction; the second is a question of applicable law.

11. This delimitation is meant to encompass the fall-back on other norms of international law because of the application of one treaty in the context of these other norms of international law. While these cases are sometimes argued and decided as questions of interpretation, they should be contrasted with situations in which a term in one regime is defined by reference to other relevant rules. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 201–05 (2006). *See generally*

second situation of domain overlap is linked to the fact that decisions of ICTs have a rule-clarifying function beyond the specific case.[12] As such, even when there is no jurisdictional overlap *stricto sensu*, the way in which an external norm is approached by an ICT may set expectations for its future relevance before that ICT.

In these situations, norms from one regime can have one of two roles before another regime's ICT. They can either reinforce the outcome that the ICT's own norm[13] suggests in the case at hand,[14] or they can point to a different outcome—i.e., be in conflict.[15] In the first instance, the regimes reinforce each other in the particular case; in the second, by being in competition, they potentially undermine

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Anastasios Gourgourinis, *The Distinction between Interpretation and Application of Norms in International Adjudication*, 2 J. INT'L DISP. SETTLEMENT 31 (2011).

12. Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 504 (Cesare Romano et al. eds., 2013). *See generally* Harlan Grant Cohen, *Theorizing Precedent in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2015).

13. The reference to "own" and "external" norms mirrors the phrase coined to describe ICTs' attitude as "my rule governs*." See* James Crawford & Penelope Nevill, *Relations between International Courts and Tribunals: The 'Regime Problem'*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 235, 257 (Margaret A. Young ed., 2012).

14. By way of clarification, it is important to note that regimes that generally aim for the same goal may point to different results in a particular case or in virtually identical cases pertaining to the legality of the same state measure. *See, e.g.*, Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence*, *in* PROCEEDINGS OF THE QUÉBEC CITY CONFERENCE ON THE WTO 20 (eds. C.E. Côté, V. Guèvremont, R. Ouellet, Presses de l'Université de Laval) (forthcoming); Stephanie Berry, *The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa*, EJIL: TALK! (Jan. 3, 2019), https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/ (last visited Mar. 10, 2019) (discussing how the HRC and the ECtHR came to different conclusions with regard to the "burqa ban").

15. Norm conflict is defined as including cases in which the law creates two obligations that cannot be complied with simultaneously or a permission/right and an obligation that contradict each other (i.e., if their addressee takes advantage of the permission, they would violate the obligation). This understanding of normative conflict is in line with the use of the term in legal theory, international legal scholarship, and even timidly in the case law of ICTs. *See, e.g.*, MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 125–28 (2007) [hereinafter KRAMER, OBJECTIVITY AND THE RULE OF LAW]; Erich Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395, 395–96 (2006); United Parcel Service of America Inc. v. Government of Canada, Case No. UNCT 02/1, ICSID, Award on the Merits, ¶¶ 117–18 (May 24, 2007) (compare with ¶¶ 40–41 in the Separate Statement of Dean Ronald A. Cass); Eureko B.V. v. Slovak Republic, PCA Case No. 2008-13, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension ¶ 253–54 (Perm. Ct. Arb. Oct. 26, 2010); Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 4.1, WTO Doc. WT/DS27/R (May 22, 1997). For an overview of the different definitions of normative conflict in international law, see MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW 50 (2012); Nele Matz-Lück, *Treaties, Conflicts between*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010) (eBook).

each other.[16]

Several studies suggest that in situations of competition, ICTs are reluctant to give much importance to norms from other regimes—or at the very least, they seem to systematically give more weight to their own norms.[17] There is no one way in which this shows in decisions. By way of example, ICTs employ a variety of subtle techniques, including ignoring a particular norm as inapplicable on formal grounds; considering an international norm as a unilateral state interest and thus requiring it to fit into the exceptions to the breach of their own norm; or finding that two norms do not conflict through the use of a dogmatic definition of normative conflict and not looking at the bottom line effect of the law, which is the effect most relevant for their addressees.[18] The effect of all of these techniques tends to be the same—the external norm is ignored altogether or is in any case not determinative of the dispute.

Taking examples from international economic law, recent studies on the practice of investment arbitral tribunals and the WTO Appellate Body show this type of reluctance by both. Investment tribunals have, for instance, afforded rather limited normative value to human rights[19] and environmental norms[20] when used as a defence. Indeed, to date, no norm from a different regime has been in itself successfully used as a defence in an investment dispute.[21] The WTO Appellate Body has also been more open to instruments created in the WTO framework than outside of it, even if they come from the field of trade.[22] With respect to both, it is quite telling that outside of their respective regimes' case law, the case law most cited in these ICTs' practice is that of the International Court of Justice (ICJ, formerly the Permanent Court of International Justice—PCIJ) and state-to-state arbitral tribunals. Additionally, the two are so cited most often for propositions

16. Benjamin Faude, *How the Fragmentation of the International Judiciary Affects the Performance of International Judicial Bodies*, *in* THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 234, 245 (Theresa Squatrito et al. eds., 2018).

17. There are exceptions to this proposition, but it holds true for most courts, most of the time, and that in itself is problematic for the reasons detailed in Section III.A.

18. For a discussion on the importance of outcomes generated by the law, see MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 143–45 (2003) [hereinafter KRAMER, IN DEFENSE OF LEGAL POSITIVISM].

19. *See, e.g.*, Silvia Steininger, *What's Human Rights Got to Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration*, 31 LEIDEN J. INT'L L. 33 (2018); José E. Alvarez, *The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (Franco Ferrari ed., 2017).

20. For a definition of the "classic approach" see Jorge E. Viñuales, *The Environmental Regulation of Foreign Investment Schemes under International Law*, *in* HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 273 (Pierre-Marie Dupuy & Jorge E. Viñuales eds., 2013).

21. This includes cases in which the tribunal found on the facts that the specific breach of the investment treaty occurred in order to implement another treaty obligation to which both parties to the investment treaty were also parties. *See generally* Ioan Micula v. Romania, ICSID Case No. ARB/05/20, Award (Nov. 23, 2013).

22. *See, e.g.*, Pauwelyn, *supra* note 14, at 28–30.

pertaining to general international law (such as rules on interpretation),[23] which serve to ground rather than conflict with the constituent instrument of the ICT in question. It is indeed worth noting that when authors suggest that ICTs *do* apply other international norms, they often either refer to general international law and ICJ case law,[24] or refer to cases in which the norms reinforce each other.[25]

Some of these cases can be explained by reference to express limitations to the mandate of an ICT. However, the way in which norms from one regime are treated before another's adjudicator is *de facto* by and large a matter of policy choice on the part of that ICT. The relevant questions of applicable law[26] or conflict definition and resolution are aspects of decision-making for which ICTs enjoy significant discretion. Treaties are often silent on these matters, and when they are not, provisions rarely have the effect of actually limiting adjudicators' choices.[27] This lack of clear regulation is further compounded by a loose legal framework regulating normative conflicts in international law[28] and a common

23. Damien Charlotin, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis*, 20 J. INT'L ECON. L. 279 (2017).

24. *Id.*; Pauwelyn, *supra* note 14, at 4–7; *see* Eva Kassoti, *Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface*, 8 EUR. J. OF LEGAL STUD. 21, 37 (2015) ("A survey of the ever-burgeoning CJEU jurisprudence reveals that the EU courts, when faced with questions of international law, show a high degree of deference to the case-law of the ICJ and use it as an authoritative interpretation of international norms . . . ."); Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 230–32 (2013) (discussing the deference paid to ICJ decisions in ICSID procedures).

25. *See, e.g.*, Alvarez, *supra* note 19, at 36–38 (discussing how the tribunal in *Electrabel S.A. v. Hungary* reconciled ECtHR case law with EC decisions); Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. LEGAL STUD. 547, 549 (2010) (summarizing the four situations in which international courts rely on the reasoning of other courts); James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 106 (2007) ("[O]ne must not neglect the possibility that international investment law and human rights effectively can complement each other.").

26. Keeping in mind that applicable law is distinguishable from a given ICT's scope of jurisdiction.

27. Two potential exceptions to this statement are: (i) Article 1.2(2), which clarifies the Comprehensive and Progressive Trans-Pacific Partnership (2018), includes a negative definition of "conflict," and narrows the content of the concept significantly; and (ii) Article 3 of the Dispute Settlement Understanding (DSU) setting up the WTO Dispute Settlement Body (DSB), which has been generally considered to limit the applicable law before the DSB to the WTO Agreements, despite a convincing argument to the contrary by Pauwelyn. *See* Pauwelyn, *supra* note 14, at 13–15 (exploring how the DSU was used in the *EC – Bananas* case). For a discussion regarding applicable law provisions in investment treaties see DAFINA ATANASOVA, CONFLICT OF TREATY NORMS IN INVESTMENT ARBITRATION (Doctoral Dissertation, University of Geneva) 52–63.

28. On the particularly malleable nature of the framework for the resolution of normative conflicts, see Jean Salmon, *Les antinomies en droit international public* [*The Contradictions in Public International Law*], *in* DIALECTICA 285, 293 (Chaïm Perelman ed., 1965) (discussing the nature of conflict resolution principles in public international law and how they reflect the underlying basic structure of international law). *See also* ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY 40–42 (2009) (explaining that norm conflict resolution has no single set algorithm).

conflation of the questions of scope of jurisdiction and scope of applicable law by ICTs. The arguments below thus focus on these cases where approaches of ICTs to external norms is within their discretion and suggest that in such cases ICTs should consider furthering the formal rule of law at the international plane a relevant factor for the choices they make in them.

B. A Formal Rule of Law Perspective on the Interaction Among ICTs

In ignoring the normative production of each other's regimes in this way, ICTs tend to create or perpetrate normative conflicts for their addressees, rather than resolve them.[29] This fact seems to be difficult to square within the concept of justified authority relations from at least one perspective. Namely, this practice hinders international law from working well as law—put in more formal terms, it undermines the formal rule of law at the international plane.

Two aspects of this claim bear stressing at the outset. First, the claim concerns a *formal* conception of the rule of law—one that focuses on proper sources and form of legality.[30] That is, the rule of law as understood here boils down to the nature of rules and addresses questions such as the manner in which a law is promulgated, the clarity of the ensuing norms, or their temporal scope.[31] It prescribes qualities such as generality, certainty, clarity, prospective character, or coherence.[32] By contrast, it does not contain requirements on the content that the law should exhibit.[33]

Second, and by implication, the claim is morally modest. Under a formal conception of the rule of law, the degree to which international law complies with the ideal can only further its *efficiency*.[34] The rule of law on this account is famously compared to what sharpness represents for a knife.[35] It furthers the

29. *See*, *e.g.*, Cohen et al., *supra* note 6, at 20–21 ("[O]verlapping jurisdiction risks disorder, highlights the limits of specific tribunals' logics and mandates, and demonstrates the limits of their effectiveness, all of which in turn may threaten their perceived legitimacy with both outsiders and insiders."); Faude, *supra* note 16, at 235–36 ("If competing international judicial bodies do not take each other's decisions into account, they mutually undermine each other's performance.").

30. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91–92 (2004).

31. Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 9 PUB. L. 467, 467 (1997).

32. LON L. FULLER, THE MORALITY OF LAW 46–70 (1964); KRAMER, OBJECTIVITY AND THE RULE OF LAW, *supra* note 15, at 101–86; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–18 (2d ed. 2009).

33. For concise presentations of some of the influential substantive conceptions of the rule of law in legal jurisprudence and political science literature (particularly Calamita), see N. Jansen Calamita, *The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions*, *in* THE IMPORTANCE OF THE RULE OF LAW IN PROMOTING DEVELOPMENT 1, 3 (Jeffrey Jowell et al. eds., 2015); TAMANAHA, *supra* note 30, at 102–13; Craig, *supra* note 31, at 477–84.

34. KRAMER, IN DEFENSE OF LEGAL POSITIVISM, *supra* note 18, at 53–71; RAZ, *supra* note 32, at 223–27.

35. RAZ, *supra* note 32, at 226.

capacity of the law to achieve the goals it has set for itself but remains neutral on whether these goals are good or bad.[36] The argument below thus operates on the assumption that international law is overall good, so it working well is desirable.

When it comes to the specific ways in which ICTs' mutual ignorance hinders the formal rule of law, there are at least two requirements of the ideal that this practice seems to go against. In Lon Fuller's formulation of the requirements of the rule of law, as refined by Matthew Kramer, ICTs' current practice disserves the fifth principle, "against conflicts and contradictions," and the eighth principle, "congruence between law as formulated and as applied."[37]

Under the fifth principle, an "overabundant"[38] existence of conflicting legal norms hinders law in its aim to achieve any of the goals it has set for itself and even its legal character.[39] This principle is present in this situation where the law will be unable to guide its addressees toward their realisation. Law fails in its claim to secure obedience by failing to issue an intelligible command. When ICTs issue competing claims as to the meaning of international law, this requirement is undermined. Fuller's eighth principle—congruence between law as formulated and law as applied—is threatened as well when a significant number of law-applying decisions purporting to be based on the same law—i.e. international law—differ. Permeating discrepancy of this kind can suggest either that the decision makers[40] disregard certain parts of the law or that they interpret the law according to differing interpretative rules. Dissonant outcomes of this type raise questions as to the objectivity and proficiency of the institutions entrusted with applying the law. In turn, this inevitably impairs the trust in the capacity of legal institutions,[41] which disserves the prospects of compliance with their commands.[42]

From this perspective, the rule of law can be seen as imposing a duty on officials, including international adjudicators, to coordinate in order to secure its respect *vis-à-vis* the groups of addressees that they have in common.[43] Indeed, the

36. *Id.*; TAMANAHA *supra* note 30, at 91–92.

37. I refer to the content of Fuller's formal rule of law requirements as elaborated on and clarified by Kramer. As such, my account also espouses Kramer's view of the moral neutrality of these tenets. KRAMER, OBJECTIVITY AND THE RULE OF LAW, *supra* note 15, at 101–86.

38. *Id.* at 130.

39. *See id.* at 125–30 (explaining the detrimental effect of abundant conflicts and/or contradictions to a normative system).

40. Decision makers are typically, but not necessarily, the courts.

41. On the essence of the requirement of congruence between law on the books and law in practice and its effect on the authority of the law, see KRAMER, OBJECTIVITY AND THE RULE OF LAW, *supra* note 15, at 66–67, 178–79, 181–82.

42. *See* Samantha Besson & John Tasioulas, *Introduction*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 1, 11–13 (Samantha Besson & John Tasioulas eds., 2010) (stating the importance of voluntary compliance in international law and beyond).

43. Jeremy Waldron, *Authority for Officials*, *in* RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 47, 67–69 (Lukas H. Meyer et al. eds., 2003) [hereinafter Waldron, *Authority for Officials*]; Samantha Besson, *The Authority of International Law — Lifting the State Veil*, 31 SYDNEY L. REV. 343, 354 (2009); Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL'Y 15, 18–19 (2006)

approach of ICTs to the norms produced outside their respective regimes results either in excessive friction at odds with the requirements of the rule of law, or in a sufficient systematisation of the scope of application of the norms in question to satisfy them. While at first view the argument above may seem to be premised on seeing international law as a single, unitary legal system, this is not necessarily so. Indeed, there are good reasons to believe that a formal rule of law requirement of coherence exists between legal systems, to the extent that they purport to regulate the behaviour of addressees that that they have in common. Two complementary reasons militate in favour of this understanding.

On a conceptual level, defining the scope of application of the formal rule of law by reference to the addressees of the norms under examination reflects the rationale of the ideal. The requirements of the rule of law are principally posited for the benefit of the addressees of the law.[44] Their function is to ensure that the law is intelligible and that it can set standards of behaviour that its addressees can follow. In turn, the fulfilment of this function dictates the personal scope of application of the requirements to be circumscribed by reference to these addressees, rather than the institutions authoring the norms. Whether legal norms come from a single system or from multiple legal systems, one can expect a certain degree of respect for formal rule of law requirements from the norms that purport to regulate the behaviour of the same group of addressees.[45]

As a matter of history, it is telling that state legal systems—the textbook example of separate legal systems—have coordinated in order to secure coherence for the addressees that they have in common. The development and principles of private international law (e.g., conflict of laws) show one such rule of law concern: "[t]o avoid [the] regrettable result (law breeding disorder instead of order), conflicts rules were to be discovered . . . ."[46] The basic problems that private international law regulates today are still a reflection of this rationale. As Alex Mills summarizes them:

> For some parties, the existence of overlapping regimes may be an unfair barrier to movement, while for others it invites the possibility of gaining an unfair advantage and increasing institutional costs by bringing proceedings in a court which is most advantageous but not necessarily

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[hereinafter Waldron, *Rule of International Law*].

44. *See* KRAMER, OBJECTIVITY AND THE RULE OF LAW, *supra* note 15, at 183–85 (Central to both the jurisprudential significance and the moral-political significance of each of the Fullerian principles [of legality] is law's basic role in guiding conduct by presenting agents with demands and opportunities.); Waldron, *Rule of International Law*, *supra* note 43, at 16–19 (In the parts discussing the different function of the rule of law for ordinary citizens and for governments in municipal legal systems.).

45. It is important to note that this extension is possible only for formal and rather thin rule of law accounts, such as the one adopted here. By contrast, thicker and more substantive understandings of the rule of law, being much more value-laden, are linked to the existence of an underlying identifiable polity. For a discussion of such conceptions and their premises and requirements, see KRAMER, OBJECTIVITY AND THE RULE OF LAW, *supra* note 15, at 142–86; TAMANAHA, *supra* note 30, at 99–113.

46. RODOLFO DE NOVA, HISTORICAL AND COMPARATIVE INTRODUCTION TO CONFLICT OF LAWS 441 (1966).

> most appropriate . . . . The need for international coordination of rules of private law is thus not merely a technical legal issue, but a political, cultural and economic problem . . . .[47]

On a more general level, similar issues animate the subject matter of the rules on state regulatory jurisdiction under public international law as well. And these rules are also heavily supplemented by treaty arrangements where domains of jurisdiction overlap too often for the general rules to ensure a sufficient level of coherence for common addressees.[48]

This aspect of mutual recognition and coordination between state legal systems remains usually understudied in the literature on ICTs[49] as compared to the more classic parallel drawn between constitutional courts and ICTs—both as a descriptive and as a prescriptive model.[50] However, it is important to note that constitutional law comprises the pillars of a legal system—the principles most fundamental in its existence and operation. As such, it is natural that the commitment to the relevant constitutional instrument prevails over (or at least shapes) any court decision regarding external interests or norms. Prescribing a similar level of commitment by ICTs regarding the instruments they are entrusted to apply is implicitly premised on the understanding that all norms in these instruments are as essential to their respective regimes as those of constitutions are in state legal systems. Such a wholesale parallel is questionable. In turn, so should be the prescription for ICTs to abide by principles of engagement with external norms in the way constitutional courts do.

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47. ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 17 (2009).

48. Treaties on avoidance of double taxation or extradition conventions and numerous arrangements for cross-border regions where the usual division of jurisdiction between states is not satisfactory in view of the intensified cross-border movement are examples of instances where domains of jurisdiction overlap.

49. For exceptions, see Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 19–44 (Tomer Broude & Yuval Shany eds., 2011) (addressing conflict of laws in public and private international law); DIRK PULKOWSKI, THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT 329–35 (2014) (discussing regime conflict as horizontal jurisdictional conflict); GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 42–43 (2012) (discussing reasons for lack of coordination between state legal systems); Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AM. J. INT'L L. 77 (2002) (exploring how different governments are linked through trade); Dafina Atanasova, Conflict of Treaty Norms in Investment Arbitration 158–84 (Doctoral Dissertation, University of Geneva).

50. *See, e.g.*, Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, *in* RULING THE WORLD? 356 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes*, 1 J. L. & CT. 61 (2013).

Indeed, ICTs are in a position where they derive benefits from being institutions that are identified as part of the international law machinery. When ICTs claim that their decisions should be respected and the norms of their regimes must be complied with, they generally do so by virtue of being *international legal* institutions. They rely implicitly (and sometimes explicitly) on the authority of international law to advance their institutional goals and even to justify their existence. Being identified as part of the club of legal institutions can reasonably be seen as beneficial to them in performing these goals. This is particularly true given that ICTs lack the types of compliance-inducing mechanisms that state institutions typically have at their disposal, such as coercion or a more clearly defined democratic pedigree.[51] Being recognised as part of international law sets them apart from the non-legal institutions operating at the international plane which, while sometimes very influential, are denied access to the international law toolbox.[52] As a result, their attitude disserves the way in which international law functions—i.e., it is at odds with the requirements of the formal rule of law as described above—also disserves the ability of any of them to coordinate the addressees they have in common.[53]

While a rigorous assessment of the relation of upholding the formal rule of law with the complex question of the legitimacy of ICTs[54] is beyond the scope of this article, I will make a modest argument that the extent to which ICTs advance the formal rule of law at the international plane can be a relevant normative factor by which to assess their output, or result-oriented legitimacy.[55] Indeed, furthering the coherence of international law as described above can be reasonably linked to such goals of ICTs as setting precedent or providing guidance on international law interpretation. My argument in this respect suggests only a limited and relative correlation between the two. The correlation is limited in that an approach furthering the formal rule of law at the international plane is one among other such

51. This characteristic is manifest in the fact that a number of international norms' compliance depends mainly or only on peer pressure or what is usually termed "the politics of shame." Even regimes which possess strong judicial mechanisms, such as international investment law, are often bound to rely on voluntary compliance. Besson & Tasioulas, *supra* note 42, at 11–13; Jorge E. Viñuales & Dolores Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States*, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT 247 (Laurence Boisson de Chazournes et al. eds., 2013); Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, 29 ICSID REV. 187, 187 (2014).

52. For discussions on the consequences of qualifying as a norm of international law see Joost Pauwelyn, *Is It International Law or Not, and Does It Even Matter?*, *in* INFORMAL INTERNATIONAL LAWMAKING 125, 144–52 (Joost Pauwelyn et al. eds., 2012); THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 7–30 (2014).

53. ROUGHAN, *supra* note 2, at 45–47.

54. For an overview of the meanings of a complex concept and various understandings of it in international scholarship, see Cohen et al., *supra* note 6; Zarbiyev, *supra* note 1.

55. My reference here is to the normative legitimacy of ICTs and more specifically to factors which are relevant for assessing the results of ICT's activity, i.e. their output. *See* Cohen et al., *supra* note 6, at 4–6 (summarizing the distinction between normative and sociological legitimacy, as well as between source, process, and result-related considerations).

factors which will interact in forming an ICT's "legitimacy capital."[56]

The correlation is, by the same token, relative because considerations of formal rule of law would not trump other factors.[57] For example, when an ICT secures an approach to external norms, which furthers the formal rule of law, this directly serves the pursuit of adjudication to achieve formal justice *qua* predictability and clarity of the rules.[58] As such, in certain cases it may conflict with other basic pursuits of adjudication, such as settling the dispute between the parties or upholding the substantive values that the particular regime furthers. In such cases, the ICT's authority may sometimes be better served by satisfying one of these other pursuits. Rather than denying the existence of this possibility, the argument aims to draw attention to the relevance of a set of reasons which are currently quasi-absent from consideration.

III. THE INTERACTION OF ICTS AND JUSTICE AS IMPARTIALITY

At first look, the conclusions in Part I and Part II offer a prescriptive argument on the way in which ICTs could enhance the respect for the formal rule of law at the international plane. It provides a tentative answer to two questions. First, what approach ICTs ought to adopt regarding norms from other international regimes (including decisions of other ICTs), which they can take under international law as it currently defines their powers? And second, which is most likely to enhance the coherence of international law in line with the requirements of the formal rule of law?

I argue in response that the type of reasons considered appropriate for the public sphere under public reason theories offer important insights for formulating normative principles for the cooperation among ICTs, which in turn can serve as a base for ICTs' approach to external norms. I illustrate this relevance drawing from the theory of justice as impartiality developed by Brian Barry and point to some of the consequences that adopting such an approach would entail in comparison to the current ICT practice of polite indifference.

A. Public Reason and the Relations Between ICTs

International legal scholars commonly recommend that ICTs use public reason as a means of enhancing their legitimacy, as understood in the vertical sense, i.e., as a relation between a supranational authority and the actors she

56. The term is borrowed from Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 266 (2012).

57. *See* SAMANTHA BESSON, THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW 389–90 (2005) [hereinafter BESSON, THE MORALITY OF CONFLICT] (claiming that the interaction of ICTs should lead to securing the formal rule of law at the international plane to the highest degree possible given the circumstances and other reasons at play in the particular case).

58. For the discussion of typology, see Thomas Schultz, *The Three Pursuits of Dispute Settlement*, 1 CZECH & CENTRAL EUROPEAN YEARBOOK OF ARBITRATION 145 (2010); Cohen et al., *supra* note 6, at 15–16; Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1983).

purports to exercise authority over.[59] When ICTs define their approach to an external norm in a situation of shared domains, they are arguably faced with exactly the type of policy assessment for which using public reason can be desirable.[60]

While not incompatible with such arguments, the development below takes a different interest in the public reason tradition. It focuses on ICTs as part of a small community and aims to specify normative principles of cooperation for their relations and, in turn, on which their approach to external norms ought to be based if their goal is to further the formal rule of law at the international plane. It considers the host of theories which followed the Rawlsian original position[61] and the categories of reasons that are excluded in it can be a source of inspiration for imagining such an ideal model. More specifically, it draws from theories which exclude categories of reasons from public discourse, viewing them as inappropriate for grounding such principles of cooperation in order to inform an ideal theory of relations of ICTs in cases where their domains of authority overlap.[62]

Simplified to their core, public reason theories aim to address the condition of irreducible value pluralism within a community and specify normative principles that regulate the common life within that community which "can be justified by appeal to ideas or arguments that the [members of that community], at some level of idealization, endorse or accept."[63] While the characteristics of the communities at stake in the context of public reason theories and ICTs present important differences, the basic goals and premises of the type of ideal relations involved are sufficiently similar for the restraints prescribed in public reason theories to be used as a relevant source of inspiration for ICT cooperation.

First, the type of principles one is searching for are similar in the two contexts, both of which are second-order principles of cooperation. Public reason theories search for a way to organise common life under principles of cooperation that can be reasonably acceptable to all citizens.[64] Similarly, the principles which

59. *See generally* Silje Aambø Langvatn, *Taking Public Reason to Court*, *in* PUBLIC REASON AND COURTS (Silje Aambø Langvatn et al. eds., forthcoming); Stone Sweet & Brunell, *supra* note 50; Kumm, *supra* note 50. On the vertical dimension of public reason as used at the supranational realm, see Wojciech Sadurski, *Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities*, 4 GLOBAL CONSTITUTIONALISM 396, 406–07 (2015).

60. *See, e.g.*, Silje Aambø Langvatn, *Should International Courts Use Public Reason?*, 30 ETHICS & INT'L AFF. 355, 365 (2016) (proposing public reason as a guideline for judges to use when they engage in moral reasoning and substantive policy assessments as a method to reduce legitimacy concerns).

61. Theories inspired by the foundational theory developed in JOHN RAWLS, A THEORY OF JUSTICE (1971).

62. These approaches fall in the category of "negative" or "restraint-oriented versions" of what Langvatn defines as the "political liberal public reason" tradition. On this point and a broader typology of public reason approaches that can be found in the literature on (international) courts and tribunals, see Langvatn, *supra* note 59, at 8–14.

63. Jonathan Quong, *Public Reason*, STAN. ENCYCLOPEDIA OF PHIL. (May 20, 2013), https://plato.stanford.edu/archives/spr2018/entries/public-reason/.

64. For an overview see *id.*

determine how, when, and to what extent norms from one regime will be applied in another are best analysed as a reflection of the terms of cooperation between the various institutions concerned—in the case at hand, between ICTs and their underlying regime. Indeed, the ways in which institutions approach the normative production of other institutions tends to be linked to the level of recognition that they give to these other institutions. Typically, the justification for applying such external norms is their *origin*[65] and the recognition that the external norms are applicable is a way of showing respect to a regime existing *alongside* the one applying them.[66] Classic examples given in jurisprudence are laws belonging to foreign legal systems or the rules of private associations, such as sporting governing bodies and clubs.[67] The history of private international law provides support for this view, as the level of mutual recognition among legal systems has conditioned the birth and development of the discipline as a whole.[68] In the context of international law, recent work also draws attention to the fact that applying another regime's norms implies a similar inter-institutional element.[69]

Second, the basic question before public reason theories and before someone searching for an ideal model of cooperation among ICTs is similar, as well. Namely, this theory asks how to accommodate the existence of reasonable disagreement among members of the given community. The interactions of ICTs are coloured by diverging rationalities. Cultural and axiological differences are commonplace in inter-regime relations and normative interactions.[70] ICTs are often described as having built-in bias, aimed at legitimising and furthering the particular goals of their respective regimes.[71]

While the reasons for accepting that there is reasonable (and irreducible) disagreement in both contexts are very different, the effect is similar in both—

65. MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 39 (2004) [hereinafter KRAMER, WHERE LAW AND MORALITY MEET]; RAZ, *supra* note 33, at 119–20 (referring to this type of norm as an "adopted" one).

66. In this case, the existence of an institutional structure of the regime—the fact that it has its own officials vested with the power to interpret and apply the norms of that regime—is its most relevant feature. KRAMER, WHERE LAW AND MORALITY MEET, *supra* note 65, at 39–40.

67. *Id.*

68. *See generally* Harold J. Berman, *Is Conflict of Laws Becoming Passé? An Historical Response*, *in* BALANCING OF INTERESTS: LIBER AMICORUM PETER HAY ZUM 70. GEBURTSTAG 43 (Hans-Eric Rasmussen-Bonne ed., 2005).

69. *See, e.g.*, Tomer Broude, *Fragmentation(s) of International Law: On Normative Integration as Authority Allocation*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY: ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH 99 (Tomer Broude & Yuval Shany eds., 2008); *see also* Trachtman, *supra* note 49.

70. *See generally* MOSHE HIRSCH, INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW (2015) (discussing the interplay of social identity, international groups, and international law, and the diffusion of norms and limits in ICTs in Chapters 4 and 5, respectively); PROST, *supra* note 15 (discussing formal and cultural unity in international public law in Chapters 6 and 7, respectively).

71. Shany, *supra* note 56, at 246.

namely, accepting the existence of reasonable disagreement as a given. In the original context of public reason theories, it is the moral value of autonomy and equality of the citizens concerned.[72] In the context of ICTs, it is rather the fact that from a *formal legal* perspective, these institutions are for the most part both equal and largely autonomous from one another.

No hierarchy exists between international regimes.[73] This puts their respective institutions, including ICTs, in a position of formal equality.[74] While in practice certain ICTs are much more visible at the international plane and have the *de facto* power to influence the content of international law more than others, this superior position cannot be justified on legal grounds. Save for the limited category of *jus cogens* norms (and arguably the U.N. Charter), there is typically also no clear priority between international norms. As a result, no ICT when put in a position of domain overlap can claim credibly that the norms of its regime are more binding than those of another regime, nor can it usually claim that its decision is more legally binding than that of another ICT.[75] Put differently, no *legally relevant* reasons justify an ICT to automatically give priority to the norms of its own regime, or another regime, for that matter, in the way which their current practice of polite indifference implicitly does.

Finally, ICTs, similarly to the social construct created when citizens utilize public benefits, ICTs can be seen as benefitting from a system of mutual restraint, and thus are required to do their allotted part under that system.[76] As argued above, ICTs are better off as part of that community of international legal institutions and, generally speaking, identify with it voluntarily. In turn, this participation can reasonably be interpreted as entailing a duty of doing their part for the functioning of international law, including a measure of restraint where necessary.

B. Justice as Impartiality and Its Relevance

Among the various public reason theories, I will focus on the theory of justice as impartiality developed by Brian Barry. This theory offers one model upon which relations between ICTs can be based and while it is certainly not the only one, I find it fitting to the relation presented in this article for two complementary

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72. Quong, *supra* note 63.

73. Samantha Besson, *Theorizing the Sources of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 163, 183 (Samantha Besson & John Tasioulas eds., 2010) [hereinafter Besson, *Theorizing the Sources of International Law*].

74. This statement concerns as much the institutions themselves as their normative production. Formally speaking, neither the decisions of judicial nor of quasi-judicial organs constitute proper sources of international law. Both seem to be *de facto* a source specifying the meaning of international norms in a way which very much approximates the role of these sources. *See generally* Bogdandy & Venzke, *supra* note 12; George Nolte, Special Rapporteur, *Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/694 (Mar. 7, 2016).

75. This proposition holds true only among ICTs with the power to issue binding decisions.

76. For a concise presentation of the idea of fair play see Leslie Green, *Legal Obligation and Authority*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 29, 2003), https://plato.stanford.edu/archives/win2012/entries/legal-obligation/.

reasons.

To begin with, the level of idealisation that Barry provides aligns with the question that this article asks.[77] Barry's justice as impartiality model provides a hypothetical original position which is much less idealised than the original position *qua* Rawls.[78] Unlike in Rawls' original position,[79] Barry's parties are not deprived of information about their relative power positions and their understanding about what constitutes a good life for them.[80] The choice situation in the original position is said to be fair, however, because all the parties can veto an agreement on reasonable grounds. Thus, the hypothetical circumstances imagined by Barry are attuned to the position of ICTs and their underlying regimes. Namely, his theory takes into account the tension between factual inequality of the parties in the original position and the unacceptable character of this inequality as basis for the principles on which their cooperation would be based.[81]

In addition, Barry considers that the more an actual situation of decision-making approximates the empirical conditions specified in the original position,[82] the more likely it is that the governing rules agreed upon would "tend to be just."[83] At the same time, Barry resists the temptation to mechanically translate the ideal into the real world, paying attention to the constraints and to human and institutional fallibility, that such a transposition requires.[84] Thus, several passages of his writings suggest institutional or regulatory features aimed at effectively transposing circumstances-of-impartiality-like conditions in the actual institutional workings.[85] As a result, his ideas are more immediately transposable to the inter-authority interactions among ICTs than a number of other public reason theories.

As with other public reason theories, justice as impartiality is committed to

77. *See generally* Joseph H. Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INT'L MIGRATION REV. 156 (1996) (pointing out that the key to finding the right level of idealisation is to align the factual input with the aims of one's theory). For an overview of the question of ideal and non-ideal theories, see Laura Valentini, *Ideal vs. Non-ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654, 659 (2012) (stating that principles will be practically ineffective without taking into account sufficient real-world constraints; however, those same principles run the risk of resembling an uncritical endorsement of the *status quo* when more real world constraints are considered).

78. There is no equivalent to the Rawlsian "veil of ignorance." *See generally* RAWLS, *supra* note 61.

79. *Id.*

80. 1 BRIAN BARRY, THEORIES OF JUSTICE: A TREATISE ON SOCIAL JUSTICE (1989) [hereinafter BARRY, THEORIES OF JUSTICE].

81. *Id.*

82. *Id.* at 347.

83. 2 BRIAN BARRY, JUSTICE AS IMPARTIALITY: A TREATISE ON SOCIAL JUSTICE 100 (1995) [hereinafter BARRY, JUSTICE AS IMPARTIALITY].

84. *See, e.g.*, Brian Barry, *A Commitment to Impartiality: Some Comments on the Comments*, 44 LONDON SCH. OF ECON. POL. STUD. 328, 333–34 (1996) [hereinafter Barry, *A Commitment to Impartiality*].

85. See *infra* Section III.C.

value pluralism[86] and equality among the participating parties.[87] It aims at providing a workable framework for accommodating different rationalities, without the need to adhere to the claim of superiority of any of them.[88] It is a negative public reason approach. Barry posits that the rules upon which a society functions are just when "no one could reasonably reject [them] as a basis for informed, unforced, general agreement."[89] To arrive at this theory, Barry revisits an idea identified by Thomas Scanlon,[90] and develops it for the purposes of a political philosophy. Barry deems just any set of rules which could have been agreed upon in this hypothetical original position.[91] Justice as impartiality thus posits three key requirements, which are founded on two additional (but equally fundamental) underlying premises. These elements are discussed in detail in the next subsections.

C. The Requirements of Justice as Impartiality

The requirements of justice as impartiality on which an agreement in the original position can be based may be summarised as follows: the agreement must be unforced, informed, and must not be susceptible to reasonable objection. This Section unpacks the meaning and relevance of each of these requirements when transposed to a situation in which an ICT is faced with a choice on how to approach a norm from another regime.

1. Unforced Agreement

First, Barry argues for an agreement that is "unforced." This condition is meant to not only exclude coercion between the parties, but also the use of one party's superior bargaining position in order to get a more advantageous deal even in the absence of overt coercion.[92] The only acceptable pressure upon the parties in the original position is their desire to find a reasonable agreement.[93] In the relations among ICTs (and among regimes), it seems reasonable to consider that the "superior bargaining power" in play is the difference in enforcement mechanisms of the norms at their disposal. The difference seems equally relevant whether it

86. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 77.

87. *Id.* at 7–8.

88. *Id.* at 77.

89. *Id.* at 67.

90. Thomas Scanlon developed this very idea for moral philosophy, rather than political philosophy. Thomas Scanlon, *Contractualism and Utilitarianism*, *in* UTILITARIANISM AND BEYOND 103, 115 (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Scanlon, *Contractualism*]; THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (1998) [hereinafter SCANLON, WHAT WE OWE TO EACH OTHER].

91. BARRY, THEORIES OF JUSTICE, *supra* note 80, at 371; Barry, *A Commitment to Impartiality*, *supra* note 84, at 328–29. *See generally* Neil MacCormick, *Justice as Impartiality: Assenting with Anti-Contractualist Reservations*, 44 POL. STUD. 305 (1996). See *infra* Section III.D for a discussion on the possibility of transposing a motivation of justifying one's actions to others in the context of the relations between ICTs.

92. Scanlon, *Contractualism*, *supra* note 90, at 111; BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 68.

93. Scanlon, *Contractualism*, *supra* note 90, at 111.

pertains to the likelihood of incurring a sanction as a result of a norm's breach or to the intensity of the potential sanction.

Certain norms in international law are considered to have more efficient enforcement mechanisms than others in both respects: the suspension of concessions under WTO law is one example; access to arbitral decisions enforceable in third states available under most investment treaties is another. If the European Union (E.U.) is taken into account, its enforcement capacity outweighs that of these two, as it benefits from the enforcement power of its member states. By contrast, liability cannot be directly pursued under international environmental norms and human rights as jurisdictions usually award relatively low amounts of damages. One can, for instance, compare the respective amounts awarded by the ECtHR and by the investment tribunals dealing with the same measures adopted by the Russian Federation regarding Yukos shareholders.[94] Bruno Simma and Dirk Pulkowski term the division of norms along these lines as a division between strong and weak regimes, where the second are usually perceived as "inherently" legitimate.[95]

An ICT brought to consider the weight of a norm from a regime closer to the "weak" end of the spectrum could be tempted to expand the scope of application of its own norms beyond what would be reasonable in conditions of equal efficiency. This attitude would be inconsistent with the requirements of the original position as it would be grounded on the (ab)use of a superior bargaining position.

An ICT decision openly based on a difference of efficiency, as described above, is unlikely. Rather, this requirement can be read as bringing forward an additional rationale behind the general requirement for ICTs to provide reasons for their decisions. Namely, when ICTs' domains overlap, providing reasons for applying the ICT's own norms has the function of demonstrating that the efficiency of the respective regimes did not influence the court's approach.[96] Indeed, the absence of reasons to prefer one's own norm in cases where an external norm is also potentially applicable can raise doubts as to the underlying motivation of ICTs, especially from "strong" regimes. Unfortunately, this type of default preference for one's own constituent instrument, aptly coined "my rule governs,"[97] is closest to the current practice of ICTs as described in Section II.A. Providing

94. Compare the reasoning regarding the amount of compensation awarded respectively in Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA 227, Final Award, ¶¶ 1825, 1827 (Perm. Ct. Arb. 2014) (awarding only the majority shareholders) with OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Judgment, Eur. Ct. H.R. 11 (2014) (awarding all former shareholders of Yukos).

95. Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 510 (2006).

96. *See* Gerald J. Postema, *Objectivity Fit for Law*, *in* OBJECTIVITY IN LAW AND MORALS 99 *passim* (Brian Leiter ed., 2001) (naming general explanations for the need to provide reasons for judicial decisions and beyond).

97. James Crawford, Penelope Nevill, *Relations between International Courts and Tribunals: The "Regime Problem," in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 256–57 (Margaret A. Young, ed., 2012).

reasons to the contrary could work to demonstrate, to the common addressees and indirectly to the other regime's ICT(s), that the respective decision is not based on an abuse of bargaining power.

2. Informed Agreement

Barry's hypothetical agreement must also be "informed." This requirement, as most public reason approaches, is meant to exclude "superstition and false belief" as bases for the principles on which cooperation should be based.[98] It requires the parties in the discussion "to be able to understand how alternative proposals will affect them and also to assess the claims of others about the way in which they would be affected."[99] It is not easy to fulfil this condition in the absence of a neutral standpoint.[100] In such circumstances, the best way to provide information in the real world, Barry tells us, is through procedural constraints, making it harder for the decision-maker to ignore certain interests.[101]

In the context of interaction among ICTs, this requirement may translate into a specific procedural status of the other regime's norm. Indeed, informed agreement means that any decision on normative interaction should ideally be made on the basis of accurate information on the external norm's intended scope of application and how its non-application *in casu* will affect both the regime from which that norm originates and the ICT's own regime. Information of this kind is necessary in order for each party in the hypothetical discussion to keep its claims within reasonable limits.[102] Put in more practical terms, it is important that an ICT deciding how much importance to assign to a norm from another regime be put in a position in which it is difficult to ignore both the existence and content of the norm in question.

In a heterarchical setting, similar to that of ICTs at the international plane, the status of foreign law in private international law may serve as a source of inspiration for possible ways to satisfy the information requirement, both regarding the types of ignorance that may take place and the types of constraints limiting their effects. Indeed, the history of private international law shows that one of the techniques that authorities used to diminish the relevance and status of certain sources of law was to consider them facts—that is, to deny them the status of *legal* norms at par with those of the forum[103] in a way similar to some of the practices of

98. Scanlon, *Contractualism*, *supra* note 90, at 111.

99. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 79, at 107.

100. *See id.* at 69 (explaining that disagreements stem from differing assessments of consequences).

101. *Id.* at 104.

102. *Id.* at 107–08.

103. *See* Stephen L. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332, 349–51 (1968) (explaining how unwritten Roman laws and foreign laws were treated as facts, that is, they were only considered if brought to the court's attention and their content was proven by the parties); *see also* SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS 229 (2004) (stating that American state courts considered foreign laws to be facts, so they did not fall within the courts' jurisdiction).

ICTs described in Section II.A. Progressively, in most jurisdictions, this led to the development of rules on the status of foreign law, based on recognition of its (quasi-)equality with the law of the forum.[104] These include not only taking judicial notice of the foreign law, but also rules on its interpretation as it would be construed in its home state.[105] When ICTs adopt an approach along similar lines toward norms from other international regimes, it can serve to demonstrate that their decision satisfies the requirement of information. It can serve as a normative criterion for assessing the adequacy of the procedural place that ICTs allocate to external norms in furthering the formal rule of law.

3. Agreement Not Amenable to Reasonable Objections

Third and finally, parties in the original position should recognize reasonable objections. The original position is envisaged as a debate in which each party's goal is to convince its opponents.[106] "Each person in this original position has a veto over proposed principles, which can be exercised unless it would be reasonable for that person to accept a principle."[107] The debate should be construed as a two-way street: parties "must be willing to acknowledge a good argument, even if it runs against their interests to do so."[108]

This final requirement is certainly, in Barry's own words, the most elusive one,[109] but there are two guiding principles that Barry distils aimed at specifying practical implications based on it. The first is that reasonable objections should be acknowledged independently of the quarters from which they come.[110] The willingness to recognize reasonable objections is a particular implication of the underlying fundamental commitment to equality between the parties in the original position.[111] The author illustrates the point as follows:

> Suppose I belong to the dominant group in my society . . . . And suppose further that I believe that the members of my group could validly object to some policy if it would have the effect of denying our children a decent education. Then I cannot say that a similar objection to a certain policy is to be discounted simply because it is made by or on behalf of the members of some minority such as gypsies or the residents of inner-

104. *See, e.g.*, GEEROMS, *supra* note 103, at 229–31 (explaining how foreign laws stopped being considered facts and became recognized as laws in the United States).

105. *See, e.g.*, *id.* at 181–94 (describing how foreign laws are interpreted in different countries, including the United Kingdom, the United States, Germany, and the Netherlands); *see also* MAARIT JÄNTERÄ-JAREBORG, FOREIGN LAW IN NATIONAL COURTS: A COMPARATIVE PERSPECTIVE 181 *passim* (2003) (discussing how foreign laws are applied in national courts using old and new theories).

106. BARRY, THEORIES OF JUSTICE, *supra* note 78, at 371.

107. *Id.* at 372.

108. *Id.* at 371.

109. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 100.

110. *See id.* (arguing that all claims should be weighted equally, regardless of whether they are made by someone from a dominant group or a minority group).

111. See *infra* Section III.D for a discussion on transposing an ICT's motivation to justify its actions to other ICTs.

city ghettos.[112]

Transposed to the interaction between ICTs, this insight would require that the ICT(s) in one regime not disregard the application of the norms of another regime on grounds that they would have found unacceptable for the disregard of their own norms. An additional dimension derived from the same guiding principle is that the application of norms from different regimes should not depend on criteria that are qualitatively different based on the particular regime from which they originate. Following this understanding, it would be possible to criticize the decision of an ICT for giving priority to one external norm over their own, while not doing the same with another one, in the absence of pertinent reasons for doing so.

Again, a difference in care when providing reasons for disregarding the two types of norms may serve as an indicator of this type of unjustified inequality. Taking an example from investment case law, one may observe that, in general, claims of conflict between E.U. competition law and investment treaty duties have been considered in more depth by investment tribunals than arguments linked to human rights issues. Tribunals sitting in cases in which E.U. law was invoked as a defence generally considered the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT) at length.[113] Even when they ended up not applying the E.U. norm, most tribunals still addressed the arguments of the parties at length. In certain cases, such as *Electrabel v. Hungary* or *Oostergetel v. Slovakia*, the tribunals even developed their position on the weight they would have given to the E.U. norm in *obiter dicta.*[114]

In contrast, in cases where human rights obligations on the part of host states were invoked as justifying, in one way or another, the states' behaviour, tribunals tended to be cursory and rarely even referred to the VCLT. In *SAUR v. Argentina*, for example, the tribunal's motivation on the need to interpret the duties under the relevant Bilateral Investment Treaties in harmony with Argentina's assumed obligations under international human rights treaties is limited to three paragraphs.[115] The main argument is that "[t]he fundamental right to water and the investor's right to benefit from the protection offered by the [treaty] operate at different levels,"[116] and therefore the state's prerogatives to regulate activities in its territory are *a priori* compatible with the investor's rights.[117] Even if the ultimate

112. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 79, at 100.

113. *E.g.*, Eastern Sugar B.V. v. Czech, SCC No. 088/2004, Partial Award (Mar. 27, 2007); Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Eureko B.V. v. Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb. Oct. 26, 2010); European Am. Inv. Bank AG v. Slovak Republic, PCA Case No. 2010-17, Award on Jurisdiction (Oct. 22, 2012); Jan Oostergetel & Theodora Laurentius v. Slovak Republic, Decision on Jurisdiction (Arb. Mat'l Apr. 30, 2010).

114. Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, ¶¶ 4.167–.191; Jan Oostergetel & Theodora Laurentius v. Slovak Republic, ¶¶ 101–08.

115. SAUR International S.A. v. Arg., ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶¶ 329–31 (June 6, 2012).

116. *Id.* ¶ 331.

117. *Id.* ¶¶ 330–31.

reasons for disregarding the particular norm are good, the difference in justificatory care would still be at odds with the requirement to accept reasonable objections from any quarters.

The second guideline Barry provides is that reasonableness is best assessed in a specific context. Thus, one is to specify what reasonableness would mean in the context of the interaction of ICTs. For this purpose, reasonableness can be defined as "presuppos[ing] . . . a certain range of reasons which are taken to be relevant, and goes on to make a claim about what these reasons properly understood, in fact support."[118] In law, a determination of the relevant reasons is always subject-matter specific[119] and takes into account the nature of the rule that is being assessed.

Conflict rules, such as the ones ICTs explicitly or implicitly create when they assign more or less weight to a norm from another regime,[120] are secondary norms (sometimes referred to as meta-rules): they are concerned with the scope and modalities of application of the norms prescribing particular conduct, rather than prescribing conduct themselves.[121] Conflict rules are thus defined by their relation to another norm of the particular legal system.[122] They determine the material scope of application of norms as against other norms and thus are best described as norms of interpretation and application.[123]

In turn, the secondary nature of conflict rules dictates what types of reasons would be relevant in order to assess whether said conflict rules are in line with the reasonable objection requirement. Namely, it suggests that the relevant reasons are systemic ones, that is, reasons linked to the allocation of appropriate reach of regulatory authority among international regimes, rather than reasons directed at the outcome of the individual case.[124] On this basis, one could consider that an ICT's approach to the norms from another regime could be in line with the requirement of reasonable objection, but only if it is based on reasons pertaining to the allocation of competence that it produces between the different institutions involved.

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118. SCANLON, WHAT WE OWE TO EACH OTHER, *supra* note 90, at 192.

119. *See* Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575, 1586–87 (1999) (discussing the limits of objectivity because of reasonable points of disagreement).

120. *See* BESSON, THE MORALITY OF CONFLICT, *supra* note 56, at 419–56 (discussing formal conflict rules within the context of conflicting constitutional rights).

121. The distinction between primary and secondary rules adopted here follows the jurisprudential sense associated with H. L. A. Hart. H. HART, THE CONCEPT OF LAW 94–99 (3d ed. 2012). *See also* MILLS, *supra* note 47, at 19–20 (considering that private international law rules are secondary in nature).

122. Norberto Bobbio, *nouvelles réflexions sur les normes primaires et secondaires*, *in* ESSAIS DE THEORIE DU DROIT: (RECUEIL DE TEXTES) 159, 165 (Michel Guéret & Christophe Agostini trans., 1998).

123. *Id.* at 167.

124. For reasoning along similar lines regarding rules of private international law see MILLS, *supra* note 46, at 18.

Taken together, the insights that the guiding principles provide suggest that ICTs should base their approach to external norms on systemic reasons they consider valid for their relations with any other regime at the international plane and they would find justified as a basis for other regimes to approach their own norms. Much in the same way in which the information requirement suggests what the adequate procedural place of external norms should be, tailored to the situation of ICTs, these insights of the reasonableness requirement can be seen as criteria for assessing the adequacy of the conflict rules that ICTs use for cases of domain overlap to further the formal rule of law.

D. Does Justice as Impartiality Demand Too Much of the Relations Between ICTs?

Barry's theory is premised on two characteristics that are imputed to the parties in the original position. This is his reality check for the assessment of how practical it is to expect that his requirements would be acceptable to (even hypothetical) parties in the original position, or simply put, it is his way of testing the stability of the framework that he offers. A similar reality check suggests that sufficient considerations militate in favour of requiring ICTs to strive to justify their decisions to other ICTs in circumstances of domain overlap.

1. Should ICTs be Motivated by the Possibility of Justifying Their Decisions to Other ICTs?

As Barry points out, it is important to posit a motivation of the parties in the original position which is realistic, as this motivation will be material to their (hypothetical) arguments and willingness to moderate their insistence on their own interest in particular situations.[125] In the original account of justice as impartiality, these parties are stipulated to have as a motivation their interests, but not in isolation. Rather, they are presumed to be motivated by the possibility of justifying their actions to others. The parties are motivated, therefore, to reach an agreement on rules that no one could reasonably reject, as those would be rules which *justify* the permissibility of their actions.[126]

Stipulating a motivation to justify one's actions to others[127] is considered the most plausible basis for a stable agreement between parties in the original position where these parties are presumed equal.[128] To the extent a similar motivation can be plausibly attributed to ICTs, justifying to others the claim of application of one's own norms can be an appropriate normative ground for an agreement among

125. *See* BARRY, THEORIES OF JUSTICE, *supra* note 80, at 346 (providing a technical justification for this statement).

126. BARRY, THEORIES OF JUSTICE, *supra* note at 80, 370–72; Scanlon, *Contractualism*, *supra* note 86, at 116.

127. In the works of Barry, essentially the same type of motivation is referred to as the motivation to behave fairly. *See, e.g.*, BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 33.

128. On the shortcomings of relying on a stipulated motivation limited to self-interest see *id.* at 28–51. In particular, see the author's position on the conception of justice as mutual advantage and on the conception of justice as fairness and "strains of commitment." *Id.* at 40, 61–67.

different regulatory communities in international law as well.

The account of justifiability in the accounts of Barry and Scanlon is based on an understanding of human nature. While similar reasons behind it cannot be attributed to ICTs, which are not human beings,[129] it is still realistic to consider that ICTs can be reasonably motivated to justify their actions to other ICTs. Such a motivation may be imputed to ICTs because they share domains of authority and derive benefits from being part of international law. The first fact puts them in a position in which they must coordinate in order to satisfy their duties toward their common addressees. The second makes it beneficial for them to include other ICTs as a relevant audience when justifying their decisions.[130] ICTs benefit from being part of the international law club; therefore, their long-term interests (defined here as their ability to fulfil their institutional goals) are furthered by maintaining its importance as a tool of governance at the international plane. This status of the law is disserved when courts no longer permanently settle points of disagreement or when they are incapable of clarifying and specifying the legal rules.[131] As a consequence, it is reasonable for ICTs to prefer an effective resolution to questions regarding their relations with other international law institutions *through* law rather than outside of it. At the same time, because of the important degree of autonomy that they enjoy from one another,[132] effective resolution is most likely to be obtained when the reasons an ICT offers are sufficient to justify its chosen ruling to the other institution involved to deter it from issuing a decision to the contrary.[133]

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129. A similar motivation may potentially be imputed to the decision-makers in ICTs. On an interpersonal level, such as among the judges in ICTs, a further putative reason may also be derived from an expectation of collegial respect among judges and other decision-makers in an epistemic community. However, it is empirically questionable to what extent that community is tight enough to allow for a similar assumption. *See* PROST, *supra* note 15, at 144–48 (discussing the existence of a common sensibility shared by the practitioners of international law). It is further questionable to what extent it would be justified for decision-makers to put their desire for collegial recognition above the goals and basic tenets of the regime they are adjudicating over. *See* Jeremy Waldron, *Do Judges Reason Morally?, in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 38 (Grant Huscroft ed., 2008) (discussing the types of moral reasoning judges should use); Langvatn, *supra* note 59, at 364–73 (discussing how ICTs should consider, among other doctrines, public reason).

130. This statement does not mean that ICTs constitute each other's legitimating audiences, as usually described in the legitimacy literature. Rather, they are in a position in which inter-institutional communication is a means toward securing perceived legitimacy from their common legitimating constituencies.

131. *See* Faude, *supra* note 16, at 245–47 (discussing how fragmentation among ICTs can lead to diverging judgments that threatens the legitimacy of judicialized resolutions).

132. On the autonomy ICTs have from one another, see RADI, *supra* note 1, at 231–41; Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, 3 J. INT'L DIS. SETTLEMENT 247, 260–67 (2012) (discussing structural factors of international law that enhance the space of discretion of ICTs).

133. It is important to point out that including other ICTs among the relevant constituencies to which ICTs may be seen as owing justification (their legitimating constituencies) does not detract from the existence of other such constituencies. ICTs are further only relevant in cases of domain overlap.

2. Should ICTs be Moderately Sceptical?

Turning to the second premise underlying justice as impartiality, the motivation of parties to arrive at a reasonable agreement would be impossible if they are not capable of moderate scepticism regarding the claims they make.[134] In order to present the importance of this premise as clearly as possible, I will begin by presenting its role in the original scope of Barry's study: justice and its relation to people's differing conceptions of the good. I will then be better equipped to elucidate the relevance of this requirement for the relations among ICTs.

In Barry's words, if parties in the original position are to agree on reasonable terms, as is stipulated, their agreement cannot be based on any one conception of the good, as there is no such conception which "provides a basis for agreement on terms that nobody could reasonably reject."[135] Thus, "reasonable terms must be terms that do not presuppose the correctness of any conception of the good"—they must be neutral.[136] This statement, however, requires an acknowledgement of the fact that "certainty is ill-founded."[137] Put differently, neutrality regarding different positions of the good requires accepting that no conception thereof "can justifiably be held with a degree of certainty that warrants its imposition on those who reject it."[138] The view argued for is a moderate one: the central point is a certain degree of *doubt* as to the veracity of one's beliefs which would constrain one from imposing these beliefs on others.[139] A call for doubt in one's convictions—or moderate scepticism—in these terms, if not acceptable to everyone, can at least not be *reasonably* rejected according to Barry.[140]

Returning to the interaction between ICTs, one must then ask whether it is reasonable to expect a similar moderately sceptical approach to norms from other regimes on the part of ICTs. Translated in the context of ICT relations, imputing such a moderately sceptical view calls into doubt the intended meaning and stringency of an ICT's own norms. Put differently, applying norms from other regimes and sometimes giving them priority over the norms of one's own regime implicitly recognizes that the outer limits of the scope of application of these own norms can be put in doubt, that they are fuzzy.

Imputing such a moderately sceptical position on the part of ICTs regarding the scope of application of their own norms *vis-à-vis* norms from other regimes also seems both realistic and desirable, if contained within certain limits. Two

134. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 172.

135. *Id.* at 168.

136. *Id.* at 169. On the difficulty generated by the claim of neutrality/impartiality, see Troy Jollimore, *Impartiality*, STANFORD ENCYC. OF PHIL. (Mar. 25, 2002), http://plato.stanford.edu/archives/spr2014/entries/impartiality/.

137. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 169, 173–88 (demonstrating that other justifications of neutrality fail).

138. *Id.* at 169.

139. *Contra* Peter Klein, *Skepticism*, STANFORD ENCYC. OF PHIL. (Oct. 28, 2010), http://plato.stanford.edu/archives/sum2014/entries/skepticism/ (offering the classic account of scepticism as the denial of possibility of knowledge).

140. BARRY, JUSTICE AS IMPARTIALITY, *supra* note 83, at 174.

complementary reasons militate in favour. To begin with, as outlined in Section I.A, there is no clear regulatory framework for assigning priority to one norm over another in international law or among regimes. In addition, the norms that interact share their *authorship*, in addition to sharing their addressees. Through the operation of the *pacta tertiis* rule, this common authorship *circumscribes* the pool of international norms that is part of the applicable law before an ICT.[141] In turn, it is reasonable to consider that the states that authored the norms in both regimes equally and provided them with equal obligatory force did not intend to maximize the stringency, scope of application, and effect of only one of them. These conditions combined mean that most questions of normative interaction are coated with a thick layer of legal indeterminacy in which recognizing that the scope of application of one's own norms may be uncertain is compatible with, if not illustrative of, the expected expertise of adjudicators in ICTs. In fact, developing a principled approach for these cases can arguably temper the negative impact associated with perceptions that an ICT has overstepped its jurisdiction.[142]

IV. CONCLUSION

This article questions the manner in which ICTs currently approach the normative production of international regimes outside their own, which can best be described as an attitude of polite indifference. It argues that such attitude on the part of ICTs is detrimental to the formal rule of law at the international plane, which in turn undermines ICTs' capacity to coordinate the actions of the addressees that they have in common and may be detrimental to their legitimacy claims.

Against this backdrop, the article argues that ICTs should be guided by the rationale of furthering the formal rule of law at the international plane when they approach norms from other international regimes and provides a tentative ideal model for inter-ICT relations which could further this goal. To do so, it turns to the type of reasoning developed in certain public reason theories as a source of inspiration. Implementing discourse constraints in line with the requirements of one such approach—justice as impartiality—this article provides guidance on the ideal procedural place for external norms in proceedings before ICTs, as well as on the types of conflict rules conducive to furthering the formal rule of law.

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141. The *pacta tertiis* rule, as embodied *inter alia* in Article 34 of the VCLT, states that "a treaty does not create either obligations or rights for a third State without its consent." On its implications and more broadly on the personal scope of application of international norms, see HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 35–36 (2014); Besson, *Theorizing the Sources of International Law*, *supra* note 73, at 168–69. Regarding the difference between applicable law and interpretation, see *supra* Section II.A, referring to Pauwelyn.

142. *See, e.g.*, Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, *in* LEGITIMACY AND INTERNATIONAL COURTS 354, 368 (Nienke Grossman et al. eds., 2018) (discussing the limited impact of ICT judgments perceived to have adopted inadequate understandings of their scope of authority); *see also* Cohen et al., *supra* note 6, at 9 (discussing different scholarly perspectives to studying ICT effectiveness).