

## Legitimacy and International Courts – A Framework

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### I Why Relevant? Why Important? Why Interdisciplinary?

One of the most noted developments in international law in the past twenty years is the multiplication of international courts, tribunals, and other adjudicatory and quasi-adjudicatory bodies (ICs, or international courts).<sup>1</sup> They include the International Court of Justice (ICJ); the World Trade Organization's panels, Appellate Body, and the Dispute Settlement Body (the WTO-DSB); ad hoc tribunals under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID); and the European Court of Human Rights (ECtHR), among many others.

These bodies are deciding disputes with implications for our planet and its people, such as when the use of force is legal, what natural resources belong to whom, and the content of sovereign rights and obligations with respect to human rights, the environment, and trade. Their decisions frequently transcend the parties immediately before them. They shape and promote specific normative regimes like international investment, human rights, humanitarian law, and trade law. Even when decisions are not formally binding, advocates before them, scholars, politicians, and judicial opinions frequently cite them as if they set precedent – yet *stare decisis* is not the prevailing rule.<sup>2</sup> Decisions are

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<sup>1</sup> Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014), pp. 3–4.

<sup>2</sup> See N. Grossman, "The Normative Legitimacy of International Courts," *Temple Law Review*, 86 (2013), 68–72.

frequently used as focal points in driving domestic and international political debates.<sup>3</sup> States not involved in a particular dispute look to international court decisions that may affect the standards by which their conduct may be judged in the future.

As international courts' numbers and influence grow, so too do questions about their legitimacy. Political actors query why a state should abide by the decisions of a court located thousands of miles away and composed of foreign nationals, and why a state should subject itself to the jurisdiction of a court that may decide a dispute against a state's perceived self-interest. Scholars seek a theoretical framework for understanding the sources of international courts' authority. What qualities must international courts possess for their authority to be justified? In what circumstances should states subject themselves to the jurisdiction of international courts? What drives the audiences of international courts – states, international organizations, individuals, and nongovernmental organizations – to support or disparage international courts?

Legitimacy provides one theoretical lens through which to assess and critique the work of international courts. Although many have written about the legitimacy of specific international courts, there has been little effort to link these discussions and to determine to what extent they are theoretically consistent with each other. What is common across criticisms and analyses of the legitimacy of international courts? How do differences depend on particular characteristics of individual institutions – their role or impact within a complex of actors including states, international organizations, and civil society actors? This book seeks to fill these gaps in two ways. First, it highlights and evaluates some cross-cutting themes that may affect legitimacy no matter what court may be involved, such as democracy, justice, and effectiveness. Second, it brings together experts on specific international courts to consider what legitimacy means and how it applies to their court. This book lets readers consider the legitimacy of international courts from a comparative perspective. The stakes are high. Failing to understand and respond to legitimacy concerns endangers both the international courts and the

<sup>3</sup> H. Cohen, "Theorizing Precedent in International Law," in A. Bianchi et al. (eds.), *Interpretation in International Law* (Oxford, UK: Oxford University Press, 2015), pp. 268–89; H. Cohen, "International Precedent and the Practice of International Law," in M. Helfand (ed.), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge, UK: Cambridge University Press, 2015), pp. 172–94.

law they interpret and apply. If international courts lack justified authority, so too will their interpretations of international law.

The set of contributions in this book examines what underpins and undermines legitimacy, or the justification of authority, of international courts and tribunals. The authors explore what strengthens and weakens the legitimacy of various different international courts, while also considering broader theories of international court legitimacy. Some chapters highlight the sociological or normative legitimacy of specific courts or tribunals, while others address cross-cutting issues such as representation, democracy, independence, and effectiveness. A solid understanding of the complexities of legitimacy require a set of scholars who bring a range of different methodologies to the table – drawing from law, philosophy, and political science – and bring a range of perspectives – having studied courts and tribunals as academics, practitioners, government officials, and judges. The authors hail from several countries and institutions around the world.

The result is a broader understanding of the underpinnings of legitimacy for international courts. This volume helps readers understand how legitimacy challenges differ from one court with one subject matter to the next, and how older, more traditional tribunals may learn from newer ones, and vice versa.

This initial chapter surveys some of the key contributions of this book and distills some of the lessons of its varied chapters for the legitimacy of international courts. Sections II and III are largely conceptual in approach, exploring what legitimacy means for each and all of the courts. Section II explores the concept of legitimacy as it pertains to international courts, examining the relationship between source, process, and results-oriented aspects of IC legitimacy and the relationship between legitimacy, justice, democracy, and effectiveness. Section III looks more closely at the chapters in this book and explores their contributions to the preceding discussions, as well as their lessons regarding the relationship between sociological and normative legitimacy.

Section IV takes a more functional approach, exploring how various factors internal or external to particular courts have contributed to those courts' normative or sociological legitimacy. It considers international courts in their context, examining the relationship between the specific goals, design choices, audiences, institutional contexts, and IC legitimacy. It explores three models of how these factors interact in this book's chapters to either support or undermine an international court's sociological or normative legitimacy. Section V provides thumbnail summaries of each the chapters that follow.

## II Legitimacy Approaches

### A Sociological and Normative Legitimacy: Source, Process, and Result-Oriented Factors

Legitimacy is often criticized as a notoriously slippery concept. It is defined in myriad ways by many different authors, frequently to justify a set of reforms for a particular institution. Yet it is a meaningful concept because it seeks to explain why those addressed by an authority should comply with its mandates in the absence of perceived self-interest or brute coercion. A legitimate power is broadly understood to mean one that has “the right to rule.”<sup>4</sup> A legitimate court, therefore, possesses a justifiable right to issue judgments, decisions, or opinions, which those normatively addressed must obey, or at least consider with due care.

While normative legitimacy is concerned with the right to rule according to predefined standards, sociological legitimacy derives from *perceptions or beliefs* that an institution has such a right to rule.<sup>5</sup> Assessments of normative legitimacy may apply legal, political, philosophical, or other standards. Sociological legitimacy is subject to empirical analysis, such as by measuring the degree or type of support that an institution enjoys. Sociological legitimacy may fluctuate over time and vary by the constituency or audience whose support is being measured.<sup>6</sup>

<sup>4</sup> D. Bodansky, “Legitimacy in International Law and International Relations,” in J. L. Dunoff and M. A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, UK: Cambridge University Press, 2013), p. 324; D. Bodansky, “The Concept of Legitimacy in International Law,” in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer-Verlag, 2008), p. 313; D. Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” *American Journal of International Law*, 93 (1999), 603–4; A. Buchanan and R. O. Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics and International Affairs*, 20 (2006), 405; A. Buchanan, “The Legitimacy of International Law,” in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford, UK: Oxford University Press, 2010), p. 79; J. Tasioulas, “The Legitimacy of International Law,” in *The Philosophy of International Law*, p. 97; A. Follesdal, “Legitimacy Deficits Beyond the State: Diagnoses and Cures,” in A. Hurrelmann et al. (eds.), *Legitimacy in an Age of Global Politics* (Basingstoke, UK: Palgrave Macmillan, 2007), pp. 211–28.

<sup>5</sup> See, e.g., Buchanan and Keohane, “The Legitimacy of Global Governance Institutions,” 405.

<sup>6</sup> Mark A. Pollack (Chapter 6 in this volume), citing I. Hurd, “Legitimacy and Authority in International Politics,” *International Organization*, 53 (1999), 379, 381; see also N. Grossman, “Legitimacy and International Adjudicative Bodies,” *George Washington International Law Review*, 41 (2009), 117.

“Legitimacy capital” may increase or decline over time.<sup>7</sup> While “internal legitimacy” looks at the perceptions of regime insiders, or constituencies working within the institutional regime concerned, “external legitimacy” refers to the beliefs of outsiders, or constituencies beyond the institution itself.<sup>8</sup> Previous empirical analyses have evaluated “specific support,” which relates to the extent to which an institution’s specific decisions coincide with individuals’ policy preferences, and “diffuse support,” which looks to individuals’ favorable dispositions toward a court generally and willingness to tolerate unpalatable decisions.<sup>9</sup>

Considerations and concerns about legitimacy can be usefully split into source-, process-, and results-oriented factors.<sup>10</sup> For example, consent to be bound is a powerful source-based justification for the exercise of authority over the bound subject, also called “legal legitimacy.”<sup>11</sup> Because states are sovereign and independent, they enjoy a presumption that they cannot be coerced without their consent. Thus, a court that acts beyond the scope of authority granted to it, or *ultra vires*, exceeds the bounds of state consent and lacks justified authority.<sup>12</sup> Moreover, it is expected that courts, as legal organs, apply generally accepted methods of interpretation. Source-based legitimacy may arguably require the consent of affected nonstate stakeholders, such as civil society in nondemocratic states, or transnational groups, as well as that of states.

<sup>7</sup> See Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford, UK: Oxford University Press, 2014), pp. 145–7.

<sup>8</sup> See, e.g., Joost Pauwelyn, in Chapter 8 of this volume, citing J. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement,” *Journal of World Trade*, 35 (2001), 193.

<sup>9</sup> Mark A. Pollack, in Chapter 6 of this volume, citing Y. Lupu, “International Judicial Legitimacy: Lessons from National Courts,” *Theoretical Inquiries in Law*, 14 (2013), 440–2. The canonical origin of the terms is David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965).

<sup>10</sup> R. Wolfrum, “Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations,” in R. Wolfrum and V. Röben, *Legitimacy in International Law*, p. 6.

<sup>11</sup> J. Klabbers, “Setting the Scene,” in J. Klabbers et al. (eds.), *The Constitutionalization of International Law* (Oxford, UK: Oxford University Press, 2009), p. 39; L. H. Meyer and P. Sanklecha, “Introduction,” in L. H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge, UK: Cambridge University Press, 2009), pp. 3–4; Bodansky, “The Legitimacy of International Governance,” 596, 597, 605; Buchanan and Keohane, “The Legitimacy of Global Governance Institutions,” 412–13.

<sup>12</sup> Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” 605.

Regarding process-oriented factors, fair and even-handed procedures and the open-mindedness of judges are also considered essential to legitimacy. If an international court does not provide equal opportunities to be heard to all the relevant parties, then its authority may suffer.<sup>13</sup> In recent years, and as discussed later, questions have been raised about who those relevant parties may be and what kinds of procedural rights they should be afforded.<sup>14</sup>

Finally, results-oriented factors that concern how well the international court performs its “functions” are variously defined. A first set of performance factors concern how well ICs perform the functions that states intended them to serve. For example, do courts issue judgments in the cases brought before them in a reasonably quick and efficient fashion?<sup>15</sup> A second form of performance factors pertains to how well ICs contribute to solving the problems that states established specific ICs to address, be it protecting and promoting human rights, increasing foreign direct investment, or bringing justice to peoples suffering from violations of international criminal law. It can also be asked how well a court performs functions beyond dispute settlement between the disputing parties, such as setting precedents or giving general guidance on interpretation; participating in judicial law-making; and serving as an integral part of an international regime, including compliance functions. A final kind of performance factors concerns the extent to which ICs may transform international relations, for example, to what extent the European Court of Justice has promoted European integration.<sup>16</sup>

<sup>13</sup> See Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford, UK: Oxford University Press, 1995), p. 7 (discussing both procedural and substantive fairness); Bodansky, “The Legitimacy of International Governance,” 612 (stating that “authority can be legitimate because it involves procedures considered to be fair”); J. H. H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement,” *Journal of World Trade*, 35 (2001), 204 (explaining that the legitimacy of courts is largely based on their ability “to listen to the parties, to deliberate impartially favouring neither the powerful nor the meek, to have the courage to decide and then, crucially, to motivate and explain the decisions”).

<sup>14</sup> See, e.g., Grossman, “The Normative Legitimacy of International Courts,” 82.

<sup>15</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981); L. Helfer, “The Effectiveness of International Adjudication,” in K. Alter et al. (eds.), *Oxford Handbook of International Adjudication* (Oxford, UK: Oxford University Press, 2014), pp. 464–82; Armin von Bogdandy and Ingo Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* (Oxford, UK: Oxford University Press, 2014); Karen J. Alter, *The New Terrain of International Law: Courts Politics, Rights* (Princeton, NJ: Princeton University Press 2014), pp. 10–13.

<sup>16</sup> A. M. Burley and W. Mattli, “Europe before the Court: A Political Theory of Legal Integration,” *International Organization*, 47 (1993), 41–76.

*B Standards for Assessing Normative Legitimacy*

## 1 Justice

According to Raz's service conception of authority, the legitimacy of an institution concerns whether it helps a state to better act in accordance with rules that bind it independently.<sup>17</sup> Thus Allan Buchanan and Robert Keohane have argued that the legitimacy of global governance institutions depends on respecting standards of "minimal moral acceptability."<sup>18</sup> Nienke Grossman has proposed a legal standard: if states are better at complying with international law acting on their own – in courts' absence – then it is difficult to justify international courts' authority.<sup>19</sup> In other words, if courts fail to help states comply with normatively acceptable law, including universally accepted human rights obligations, they are illegitimate.<sup>20</sup>

These understandings of legitimacy have several implications. For example, some treaties and their ICs may violate standards of global justice. Their legitimacy is thus threatened from the outset; some critics of the WTO regime appear to hold such views.<sup>21</sup> To the extent that standards of global justice apply to all international actors, they may affect how judges on international courts should reason when interpreting vague terms and specifying the treaty obligations and may create a tension between legal legitimacy based on an interpretation of the obligations as set out in the treaty and justice-based legitimacy.

## 2 Democracy

Some have sought to connect democratic theory or values with both normative and sociological legitimacy. Several debates about the legitimacy deficits of international governance institutions concern their lack of democratic accountability – thus many critics have complained that the European Union bodies are undemocratic.<sup>22</sup> Likewise, authors who address the legitimacy deficits of ICs propose their "democratization," by which the authors often mean to increase their transparency,

<sup>17</sup> Joseph Raz, *The Morality of Freedom* (Oxford, UK: Oxford University Press, 1986), pp. 47, 53.

<sup>18</sup> Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," 405–37.

<sup>19</sup> Grossman, "The Normative Legitimacy of International Courts," 100. <sup>20</sup> *Ibid.*, 101.

<sup>21</sup> T. Pogge, "The Role of International Law in Reproducing Massive Poverty," in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford, UK: Oxford University Press, 2010), pp. 417–35.

<sup>22</sup> A. Follesdal and S. Hix, "Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," *Journal of Common Market Studies*, 44 (3) (2006), 533–62.



accountability or participation by various parties.<sup>23</sup> At the same time, such calls for democratization should give pause because national courts are seldom subject to similar norms of democratic election and accountability as are national parliaments or the executive.

As regards ICs, such calls for increased democratic accountability may best be understood along one of three strands. First, they may be proposals to improve the selection of judges to secure more equitable representation of the population, such as calls for more women and minorities as judges of ICs.<sup>24</sup> Second, there may be proposals to make the treaties or the jurisprudence of the IC less skewed toward the interests of some states rather than others.<sup>25</sup> A more “democratic” IC should be less biased. Such calls must, of course, be specified carefully. For instance, some authors assume that states represent and protect the interests of their people, so that inclusion of all states also ensures that the citizens of these states will have their interests better secured. However, this assumption cannot easily be maintained in the face of highly undemocratic states.<sup>26</sup> A third set of recommendations calls for more transparency, accountability, and participation concerning ICs.<sup>27</sup> However, such changes may be of value for reasons other than as building blocks of democracy. More transparency, accountability, or participation is often, but not always, beneficial in this regard: partial increases in accountability or participation, for example, may render the ICs less normatively acceptable for some but not all stakeholders. Transparency may also deter some actors from using ICs. Moreover, such changes toward more transparency can be valuable even when they do not advance democracy.

### 3 Legitimacy and Performance, or Effectiveness

Unless ICs *in fact* promote their stated objectives or otherwise promote recognized values, they may have no moral claim on actors to defer. In other words, if an IC is not effective in this sense, its normative

<sup>23</sup> von Bogdandy and Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts*.

<sup>24</sup> N. Grossman, “Achieving Sex Representative International Court Benches,” *American Journal of International Law*, 110 (2016), 82.

<sup>25</sup> E.g. S. D. Franck, “International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?” *ILSA Journal of International and Comparative Law*, 12 (2006), 499, 501.

<sup>26</sup> Y. Shany, “Assessing the Effectiveness of International Courts: A Goal-Based Approach,” *American Journal of International Law*, 106 (2012), 241.

<sup>27</sup> Grossman, “The Normative Legitimacy of International Courts,” 61–105; Buchanan and Keohane, “The Legitimacy of Global Governance Institutions,” 405–37.



legitimacy is at stake. In this vein, Yuval Shany has proposed a “goal-based” approach to the study of the effectiveness of ICs in which a court’s aims or goals, as described by its mandate providers, are measured against whether it has achieved them.<sup>28</sup> Goals might also, however, be articulated by nonmandate providers, and it is essential that goals be explicitly stated for effectiveness to be properly measured.

What about the relationship between compliance with an IC’s decisions and legitimacy? Persistent and widespread noncompliance, which amounts to free riding among state signatories, especially if it shifts excessive burdens onto compliers, may thus challenge the normative legitimacy of the IC. For other ICs, noncompliance by some states may be less worrisome. For instance, there may be several benefits of a regional human rights court even if its rulings are only complied with by some of the state signatories.

Challenges to the legitimacy of an IC that relate to its effectiveness may arise if institutions other than courts would secure the objectives more efficiently or with greater certainty. Further legitimacy dilemmas may arise if an IC is “too effective.” For example, popular resentment against an IC may develop if its judgments are seen to intrude on state sovereignty once they take effect. Also, a large backlog of cases, as in the case of the European Court of Human Rights, may affect that institution’s effectiveness and, thereby, its legitimacy.

### III Contributions to the Legitimacy Literature – Sociological and Normative Legitimacy

As the next sections of this chapter show, this book significantly deepens our understanding of (1) the factors driving sociological legitimacy, as well as interactions between normative and sociological legitimacy and (2) the relationship between normative legitimacy and various substantive outcomes, such as justice, democracy, and effectiveness.

#### A Normative Legitimacy and Its Relationship to Sociological Legitimacy

One might assume that if a court possesses normative legitimacy, perceptions of the court as legitimate will follow. Nonetheless, factors that

<sup>28</sup> Shany, “Assessing the Effectiveness of International Courts: A Goal-Based Approach,” 241.

contribute to sociological legitimacy may differ from those necessary for normative legitimacy, or may interact in interesting ways. The focus of many chapters in this book on specific international courts provides new and more concrete insights into what drives sociological legitimacy and the relationship between normative and sociological legitimacy in the context of a specific international court.

For example, as **Mark A. Pollack** demonstrates in Chapter 6, although the European Court of Justice is one of the most trusted institutions in Europe, its legitimacy rests on a “thin base of knowledge about the Court” and appears to be more rooted in general attitudes toward Europe and the rule of law than particular characteristics of the court itself. In other words, he suggests that familiarity with and normative legitimacy of a specific international court may not be the ultimate determinant of sociological legitimacy. Instead, how it is embedded within and among other institutions and regimes, and its relationship to a broader political institution and regime, may be more relevant.

**Andrea K. Bjorklund** argues in Chapter 9 that while defenders of the International Centre for the Settlement of Investment Disputes tend to rely on normative legitimacy arguments, critics employ a more sociological lens. Defenders of ICSID highlight state consent to investment treaties and the ICSID Convention, as well as procedural safeguards in investment treaty arbitrations. Detractors, on the other hand, focus on the public interest implications of arbitration, impact on regulation for desirable social purposes, decision makers’ identity, and the “correctness” of tribunal decisions. The distinction between normative and sociological legitimacy thus helps to explain why these two groups are “talking past each other,” and why defenses of an institution’s normative legitimacy may not satisfy constituencies’ concerns stemming from sociological legitimacy.

**Alexandra Huneeus** draws related insights in Chapter 5 from her case study of the involvement of the International Criminal Court (ICC) and the Inter-American Court of Human Rights (IACHR) in the Colombian peace process. She suggests that the sociological legitimacy of one international court, or of all international courts, may impact the legitimacy of another court. For example, the ICC and the IACHR, through a dynamic of “constructive interference,” boosted each other’s legitimacy by both working toward the same end of accountability for the crimes of the paramilitary in the Colombian conflict. To the extent that their goals coincide, their authority is reinforced and considered more justified. She argues that the ICC prosecutor’s use of the jurisprudence of the IACHR