Should International Courts Use Public Reason?

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Is public reason an appropriate ideal for international courts? Since the early 1990s various political philosophers and legal scholars have argued that supreme courts should "use public reason" or abide by an "ideal of public reason."[1] More recently, scholars such as Wojciech Sadurski, Mattias Kumm, and Ernst-Ulrich Petersmann[2] have also applied the concept to discussions about international courts and tribunals (ICs), and argued that some of these significantly enhance their legitimacy through public reason.[3] But what can be the content of a standard of public reason for an IC? And how can public reason enhance these courts and tribunals' normative legitimacy?

The answers to the above questions hinge largely on the exact meaning of the concept of "public reason" and what it means for a court to "use public reason," "appeal to public reason," or "abide by an ideal of public reason." This article seeks to make three contributions. The first section provides a clarification of the range of conceptions, or ideas and ideals, referred to as public reason in the dominant and broadly Rawlsian tradition. This initial delimitation opens up to a more focused discussion of how public reason may be important for ICs. The second section presents properties and features of ICs that make public reason relevant for their normative legitimacy. The new type of ICs that have emerged since the end of the cold war face legitimacy problems that cannot be satisfactorily addressed by reference to state consent, the traditional source of IC legitimacy. I argue that although many aspects of IC legitimacy lie beyond the courts' control, a properly construed ideal of public reason offers a way in which ICs themselves can address

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serious legitimacy concerns raised against them. The third section then sketches an ideal of public reason for ICs that suggests guidelines and principles to limit the discretion of judges when reasoning about morally and politically contentious issues. This ideal is designed to address a particular legitimacy concern raised against many new ICs, namely, that they engage in judicial activism, passing judgments on these contentious issues without being sufficiently authorized and accountable. The final section of the article compares and contrasts the proposed account of public reason to other adjudicative ideals, both from the general adjudicative accounts of Ronald Dworkin and Cass Sunstein, and the more ambitious and cosmopolitan accounts of public reason for ICs offered by the legal scholars Kumm, Sadurski, and Petersmann.

Public Reason: A Contested Concept

What does it mean to say that a court uses or that it should use "public reason"? And why would a practice of public reasoning be normatively important for a court? The idea of public reason is often associated with the American philosopher John Rawls. Although Rawls did not invent the concept as such, it was with his political liberal conception of public reason that discussion of the concept gained momentum and was put into wider academic circulation.[4] Rawls also triggered the interest, and dismay, of many legal scholars when he said that public reason applies in a special way to the judiciary, and that the Supreme Court in regimes with constitutional review is the "exemplar of public reason."[5] But simply referencing Rawls does not make it clear exactly what "public reason" refers to. The exact content of Rawls's concept of public reason is still disputed—a result of the complexity of his own discussion of public reason and the fact that his understanding of the content and role of public reason continued to develop in his later writings.[6] Moreover, during the last decade a number of political philosophers and legal theorists have modified and developed Rawls's approach to public reason,[7] while still others have developed conceptions of public reason that depart from Rawls altogether.[8]

Does the wide range of conceptions of public reason show that it is what W. B. Gallie calls an "essentially contested concept," that is, one that competent speakers use with different and sometimes conflicting meanings?[9] Or are the different examples of use united by certain underlying ideas? When we examine the full range of meanings attributed to the concept in current legal and philosophical

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theory, we must conclude that it does in fact refer to different and sometimes conflicting ideas and conceptions. At best we can say that there is a group of ideas and conceptions of public reason with certain family resemblances. Nevertheless, the majority of public reason conceptions can be said to belong to a broadly Rawlsian tradition, and they share certain underlying normative ideas. This is the dominant, most distinctive, and, in my opinion, most convincing variety of public reason thinking. In this article I therefore reserve the concept of "public reason" for ideas and ideals that fall within this broad tradition.[10]

Delimiting Public Reason

All conceptions of public reason in the broadly Rawlsian tradition share a basic underlying normative idea: *collectively laws, rules, and decisions should be reasonably acceptable to all those over whom they purport to have authority.*[11] One does not have to be a proponent of public reason to affirm this liberal idea. However, we can understand conceptions of public reason as particular ways to *specify* and *instantiate* the general liberal requirement that collectively binding coercive laws and institutions must somehow be acceptable to each of their subjects.

A first step in the specification that leads to conceptions of public reason is to say that in order for public laws and decisions to be reasonably acceptable to all their subjects, they must somehow be demonstratively or *publicly justifiable* to the subjects. The idea here is not that all subjects must publicly support all laws and decisions in order for them to be legitimate; this is clearly an unrealistic requirement in large and pluralistic forms of cooperation. Rather, the idea is that the *reasoning* and type of *reasons* that justify collectively binding laws, rules, and decisions—and especially laws that form part of the higher constitutional law and that regulate the basic institutional structure—should be *publicly known* or publicly available to the subjects, and also presented such that the subjects can recognize them as appropriate and *reasonably acceptable* forms of political and legal reasoning.[12]

Second, conceptions of public reason furthermore assume that public justification of laws requires a practice whereby those who exercise public authority to make or shape the laws must respect an *ideal of public reason*. This means that they must be willing to provide a public justification of their acts that is directed toward the subjects or addressees of the laws and decisions, a justification that they sincerely believe that these subjects can recognize as reasonable or see as an appropriate public justification of a binding law or decision.

The third and final specification that leads us to conceptions of public reason is the assumption that offering a reasonably acceptable public justification for a law requires the use of distinctly *public reasons* or a distinctly *public form of reasoning*.

These ways of specifying the liberal requirement that binding laws and decisions must be reasonably acceptable to each subject determine the scope of conceptions of public reason in the broadly Rawlsian tradition. But even with this understanding, the broad nature of the Rawlsian tradition allows for considerable variation in conceptions and ideals of public reason.

Varieties of Public Reason

One source of variation among conceptions of public reason stems from different understandings of what exactly it takes to provide "public reasons" or use "public reasoning," and hence what it takes to provide a public justification for a law that can be reasonably acceptable to all its addressees. Most proponents of public reason argue that public justifiability requires the use of reasons and forms of reasoning that are at least *accessible* to the subjects of the law or decision, including those who may have a different worldview, such as a different religion.[13] This means that reasons or forms of reasoning that appeal to private intuitions, revelation, or religious authority are not recognized as public reasons, and are not an appropriate means of justifying collectively binding laws and decisions.

Public reasons are often defined in a negative way, that is, as reasons or forms of reasoning that *do not* build on private intuitions, revelation, or gestures to religious authority; that *do not* amount to personal preferences or dislikes and prejudices; that *do not* rely on any one notion of the good and worthy life; and that *do not* depend on a particular worldview or on a particular comprehensive moral, philosophical, or religious doctrine. Proponents of public reason in the Rawlsian tradition disqualify these latter types of reasons as an appropriate basis for collectively binding laws because they assume there to be a *reasonable pluralism* of religions and worldviews, and also of comprehensive moral and philosophical doctrines.[14] Thus, they believe that reasons and reasoning that directly derive from or that exclusively appeal to these sources are such that reasonable persons can reasonably reject them as acceptable forms of justification for coercive and collectively binding laws and measures. On the other hand, reasons that draw on common sense, ordinary forms of logic, and on science (when not controversial) are widely acknowledged as public reasons, that is, as publicly accessible and reasonably acceptable in the context of legal and political decision-making.[15]

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Most proponents of public reason argue that the public justification of a law must also cohere with, or at least not conflict with, widely shared political-moral norms and values in the relevant community. But again, what exactly this means is contested. Some argue that public justifiability requires that one ensures compatibility with uncontroversial political-moral values, or with values that all subjects can accept from within their comprehensive doctrine in an overlapping consensus.[16] Others, like Rawls, argue that one must start from the implicitly shared practical reason of the political practice in question, or from the political-moral ideas and values present in the public political culture of the community in question. One should then try to form these implicitly accepted political ideas and values into a coherent and sufficiently complete "political conception of political justice"[17] in reflective equilibrium with one's most considered convictions of justice:[18] that is, one should try to interpret and specify the most basic political values and conceptions into political principles of justice, and order these principles into a political conception of justice appropriate for the particular political or legal regime. When doing so, one should proceed within the language and concepts familiar from the political culture, and not seek for the deeper foundation of these ideas in comprehensive philosophical or moral doctrines. The reasoning here is that if those who exercise political power to change a law give a public justification of the law showing that it is at least compatible with such a political conception of justice, then the subjects of the law will be able to recognize the law as politically reasonable, even if they dislike the law from a private point of view or from the point of view of their comprehensive doctrine. Why? Because they can see that the law is justified with reasons that are compatible with a coherent and reasonable interpretation of the shared political values of the community, and with a type of evidence, logic, and form of reasoning that is accessible and reasonably acceptable to them.

It is often argued that Rawlsian conceptions of public reason exclude a wide range of reasons and forms of reasoning from the public sphere in general, and from political debates in particular. But the broadly Rawlsian tradition, including Rawls in his later years, has gone in the direction of becoming more inclusive. There is a growing consensus that one should allow, and even encourage, all kinds of reasons and reasoning in public debates and political discussions. On this view, the public justifiability of laws does not depend on nonpublic reasons being excluded from public discussions. The core idea is rather that public justifiability and hence the use of public reasons is a requirement for *those who make*

collectively binding laws and decisions when they exercise this power—especially when they exercise power in relation to issues that shape constitutional essentials and matters of basic justice.[19] Supreme Court justices and international judges are seen as exercising political power over such matters in fairly direct ways, and many proponents of public reason therefore think that the duty to use public reason applies to these judges in a particularly stringent way. Rawls, for example, argues that the ideal of public reason applies to Supreme Court judges not only when they make their decisions but also when they discuss and deliberate these issues in court and in other authoritative and public forums. Ordinary citizens, on the other hand, may abide by a more relaxed standard of public reason when they discuss policy proposals and laws—in the editorial pages of a newspaper, for example—and can introduce personal reasons and reasons connected to their comprehensive doctrines.

Are International Courts the Kinds of Entities for Which Public Reason is Relevant?

Even if we accept the idea that public laws should be justifiable to all those over whom the laws purport to have authority, and even if we are convinced that this requires a practice where those who exercise public authority should attempt to give a justification using public reason, it is still far from clear that ICs should use public reason.

The Development of "New Style" ICs

Those who accept the traditional view of international law and international courts will be less likely to see a need for ICs to engage in public justification and to use public reason, because in the traditional view ICs do not have much public power or public authority in the first place. The traditional view was formed in the early days of ICs when there were few international courts and tribunals, and when those that did exist had few powers. ICs lacked compulsory jurisdiction and could only proceed with the consent of states. Their primary role was thus to specify the terms of the contract between states, and to function as interstate arbiters.

Traditional or "old style" international courts, such as the International Court of Justice (ICJ), still exist, but over the last few decades there has been a sharp rise in the number of international courts and tribunals, and in the number of rulings they have passed. Even more importantly, many of today's international courts

have taken on new roles and functions. Political scientist Karen Alter refers to this development as the emergence of "new style ICs."[20] Alter's extensive study of today's twenty-four permanent ICs shows that this type of international court and tribunal has become increasingly common. New style ICs typically have compulsory jurisdiction and typically also allow nonstate actors various forms of access, ranging from the ability to initiate litigation to the permission to file amicus briefs. It is also common for these ICs to have jurisdiction to review the legal validity of states' and international organizations' legislative and administrative acts. A majority of today's twenty-four permanent ICs have jurisdiction to perform administrative review of supranational administrators.[21] Ten ICs have jurisdiction to perform some sort of constitutional review, which entails "jurisdiction to assess the legal validity of public acts, with the remedy being the nullification of the illegal acts."[22] Nineteen ICs have enforcement jurisdiction that allows them to adjudicate state compliance with international legal rules.[23] Most of these new style ICs are regional courts, although we also find new style ICs with a global reach, like the World Trade Organization Appellate Body (WTO AB). Other new courts, like the International Criminal Court (ICC), fall somewhere between the new and the old type of ICs.

The increase in the number of ICs, and the increasing prominence of this new type of IC, does not mean that states are ceding all of their power. States still create the treaties, and thereby the rules and statutes by which ICs are bound. States also appoint judges, and states can—and sometimes do—disregard IC rulings. But today, setting up an IC typically creates a sovereignty risk for states. ICs are no longer entirely within the control of states; more precisely, they are no longer something a single state can control.[24] Moreover, ICs now deal with a much wider range of issue areas than previously, including those typically considered the exclusive domain of states, such as a state's relation to its own citizens.

ICs and Judicially-Driven Development of Law

It can be argued that in spite of the emergence of new style ICs, they still do not truly wield public authority and therefore should not be expected to provide public justifications or use public reason. After all, if the duty to publicly justify collectively binding laws and decisions falls on the lawmaker—in this case the member states of the IC or the Assembly of State Parties—then the role of the ICs themselves is merely to apply the law as defined by the treaty or charter of

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the court. In this view, the international judiciary is simply, as Montesquieu puts it, *la bouche qui prononce les paroles de la loi*—the mouth that speaks the law.

There is no doubt that the permissible forms of reasoning for an IC judge are restricted by the text of the authoritative legal documents and by customary law and other recognized sources of international law.[25] The primary role of an international judge, as of any judge, is to apply the law, not make the law. However, adjudicative reasoning unavoidably involves more than outlining what the authoritative legal texts say and how the law pertains to the facts of the case.[26] This is particularly evident in cases where the law does not foresee a particular situation, that is, when there are gaps in the law and when judges have to adapt legal rules to changing circumstances. It is also evident when the legal text itself is ambiguous or vague. But even in more straightforward cases, all application of the law requires interpretation of the law and involves a certain degree of interpretation as to what counts as legal sources, identification of relevant sources in the particular case, as well as a choice of interpretative method and legal techniques.[27] The interpretative and methodological choices that judges make can influence how the judges end up positioning themselves toward contentious moral and political questions.

The degree to which adjudication involves interpretative choices is particularly evident in the adjudication of human rights because many human rights provisions are not formulated as either-or rules, but rather as open-ended rights or principles. Moreover, human rights provisions often have vague delimitation clauses that require substantive interpretation. Take, for example, Article 8 of the European Convention on Human Rights (ECHR). The first part of this article guarantees the right to respect for private and family life. The second part outlines a delimitation clause that says the right to private and family life can be limited, but only if the limitation is in accordance with law and "necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Thus, when applying Article 8 the judge must interpret what "respect for private and family life" means and at the same time what is necessary for a country's national security, economic wellbeing, and so forth—all of which is empirically contested and which leads to morally contentious questions.

Another example requiring substantive deliberation is IC judges' use of legal techniques such as the proportionality test. The proportionality test amounts to a three- and sometimes four-pronged analysis designed to assess whether an

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infringement of a legally guaranteed right is justified, or whether a right can be limited in the particular context. It has emerged as an important framework for evaluating rights violations in constitutional law and in international human rights law, but it is also used by the WTO AB. Judges who use this test first assess whether a disputed measure, such as a law forbidding same-sex marriage, serves a legitimate policy aim. Second, they assess whether the measure is necessary, and last they assess whether the measure is proportional to the rights infringement. At first sight, this three-pronged test may seem like a highly structured and principled means of judicial reasoning. But how can a judge determine what is a legitimate policy aim in a *strictly legal way*? How can he or she determine, in a strictly legal way, whether a measure is necessary and whether it is proportional? Here the judges must resort to more general forms of practical and moral reasoning.

Recent years have also seen the emergence of ICs with considerable interpretative freedom or, as some would say, considerable judicial discretion. Wide interpretative room has been made possible by international treaties and conventions that leave statutes open or vague, and by conventions that explicitly provide their courts with review powers. But we also find examples of activist courts and tribunals that over time have arrogated more interpretative and discretionary powers to themselves. In its rulings over time, a court may seek to create more autonomy from its charter; it may expand the types of issues it deals with beyond what is stated in the charter; and it may adopt new legal techniques, including review-style legal techniques such as balancing, multitier tests, and proportionality testing.[28]

We can applaud or we can lament these developments in international law. Either way, it seems undeniable that many ICs now have fairly wide interpretative powers, that they engage in substantive policy assessment and moral reasoning, and that they not only apply law but also sometimes make law. It is also undeniable that ICs now influence the rights and lives of persons all over the world much more directly than did old style ICs. In other words, it seems undeniable that there has been a considerable increase in many ICs' public authority and power.

Now, if we accept the general idea of the public reason tradition outlined in the first part of this article—the idea that collectively binding laws and decisions should be publicly justifiable, and that this requires a practice whereby those who exercise public power should be able and willing to offer a justification in terms of public reasoning and public reasons—then the discussion in this section suggests that the duty to use public reason applies to many ICs. That is, in this

section I have tried to show that a majority of the permanent international courts wield a considerable amount of public power to make and shape collectively binding laws, and that they can no longer be seen as mere agents of states. All of this points to public reason as an appropriate requirement for ICs, and in particular for the judges that serve on these courts and tribunals. Moreover, it seems plausible to say that ideals of public reason should apply more stringently to ICs that have compulsory jurisdiction, review powers, and whose rulings touch on subject matters that directly influence the lives and basic rights of citizens. This conclusion, however, leaves open the question of what kind of ideal of public reason would be appropriate for the international judiciary.

What Can Be an Appropriate Ideal of Public Reason for an IC?

For many, the growth of new style ICs, the expansion of these courts into new issue areas, the judicially driven development of international law, and the fact that ICs sometimes even make law are all growing legitimacy concerns. Lawyers typically frame this as a problem of legality and as a problem for the legitimacy of international law. They worry that international judges are acting *ultra vires*, or outside the law, and that activist judges undermine the rule of law in favor of the rule of men, thus threatening the predictability and impartiality that sets law apart from politics.[29] Others frame it as more of a political-moral problem, and fear the consequences of contentious moral and political issues increasingly being left to the arbitrary will and whims of a few judges with weak democratic credentials and restricted by few mechanisms of accountability.[30]

These worries should not be taken lightly. But the suggestion that international judges should engage in public justification of their rulings, and use public reasons and public forms of reasoning, may only exacerbate the legitimacy problems of ICs. That is, one may think that to say that judges should abide by an ideal of public reason is to say that they should engage in more substantive moral reasoning, understood as an extralegal form of reasoning that leaves more discretion and power to the judges and takes them further away from the authoritative legal texts and the will of the lawmakers. Critics might argue that this will lead judges to pass rulings on the basis of some kind of hidden natural law doctrine or comprehensive liberal doctrine, but then present these as based on dialogical and procedural justifications that no one can reasonably reject. Many critics of Rawls have,

for example, suspected that the operative part of his ideal of public reason is his conception of "reasonableness," and that this conception in turn relies on a fairly comprehensive liberal doctrine of what it means for a person to be reasonable. One may also think that for a court to respect an ideal of public reason it must be a more activist court that engages in more judicial review, because it is assumed that an ideal of public reason will require a court to strike down any act or measure that has not been given, or that cannot be given, a sufficient justification in public reason.

The public reason tradition, however, provides a flexible framework and allows for different conceptions and ideals of public reason. In this section I propose a conception of public reason for ICs that responds to the legitimacy concerns about IC judges' arbitrary exercise of public power. This ideal does not encourage judges to conduct more judicial review, use more discretion, or engage in more moral reasoning or other forms of nonlegal reasoning. Rather, it proposes guidelines for what can count as appropriate reasons and forms of reasoning *when the judges have to engage in moral reasoning and substantive policy assessments*. That is, it is an ideal of public reason that provides a conception of what counts as appropriate and inappropriate types of reasons and reasoning when a judge has to adapt existing statutes to new circumstances or interpret vague statutes. It provides a set of guidelines for judges when they have to interpret delimitation clauses, such as the delimitation clause of Article 8 in the ECHR, and thus assess the extent to which considerations of public morals can limit an individual's right to a family and private life. It is an ideal that also speaks to how a judge should restrict their reasons and reasoning at the various stages of a proportionality test. This ideal builds on the assumption that judges unavoidably have to engage in substantive moral and practical reasoning in some cases, and proposes a way of doing so that raises fewer legitimacy concerns. I refer to this as "the ideal of public reason as judicial self-restraint when conducting moral reasoning."

Exactly what guidelines such an ideal of public reason should include is a more difficult question. The specifics of an ideal of public reason for an IC cannot be worked out in isolation from the specifics of the court or tribunal in question, and will depend on the issue area on which the court adjudicates, what its treaty or charter says, how much agreement or conflict there is on rules and values between those who set up the court and among those who are bound by its rulings, and so on. Nevertheless, the broadly Rawlsian public reason tradition can provide

some useful general insights on what it takes to provide public justifications in deeply pluralistic settings like those in which ICs operate.

Thus, I suggest that ideals of public reason for ICs should be informed by the following guidelines for how judges should reason when they engage in policy assessment and moral forms of reasoning. First, the judge should always respect the idea that the reasons and reasoning that underpin the decision should at least be *accessible* to all those who are directly affected by the decision. This means that a judge should avoid building his or her decision on reasons and forms of reasoning that rely on private intuitions, private likes and dislikes, revelation, and appeals to religious authority. Moreover, recognizing that rational and reasonable persons can continue to disagree on religious, moral, and philosophical doctrines, the judge should also avoid reasoning that builds directly on, and uses the vocabulary of, particular comprehensive doctrines, including comprehensive or perfectionist liberal doctrines of justice and welfarist doctrines of justice and the good life. The judge should also avoid relying on scientific findings and scientific methods that are disputed in the scientific community.

Second, when a judge engages in substantive policy assessment or moral reasoning, he or she should do so in a way that demonstrates compatibility with the basic political-moral aims and purposes of the treaty that the court serves, as well as the basic aims and purposes of the practice of international law more generally.[31] Given the development of international law over the last two decades, the latter should be seen as including certain minimal requirements of human rights.[32] Reasoning about the aims and purposes of the treaty and international law is often seen as opening space for considerable judicial discretion. To make the judge's reasoning about aims and purposes more principled and consistent across cases, and also less reliant on nonaccessible and disputed forms of reasoning, the ideal proposes that the judge should try to bracket the deeper doctrines that political-legal aims and values might have emerged from. Moreover, the judge should focus on how the aims and purposes can be combined, rather than focus exclusively on salient aims or values in the case at hand.[33] To make the judge's interpretation of these aims and values less subjective and more attuned to the affected public, the judge should also take into account how the aims and values of the treaty are understood in the political community in question, and the extent to which they are disputed. If the judge's understanding of these aims and values conflicts with the contracting parties or the affected community's understanding of them, or if the aims and values are the subject of

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deep disagreements in the affected community, this requires the judge to show more restraint and provide a justification for why the judge chose to follow his or her particular interpretation of these aims and values.[34]

Last, the proposed ideal of public reason requires judges to make the basis of their discretionary reasoning on morally and politically contentious issues explicit and public in the written judgment, and in the separate opinions if the court allows for this. When a judge rules on morally contentious issues that call for the judge's substantive policy assessment or moral reasoning, the written judgment should demonstrate compatibility with the aims and purposes of the regime, with the minimal human rights norms of international law, and with its relation to the public practice and public opinion on the issue in the community in question. And all the while the judge should use types of reasoning and reasons that are accessible in a pluralistic polity. This makes the basis of the ruling public to those who are bound and affected by it, and it makes it possible for those affected to assess and criticize not only the outcome of the case but also the acceptability of the reasons and reasoning underpinning it.

The proposed ideal of public reason is an attempt to limit unrestrained and unaccountable judicial discretion when judges conduct moral and practical reasoning, by making it more reflexive, principled, and publicly transparent, and thus open to public contestation and correction. The ideal offers a way for the international judiciary to make itself more accountable to a broader range of publics and actors, in a situation where it has little democratic legitimacy and is subject to few other mechanism of accountability. However, the proposed ideal of public reason is in no way intended to preclude or replace more external or institutional measures of accountability, such as, for example, the development of improved mechanisms for treaty revision or a strengthening of legislative bodies, and the like. There is wide agreement that such reforms are necessary, though there is not enough political will to actually push them through. In the absence of such reforms, the proposed ideal of public reason offers ICs one way of enhancing the legitimacy of their rulings and strengthening the legitimacy of their office more generally.

Public Reason as Judicial Self-Restraint Contrasted with Two Other Adjudicative Ideals

The ideal of public reason sketched in this article may be helpfully contrasted with two other adjudicative ideals: that of Ronald Dworkin, on the one hand, and that of Cass Sunstein, on the other.

I consider Dworkin's conception of law as integrity and his theory of adjudication to be inconsistent with the proposed conception of public reason for ICs.[35] On Dworkin's view, the ideal judge should analyze the case at hand with an eye to "fit" and "justification."[36] This means that the judge should try to fit his or her ruling into existing legal materials, but at the same time try to cast these materials in their best light and weave them together into a coherent framework. Dworkin's ideal differs from the kind of ideals of public reason discussed here in that Dworkin does not, in principle, place any restrictions on the kind of justifications the judge can use when resolving hard cases. Or, more precisely, as Lawrence Solum puts it, Dworkin's ideal judge "sees no limit to the conceptual ascent that may be required to resolve a hard case."[37] In other words, Dworkin's ideal allows, and even encourages, the judge to "go deep" and to try to identify the comprehensive theory or doctrine that best fits and justifies the law.

From the point of view of the Rawlsian public reason tradition this type of deep justification is problematic. The ideal of public reason I have proposed accepts "the idea of a reasonable pluralism." It assumes that justification that relies on comprehensive doctrines, including comprehensive liberal doctrines of the right, like that defended by Dworkin, will not be reasonably acceptable to all those affected as a basis for collectively binding laws and policies. An ideal that encourages judges to advert to their deepest beliefs about morality and political philosophy when they adjudicate is problematic on this view, because such an adjudicative ideal ignores the fact that there can be a reasonable pluralism of views on such ultimate matters, and fails to show respect for (at least some of the) subjects of their rulings. For judges to "go deep" in their adjudicative reasoning may also be problematic for stability reasons: making law and a court's justification for their rulings dependent on deep foundations is not likely to make the law and its adherence stable in highly pluralistic settings such as those within which ICs operate. The ideal of public reason for ICs that I have proposed conflicts with any theory or ideal of adjudication that relies on a conception of natural law, and it conflicts with ideals of adjudication that rely on specific comprehensive theories of the good or right, including Kantian liberal theories of adjudication and interpretation like those of Dworkin and George Letsas, and with welfarist theories like those of Louis Kaplow and Steven Shavell.[38]

The ideal of public reason proposed here rejects a reliance on grand theory, and in this respect it has many similarities with Cass Sunstein's concept of "incomplete theorizing."[39] But there are also important differences. Sunstein's idea of

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incomplete theorizing is, like most conceptions of public reason, motivated by the recognition of a deep and irreducible pluralism in modern legal regimes. But his recommendation is to deal with this pluralism by moving to *lower levels of generality*: take a case-by-case approach; seek agreement on concrete outcomes and particulars; and refrain from deciding on the basis of, and appealing to, general principles and values as much as possible.[40] By contrast, the ideal of public reason proposed here allows, and indeed encourages, judges to appeal to "mid-level" political-moral ideas, aims, values, and principles that are central to and widely accepted in the political practice in question—*when* the judges have to engage in moral reasoning and policy assessment. According to the proposed ideal, judges should not bring in, or attempt to uncover, the deepest and foundational forms of moral reasoning in their judicial considerations and written judgments. Nevertheless, they are allowed and even expected to provide more than appeals to mutual interest and proposals of compromise.[41] The proposed ideal of public reason as judicial self-restraint encourages judges to appeal to the substantive political-moral values and ideas they sincerely believe to be inherent in, and central to, the political or legal regime defined by their treaty, as well as the minimal human rights values that are part of the practice of international law more generally. The proposed ideal is premised on the idea that the reasons given for a decision matter, and that mere modus vivendi compromises yield a too fragile and shallow basis or justification for coercive laws and decisions.

Public Reason as Judicial Self-Restraint Contrasted with Other Proposed Ideals of Public Reason for ICs

Kumm, Sadurski, and Petersmann have so far been the most prominent defenders of the idea that ICs can and do enhance their legitimacy through the use of public reason. All three seem to develop their conceptions of public reason within a broadly Rawlsian tradition: they endorse the general idea that public laws and rules must be justifiable to those over whom the rules purport to have authority, and the idea that public laws and rules should be demonstratively or publicly justifiable.[42] They also endorse the idea that those who make and implement these laws, rules, and acts have a duty to provide a public justification for them, and that this somehow requires the use of public reasoning or public reasons.[43] However, a review of the articles where they exemplify ICs' use of public reason or ICs "engaging in public reasoning" shows that their examples point in somewhat different directions.

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Kumm speaks of ICs engaging in public reason when ICs use proportionality testing or, more generally, when ICs scrutinize the justifications or reasons that a government, legislature, or international organization has offered for an act or measure that a plaintiff sees as an infringement of a legally protected right.[44]According to Kumm, public reason qua proportionality testing helps sort out pathologies of the political process by detecting insufficient justifications and illegitimate reasons for acts and measures, such as blind reliance on tradition, convention, or preference; controversial notions of the good; government hyperbole or ideology; and the capture of the legislative process by rent-seeking special-interests groups.[45] Kumm sometimes characterizes the use of proportionality testing and public reason as a form of *Socratic contestation*, that is, as a way of assessing "the internal coherence and consistency of justifications and reasons offered for a disputed act or measure,"[46] and as a way to sustain "a practice of reasoning and truth seeking."[47] But elsewhere Kumm attributes a more substantive and liberal meaning to public reason. Here he says that the point of the proportionality test is to assess whether public acts and measures can be publicly justified in light of what he calls the "principles of cosmopolitan constitutionalism," that is, "common principles that underlie both national and international law,"[48] and whose underlying idea is the freedom and equality of persons.[49] Kumm recommends that IC judges reason within a cosmopolitan constitutional framework that has an individual rights bias, rather than the collectivist bias of the statist or interstate framework, and that they read the underlying teleological structure of international law as one aiming to secure the freedom and equality of persons as well as to realize global public goods.[50]

Sadurski, too, mentions proportionality testing as a way that ICs engage in, or use, public reason. But Sadurski also says that international courts "follow the pattern of public reason" when they address diverse audiences;[51] when they use forms of reasoning and rely on values and ideas that are sufficiently widely shared;[52] and when they uphold general requirements of epistemological values, such as accuracy, openness to diverse points of view, and deliberate screening off of prejudice, hatred, hostility, and self-interest.[53]

Petersmann draws most of his examples from the area of international economic law, and argues that an IC acts as an exemplar of public reason when it respects the equal rights of citizens and settles, for example, investor-state disputes "in conformity with the human rights obligations of governments and the constitutional principles of democratic self-governance."[54] In other passages he says that an ideal

of public reason requires judges to take more justice and equity considerations into account in their reasoning and rulings.[55] But according to Petersmann, international judges also use public reason when they take into account international public goods, such as the protection of the environment, the rule of law, and an efficient world trading system.[56]

None of these three legal scholars presents a systematic ideal of public reason for ICs, and it can be difficult to grasp exactly how they delimit "public reasons," "public reasoning," and what it means for an IC to "engage in public reason." But the underlying arguments in all of their writings clearly amount to a more *cosmopolitan, individual-centered*, and *substantively liberal* ideal of public reason for ICs than the ideal I have proposed in this article.

Kumm, Sadurski, and Petersmann propose individual-centered conceptions of public reason in the sense that they assume that the justification offered for the disputed act or measure should be publicly justifiable and reasonably acceptable to all *individuals* affected by it. They explicitly reject what we may call an "intergovernmental," "international," or "interstate" public reason[57]—that is, they reject an understanding of public reason as a requirement to offer reasons that are acceptable to the public of *states*.[58] By implication, they also reject Rawls's proposal of a "public reason of the Society of Peoples."[59] This focus on acceptability to individuals is closely tied to an approach to public reason that is cosmopolitan constitutional, rights-centered, and substantively liberal. Most of their examples suggest that for an IC to engage in public reason is for an IC to be more activist and to pass rulings that secure certain principles of justice (Petersmann), or to act as a warden and ensure that the protection of individual rights trumps appeals to public interests and perfectionist policy aims (Kumm and Sadurski).

The ideal of public reason I have argued for here is a proposal that first and foremost seeks to ensure that IC judges do not rely on types of reasoning and justification that are inappropriate in pluralistic settings. The ideal does not suggest that courts should be more activist, or that they should function as wardens engaging in more review and proportionality testing. My proposed ideal of public reason for ICs is neither an interstate nor a cosmopolitan ideal of public reason, in the sense that it does not assume that ICs' primary public should be either the state parties or the affected individuals. The ideal suggests that IC judges should always keep an eye on a decision's compatibility with minimal human rights, meaning that they can never ignore the wider public of affected and potentially affected individuals altogether. But the exact balance of taking into account the

respective interests of individuals or states and of addressing affected individuals or state parties will have to depend on the type of IC and the context in which it is operating. A regional human rights court like the European Court of Human Rights adjudicates a subject matter with direct impact on individuals' basic rights; it has substantive review powers, and it operates in a context with a thicker agreement on how to understand the basic social and political values than is the case for many other ICs. This type of court and context necessitates a judicial public reason that is more attuned to the public of affected individuals, and it necessitates an ideal of public reason that includes a more substantive formulation of the norms and values assumed to be inherent in the treaty and widely shared in the regime. A thinner, and also more interstate-oriented public reason might be appropriate for ICs functioning primarily as dispute-settlement mechanisms and operating with the consent of the disputing parties, at least when dealing with subject matters like border or trade disputes.

Ideals of public reason must tread a fine line between what we can call a conservative, or *status quo*, pitfall and an idealizing pitfall. The point of a practice of public reason is to ensure that public power is exercised in ways that can be publicly justifiable or reasonably acceptable to the subjects. But if we define "what is reasonably acceptable" as that which the affected or relevant public *actually accepts*, or as the contingent set of reasons and values that all in the relevant public happen to agree on, then we run the risk of being too conservative and of accepting biased thinking and prejudices as an appropriate basis for collectively binding public laws and decisions. Yet if we define "what is reasonably acceptable" in terms of an idealized picture of what rational and reasonable persons *would have* accepted—as modeled in our preferred ideal theory of morality or practical reason—then we risk conflating what is reasonably acceptable to others with our own favorite views, thus imposing our own preferred ideas about what others can, or rather should, accept. For conceptions of public reason to be something distinct from traditional Kantian and liberal normative ideal theories, and something distinct from appeals to public opinion, they must avoid both extremes.

Many are pessimistic about the possibility of appealing to what is reasonably acceptable without becoming too idealizing.[60] I believe that there is a way to avoid this. Any normative position in political and moral philosophy requires a certain idealization, that is, certain background assumptions about who counts as participants in the relevant political or legal regime, as well as assumptions about the normal functioning of these participants, or their moral psychology

and political sociology. The challenge is to ensure that the psychological and sociological background assumptions of a conception of public reason are sufficiently realistic, and also to bring these background assumptions to the fore, instead of letting them do the operative job of the normative conception in a way that is obfuscating. One way to avoid being too idealizing is to follow the lead of the broadly Rawlsian tradition of public reason, and say (1) that one should avoid relying on certain types of reasons and reasoning that appeal to private intuitions, revelation, transcendent truths, and deep and general doctrines, because persons who are rational and reciprocity-oriented can reasonably reject these types of reasons and evidence as a basis for politics, and many are likely to do so in a pluralistic polity; and (2) that one should also start from, or at least pay attention to, mid-level political-moral and legal ideas, aims, and values that are central to, and widely accepted in, the legal and political regime in question.

When we look at the current practice of international law we find a mixture of statist and cosmopolitan constitutional ideas and values, and little general agreement on their relative priority. I have tried to take this into account when formulating an adjudicative ideal for IC judges. The ideals of public reason proposed by Petersmann, Sadurski, and especially Kumm run the risk of falling into the idealizing pitfall. And like Dworkin's ideal, they fail to take sufficiently into account the pluralism and lack of acceptance among many publics regarding what they take to be the required form of public justification for public acts and measures. Sunstein's adjudicative ideal, on the other hand, risks falling into the conservative pitfall.

Conclusion

To work out a viable conception of public reason in an international context is far more complex than to work out an ideal of public reason in a well-functioning constitutional liberal democracy: the international domain has more diversity and pluralism, and fewer institutions and public venues that bind it together. Also, ICs do not typically address one public but many parallel publics simultaneously, and they operate in a context of several levels of authority, and in a context of overlapping regimes, governance, and authorities. This makes it more challenging to determine what the content of a public reason for an international legal regime can be, or what counts as reciprocally accepted values, norms, and forms of justification. But though working out ideals of public reason for the

international judiciary may be more difficult, it is arguably more pressing than working out ideals of public reason for domestic judges. This is because at the domestic level we usually find a more clear-cut division between the adjudicative, the legislative, and the executive powers, and a corresponding system of checks and balances that restrains judges' powers. Domestically it is also possible to leave more of the difficult moral and political decisions and development of the law to the legislature, at least in well-functioning constitutional liberal democratic regimes.

This article has argued that the increasing public authority of ICs supports claims that they should use some form of public reason. But what exactly can be an appropriate form of public reason for a particular legal regime and a particular IC is highly contextual. Today's ICs deal with a wide variety of subject matters. Some operate in contexts with a high degree of disagreement, others where there is less controversy. ICs also have different powers and different degrees of independence as provided for in their charters, and all these factors play into the question of what type of ideal of public reason is appropriate for each of them. Still, this article has argued that the broadly Rawlsian tradition of public reason offers some plausible general recommendations for how to work out ideals of public reason in deeply pluralistic settings. The proposed ideal of public reason is a relatively modest one, providing certain guidelines and restrictions on what can count as appropriate reasons *when* ICs engage in substantive policy assessment or moral and practical reasoning. It is an ideal of public reason tailored to address the legitimacy concerns that arise when ICs with weak democratic authorization and few mechanisms of accountability engage in substantive policy assessment and moral and political reasoning. It shows that an ideal of public reason for an IC does not have to entail a more activist court, or a court that engages in more extralegal reasoning. However, the article has not argued that such an ideal of public reason can solve these legitimacy problems alone. Nor does it deny that additional requirements of public reason may be appropriate for ICs generally, and for some ICs in particular.

NOTES

[1] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); "Political Liberalism: Reply to Habermas," *The Journal of Philosophy* 92, no. 3 (1995); "The Idea of Public Reason Revisited," *Univ. Chic. Law Rev.* 64, no. 3 (1997); "Introduction to the Paperback Edition," in *Political Liberalism* (New York: Columbia University Press, 1996); Kent Greenawalt, "On Public Reason," *Chicago-Kent Law Review* 69, no. 3 (1994); Lawrence B. Solum Solum, "Public Legal Reason," *Virginia Law Review* 92, no. 7 (2006); Ronald Den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge: Cambridge University Press, 2009).

[2] Wojciech Sadurski, "Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities," *Global Constitutionalism*, vol. 4, no. 3 (2015); Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State," in Jeffrey L. Dunoff and Joel P. Trachtman, eds., *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009); "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," *Law & Ethics of Human Rights* 4, no. 2 (2010); Ernst-Ulrich Petersmann, "Human Rights, International Economic Law and 'Constitutional Justice,'" *European Journal of International Law* 19, no. 4 (2008); "Need for a New Philosophy of International Economic Law and Adjudication," *Journal of International Economic Law* 17, no. 3 (2014).

[3] Cf. Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy*, Oxford Constitutional Theory (Oxford: Oxford University Press, 2014). Leena Grover and Max Pensky mention public reason, or public reasoning, as a legitimizing strategy pursued by the International Criminal Court (ICC). Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2014). Max Pensky, "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law," *Ethics & Global Politics* 1, no. 1–2 (2008). Several other legal scholars use the concept of public reason in passing when discussing international criminal courts, but attribute different meanings to it.

[4] Rawls, *Political Liberalism*. Prior to Rawls the term had been used in passing by J. J. Rousseau and I. Kant, but with different meanings.

[5] Ibid., p. 231ff.

[6] Cf. Rawls, "Introduction to Paperback" and "The Idea of Public Reason Revisited." See note 15.

[7] Cf. Leif Wenar, Samuel Freeman, Paul J. Weithman, Stephen Macedo, Anthony Simon Laden, Micah Schwartzman, Jonathan Quong, Lawrence Solum, Ronald Den Otter, David M. Rasmussen, Wojciech Sadurski, Andrew March, Mohammad Fadel, and Sonu Bedi.

[8] Cf. Gerald F. Gaus, Kevin Vallier, Fred Frohock, David Gauthier, and John Finnis.

[9] W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56 (1955).

[10] This means that what I refer to as "public reason conceptions" does not include certain thinkers who profess to work out conceptions of public reason, like Finnis's natural law approach to public reason, Gaus and Vallier's convergence conception, and Frohock's realist conception of public reason, or Gauthier's neo-Hobbesian version of public reason. Nor does it attempt to capture the approaches of thinkers often associated with public reason, like Jürgen Habermas and Ronald Dworkin.

[11] Cf. Jonathan Quong, "Public Reason," in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (2013), plato.stanford.edu/archives/sum2013/entries/public-reason/.

[12] Proponents of public reason formulate this requirement in somewhat different ways: Some use formulations like "reasons that no one can reasonably reject" or "reasons of the kind that every citizen might reasonably accept, even if they don't." Kumm, "The Idea of Socratic Contestation," p. 169.

[13] See Vallier for an overview and critical assessment of such arguments; Kevin Vallier, "Against Public Reason Liberalism's Accessibility Requirement," *Journal of Moral Philosophy* 8 (2011), pp. 366–89.

[14] Rawls introduced the notion "reasonable pluralism" in Rawls, *Political Liberalism*. His later writings emphasize that there is a reasonable pluralism also of political conceptions of justice, including political liberal conceptions of justice. Rawls, "Introduction to Paperback" and "The Idea of Public Reason Revisited."

[15] These notions are of course vague and need further elaboration.

[16] Cf. Quong, who refers to this as "the common view of overlapping consensus." Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), p. 163ff.

[17] Rawls, "Introduction to Paperback," p. xxxviii.

[18] Ibid., p. lviii.

[19] In his late writings, Rawls calls this the "wide view of the public political culture" and says that such a wide view is more likely to create trust and civic friendship in deeply pluralistic societies than a restrictive and exclusionary view. Rawls, "Introduction to Paperback" and "The Idea of Public Reason Revisited." In his earliest writings on public reason, however, Rawls defended a more restrictive view; Rawls, *Political Liberalism*.

[20] Karen J. Alter, *The New Terrain of International Law* (Princeton: Princeton University Press, 2014). When Alter speaks of "ICs" she also includes certain tribunals, and court-like entities like the WTO AB.

[21] Ibid., p. 13.

[22] Ibid., p. 16. "Nine out of these ICs have jurisdiction to review the validity of supranational laws and acts; four have explicit jurisdiction to review the validity of national acts."

[23] Ibid., p. 15.

[24] Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," *European Journal of International Law* 23, no. 1 (2012).

[25] Cf. Article 38 (1) of the ICJ Statute, generally recognized as giving the definitive statement of the sources of international law. Cf. the 1969 *Vienna Convention on the Law of Treaties*.

[26] Armin von Bogdandy and Ingo Venzke, "Lawmaking by International Courts and Tribunals," in Karen J. Alter, Cesare P. R. Romano, and Yuval Shany, eds., *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), p. 508f.

[27] Duncan B. Hollis, "The Existential Function of Interpretation in International Law," in Andrea Bianchi, Daniel Peat, and Matthew Windsor, eds., *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

[28] Alec Stone Sweet and 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," *Journal of Law and Courts* 1, no. 1 (2013), pp. 61–88.

[29] Paul Mahonay, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin," *Human Rights Law Journal* 11 (1990), p. 57.

[30] Richard Bellamy, "Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act," in Tom Campbell, K. D. Ewing, and Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001).

[31] Cf. Waldron's differentiation between "individual moral reasoning" and reasoning in "the name of the whole society"; Jeremy Waldron, "Do Judges Reason Morally?" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008).

[32] Nienke Grossman, "The Normative Legitimacy of International Courts," *Temple Law Review* 86, no. 1 (2013), p. 97.

[33] Cf. Rawls's idea of formulating a sufficiently complete and coherent "political conception of justice." Rawls, "The Idea of Public Reason Revisited."

[34] The proposed approach here has some similarities with the practice of the European Court of Human Rights' interpretative custom of trying to identify an "European Consensus." Cf. Samantha Besson, "Human Rights as Transnational Constitutional Law," in Anthony Lang and Antje Wiener, eds., *Handbook on Global Constitutionalism* (London: Edward Elgar, forthcoming 2017).

[35] Cf. Solum, "Public Legal Reason"; George Rutherglen, "Private Law and Public Reason," *Virginia Law Review* 92, no. 7 (2006), p. 1503.

[36] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[37] Solum, "Public Legal Reason," p. 1475.

[38] E.g., George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007). Solum, "Public Legal Reason." Rutherglen, "Private Law and Public Reason," p. 1505.

[39] Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996). Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge Mass.: Harvard University Press, 1999); and "Incompletely Theorized Agreements in Constitutional Law," in Public Law and Legal Theory Working Paper No. 147, The Law School, University of Chicago (2007). Sunstein discusses differences and similarities with Rawls's idea of an "overlapping consensus" in his *Legal Reasoning and Political Conflict*, pp. 46–48.

[40] Sunstein rejects Rawls's idea of an overlapping consensus and ideal of public reason partly because Sunstein assumes that Rawls only acknowledges a reasonable pluralism of religious, moral and comprehensive doctrines, but naively believes in the possibility of arriving at a consensus in political philosophy. Thus, Sunstein says that "A special goal of the incompletely theorized agreement on particulars is to obtain a consensus on a concrete outcome among people who do not want to decide questions of political philosophy"; Sunstein, *Legal Reasoning and Political Conflict*, p. 47f. Sunstein's reading of Rawls, however, ignores the content and spirit of Rawls's later texts on public reason, where Rawls explicitly acknowledges that there is a reasonable pluralism also of political conceptions of justice; Rawls, "Introduction to Paperback" and "The Idea of Public Reason Revisited."

[41] Sunstein's idea of incomplete theorizing may seem to have more in common with Gaus and Vallier's convergence theories of public reason than with Rawls's ideal. Cf. Gerald F. Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2011); cf. Gaus and Vallier, "The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry and Political Institutions," *Philos. Soc. Crit.* 35, no. 1–2 (2009). But whereas Gaus and Vallier are obviously motivated by the underlying idea of "justifiability to all affected," Sunstein seems more concerned with stability and enabling cooperation. In

Sunstein, "Incompletely Theorized Agreements in Constitutional Law," however, Sunstein seems to be more concerned with "respect" than in earlier texts.

[42] Sadurski, "Supranational Public Reason: Part 2: Practice," Legal Theory Research Paper 15/22, Sydney Law School (2015), p. 11. Petersmann, "Need for a New Philosophy of International Economic Law and Adjudication," p. 647. Kumm, "The Idea of Socratic Contestation."

[43] C.f. section 1 of this article.

[44] Kumm, "The Idea of Socratic Contestation," pp. 144, 158.

[45] Ibid., p. 163f.

[46] Ibid., p. 154.

[47] Ibid., p. 155.

[48] Kumm, "The Cosmopolitan Turn," p. 274.

[49] Kumm, "The Idea of Socratic Contestation," p. 165; Kumm, "The Cosmopolitan Turn," p. 272.

[50] Kumm, "The Cosmopolitan Turn," p. 263ff.

[51] Sadurski, "Supranational Public Reason: Part 1—A Theory," Legal Studies Research Paper No. 15/02, Sydney Law School (2015), pp. 15, 17.

[52] Ibid., p. 14.

[53] Ibid., p. 16. Sadurski, "Supranational Public Reason: Part 2: Practice," p. 24.

[54] Petersmann, "Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration," in Christina Binder, et al., eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), p. 890.

[55] Petersmann, "From State-Centered towards Consitutional 'Public Reason' in Modern International Economic Law," in G. Bongiavanni et al., eds., *Reasonableness and Law*, Law and Philosophy Library 86, Springer (2009), p. 422.

[56] Cf. Petersmann, "Human Rights, Constitutionalism, and 'Public Reason,'" p. 891.

[57] Cf. Petersmann, "From State-Centered towards Consitutional 'Public Reason,'" p. 421.

[58] This view is implied by the traditional understanding of international law, which sees *states* as the primary audience and addressees of ICs when they pass their rulings.

[59] John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard Univ. Press, 2001), pp. 54–59. Rawls speaks of the acceptability to "Peoples," and not about acceptability to states. However, Rawls goes on to define Peoples not by their cultural or linguistic features, but as an entity that has a shared basic structure. In practice this comes very close to thinking of them as states. I will therefore argue that Rawls's own "public reason of the Society of Peoples" amounts to an "statist," "intergovernmental," "international," or "interstate" form of public reason.

[60] Cf. David Enoch, "Against Public Reason" in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, Vol. 1 (Oxford University Press, 2015), ch. 6, pp. 112–40.