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International Constitutional Court: Rise and Fall of an International Debate*

Tribunal Constitucional Internacional: Ascensão e Queda de um Debate Internacional

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Abstract

Traditional legal approaches assume that a court is legitimate when its decisions are faithful to the text that expresses the mandate for which it was created (the Constitution, in the case of domestic courts; and the treaty, in the case of international courts). However, studies employing game theory, especially the Hawk-Dove game, show that judges of international courts cannot always be faithful to this mandate and provide the single right legal answer to the cases brought before them for it would risk the stability of the whole system. In light of these findings, the objective of this paper is to sketch the foundations of a new theory of legitimacy that justifies the authority of international adjudicative bodies and provides a framework to assess their activity. The paper hypothesizes that the role of international courts is not (and cannot be) solely to provide the unique right legal answer on a case-to-case basis in an approach that focuses on individual rights. Instead, their role is to advance and sustain a "legitimate state of affairs" that is in line with the normative goals that motivated the creation of the international organization. Employing an analytical methodological approach, the authors take as a starting point game theory models and findings by Dyevre and Loth, and use the theory of the "objective dimension of fundamental rights" advanced by Robert Alexy and the theory of the "unconstitutional state of affairs" advanced by the Colombian Constitutional Court in order to rebuild a coherent theory of the legitimacy of international adjudicative bodies.

Keywords: Hawk-Dove game. Legitimacy. International courts.

Resumo

Abordagens jurídicas tradicionais presumem que uma corte é legítima quando suas decisões são fiéis ao texto que expressa o mandato para o qual foram criadas (a Constituição, no caso de cortes domésticas; e o tratado, no caso de cortes internacionais). No entanto, estudos empregando teoria dos jogos, especialmente o jogo do Gavião-Pombo, mostram que os juízes de cortes internacionais não podem ser sempre fiéis a esse mandato e dar a única resposta jurídica certa para os casos que lhe são trazidos, pois isso arriscaria a estabilidade de todo o sistema. À luz desses achados, o objetivo

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deste artigo é traçar as fundações de uma nova teoria de legitimidade que justifique a autoridade de órgãos adjudicatórios internacionais e ofereça um parâmetro para avaliar sua atividade. A hipótese é de que o papel das cortes internacionais não é (e não pode ser) apenas dar a resposta jurídica certa com base no caso a caso e com uma abordagem que foque em direitos individuais. Ao contrário, seu papel é avançar e sustentar um "estado de coisas legítimo" alinhado com os objetivos normativos que motivaram a criação da organização internacional. Empregando uma metodologia analítica, os autores tomam como ponto de partida modelos da teoria dos jogos e os achados de Dyevre e Loth, e usam a teoria da "dimensão objetiva dos direitos fundamentais" elaborada por Robert Alexy e a teoria do "estado de coisas inconstitucional" da Corte Constitucional Colombiana para reconstruir uma teoria da legitimidade dos órgãos adjudicatórios internacionais.

Palavras-chaves : Jogo Gavião-Pombo. Legitimidade. Cortes intercionais.

1 Introduction

Lawyers usually think of judgments in strictly legal terms, that is, the applicable legislation, the correct invocation of case law, the appropriateness of this or that principle. For them, this is how adjudication is and should be done since the law is an autopoietic system[1], whereby all economic, political and other external influences are filtered out when they enter the legal realm. Rarely, lawyers, especially judges, explicitly admit that outside factors played a crucial role in an adjudication outcome. Even more rarely, they will explicitly posit that these aspects *should* play any role. The professional ethos – and the belief in the explanatory power of the law that comes with it – hinders lawyers from incorporating into legal theory the many power relationships outside the law involved in a judgment. Therefore, when they actually have an influence more significant than the strictly legal reason, it is seen as a failure to achieve the right answer[2], a disruption in the system, but not as something inherent to and compatible with the law.

This tendency to try to explain adjudication exclusively in legal terms has been decreasing though. Many studies show that things such as gender, age, political preference, tiredness affect judgments[3]. For legal theory, yet, these are human flaws that must be overcome, but that do not affect the very foundations of the law, understood as a system with an internal coherence that can be protected from these biases. Amongst these recent studies, however, there is one field that challenges traditional jurisprudence, namely, that of judicial dialogues between heterarchical courts. The lack of hierarchical superiority of international courts poses a difficulty to legal theory because there is no supremacy of the constitution to explain their legitimacy, and consequently neither why national courts should comply with their decisions nor why they do so when there is no punishment at stake.

Departing from purely doctrinal approaches, a range of recent studies has tried to grasp the peculiar relationship between courts in non-hierarchical international settings. Relying on empirical data, studies show that not only seeking the right answer motivates the dialogue between national and international courts, but also exogenous factors, such as the country's involvement in transnational economic activity[4]. Moreover, empirical findings show that resistance towards the international court's decision has varied reasons: some relate to legal issues, such as the preservation of national identity, others are simply policy or personal preferences of the judges[5]. The support of the legislative and executive also seems to influence adjudication, pushing judges into strategical behavior when they face political constraints, i.e., threats of non-compliance or legislative override[6]. Politics indeed appears to be a major power influencing the behavior of international courts. In this

1 LUHMANN, N. *Law as a Social System.* Oxford: Oxford University Press, 2004.

2 DWORKIN, R. No Right Answer. *New York University Law Review,* v. 53, n. 1, p. 1-32, 1978.

3 For example, BOYD, C.; EPSTEIN, L.; MARTIN, A. Untangling the Causal Effects of Sex on Judging. *American Journal of Political Science*, v. 54, n. 2, p. 389–411, Apr. 2010; HANGARTNER, D.; LAUDERDALE, B. E.; SPIRIG, J. *Refugee Roulette Revisited:* Judicial Preference Variation and Aggregation on the Swiss Federal Administrative Court 2007-2012. Available at: http://benjaminlauderdale.net/files/papers/SwissAsylumPanels.pdf

4 CARRUBBA, C. J.; MURRAH, L. Legal Integration and Use of the Preliminary Ruling Process in the European Union. *International Organization,* v. 59, p. 399-418, 2005.

5 HOFMANN, A. *Resistance against the Court of Justice of the European Union.* Copenhagen, iCourts - The Danish National Research Foundation's Centre of Excellence for International Courts, 2018.

6 CARRUBBA, C. J.; GABEL, M.; HANKLA, C. Judicial Behavior under Political Constraints: Evidence from the European Court of Justice. *American Political Schience Review,* v. 102, n. 4, p. 435-452, 2008.

regard, Helfer and Alter[7], by comparing cases before the Court of Justice of the European Union, the Andean Tribunal of Justice, and the Economic Community of West African States Court of Justice, found that the legitimacy of international courts before national governments is not affected by their activism or constraint, but by political and contextual traits of the system.

Similarly, game theory has displayed interesting insights. Trying to understand why domestic systems comply or not with international decisions, Carrubba and Gabel[8] modeled a game of the interaction between international courts and national governments. They found that governments comply with decisions when they anticipate being sanctioned by peers (other governments) or when the decision is not too harsh; moreover, courts are more likely to rule against states when they have government's support. Focusing on dialogues between courts (i.e., excluding the government), Loth[9] and Dyevre[10] argue that courts' advances and setbacks can be understood as a Hawk-Dove game. According to them, when tensions escalate, one player/court refrains from being assertive in order to avoid an insurmountable conflict, consequently keeping the dialogue going on. Despite both authors use of the Hawk-Dove game as an explanatory tool, Dyevre takes a more descriptive emphasis, whereas Loth reflects on the implications of recognizing the existence of the game, specifically regarding the legitimacy and effectiveness of the European system. Overall, what these studies show is that courts act strategically, considering other factors than just the law. This is not a novel claim though. For instance, Kelemen[11] listed a number of works that suggest that courts adjust their precedents as a reaction to political pressures. Likewise, Bailliet[12] suggests that the Inter-American Court of Human Rights refrains from issuing advisory opinions in controversial cases to prevent countries from withdrawing from the Inter-American system, which as a strategic move.

Notwithstanding Loth's contribution, the *normative* implications of these studies – especially his and Dyevre's – remain undertheorized insofar there are no exhaustive discussions in this regard. As we do not want to dismiss these findings by labeling them as mere exceptions or abstractions, we are left with a puzzle since legal theory seems to be incompatible with them. On the one hand, legal theory tells us that there is a single right answer to each case, that *ubi eadem ratio ibi idem jus* (where there is the same reason, there is the same law), and that *ubi eadem legis ratio ibi eadem dispositio* (where there is the same reason, there is same reason to decide). On the other hand, empirical and game-theoretical works show us that, in practice, cases alike are being decided differently, depending on circumstances that have nothing to do with the cases themselves. Framed like this, legal theory and the empiric findings seem irreconcilable because, unlike theory, the practice of international courts is akin to a political game in which serving the law is not necessarily the leading rule.

In face of these challenges to legal scholarship, and aiming at not having a theory that is completely detached from reality, we propose incorporating Loth's and Dyevre's game-theoretical models into normative legal theory. To this end, we will answer the ensuing question: *in international non-hierarchical judicial dialogues, how could it be legitimate for international courts to privilege the maintenance of the system over purely legal arguments related solely to the case?* In order to answer this question, we will focus on the concept of legitimacy, following a discussion that was initiated by Loth[13] (although with significant conceptual differences). Furthermore, we will rely on a range of theoretical models that have been elaborated to tackle the issues that arise from problematic decision settings, namely theories of legal and moral justifiability, cons-

[7] HELFER, L. R.; ALTER, K. J. Legitimacy and Lawmaking: A Tale of Three International Courts. *Theoretical Inquiries in Law,* v. 14, p. 479-503, 2013.

[8] CARRUBBA, C. J.; GABEL, M. J. Courts, Compliance, and the Quest for Legitimacy in International Law. *Theoretical Inquiries in Law,* v. 14, p. 505-543, 2013.

[9] LOTH, M. Who has the last word: On judicial lawmaking in European private law. *European Review of Private Law,* p. 45-70, 2017.

[10] DYEVRE, A. Domestic judicial defiance and the authority of international legal regimes. European Journal of Law and Economics, v. 44, p. 453–481, 2017. Available at: https://doi.org/10.1007/s10657-016-9551-2; DYEVRE, A. *The Future of Legal Theory and the Law School of the Future*. Intersentia: Antwerp, 2016. ISBN 978-1-78068-374-4; DYEVRE, A. *Judicial Non-Compliance in a Non-Hierarchical Legal Order*: Isolated Accident or Omen of Judicial Armageddon? 2012. Unpublished paper. From the SelectedWorks of Arthur Dyevre. Available at: htt ps://works.bepress.com/arthur_dyevre1/7/.

[11] KELEMEN, D.The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU. *Comparative Political Studies, v.* 34, n. 6, p. 623, 2001.

[12] BAILLIET, C. M. The strategic prudence of The Inter-American Court of Human Rights: rejection of requests for an advisory opinion. *Revista de Direito Internacional*, Brasília, v. 15, n. 1, p. 254-276, 2018.

[13] LOTH, M. Who has the last word: On judicial lawmaking in European private law. *European Review of Private Law,* p. 45-70, 2017.

titutional state of affairs, institutional and substantive principles.

The intended contribution of this paper is to provide a solid normative justification for these strategic behaviors. For a normative justification to be possible, we must rely on some assumptions since legitimacy does not work in all scenarios (for instance, when judges act strategically to keep their salaries). As said before, our goal is to bring the strategic behavior that courts engage in, like in a Hawk-Dove game, to the legal realm, so that the strategy would be lawful. To do so, we assume that judges are in fact constrained by the law, i.e., the law effectively limits their possible answers to cases, despite external circumstances. This means either adhering to the single right answer or admitting varied right answers, but that judges will not choose legally inadmissible answers. Another assumption is that the legitimacy of international courts is more endangered than that of domestic courts if one acknowledges that judges behave strategically. Given that, generally, they do not have coercive enforcement mechanisms, they need to appear more legitimate, which means, in practice, relying on other mechanisms (not legal in nature) to increase the costs of not complying with their decisions and enhance their practical power. These mechanisms turn them from a court of law that (in principle) acts as an unconditional counterweight to political power to secure the rights of the people to an institution that must work strategically to try to accomplish its mandate.

Employing an analytical methodological approach, we take as a starting point game theory models and findings by Dyevre and Loth, and use the theory of the "objective dimension of fundamental rights" advanced by Robert Alexy and the theory of the "unconstitutional state of affairs" advanced by the Colombian Constitutional Court in order to rebuild a coherent theory of the legitimacy of international adjudicative bodies. According to Alexy, rights should not only be considered in their individual dimension but also in their objective dimension, which means that they are guiding principles that infuse the whole legal activity. This conception of rights as principles entails that they should be advanced *to the largest extent possible*[14]. In turn, the extent to which a principle should be developed depends on the constraints faced by the legislators and adjudicators. As we will argue in this paper, adjudicators face strong political constraints, which *ought to* be considered in order to avoid what the Colombian Constitutional Court called an "unconstitutional state of affairs"[15], such as the collapse of the international adjudicative body.

To answer the proposed research question, this paper is divided as follows. Following this introduction, we will flash the serious implications that game theory poses to legal theory by fostering a dialogue between Loth and Dyevre with positivist and post-positivist decision theory (section 2). Afterward, we will present theories on the legitimacy of courts, and how they render patent the issue of courts' strategic behavior (section 3). Subsequently, we will proceed to try to reconcile game theory and normative legal theory, focusing on courts' legitimacy (section 4). Finally, some concluding remarks will summarize the main points made throughout the paper (section 5).

2 Game theory *vs.* legal theory

Thinking of courts in terms of game theory gives a different outlook from the perspective provided by legal theory, which focuses on how they should work. This difference and the problems it entails might not be self-evident though. To explain the repercussions of the game theory to jurisprudence, we will elaborate on what the Hawk-Dove game teaches us about judicial dialogue in international non-hierarchical settings. Then, we will expose its implications to traditional legal theory.

According to Loth[16] and Dyevre[17][18], the Hawk-Dove game is a useful tool to understand how international and national courts interact. Dyevre models a game that considers the political bargaining capital of the national and international courts before one another and before the general political setting (for an international court, this means the support of member countries for being

[14] ALEXY, R. On the Structure of Legal Principles. *Ratio Juris*, v. 13, n. 3, 2000.

[15] QUINTERO, J.; NAVARRO, A.; MESA, M. El Estado de Cosas Inconstitucionales como mecanismo de protección de los derechos fundamentales de la población vulnerable de Colombia. *Revista Jurídica Mario Alario D'Filippo*, v. 3, n. 1, p. 69–80, 2011.

[16] LOTH, M. Who has the last word: On judicial lawmaking in European private law. *European Review of Private Law,* p. 45-70, 2017.

[17] DYEVRE, A. Domestic judicial defiance and the authority of international legal regimes, *European Journal of Law and Economics*, v. 44, p. 453–481, 2017.

[18] Given that their works were the inspiration for this paper, we will focus only on their writings.

assertive; for national courts, this means the support of their legislatures and executives to their non-compliance with the international decision). His model also considers the repetition of the dialogue, which eventually steers the dialogue in the direction of cooperation, neutralizing the advantage of being the first mover. In summary, his Hawk-Dove game asserts that depending on whether one or another is assertive (or both or neither), the final result (i.e., the decision issued and the compliance with it) is different.

Likewise, Loth uses the Hawk-Dove game to explain why, within the European system, courts claim to have the final word on conflictual matters. This way, a court poses like a hawk in order to force the other to be the dove. Most of the times, Loth argues, the courts do not actually act like hawks, for that would be costly. On the contrary, they both act like doves, refraining from imposing itself over the other, thus, sharing the jurisdiction. Nevertheless, this dynamic is a sort of strategic behavior on the part of the courts, which could be contended as detrimental. For Loth, however, the strategy is justified because it promotes the courts' legitimacy. The legitimacy, or "good reasons"[19], for strategically engaging in dialogue rather than installing one court with authority over the other is twofold. First, the continuous dialogue promotes institutional balance since courts function as checks and balances of one another. Second, it might foster substantive equilibrium because both the national and international interests are realized to some extent. For these institutional and substantive equilibria to be effective, Loth reasons, domestic courts must provide a counterweight to the European court through detailed information and good reasoning.

Although undeniably useful for understanding courts' interactions, this Hawk-Dove explanation has a challenging implication to legal theory. Legal theory is concerned with issuing decisions in accordance with statutes, case-law, established doctrines, and the facts of the case. Game theory, on the other hand, seems not to worry about the actual case at hand, but mostly with the courts in and of themselves and the costs they face[20]. In this regard, the absence of a variable for the case in the models is telling. Given that decisions involve the courts *and* the case that started the dialogue in the first place, we are left with the following question: is the outcome that resulted from the strategic conduct compatible with the legal answer that considers only the facts of the case in face of the legal order? To better illustrate the question, let us problematize one of Dyevre's assertions. In a passage, he states that "weak [international] regimes […], anticipating non-compliance [from the national courts], *restrictively* interpret the provisions enshrined in the international agreement"[21]. This statement bears an implicit repercussion. Namely, were the international regime strong, the international agreement would have been interpreted *extensively*, and consequently, the decision for that same case would have been different, even though the difference is in the court itself, not in the case. In this hypothetical, abstract example, which decision would be right, that of the strong regime or of the weak one? Is it possible that both are right? Does it matter? And for whom?

At some level, we are reviving an old positivist and post-positivist discussion, here represented only by two emblematic authors, Hart and Dworkin. According to Hart[22], the law does not and cannot provide adjudicators with a single right answer. Instead, in hard cases, in which legal language is ambiguous or vague, judges have discretion in choosing among the possible solutions that law indicates which one they think is the most appropriate. For Hart, then, both decisions referred to in the paragraph above could be valid, as long as they were within the judges' discretion. Dworkin would be dissatisfied with such a solution. For him, cases have a unique right answer[23]. Despite changes in this theory over time[24], Dworkin maintained that law, viewed as integrity, provides one right answer. For him, neither the

[19] LOTH, M. Who has the last word: On judicial lawmaking in European private law. *European Review of Private Law,* p. 55, 2017.

[20] "Fig 1 Jurisdictional dispute as one-shot game. J denotes the value of the jurisdictional resource at stake for the domestic court and α the value attached by the international court to the same jurisdictional resource. C and b represent the cost arising from a constitutional crisis for, respectively, the domestic court and the international court". DYEVRE, A. Domestic judicial defiance and the authority of international legal regimes, *European Journal of Law and Economics*, v. 44, 2017, p. 460.

[21] DYEVRE, A. Domestic judicial defiance and the authority of international legal regimes, *European Journal of* Law *and Economics*, v. 44, p. 462, 2017.

[22] HART, H. L. A. *The Concept of Law.* 2nd Edition ed. Oxford: Oxford University Press, 1994.

[23] DWORKIN, R. No Right Answer. *New York University Law Review,* v. 53, n. 1, p. 1-32, 1978. DWORKIN, R. How Law is Like Literature. In: LAW'S Empire. Cambridge, London: Harvard University Press, 1986. p. 146-166. DWORKIN, R. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

[24] BIX, B. Ronald Dworkin's Right Answer Thesis. In: LAW, Language, and Legal Determinacy. Oxford: Oxford University Press, 1993. p. 77-132.

ambiguity, open-texture, or vagueness of language hinders its existence, nor does the fact that two reasonable people might find two equally reasonable, though divergent, answers[25]. Conscientiously, patiently, and prudently, judges could find what the right answer, all things considered, would be. This answer would maintain the coherence and integrity of the law as if each decision were part of a chain novel[26].

When combined with the Hawk-Dove game, both legal theories present grave complications though. An example will help to illustrate the matter. Suppose that an international court receives a new case about the use of religious symbols in public spaces. The national court forbade the use of a symbol in its sentence A. In this particular situation, the international court has two options[27]: *i)* override A, and replace it with B, in which the person can use the symbol, because religious freedom is assured in the international commitments of this country; *ii)* sustain A because it is a domestic issue, which is also secured by the treaty. Outside the case, the situation is problematic. In the past interactions between these international and domestic courts, the former has been prevailing. Because of this, the domestic court has been signaling its dissatisfaction for having to disregard its own solutions, and the national executive and legislative have been threatening to leave the system for what they see as an unduly invasion in the country's sovereignty. The international court knows that, given the context, the threat is real. The domestic court is amongst the powerful ones (though not the most powerful). Evaluating these elements, the international court chooses to uphold the domestic court's decision. Translating this situation to that Hawk-Dove model, it means that the international court acted as a dove, whereas the domestic court got to be the hawk. Now, let us combine it with positivism[28] and post-positivism to elaborate on the normative implications.

According to Hartian positivism, there are easy cases, whereby the literal wording of the law applies clearly to solve the dispute, and there are hard cases, in which law provides more than one possible solution, which is the situation above. In that hard case, the law points to two equally possible solutions, A or B. Given they are both valid decisions (and reasonable interpretations), judges have the discretion to choose the one they believe to be the most appropriate. Choosing either A or B is, then, equivalent, for both are be valid solutions within the discretionary power of the judge to *make* the law[29]. Adding now what we have learned from game theory, we can conclude that the relevant factor for the decision, in the end, is then the courts' dynamic. If judges can decide either way, then, the true weighty element to be considered is the judicial dialogue (considering power and convenience). Under Hartian positivism, the law can equally justify both decisions. However, the political consequences are not equal, so one strategy will be better than others (law just follows the decision). Accepting that judges do act strategically, the implication of game theory within Hartian positivism in the context of international judicial dialogues is that decisions are more political than legal. The reasons that would make judges pick answer A over B[30] are not necessarily connected to their supposed willingness to make the best legal choice (though legally correct), but would be politically motivated (in that case, keep the dialogue going on). If it is so, adjudicator organs only differ from purely political institutions in terms of vocabulary.

Post-positivism, its turn, also poses an embarrassment when combined with game theory. In the case above, only A or B can be the right answer, not both, not neither. Supposing that, considering the facts of the case and the legal order, B is the right answer. So, if there is indeed a single right answer that is attainable to judges, and if they are rational agents (as game theory presupposes), it follows that, sometimes, they *deliberately* choose to sacrifice the right answer to the individual case for the sake of the continuity of the judicial dia-

[25] DWORKIN, R. No Right Answer. *New York University Law Review,* v. 53, n. 1, p. 1-32, 1978. DWORKIN, R. How Law is Like Literature. In: LAW'S Empire. Cambridge, London: Harvard University Press, 1986. p. 146-166. DWORKIN, R. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

[26] DWORKIN, R. How Law is Like Literature. In: LAW'S Empire. Cambridge, London: Harvard University Press, 1986. p. 146-166.

[27] We are dealing with only two options to facilitate the point we want to make. It is not to confuse the international court with a court of cassation nor to say that there are always only two options.

[28] For another type of analysis that takes into consideration strategic courts' behavior and judges' discretion see DOTHAN, S. How International Courts Enhance Their Legitimacy. *Theoretical Inquiries in Law,* v. 14, p. 455-478, 2013, who considered how courts can use legal reasoning to mask discretion and their policy preferences.

[29] HART, H. L. A. *The Concept of Law*. 2nd ed. Oxford: Oxford University Press, 1994. p. 273.

[30] Of course, there is always the possibility that the political constraints take judges to select a legally inadmissible answer C, but that is not an immediate implication of game-theory to positivism, and that is also a problem present in Dworkin's post-positivism.

logue, which is a utilitarian type of reasoning. This is at odds with Dworkinian theory. As Mackie[31] summarizes Dworkin's position: "if they [judges] let policy outweigh principle, they will be sacrificing someone's rights in order to benefit or satisfy others, and this is unjust". Therefore, if solution B was the right answer to the case above, a game theory scheme that displays the right answer would show that there is only one outcome in which it is actually applied, as our table below illustrates:

Table – Hawk-Dove Game and the Right Legal Answer

	International Court Assertive	International Court Restraint
National Court Restraint	Right answer prevails	Right answer (s) disregarded
National Court Assertive	Right answer prevails in the decision, but is disregarded in practice	Right answer disregarded

So far, we have shown the consequences of game theory to decision-making based on our assumption that judges are, in fact, constrained by the law. However, it is to notice that, since in game theory there is no variable for the case, even completely wrong answers are admissible because the case does not count for anything, putting it closer to the Scandinavian form of realism. Therefore, the disregard for the right answer and the political weight are rendered more patent.

In these three situations (positivism, post-positivism, and game theory), the question whether the international court acted legitimately arises since its primary function is to apply the law (political considerations are supposed to be dealt with by political organs). However, this question remains unanswered. Dyevre[32] was not concerned with the legitimacy of the courts; therefore, he did not elaborate on anything in this regard in the paper mentioned above. However, in *The future of legal theory and the law school of the future*[33], he indicates not adhering to the unique right answer thesis. For him, when Dworkin denies that judges have discretion, but find the right answer, he was actually conducting "a masterful exercise in defence of the US Supreme Court's civil rights revolution"[34]. According to Dyevre[35], Dworkin's influence as a scholar is attributable, in large part, to his rhetorical abilities in framing his ideas sympathetically rather than in establishing a coherent and practical jurisprudence. Therefore, Dyevre seems to reject the possibility of existing a unique right answer for all the cases, but he does not explicitly endorse positivism either. Although, as stated above, Loth asserts that the legitimacy of the Hawk-Dove interaction is to provide a means for checks and balances and to foster a balanced development of law, this understanding of legitimacy is not extensively developed in his paper since it was beyond its scope. Moreover, it does not address the lawfulness of solving cases primarily considering the system in the long run, instead of the case alone.

These implications (equating an adjudicator organ to a political one and disregarding the right answer) are seemingly serious threats that game theory presents to the legitimacy of courts. As adjudicatory bodies that are (and should be) mostly concerned with the law, their legitimacy cannot depend only on the power they wield (or the effectiveness of their decisions, to employ a juristic terminology), but on how they manage to apply the law correctly. Legitimacy is, thus, at the core of the reconciliation between game and legal theory.

3 Legitimacy

So, when is an institution (legislature, court, administrative agency) legitimate? Unfortunately, legitimacy is an evasive concept. Since it is not used to refer to something that has a physical existence in reality, there is vast disagreement over the features it encompasses. In general, legitimacy is the abstract concept that supports (theoretically and practically) the existence of the law. Other than that common trait, there are disagreements between scholars. Given these differences, and for conceptual clarity, we will briefly summarize the main positions.

To this end, we will rely on the distinction drawn by Falllon[36], according to which legitimacy is understood in

[31] MACKIE, J. The Third Theory of Law. *Philosophy and Public Affairs,* v. 7, n. 1, p. 5, 1977.

[32] DYEVRE, A. Domestic judicial defiance and the authority of international legal regimes, *European Journal of Law and Economics*, v. 44, p. 453–481, 2017.

[33] DYEVRE, A. *The Future of Legal Theory and the Law School of the Future*. Intersentia: Antwerp, 2016.

[34] DYEVRE, A. *The Future of Legal Theory and the Law School of the Future*. Intersentia: Antwerp, 2016. p. 38.

[35] DYEVRE, A. *The Future of Legal Theory and the Law School of the Future*. Intersentia: Antwerp, 2016. p. 38.

[36] FALLON, R. Legitimacy and the Constitution. *Harvard Law Review*, v. 118, p. 1787, 2005.

three meanings: a) legal, b) moral, and c) sociological. This distinction is analogous to the well-established analytical framework advanced by Bobbio, who distinguished three different criteria to analyze the legal norms, namely, validity, justice, and efficacy, respectively[37]. Indeed, according to Bobbio, a norm is valid if it exists as a legal rule, it is just if it goes in accordance with the higher moral values (that ought to inspire law) and it is efficacious if it is accepted and followed by the people to which it is addressed (or enforced by the authorities otherwise)[38]. Relying on this distinction, we contend, based on Fallon, that legitimacy (as does any legal command) also has three different dimensions: a legal, a moral and a social (factual) one. In short, an international adjudicative body is legitimate in the legal sense if it (generally) follows the applicable law; it is legitimate in the moral sense if their decisions are (generally) fair; and it is legitimate in the sociological sense if it is supported (in practice) by its constituencies (the people and the political authorities)[39].

These three dimensions are independent of one another. It is possible for a norm to be issued in accordance with the legal parameters for its validity, but can be unjust and efficacious at the same time. In the same manner, it can be invalid but just and efficacious; or invalid, unjust but efficacious nevertheless; and so on[40]. A similar relation can be observed with the three different dimensions of legitimacy. The overall activity of an adjudicative body can generally be legitimate in the legal sense; however, it might be perceived as illegitimate (sociologically) by its constituencies; or vice versa, can be perceived as legitimate (sociologically), even when it generally acts in violation of its founding law.

Ideally, however, the three dimensions vary in accordance with one another. That is to say: if an international adjudicative body (generally) acts in violation of the law, then it must be the case that their decisions are also unjust, and its sociological legitimacy must be extremely weak to the point of its imminent collapse. On the other hand, if its decisions (generally) follow the binding law, then they must be just, and its sociological legitimacy should be extremely strong.

That threefold classification (legal, moral, and sociological) does not encompass all the possible approaches to legitimacy. For instance, Carrubba and Gabel[41] researched whether national compliance depends on the legitimacy of the international court. They do not, however, provide a definition of legitimacy, leaving it implicit that it is more of a sentiment that people and states have towards a court that mixes its legal mandate, its principled action, and the public support. Either way, for the sake of clarity, we will present those three approaches below. Afterward, we will explain the difficulty in assigning only one of these concepts of legitimacy to international courts.

3.1 The (purely) legal approach

From the legal sense, legitimacy refers to an abstract idea that connects the decisions of a court with its original mission that was established in its constitutive act. This could be either a Constitution of a specific country or an international treaty to which some States have agreed. This act has charged adjudicatory bodies with a primary obligation, which is, essentially, the enforcement of a set of rules, principles, and values that we know, simply, as law. The fulfillment of this obligation justifies the courts' authority. It follows that a decision from a court is legitimate when it is faithful to the terms of its mandate expressed in its constitutive act. In Hartian terms, judges enjoy legal legitimacy as long as they abide by whichever norm that is produced by a hierarchical normative system whose origin is a rule of recognition[42]. Therefore, the fact that a law has been issued, a Constitution enacted or an international treaty ratified, justifies in and of itself the activity of a court.

There is an essential formalist trait underpinning this definition of legitimacy. The fact that a law has been issued, a Constitution enacted or an international treaty ratified, validates in and of itself the activity of a court. As long as the court acts within the confines of the positive law, which is the reason a court exists in the first place, then, it is legitimate. Legitimacy becomes, thus, the mere obedience to the law supported only by the fact that a law has been enacted. Put bluntly, the con-

[37] BOBBIO, N. *Teoría General del Derecho*. 5th ed. Bogotá: Temis, 2016.

[38] BOBBIO, N. *Teoría General del Derecho*. 5th ed. Bogotá: Temis, 2016.

[39] FALLON, R. Legitimacy and the Constitution. *Harvard Law Review*, v. 118, 2005.

[40] BOBBIO, N. *Teoría General del Derecho*. 5th ed. Bogotá: Temis, 2016.

[41] CARRUBBA, C. J.; GABEL, M. J. Courts, Compliance, and the Quest for Legitimacy in International Law. *Theoretical Inquiries in Law*, v. 14, p. 505-543, 2013.

[42] HART, H. L. A. *El concepto de derecho*. (G. Carrió, Ed.). Buenos Aires: Abeledo- Perrot, 1963.

tent of the law is irrelevant. Because substance matters, purely legal legitimacy has been deemed insufficient by other strands.

3.2 The moral (normative) approach

Incorporating part of the legal approach, the normative adds another element to the compliance with enacted norms, namely, a moral justification. Under this strand, the idea of legitimacy as being solely connected to the obedience of law cannot be considered complete. Human actions cannot be justified merely on facts. The obedience to a system of norms needs further justification, that is, it needs elements of substantive normativity, which means an underlying *moral* reason that justifies acting according to those legal documents[43]. For these authors, to *justify* something is to provide sound moral reasons in its favor; it is to argue why we *ought to* do something[44]. Such moral standards are the source of judges' moral legitimacy. There are two sorts of moral basis that justify the courts' existence: the rights-based approach and the procedural legitimacy approach[45].

According to the rights-based approach, the main duty of judges is to enforce the rights of the individuals. This normative goal is what justifies any government action, and it is also what sets its limits. Hence, we can speak of the two dimensions of rights: they provide legal standards to assess governmental actions, and they justify the exercise of the authority vested in the judiciary. If judges have the power to overturn laws enacted by institutions with democratic legitimacy (like the parliament), it is because of the justificatory dimension implied in the protection of rights[46]. The *telos* of the judiciary is to make sure that government action does not violate such rights. Proponents of this theory place a strong emphasis on the notion of rights because they conceive of them as expressions of basic moral principles, whose protection and expansion serve to advance the autonomy of human beings, which is our most fundamental value[47]. There are some discussions with regard to the nature of the aforementioned moral principles. A legal positivist may argue that their selection is a political matter[48]. The drafters of a Constitution select a particular moral principle for its importance on society (say, free speech, for example). Once enacted by law, it is the judges' obligation to enforce them. Others, like Finnis[49], may argue that rights are necessary normative premises that are deducted from a fundamental underived moral principle (the achievement of the common good). Whatever their origin, the relevant point for this branch is that rights constitute the foundation of the authority of judges. If judges have a legitimate authority, it is because they are supposed to enforce the rights of the people. That normative goal is so important as to justify the existence of a non-democratic institution that has the power to oversee the other branches of the State.

The second approach is procedural, rather than substantive. It considers that the role of the judiciary that legitimizes its authority is to oversee the exercise of public powers. This more procedural approach focuses on matters related to authority, power, and competences for which issues related to the form of the decisions are as important as issues related to its substance[50].

A common element underlying these two theories is that they both give legitimacy to a normative foundation. A court's decision is justified when it abides by its primary moral duty to obey the law; not any law, but a law that has been issued according to certain objective moral standards (e.g., human rights, substantive and formal democracy)[51]. So, moral justifiability is the most fundamental form of legitimacy that actually supports legal legitimacy at the abstract level[52]. However, they are both intrinsically connected since ordering human relations requires more than abstract fundamental moral principles. The subjects of law require certain formal principles, like certainty, transparency and predictability to get the best out of the interactions with one ano-

43 CARACCIOLO, R. Democracia y Obediencia al Derecho: El Argumento de Nino. *Análisis Filosófico*, v. 35, n. 1, p. 81–110, 2015.

44 NINO, C. El concepto de poder constituyente originario y la justificación jurídica. In: BULLYGIN, E. (ed.). *El lenguaje del Derecho:* Homenaje a Genaro Carrió. Buenos Aires: Abeledo-Perrot, 1983. p. 339–370.

45 POOLE, T. Legitimacy, Rights and Judicial Review. *Oxford Journal of Legal Studies*, v. 25, n. 4, p. 697–725, 2005.

46 POOLE, T. Legitimacy, Rights and Judicial Review. *Oxford Journal of Legal Studies*, v. 25, n. 4, p. 697–725, 2005.

47 PRIETO SANCHÍS, L. *El Constitucionalismo de los Derechos*. Madrid: Trotta, 2013.

48 RAZ, J. *Morality of Freedom*. New York: Oxford University Press, 1986.

49 FINNIS, J. *Natural Law and Natural Rights*. 2nd ed. Oxford: Oxford University Press, 2011.

50 POOLE, T. Legitimacy, Rights and Judicial Review. *Oxford Journal of Legal Studies*, v. 25, n. 4, p. 697–725, 2005.

51 NINO, C. La justificación de la democracia: entre la negación de la justificación y la restricción de la democracia. réplica a mis críticos. *Análisis Filosófico*, v. 2, p. 103–114, 1986.

52 NINO, C. *Ética y Derechos Humanos*. Buenos Aires: Paidos, 1984.

ther; and they get that from a structured legal system of rules and principles. Hence, the moral obligation of the judges can be construed as the imperative to abide by a legal system whose existence and enforcement is further justified by the substantial values of democracy and human rights.

3.3 The sociological approach

In the realm of political sciences, the concept of legitimacy acquires a descriptive sense. Descriptive approaches to legitimacy try to explain what makes the activity of courts sustainable over time. This is what Fallon calls the sociological legitimacy of the courts[53]. Sociological legitimacy is an empirically-rooted (contingent) concept that refers to the approval of a number of relevant actors in the judicial lawmaking process. That approval depends on how those constituencies perceive the activity of the institution; and it is that approval what sustains, *politically*, the institution over time. Some authors in political science define legitimacy as a collective belief in the adequacy of the existing political institutions. Lipset defines it as: "the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate and proper ones for the society"[54].

As Grossman states, the sociological legitimacy is "agent-related," which means that it is created by the different stakeholders[55]. In the case of international adjudicative bodies, the member states, of course, play a crucial role, but they are not the only actors. National political parties, nongovernmental organizations, elites, and even voters help to shape the *capricious political support* towards an international court which has come to be known as sociological legitimacy. The conflicting interests of many stakeholders shape each State's preferences, and, in turn, it is each State's preferences what affects the stability of the transnational adjudicative system directly. This is the sense employed by Dothan[56], for whom international courts' legitimacy is the community perception that they are just, correct, and unbiased so that their judgments will be accepted even though some actors might disagree with them.

It is important to notice that there is no necessary connection between the normative and sociological legitimacy. It is true that, in principle, if people (as a collective) accept law as a legitimate enterprise, it is because they *believe* that judges decide cases (in an unbiased and impartial manner) according to objective parameters of procedural and material justice (these parameters are usually expressed in written documents that constitute the legal framework to be enforced by courts)[57]. However, the fact that people *believe* that an institution is legitimate (sociological), does not make it legitimate (normative). And the other way around: an institution can be legitimate (in the normative sense) even when people believe that it is not (it lacks sociological legitimacy). So, the fact that a court generally acts in a legitimate legal way (assuming the thesis of the unique right legal answer) will not necessarily make it be perceived as legitimate in the sociological sense by all the constituencies.

3.4 The dilemma of international courts

Now, this work focuses on the normative legitimacy of international courts, which is different from the normative legitimacy of domestic courts. For one thing, for domestic courts, the sociological legitimacy is not as critical as it is for international courts. Of course, domestic courts are constrained by the power held by national elites and local political groups, but (at least in consolidated democracies) they do not have the power to do away with the institution of the judiciary, nor does any of the branches of the State. The situation with international courts is different. They must accommodate the interests (legitimate or not) of all the stakeholders in order to survive. If they do not, the whole transnational system of law could be dismantled. Furthermore, national courts have as their immediate public a country, a nation, whose people tend to share core values; international courts dialogue with varied countries, whose people often have different values. This means that normative legitimacy is also trickier for international courts. In addition, Grossman[58] also points out that the legal

53 FALLON, R. Legitimacy and the Constitution. *Harvard Law Review*, v. 118, p. 1787, 2005.

54 LIPSET, S. M. *Political Man: The Social Bases of Politics*. 2nd ed. London: Heinemann, 1983. p. 64.

55 GROSSMAN, N. Legitimacy and International Adjudicative Bodies. *George Washing International Law Review*, v. 41, p. 107, 2009.

56 DOTHAN, S. How International Courts Enhance Their Legitimacy. *Theoretical Inquiries in Law,* v. 14, p. 455-478, 2013.

57 GROSSMAN, N. Legitimacy and International Adjudicative Bodies. *George Washing International Law Review*, v. 41, p. 107, 2009.

58 GROSSMAN, N. The Normative Legitimacy of International Courts. *Temple Law Review*, v. 86, p. 61, 2013.

document that gives them their authority arises from the consent of the contracting member states, but their decisions have deep impact on natural and legal persons that did not enter into the agreement (such as non-contracting states, non-governmental organizations, businesses located outside the region). Furthermore, the rulings affect directly people who did not get the chance to take part in the process[59]. A ruling from the ECtHR against Italy, for example, may affect citizens from France or Germany. So, the consent of the contracting member States is neither a sound legal nor moral reason to justify the authority that, in practice, they bear.

The three types of legitimacy clash when it comes to international courts. Their dilemma can be stated as follows: If they are to maintain the stability of the system and be effective, they must, sometimes, disregard the single right legal answer and be indulgent to the interests of the most powerful nations of the transnational system. Acting like this may preserve the stability of the system from the political perspective but at the cost of undermining its *normative foundations*, i.e., the moral reasons that support the obedience to their rulings. The normative foundations of an international court rely on the consent of the Member States. The court exists because a group of States agreed to create a transnational court to which they would surrender (part of) their sovereignty, presupposing that the court would use its power to enforce the terms of a specific treaty, not the interests of the powerful nations. So, if the courts are not faithful to the consent of the States expressed in the text of the treaty, their authority would not be justified; that is, the institution as such would lose its legal legitimacy. Given this complicated situation, international courts must adopt strategies that are seemingly at odds with the law in order to enhance their sociological legitimacy and be effective; in doing so, they lose their normative legitimacy. So, normative legitimacy seems to be something that international courts, by their very nature, cannot afford. All that international courts seem to have is sociological legitimacy. But, if their mission is not to secure the rights of the individuals, what is their function and what justifies their existence and activity? Do they have any normative legitimacy whatsoever? An even more fundamental question would be, can an international court of law exist without normative legitimacy that justifies its authority?

[59] GROSSMAN, N. The Normative Legitimacy of International Courts. *Temple Law Review*, v. 86, p. 61, 2013.

We believe that, theoretically, an international court of law without normative foundations is not coherent for it would entail either to deny the legal character of the international court or to deny the normative nature of law. The problem lies in the way in which legal and political scholars have framed the issue. We believe that it is possible to build a theory of the normative legitimacy of international courts that reconciles both the legal character of the international court, the normative nature of law, and strategic behavior. This is not a mere thought experiment. Reframing the theory of the normative legitimacy of international courts have practical implications. Indeed, we need an appropriate theoretical framework to assess the activity of an international court to determine if it is achieving its normative goals and to design the necessary reforms to the specific transnational system of law. That is what we will proceed to do in the next section.

4 A new theory of the normative legitimacy of international courts

To redefine the theory of normative legitimacy of international courts, we must find what truly makes their authority justified, independently of the perceptions of the different stakeholders. We argue that this 'something' is its crucial function in creating, maintaining and advancing a "constitutional state of affairs." In this section, we will sketch the foundations of a new theory of the normative legitimacy of international adjudicative bodies.

Our theory of the normative legitimacy of international courts also relies on the justificatory power of rights. However, we take on a new approach that departs from the traditional understanding of rights as devices of protection for the subjects of law. Under the traditional understanding, rights are seen as *subjective rights* (subjective in the sense that they protect a specific subject, be it a person or a determined group of persons) that were devised by the constituent power to protect the citizens from the power of the State; and, later in history, to give the citizens certain privileges and claims against the State. This position was summarized by the German Federal Constitutional Court, in its decision BVerfGE 7, 198 (Lüth case): "There is no doubt that the main purpose of basic rights is to protect the

individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state". The most relevant feature of this *subjective dimension* of rights is that they follow the structure subject – right – claim:

> *Subject* A has the *right* to R, which can be enforced against subject B;
>
> Subject B violated the right R;
>
> Subject A has a *claim* against subject B.

In the context of constitutional and international law, the subjects will usually be a citizen or a member State. So, a citizen may have a claim against a member State (not the other way around); and a member State may have a claim against another member State, but a citizen does not have a claim against another citizen. Using Hohfeld's[60] classification, the right may involve a claim (that involves a duty to do or not to do something enforceable against the other party), a privilege (meaning that party A does not have a right to demand party B to abstain from performing certain activity), an immunity (meaning that party A cannot be affected by certain legal power vested – by the law or a contract – on party B) or a power (meaning that party A has a certain ability to change the legal status of party B without his acquiescence)[61]. Under this conception, the courts' normative legitimacy stems from their function to hear the claims of the plaintiffs and enforce only the valid ones, which is a way to materialize justice. This approach is inapplicable in the context of international courts. For the reasons stated above, they simply cannot afford to act as a court of a fourth instance to decide individual claims, understood in Hohfeldian way. Therefore, a different approach is needed as the foundation of the normative legitimacy of international courts.

A better-suited conception for international settings entails that *rights are commands to achieve an objective value--laden "state of affairs"* directed towards the authorities, not legal devices that guarantee the efficacy of what the law promises to the subjects. This approach relies on the theory of the double dimension of fundamental rights which was initiated originally by the Federal Constitutional Tribunal of Germany in the aforementioned Lüth case:

> But far from being a value-free system the Constitution erects an *objective system of values* in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision.

(Bundesverfassungsgericht, 1958)

This ruling (later followed by decisions No. 53/1985 and 69/1995) galvanized a whole new line of reasoning that was later developed by legal scholars like Zagrebelsky and Robert Alexy. The basic insight into the new approach is that rights are not only devices of legal protection of individuals against unjustified state interventions, but an *objective system of values* that constitute the very foundations of all the State activity. As such, they ought to inspire the production, interpretation and the enforcement of the law, plus they ought to orient public policy[62].

From this line of reasoning, Robert Alexy developed a new theory of rights as legal principles. He conceptualized principles as: "Norms commanding that something be realized *to the highest degree that is actually and legally possible*"[63]. He further states that: "Principles are therefore *optimization commands*. They can be fulfilled in different degrees. The mandatory degree of fulfillment depends not only on facts, but also on legal possibilities. The field of legal possibilities is determined by countervailing principles and rules"[64]. What Alexy argues convincingly is that legal principles constitute provisions of legal nature (not merely political declarations of goodwill) from where concrete duties are generated. What a legal principle establishes with a sufficient degree of determinacy is "an ideal '*ought'* that is not yet relativized to the actual and legal possibilities"[65].

Following Alexy, what principles offer is a normative orientation with regard to a broad set of circumstances (like the ones that make up for the right to freedom of expression or the right to privacy). The concrete duties depend on the conditions that limit the ability of the State to advance the ideal declared by the legal prin-

[60] HOHFELD, W. Some Fundamental Legal Conceptions as Applied to Legal Reasoning. *Yale Law Journal*, v. 23, n. 1, p. 16-59, 1913.

[61] HOHFELD, W. Some Fundamental Legal Conceptions as Applied to Legal Reasoning. *Yale Law Journal*, v. 23, n. 1, p. 16-59, 1913.

[62] ZAGREBELSKY, G. *El Derecho Dúctil*. 2nd ed. Madrid: Trotta, 2011.

[63] ALEXY, R. On the Structure of Legal Principles. *Ratio Juris*, v. 13, n. 3, p. 295, 2000.

[64] ALEXY, R. On the Structure of Legal Principles. *Ratio Juris*, v. 13, n. 3, p. 295, 2000.

[65] ALEXY, R. On the Structure of Legal Principles. *Ratio Juris*, v. 13, n. 3, p. 300, 2000.

ciple. In other words, the extent to which a principle should be developed in reality is a function of the constraints faced by the branches of the State (adjudicators, legislature, the executive branch, and agencies). So, the key takeaway in Alexy's theory is that adjudicators are obliged to advance rights *to the largest extent possible*. If this holds, and we acknowledge that the need for political support is a substantial constraint of international courts, then the need for political support constitutes a significant limitation to their ability to advance the normative content of the rights. Indeed, not considering the different interests of the stakeholders of international politics and failing to "disregard" positive law when it is necessary to maintain the cohesion of the transnational legal system will bring about a *state of affairs* that is contrary to the obligation to optimize the content of the rights "to the greatest extent possible"[66].

What we argue here is not that international adjudicators must always satisfy the interests of the most powerful nations, for that would also delegitimize the transnational system and bring about its eventual collapse. Rather, we posit that judges – *to avoid the advent of a reality that is contrary to rights in their objective dimension* – must consider in their balancing exercise for each case exogenous factors (omnipresent political forces) that might affect the effectiveness of the decision and the sociological legitimacy of the court in the short and long term. Taking into consideration the exogenous political factors in their decisions is not only legitimate, but also necessary to consolidate the effectiveness of the system. This way, international courts can materialize the state of affairs envisaged by the law (and which they are required to enforce).

In the context of the aforementioned balancing exercise, we must bear in mind that what we balance are legal principles. We find two relevant types of legal principles, namely, substantive and institutional principles. Substantive principles refer to what the different subjects of law (e.g. natural and legal persons, groups of people, States) owe to one another as a matter of fairness, while institutional principles are the ones that the law gives to itself, to secure the effective functioning of the system (e.g., the principle of *res judicata*, non-retroactivity of the law and the internal hierarchy of the different laws). Atienza and Ruiz Manero[67] argue that institutional principles are naturally heavier than any substantive principles. Hence, they are virtually impossible to be defeated when they are involved in any given balancing exercise. In practice, this means that, in strict rationality, we should almost never break the non-retroactivity of the law to favor a substantive principle, like the right to life[68] – save extraordinary circumstances, like the crimes committed by the Nazi regime during World War II. We posit that sociological legitimacy (which is the basis of the effectiveness of any given legal system) is one of such institutional principles. This makes perfect sense, after all, if we allow the institutional principles to be defeated with relatively high frequency, the sociological foundations of law would be severely undermined and the stability of the whole system would be compromised[69]. This means that the material (factual) political constraints faced by international adjudicators translate into legal and moral reasons that authorize to sacrifice the fairness of the decision of a given individual case for the sake of the attainment of a greater extent of materialization of rights in their objective dimension.

Now, this idea should not come as a surprise for there are well-established instances of such reasoning throughout the different global adjudicative systems. The Colombian Constitutional Court pioneered the thesis of the "unconstitutional State of affairs" whose theoretical foundations relied on the objective dimensions of rights. According to this thesis, rights are conceived of not so much as individual claims, but as guiding principles that determine (in a binding way) what realities should be constructed by means of State action. In this line of reasoning, the Colombian Constitutional Court has declared that it has the duty to intervene not only to restore justice in individual claims, but also to restore the constitutionality of reality. A reality is unconstitutional when a group of people is forced by circumstances to be harmed in ways that substantially deviate from the state of affairs envisaged by the constituent power[70]. Romero describes the doctrine of

[66] ALEXY, R. On the Structure of Legal Principles. *Ratio Juris*, v. 13, n. 3, p. 300, 2000.

[67] ATIENZA, M.; RUIZ MANERO, J. La dimensión institucional del Derecho y la justificación jurídica. *Doxa*, v. 24, p. 115–130, 2001.

[68] ATIENZA, M.; RUIZ MANERO, J. La dimensión institucional del Derecho y la justificación jurídica. *Doxa*, v. 24, p. 115–130, 2001.

[69] ATIENZA, M.; RUIZ MANERO, J. La dimensión institucional del Derecho y la justificación jurídica. *Doxa*, v. 24, p. 115–130, 2001.

[70] QUINTERO, J.; NAVARRO, A.; MESA, M. El Estado de Cosas Inconstitucionales como mecanismo de protección de los derechos fundamentales de la población vulnerable de Colombia. *Revista Ju-*

the "unconstitutional state of affairs" as: "A solution that the constitutional judge adopts when it verifies that the causes of the generalized violation of fundamental rights are structural, in light of which, the court must issue commands towards the administrative authorities with the purpose of remedying the unconstitutional situation"[71]. According to this doctrine, it is the duty of the highest tribunals to tackle unconstitutional realities. From this, we can infer the correlative duty of not to create an "unconstitutional state of affairs." We can also relate this to international courts. As we have said, in the context of international adjudicative bodies, failing to preserve the sociological legitimacy of the courts is a way to create an "unconstitutional state of affairs", which is characterized as the absolute lack of a transnational system of justice that is able to address acute social problems that threatens the materialization of fundamental rights in reality.

In the context of the European Court of Human Rights (ECtHR), a similar doctrine was developed to transform the nature of the court. Originally, scholars thought of the court as an adjudicative institution whose function was to bring justice to individuals who had suffered a violation of their human rights in the hands of the State members. Given the practical difficulties that the court faces when trying to deliver individual justice to millions of citizens, the institution underwent substantial structural changes that transformed it into a transnational organization of judicial nature whose function is to advance the prevalence of human rights in the region, not to bring individual justice on a case-by-case basis[72]. The new approach to the role of the ECtHR can be explained as the prevalence of the general development of rights over the individual claims of justice. This doctrine is rooted on the premise that whenever choices need to be made in the transnational context, the general interest must prevail over the particular ones (no matter how unfair the individual result turns out to be).

Bringing these discussions to the Hawk-Dove game that courts play, we can envisage compatibility between strategic behavior and legitimacy. The strategy is only legally justified when it can be explicitly justified as part of the objective system of values and the necessity of maintaining a constitutional state of affairs (or avoiding an unconstitutional state of affairs, at least). In our previous example (section 2), the right answer for the international court would be A, all things considered, but not because of the strategy as such. Rather, A would be the right answer because the other options, including B, would bring about an unconstitutional state of affairs (with the withdrawal of the country from the system). Therefore, in international-national interactions, the right answer must do away with individualist approaches to the notion of 'right' to favor the sustainability of an objective system of values. In other words, what we argue is that behaving strategically can be legitimate for the international court as long as it is in compliance with its higher obligation to advance rights to the largest extent possible. As posited in section 3, a solid conception of normative (legal + moral) legitimacy does not entail the blind application of the law solely, but needs to be justified by moral standards. The moral standards that, according to our theory, justifies disregarding the legally correct (in the sense employed by Dworkin) claim of individual right, in the case of international courts, are rights in their objective dimension, which compel the international courts to act strategically in order to create and maintain constitutional state of affairs. To achieve normative legitimacy, the judge must counterweigh that right legal answer with higher moral standards that are not expressed in the text of the treaty, namely, rights in their objective dimension (from which the theory of the constitutional state of affairs is derived).

Despite our use of the Dworkinian expression 'right answer' above, these conclusions also affect positivism. Acknowledging the legal dimension of the strategy also means that there cannot be two equally valid answers within the law. In positivism, the strategy would be extra-legal, and the law would provide two answers. But this is because positivism is rooted in an individualist conception of rights. When we consider the collective aspect of human interaction and the objective dimension of law, a strategy can be something legal. As a consequence, there are not any more valid answers, but only one. Therefore, what would be deemed as political (due to positivism individualistic traits) is actually legal in nature because it is part of the constitutional state of affairs and the objective system of values that ought to be sustained.

rídica Mario Alario D'Filippo, v. 3, n. 1, p. 69–80, 2011.

71 ROMERO, N. La doctrina del Estado de Cosas Inconstitucional en Colombia novedades del neoconstitucionalismo y "La inconstitucionalidad de la realidad." *Derecho Público Iberoamericano*, v. 1, p. 244, 2012.

72 CHRISTOFFERSEN, J. Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed? In: INDIVIDUAL and Constitutional Justice. Oxford: Oxford University Press, 2011.

A final consideration must be highlighted about our understanding of the legitimate use of strategy by international courts: the consideration and weight given to the constitutional state of affairs must be explicit. Following Fuller's[73] account of transparency as one of the constituents of the *internal morality of law*, any strategy would only be admissible if the international court explicitly includes the exogenous variables (political, economic, cultural or otherwise) as part of the balancing exercise that constitutes the body of the ruling. As our understanding of legitimacy encompasses normative grounds, publicity of all the elements at play is an indispensable aspect for admitting strategic behavior into the legal realm.

5 Conclusions

This paper started from a puzzle that stemmed from game theory in face of traditional jurisprudence. As developed in section 2, game theory suggests that courts disregard the law in favor of political aspects, acting strategically. However, this is not the role assigned to courts in any system. Thus, why could it be legitimate for international courts to disregard the right answer in a case to give way to strategic political calculations that tend to maintain the stability of the system, but seemingly do not relate to the case at hand? After reviewing three approaches to legitimacy, we highlighted why none of the three alone was suited for understanding the situation of international courts (section 3). Therefore, the legitimacy of international courts must be understood as a combination of the three, which is only possible when we wield a non-individualist conception of rights, rather one that encompasses an objective system of values in order to achieve a constitutional state of affairs (section 4).

Based on this objective system of values understanding, we find that it is legitimate, in the sense herein described, for international adjudicative bodies to follow the strategic patterns of behavior derived from game theory. That is, it is legitimate to enact judicial dialogues as a Hawk-Dove game: being assertive or refraining from it to avoid the escalation of tensions to the point where the conflict is insurmountable. It follows that international adjudicative bodies *ought to* act in a strategically (not entirely principled) to keep the dialogue going on. The last assertion, which, at first glance, looks like a utilitarian maneuver, translates into a legal obligation that the courts are obliged to follow: the obligation to preserve the system, as a matter of binding law.

We contend so for two reasons. First, because institutional principles (of which effectiveness is a powerful one) generally trump substantial principles; and that could be the situation of the case at hand, if and only if the balancing exercise, which courts must explicitly perform in a case-to-case basis, shows that it is necessary to disregard the correct individual claim of rights for the sake of maintaining the effectiveness of the transnational system of law. The second reason is that the courts' moral obligation to maximize the constitutional state of affairs requires international courts to privilege the maintenance of the system over specific individual claims. When rights are understood as part of an objective system of values that serves as a set of guiding principles for authorities, *overriding what could be thought of as the right answer considering the individual* is exposed as a form of normative legitimacy.

For future studies, it can be tested whether international courts follow the theoretical framework proposed here. That is, if they privilege institutional principles, aiming at improving or maintaining a constitutional state of affairs while making explicit all the variables in the balancing exercise. With this assessment, game theory will be able to include a normative perspective in its discussions.

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