NEW YORK UNIVERSITY
JOURNAL OF INTERNATIONAL LAW AND POLITICS

TO GUIDE AND GUARD INTERNATIONAL JUDGES

ANDREAS FOLLESDAL

Reprinted from
New York University Journal of International Law and Politics
Vol. 46, No. 3
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ANDREAS FOLLESDAL*

INTRODUCTION

A central norm in Western political thought is that individuals should not endure *domination*: We should be protected against the arbitrary discretion of others. Courts have provided citizens with such protection against the arbitrary decisions of their own government and have protected contracting partners against each other in the form of rule of law, judicial review, and other checks. International courts and tribunals (ICs) have increasingly served such guardian roles. They have curbed domination in a wide range of sectors, including the protection of citizens' human rights against their governments, investors against host states, and some protection for developing countries in international trade.[1]

* Professor, Faculty of Law, University of Oslo. This Article was written under the auspices of ERC Advanced Grant 269841 MultiRights—on the Legitimacy of Multi-Level Human Rights Judiciary—www.MultiRights.net; and partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274—PluriCourts. I am grateful to the participants at the symposium at New York University Law School on the role of judges, and to Geir Ulfstein, for very helpful comments.

1. For example, the Inter-American and European Courts of Human Rights, the Investment Tribunals that adjudicate Chapter 11 of the North American Free Trade Agreement (NAFTA), and the WTO dispute settlement system—at least when arbitrations are based on the new Bali agreements. Whether these courts and treaty bodies go far enough is a matter of great dispute.

The increased number and power of ICs now give rise to concerns that the cure may be worse than the disease. International judges must themselves enjoy wide discretion to prevent some parties—such as states or powerful investors—from dominating other actors; be they states, corporations, or private individuals. This raises the question of how we can best reduce the risk that ICs themselves become new tools of domination, which could occur in at least three forms: corruption, as pawns, or as institutional entrepreneurs.

Firstly, ICs run the risk that judges are incompetent or even corrupt for their private gain. This risk may be higher than it would be in many domestic settings for several reasons. The processes for choosing international judges often leave much discretion to the nominating state, which may not have sufficient quality control, and instead nominates government-friendly candidates. This may render international courts more vulnerable to unqualified judges than domestic courts in well-functioning democratic states with high professional standards for selections to the bench.[2]

Two other risks merit perhaps more attention. It should come as no surprise that judges may have to serve as a tool for the powerful.[3] The problem arises when the judges are unduly controlled as pawns by the parties that appoint them—be they state parties to a court or private parties to an arbitration panel.[4] Thus MacKenzie et al. note that, as regards the International Court of Justice (ICJ) and the International Criminal Court, the selection processes

> are fragmented, lacking in transparency, and highly varied. At one end of the spectrum, a few candidates emerge following a transparent and formal consultative process that focuses on merit; at the other end, it is not unusual for individuals to be selected as a result of overtly political considerations or even nepotism. Whatever form of nomination process is adopted, all nominated candidates must work their way through a highly politicized election process.[5]

In short, the nomination and election procedures, combined with election campaigning, may favour candidates from more politically powerful states[6]—or those of more powerful private parties, depending on the nature of the court or tribunal.

The 'entrepreneurial' kind of domination may arise where members of the IC pursue the interests of the institution, possibly in conflict with the case at hand, contrary to the objectives of the treaty or in violation of the principles of international law. Some such interests may themselves be laudable, such as to bolster the legitimacy of the IC itself. Many note the need for a dynamic court, especially in its early years. The judges of a new IC are simultaneously its humble servants and its legitimacy entrepreneurs:

> [T]he judges who serve on these bodies are working both as guardians of the law and as builders of legal institutions and . . . these roles are not always in harmony with each other.[7]

Difficult dilemmas will arise, for example, when an IC decides whether to avoid certain controversial cases or decisions, or to pick cases that are geographically dispersed to stifle suspicion of bias, especially in the early years of the IC. Other dilemmas concern how 'dynamically' a treaty should be interpreted in order to gain the requisite legal authority—for example, when the European Court of Justice constitutionalized and hence contributed to "the transformation of Europe."[8]

This Article presents several of these challenges and offers responses, contributing to the existing literature and to the Symposium. Section I delves into reasons why judges' discretion cannot and should not be eliminated. I then attend to ways to reduce the risk that such discretion becomes domination, by limiting the *arbitrary* discretion of international judges. Section II considers suggestions that may *guide* the judges' dis-

2. *See* DANIEL TERRIS ET AL., THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES xi–xxii (2007) (introducing who international judges are).

3. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17–28 (1981) (exploring the social control aspects of courts).

4. *See* Erik Voeten, *International Judicial Independence*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 421 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (providing an overview of judicial independence).

5. SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 173 (Ruth MacKenzie et al. eds., 2010).

6. *Id.* at 173–74.

7. TERRIS ET AL., *supra* note 2, at xix.

8. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991).

cretion. Section III identifies some proposals for new mechanisms to *check* such discretion.

I. Discretion: Inevitable and Desirable

The good international judge must exercise judgment in ways that require broad discretion. There are several reasons why the professional ideal of international judges and arbitrators cannot serve to avoid discretion completely. Firstly, to simply apply existing international law to the case before them requires interpretation of a complex set of somewhat vague legal norms, standards, and objectives. Secondly, an IC may play several different roles the judge must mediate amongst. The title of one of Karen Alter's publications identifies at least four of these: *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review.*[9] In addition, ICs contribute to *developing* law, by specifying and creating legal norms.[10] ICs may or must perform several of these roles in parallel.

Thirdly, even with respect to their adjudicatory role, ICs may have several explicit objectives at the same time; for instance, they simultaneously adjudicate cases concerning trade disputes and human rights issues. To illustrate the challenge, consider Cesare Romano's helpful taxonomy of courts,[11] which aspires to lay out an exhaustive and *mutually exclusive* taxonomy. He distinguishes *inter alia* among adjudicative and non-adjudicative rule of law bodies, and identifies different families of ICs, including human rights courts, regional integration courts, and courts for international criminal law.[12] A feature of the multitude of ICs that confounds this Linneaean undertaking is that "some courts might fit in either family depending on what jurisdiction they exercise"[13]—for instance,

9. Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review, in* International Law and International Relations: The State of the Art, supra note 4, at 345.

10. *See* José E. Alvarez, International Organizations as Law-makers xiii–xvi (2005) (describing international organizations' law-making function).

11. Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions,* 2 J. Int'l Dispute Settlement 241 (2011).

12. *Id.* at 264.

13. *Id.* at 248.

the Court of Justice of the Economic Community of West African States (ECOWAS) or the Court of Justice of the European Union, both of which are simultaneously courts of regional economic integration and human rights courts. The conscientious judge must thus assess cases differently depending on whether they concern economic integration, human rights, or both. The multiple mandates increase the factors judges must consider in treaty interpretation.

Fourthly, this task is even more complex when judges seek *systemic interpretation* in response to the multitude of ICs that may have overlapping jurisdiction, even though they were originally established to adjudicate different sectors. The judge should take into account "relevant rules of international law applicable in the relations between the parties."[14] This poses at least two issues where contestable discretion is required. Firstly, systemic interpretation is controversial, at least in some sectors, which were thought to be independent from international law and other ICs generally. Therefore, some member governments were surprised when the Appellate Body of the World Trade Organization (WTO) refused to interpret WTO rules in "clinical isolation" from other ICs in the *US – Shrimp* case.[15] The assessment of fragmentation varies; some caution against harmonization, for example, because differences among the ICs reflect states' deliberate choices and should be respected:

> Whether an adjudicatory mechanism empowers only states or private parties to invoke them, includes relatively more binding tools of enforcement, or is subject to wide or narrow state defenses from liability reflect conscious choices that are essential to whether that regime operates as intended. The rational design of such treaty regimes is owed respect.[16]

This point is valued, though within limits. While each IC may be carefully negotiated, neither international law nor ICs considered as a whole bear the stamp of the intentions of a master architect or group thereof, and certainly not in all details. This

14. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

15. Terris et al., *supra* note 2, at 117.

16. José E. Alvarez, *Beware: Boundary Crossings, in* Boundaries of Rights, Boundaries of State 37 (Tsvi Kahana & Anat Scolnicov eds., forthcoming).

would overestimate the ability of states to have clearly defined objectives and a careful assessment of the alternative strategies to best pursue them. Furthermore, it is often a mistake to assume that states are unitary actors.

Be this as it may, the relevance and weight of such other rules require even further scope of discretion for judges—not least when these rules conflict with the "ordinary meaning" of the terms.[17] Thus Judge Simma warns that harmonization between investment law and human rights by means of treaty interpretation may require "excessive discretion to arbitrators."

A fifth reason why judges of ICs must enjoy broad discretion stems from the difficulty of treaty change. Compared to the domestic procedures for changes to legislation or even to a constitution in response to changing circumstances, treaty amendments are extremely cumbersome and often near impossible. Such entrenchment makes judges who respect the object and purpose of the treaty engage in more 'dynamic' or 'evolutive' interpretations of a treaty—"in the light of its object and purpose."[18] Such objects and purposes are manifold.

The upshot is that the international judge must have extensive discretion to heed the several objectives of the treaty and to seek systemic interpretation, and to follow the various precedent or systemic effects of rulings—including treaty re-interpretation:

> Obscurity of statute or of precedent or of customs or morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function.[19]

Such re-interpretation or lawmaking may come close to a "constitutional transformation," as arguably occurred with the European Court of Justice, the ICJ, and the European Court of Human Rights.[20]

17. Vienna Convention on the Law of Treaties, *supra* note 14, art. 31(3)(c). *See also* Alvarez, *supra* note 16, at 3–4 (discussing the Vienna Convention and the rules of treaty interpretation).

18. Vienna Convention on the Law of Treaties, *supra* note 14, art. 31(1).

19. BENJAMIN CARDOZO, THE NATURE OF THE JUDICAL PROCESS 128 (1921).

20. *See* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289 (2013) (exploring how international organizations undergo informal constitutional change or transformation).

II. To Guide Discretion

What advice can we draw from the discussions and the literature as to how international judges should exercise their discretion?

Some practitioners or scholars may dismiss this question because international judges do not enjoy much discretion, perhaps because the answer seems determined by more general principles. It is beyond the international judges' choice; instead, the facts of the case and the established weight of relevant factors compel their judgment. In response, I submit that lawyers as much as economists—and philosophers—are often unaware of the alternatives available. The judge or arbitrator may recognize some rules as relevant, others not. She may grant some principles of interpretation more weight than others; for example, the 'plain meaning rule' rather than concerns for 'systemic interpretation.' To illustrate with an interpretive issue discussed by Professor Alvarez: Some human rights advocates may believe that human rights are best protected by regarding corporations as international legal persons on a par with states, since that strategy will extend some existing treaty obligations to corporations. Others will disagree, for example, because corporations are only in some circumstances relevantly similar to states.[21]

Paraphrasing J. M. Keynes: The ideas of lawyers, economists, and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves quite exempt from any real choice and from intellectual influences, are often the slaves of some ideology of a defunct legal scholar or philosopher, or of a powerful stakeholder—or of several of the above.[22]

Which norms should guide arbitrators' and judges' discretion? One central premise in the following is that even if there may not be one best way to adjudicate in each instance, there are at least better and worse ways to harmonize the various concerns indicated above. An important issue is therefore how to assess such alternative exercises of discretion.

21. Alvarez, *supra* note 16, at 31–32; José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1 (2011).

22. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383–84 (1951).

A. *A Note on 'Trustee' Rather Than 'Delegate'*

Some argue that the guiding norms of judges should be those of trustees, if not in Edmund Burke's sense of the parliamentarian as a trustee to be guided by "the general good, resulting from the general reason of the whole."[23] A more relevant notion of trusteeship has been defined by Alec Stone Sweet and Thomas Brunell:

> (1) [T]he court is recognized as the authoritative interpreter of the regime's law, which it applies to resolve disputes concerning state compliance; (2) the court's jurisdiction, with regard to state compliance, is compulsory; and (3) it is virtually impossible, in practice, for contracting states to reverse the court's important rulings on treaty law.[24]

What, if anything, is the connection between this account and that of Burke? The distinction should not be overdrawn.[25] One point is that the international judges must decide according to their own best judgement, rather than the norms of a delegate who is tasked to further the principals' express decisions.[26] In cases where the judges or arbitrators are best perceived as trustees, we should ask: Which norms should they pursue? An important difference from Burke's account is, I submit, that the independent judgments of the judge should not attend to "the general good" broadly understood, but rather be focused on at least three objectives or loyalties.

B. *Three Loyalties*

The international judge must combine at least three commitments which often, but not always, may be fulfilled simultaneously: to international law and some of its values and standards, including *the international rule of law*; to the particular IC

23. EDMUND BURKE, *Speech to the Electors at Bristol, in* 2 WRITINGS AND SPEECHES OF EDMUND BURKE 95–97 (Clarendon Press 1890).

24. Alec S. Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization,* 1 J.L. & CTS. 61, 62 (2013).

25. *See* Voeten, *supra* note 4, at 437–38 (explaining that the connotation of trustee "easily lend[s] itself to straw-man constructions").

26. Karen J. Alter, *Agents or Trustees? International Courts in their Political Context,* 14 EUR. J. INT'L REL. 33, 40 (2008).

to help maintain or increase its reputation; and to ensure that justice is done and seen to be done in the case at hand, according to the express objectives of the regime.[27] These may conflict; consider reports that judges must sometimes make decisions that are in alignment with the national interests of particular states to ensure compliance:

> [I]f ICs can neither compel compliance nor [themselves] enact strong sanctions for violating the law, the only choice left to an international judge who wants to be useful and relevant is to make rulings that appeal to a litigating state's national interest. Thus all ICs can really do is serve as coordination devices for states.[28]

These three commitments merit some comments. The set of 'international law values' appropriate for ICs and their judges cannot simply be conflated with legal values in general. Some values and standards should arguably constrain the 'global basic legal structure' as a whole—be it 'the general good,' human rights, or 'humanity.'[29] It is not obvious that some such values—or even transparency or impartiality—should be central objectives or constraints on each specific regional or international IC. Such values may be more appropriate for some component organs than others. For instance, impartiality among the parties may be more appropriate in ICs where the judges are 'trustees' of states, and less appropriate in arbitration panels where some members may see themselves somewhat more as delegates of the parties.[30] And these values may appropriately be balanced differently depending on the function of the same IC, whether it is engaged in administra-

27. *See* Stone Sweet & Brunell, *supra* note 24, at 62 (discussing the concept of international courts as trustees of their respective states).

28. KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: INTERNATIONAL COURTS IN INTERNATIONAL POLITICS 19–20 (2013) (Alter does not hold this view).

29. *See* RUTI G. TEITEL, HUMANITY'S LAW 4–8 (2011) (exploring the humanity law phenomenon).

30. *See, e.g.*, Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights,* 61 INT'L ORG. 669 (2007) (discussing the composition of the ECHR); Alter, *supra* note 26 (analyzing international courts in the category of trustee-agents); Geir Ulfstein, *International Courts and Judges: Independence, Interaction and Legitimacy,* 46 N.Y.U. J. INT'L L. & POL. 849 (exploring whether international courts should be considered trustees or agents).

tive or judicial review to prevent citizens being dominated by their state, or asked to resolve conflicts among states or among parties to an arbitration panel. Different kinds of courts and tribunals must strike a different balance among the legal values. To illustrate: International criminal law should arguably be particularly wary of applying laws retroactively. Interpretations should therefore stay closer to explications of treaty law and customary international law, and avoid blatant law making.[31] The risks of retroactive punishment may be less for the ICJ,[32] while the law making role may be more salient. Thus, the ICJ states about itself that:

> [A] judgment of the Court does not simply decide a particular dispute but inevitably also contributes to the development of international law. Fully aware of this, the Court takes account of these two objectives in the substance and wording of its judgments.[33]

In comparison, arbitration tribunals are selected differently and serve other roles, as conveyed by their description as 'judges for hire.'[34] They may have a need to maintain consistency, but may—at least currently—give less weight to promoting stable expectations and certainty by means of systemic precedents.[35] Thus in the case *Romak v. Uzbekistan* the tribunal noted that:

31. Theodor Meron, President, Int'l Criminal Tribunal for the Former Yugoslavia and the Mechanism for Int'l Criminal Tribunals, Competing Theories of Justice and Adjudication: The Role of Judges in International Law, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013).

32. J. Stephen Schwebel, President, Admin. Tribunal of the World Bank and Former Judge and President, Int'l Court of Justice, Competing Theories of Justice and Adjudication: The Role of Judges in International Law, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013).

33. INT'L COURT OF JUSTICE, HANDBOOK 76 (5th ed. 2004), *available at* www.icj-cij.org/information/en/ibleubook.pdf.

34. TERRIS ET AL., *supra* note 2, at xviii.

35. Donald Donovan, Partner, Debevoise & Plimpton LLP and President, Am. Soc'y of Int'l Law, Brian King, Partner, Freshfields Bruckhaus Derringer LLP, Andrea Bjorklund, Yves Fortier Chair in Int'l Arbitration and Int'l Commercial Law, McGill Univ. & Francisco Ferrari, Professor, N.Y. Univ. Sch. of Law and Director, Ctr. for Transnational Litig. & Commercial Law, Lawmakers or Dispute Settlers? The Role of Arbitrators in International Arbitration, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013).

> [T]he Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of 'arbitral jurisprudence'. The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.'[36]

The need to consider externalities of the decision wrought on third parties may also be less for arbitrators, as may the concern to foster systemic interpretation. On the other hand, recall the *US – Shrimp* case where the Appellate Body interpreted WTO rules in light of other ICs.[37]

C. *Four Potential Paths to Guide Discretion*

At least four sources of guidance for the discretion of international judges seem to be fruitful venues for further exploration in order to reduce the risk of *arbitrary* discretion, and to reduce reasonable suspicion thereof.

Firstly, judges should adhere to *professional legal norms.* The international judges may come to share standards of good interpretation and of judging, for appropriate balancing of values and drawing distinctions among cases. The community of legal experts with such shared understandings serve *inter alia* to guide judges' discretion. This is, of course, not to deny that such a culture can result in 'group think.' If the community is too closed, it may result in undue empire building on behalf of ICs, or "a form of 'corporate solidarity' that deflects constructive criticism and stifles new thinking."[38]

Secondly, *publicity about the reasoning* leading up to particular decisions, including those of dissenting judges, should be encouraged. This may prompt judges to be careful in their complex balancing of various considerations, and help identify

36. Romak S.A. (Switz.) v. Uzbekistan, PCA Case No. AA280 ¶ 171 (Perm. Ct. Arb. 2009).

37. TERRIS ET AL., *supra* note 2, at 117.

38. *Id.* at xix.

the sources of remaining disagreements. ICs have different practices in this regard, and such differences merit scrutiny. Thus,

> Among the thirteen major international courts, most permit dissenting and individual opinions and declarations, but one of the exceptions, the European Court of Justice, has a large caseload and extensive impact and influence. At the WTO Appellate Body, dissents are discouraged but not forbidden, and the practice in this regard is in a state of flux.[39]

The case for more transparency and visible dissent is not open and shut, especially since judges should be controlled in some ways by those who appoint them. For reasons similar to the value of secret ballots,

> Collective judgments . . . allow judges more freedom, because their individual role in the decision is hidden from public view. Dissenting opinions, on the other hand, expose judges to the scrutiny of their governments. An ECJ judge observes that "because no opinions are allowed, and it is not said who voted in favor or against, there is no way in which a government would know which way a judge voted on something or another. By the same token, the advantage of not having dissenting opinions is that there is no opportunity for a judge to signal to the boys back home, 'Look what a good boy am I.'[40]

Thirdly, *the use of precedents and persuasive past decisions* should be encouraged. They may guide—though, of course, not stifle—judges' discretion. Such guidance may include 'horizontal' borrowing among sector ICs, and 'vertical' borrowing by ICs from national court practice, or by the ICJ from 'sector' ICs.[41] Note that such borrowing does not seem generally accepted yet: "[N]o international judge seems to feel bound by the jurisprudence of another court. . . ."[42] The selection of precedents merits scrutiny, since the judges' citation practices will create salient patterns. Thus, there are some reports of a 'pecking order' among courts.[43] To create a defensible interdependent legal citation regime, it is important whose decisions shape the emerging practice. Citation patterns dominated by the courts of Western, English language states may give rise to concern. A further consideration is what sort of quality control judges should apply when they cite to precedent. Some report that international judges care more about the quality of the reasoning, rather than the formal legal nature of the source:

> [T]he formal nature of a judicial finding does not matter. Judges consider decisions of other international courts regardless of whether they are final or preliminary judgments, orders, nonbinding advisory opinions or anything else. What they look at is the jurisprudence rather than any specific case; what ultimately seems to matter is only that the reasoning that led the other tribunal to a given conclusion is legally sound and persuasive. As one judge admits, "I'm not certain that there is much great practical difference between a decision that is binding, and one that is not binding but persuasive."[44]

We should, of course, welcome the focus on good arguments, but the uncertainty about sources opens the risk that judges will be able to pick and choose completely unconstrained—thus subjecting others to their arbitrary discretion.

A fourth suggestion is *majoritarian activism* by ICs to guide and limit judges' discretion.[45] A case in point is the European Court of Human Rights' interpretive theory of 'emerging European consensus.' The Court brings the European Convention of Human Rights up to date partly by restricting states' 'margin of appreciation' on issues where the Court perceives an 'emerging European consensus.'[46] Critics are right to worry that such guides and restraints are weak—thus risking arbi-

39. *Id.* at 123.
40. *Id.* at 124.
41. *Cf.* Greg Nolte, Professor, Pub. Int'l Law, Humbolt Univ., Cross-Judging: Dialogue in the International Judicial System, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013).
42. TERRIS ET AL., *supra* note 2, at 120.
43. *See* TERRIS ET AL., *supra* note 2, at xix (describing the "keen competition between courts for attention and authority in an informal hierarchy of international law").
44. *Id.* at 121.
45. Stone Sweet & Brunell, *supra* note 24.
46. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. ¶¶ 85, 103.

trary domination. Some commentators note that the Court has also started to be guided by a perceived 'common trend' among states.[47] Such consensus and trends appear more clear and uncontroversial in the eyes of some beholders than in those of others.[48] This is also evidenced by dissenting opinions in the European Court of Human Rights itself.[49] In short,

> [T]he Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an interpretation of the Convention that it finds ideologically pleasing.[50]

III. To Check Discretion

What institutional practices can help select and check arbitrators and judges to ensure that they do not abuse their discretion, and provide public assurance that they do not? Recall that many ICs must enjoy a wide scope of discretion, while institutions that can check ICs are at best different from those within a state with an established division of power. The mechanisms to prevent abuses of discretion may have to be quite different, taking due account of the three sorts of risks: corruption, judges as pawns, or judges as institutional entrepreneurs.

A. *Two Paths to Pursue to Reduce the Risk of Abuse of Discretion*

With regard to the risk that international judges are unduly controlled by the state that nominates them, one important way to reduce such risks and increase trustworthiness is to improve the selection process. Changes should increase the importance of merit, but cannot completely exclude political considerations. Note that the 'merits' may differ systematically

47. *See* George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* The European Court of Human Rights 106 (Andreas Follesdal, Birgit Peters & Geir Ulfstein eds. 2013) (discussing the ECHR's use of common ground among contracting states to help it bring the meaning of the rights of the Convention up to date).

48. Andreas Follesdal, *Appreciating the Margin of Appreciation*, *in* On Human Rights (A.D. Elinson eds., forthcoming 2014).

49. X, Y and Z v. United Kingdom, 24 Eur. Ct. H.R. Rep. 143, 180 (1997). See also the opinion of the Court in Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) ¶ 40 (1984).

50. Laurence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 Cornell Int'l L.J. 133, 154 (1993).

across the different ICs, in light of the values that should guide the court or tribunal. Three central issues already receive much attention: firstly, how to regulate the authority to nominate, for instance, requiring reasoned briefs in support of candidates; secondly, whether to set up a (quasi) independent body to scrutinize as regards personal and professional qualifications; and thirdly, how to guide the body with the authority to select among candidates.

A second form of check is measures of accountability. It would be a mistake to insist that all judiciaries—including ICs—should be subject to the same public forms of accountability, and that these should be the same as for legislatures. The portfolio of accountability levers may helpfully draw on administrative law in the form of review of procedures and other mechanisms.[51] Generally, more publicity about the actual 'balancing' of various objectives and norms should be welcomed. This would allow several other parties, including the general public, to assess the sincerity and competence of the IC; for example, when an IC assesses 'proportionality' or 'reasonableness.'[52] A publicity norm may be less suited for arbitrations where the parties desire confidentiality—though this may be changing.[53]

Note that in our multi-level legal order, an important form of check on ICs may be 'diagonal': National courts may hold the ICs accountable.[54] Famous examples include the *So-*

51. *Cf.* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 Am. Pol. Sci. Rev. 29 (2005) (exploring the role of accountability mechanisms in world politics).

52. *Cf.* Alec Stone Sweet, Leitner Professor of Int'l Law, Politics and Int'l Studies, Yale Law Sch., Cross-Judging: Dialogue in the International Judicial System, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013); Alvarez, *supra* note 16 (discussing accountability).

53. *See* Susan D. Franck, *The Role of International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?*, 12 ILSA J. Int'l & Comp. L. 499, 500–01 (2006) (stating "confidentiality has eroded" in international arbitrations).

54. Greg Nolte, Professor, Pub. Int'l Law, Humbolt Univ., Cross-Judging: Dialogue in the International Judicial System, Panel at New York University Journal of International Law and Politics Symposium, The Function of Judges and Arbitrators in International Law (Oct. 24, 2013).

lange decisions.[55] Recent work has also explored other cases of judicial oversight over ICs from national courts.[56]

Conclusion

This Article has addressed the discretion of judges of international courts. The judges' discretion should be welcomed as an important protection against domination. Their exercise of discretion merits scrutiny, because the judges merit deference when appropriate, and criticism otherwise. I have suggested that their discretion must be guided and guarded, lest these guardians become new sites of domination. Some patterns of interpretive practice and of judges' discretion are more defensible than others. Such assessments and reasoned trust therein require various forms of transparency and accountability. The nature of regional and international law and institutions creates new opportunities for domination, and is an unfamiliar terrain for our received theories of checks and balances. But judges, arbitrators, and scholars also discover multi-level opportunities for accountability to seek to reduce the scope for the strong to do as they will, and reduce the scope wherein the weak do as they must.

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271, 1974 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 339, 1986 (Ger.).

56. *See* Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, 41 N.Y.U. J. Int'l L. & Pol. 931 (2009).