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Unseen Actors in International Courts and Tribunals

Challenging the Legitimacy of International Adjudication

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They are the unsung heroes of international litigation ... their proper functioning is absolutely vital for the effectiveness of the international adjudicative process.

Sir Arthur Watts²

‘Unseen actors’ are vital to the functioning of international courts and tribunals, exercising varying levels of influence on the adjudicatory process and its outcome. The last few decades have witnessed an expansion in the number of international judicial bodies.³ Although these bodies differ in their institutional make-up and functions, a characteristic shared among them is their reliance on the contribution of individuals or entities other than the judicial decision-makers themselves. Unseen actors may take the form of registries, secretariats, law clerks and legal officers, but they also include non-lawyers such as translators, members of the medical

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² Sir Arthur Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’, in J.A. Frowein, R. Wolfrum and C.E. Philipp (eds.), *Max Planck Yearbook of United Nations Law* (Leiden: Brill, 2001), vol. V, p. 30, focusing on Members of Secretariats in particular.

³ Cesare P.R. Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’, (1999) 31 *New York University Journal of International Law and Politics* 709; Karen J. Alter, ‘The Multiplication of International Courts and Tribunals After the End of the Cold War’, in Cesare P.R. Romano, Karen J. Alter and Chrisanthi Avgerou (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013).

profession and scientific experts. Some of these actors may be ‘more unseen’ than others but most remain nameless in the written decisions, and the extent of their contribution is generally unclear. The opaqueness of their role, combined with the significance of the judicial decision for the parties involved as well as for a wider range of stakeholders, raises questions about the impact of these unseen actors on the legitimacy of international adjudication as such. For example, an unseen actor’s influence has formed a ground upon which an arbitral award was challenged, as substantial parts had allegedly been written by a legal assistant rather than the arbitrators themselves.⁴ The domestic court adjudicating the dispute in first instance set aside the award on a different ground, so it did not address this point; the case is currently pending on appeal. This book aims to answer such legitimacy questions and identify ‘best practices’, where feasible, through a multifaceted enquiry into possible common connections and patterns in the institutional make-up and daily practice of international courts and tribunals.

This volume results from an interdisciplinary research project conducted over the course of 2017, culminating in an international conference on 26 and 27 October in The Hague, supported by the PluriCourts Centre of Excellence (Oslo University) and the Europa Instituut (Leiden University). In this book, scholars of legal, political and anthropological science, as well as members of adjudicatory institutions consider and scrutinise the practice of assigning unseen actors certain roles in the judicial process, as well as the implications for the legitimacy of international dispute settlement mechanisms. The individual chapters investigate the character and activities of one or more particular categories of unseen actors, with the aim of clarifying this practice and answering the legitimacy challenges it raises.

The structure of the book reflects overarching themes arising out of the analysis of a broad variety of unseen actors within international adjudication. This approach was preferred to an ‘actor-by-actor’ examination since many legitimacy concerns are common to the experience of several adjudicatory bodies. For example, the theme of confidentiality and transparency is relevant with respect to a range of actors in multiple fora, from

⁴ The arbitration in question was *Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Cases Nos. AA 226, AA 227 and AA 228, Final Award (18 July 2014), which was subsequently challenged by Russia before The Hague District Court (C/09/477160/HA ZA 15-1, Judgment of 20 April 2016, ECLI:NL:RBDHA:2016:4229).

‘ghost experts’ to physicians in criminal trials. This introductory chapter provides a broad overview of the issues scrutinised in this book, without seeking to pre-empt the conclusions. First, it discusses why analysing the contribution of unseen actors is important for the assessment of international courts’ and tribunals’ legitimacy; second, it outlines the structure of the book, and highlights the sub-questions discussed across various parts and chapters; and third, it indicates for whom this research project is relevant and how future projects might build upon its findings.

1.1 The Importance of Unseen Actors for the Legitimacy of International Courts and Tribunals

In order to analyse the influence of unseen actors on the perceived legitimacy of international courts and tribunals, it is important to understand, first, the meaning of legitimacy in the context of international adjudication; secondly, the multidimensional conceptualization of legitimacy as applied to unseen actors in particular; bearing in mind, thirdly, the epistemological and methodological challenges this exercise inevitably entails.

1.1.1 *The Meaning of Legitimacy in the Context of International Adjudication*

As international courts and tribunals have expanded in number, so too have the areas of international law and international relations on which they adjudicate. As a result, their visibility has increased. Their growing profile is accompanied by strong challenges to their functions, competence and even existence.⁵ This should come as no surprise given the volatile political environment in which international courts and tribunals operate, and the challenge they present to States’ sovereignty and their law-making role.⁶ International courts and tribunals are also costly institutions for States to maintain. The decision to allocate resources to them can come at the expense of non-judicial initiatives that may also

⁵ See e.g. in relation to human rights, Johan Karlsson Schaffer, Andreas Føllesdal, and Geir Ulfstein, ‘International Human Rights and the Challenge of Legitimacy’, in Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2013).

⁶ Christine Chinkin and Alan Boyle (eds.), *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 268.

have the potential to contribute to peace and security. As a consequence, international courts and tribunals are, and should be, held to a high standard. Their legitimacy is paramount and they must be subject to scrutiny. Arguably, what the international system needs, is not *more* international courts and tribunals, but ones that are *viewed as legitimate* in the eyes of their intended beneficiaries. The unseen actors within international courts and tribunals can function as an important bridge between international and domestic actors and audiences, and they may at times have the ability to improve or damage this relationship.

The charges of a lack of legitimacy levelled at international courts and tribunals require closer examination of what precisely the notion of legitimacy entails. Legitimacy is a concept that is widely used in a number of disciplines, and is understood differently by various groups.⁷ In particular, the concept of legitimacy in the context of international law has been subject to a rich and varied scholarship,⁸ in particular since the 1990s.⁹

⁷ A point which has formed the subject of critique in relation to the ballooning of discourse within international legal academia with regards to legitimacy; see James Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 *ASIL Proceedings* 271.

⁸ E.g. Thomas M. Franck, 'Legitimacy in the International System' (1988) 82 *AJIL* 705; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 *AJIL* 596; Jean-Marc Coicaud and Veijo Heiskanen, *The Legitimacy of International Organizations* (Tokyo/New York: United Nations University Press, 2001); A.E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003); Rüdiger Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Berlin/Heidelberg/New York: Springer, 2008); Hilary Charlesworth and Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy* (Cambridge: Cambridge University Press, 2010); John Tasioulas, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010); Lukas H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009); Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart, 2010); Jean d'Aspremont and Eric de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Expertise' (2011) 34 *Fordham International Law Journal* 190; Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and Michelle Q. Ziang (eds.), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge: Cambridge University Press, 2018); Harlan Grant Cohen, Nienke Grossman, Andreas Føllesdal and Geir Ulfstein (eds.), *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018).

⁹ Bodansky, 'The Legitimacy of International Governance', 596–597; Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, 907–908; Christopher A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 *Oxford Journal of Legal Studies* 729, 731. A notable early exception is Inis Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20 *International Organization* 367.

The legitimacy of international organisations in general has long been recognised as a layered, multi-dimensional concept,¹⁰ although international courts have in recent years also begun to be examined through the lens of legitimacy. The concept of legitimacy is linked, *inter alia*, to legality, moral justification, social acceptance and compliance. As a result, legitimacy is subject to criteria that are legal, moral and social.¹¹

Scholars have generally viewed legitimacy as comprising sociological and normative dimensions.¹² From a sociological perspective, legitimacy is based on perception: an institution or an actor has legitimacy if its addressees provide it with acceptance and recognition, and consider its authority to be justified.¹³ In this sense, a legitimate institution can override the self-interests of its addressees, albeit only to a certain

¹⁰ Silje Aambø Langvatn and Theresa Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (Cambridge: Cambridge University Press, 2017). For an overview of the literature on the legitimacy of international organisations, see *inter alia* Shane P. Mulligan, 'The Uses of Legitimacy in International Relations' (2005) 34 *Millennium* 349; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', in Lukas H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009); Daniel Bodansky, 'Legitimacy in International Law and International Relations', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012).

¹¹ Anne Peters, 'Membership in the Global Constitutional Community', in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), pp. 235–236.

¹² A range of terminology is used in the literature to refer to these two categories. See Bodansky, 'The Legitimacy of International Governance', 601; Michael Zürn, 'Global Governance and Legitimacy Problems' (2004) 39 *Government & Opposition* 287; Robert O. Keohane and Allen Buchanan, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405; Lukas H. Meyer and Pranay Sanklecha, 'Introduction: Legitimacy, Justice and Public International Law. Three Perspectives on the Debate', in Lukas H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009); Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 *George Washington International Law Review* 107.

¹³ Legitimacy from this perspective is also known as 'descriptive', 'empirical', 'origin' and 'social' legitimacy. Sociological legitimacy has in turn been divided into source-, process- and result-oriented forms of legitimacy; see Rüdiger Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations', in Rüdiger Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Berlin/Heidelberg/New York: Springer, 2008), pp. 6–7; Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Geir Ulfstein, 'Legitimacy and International Courts – A Framework', in Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal and Geir Ulfstein (eds.), *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018).

extent: individuals or States might question an individual judgment of an international court, yet retain belief in its overall legitimacy and authority to render that judgment.¹⁴ Sociological legitimacy is fact-based in the sense that it can be measured empirically,¹⁵ although it nonetheless entails a normative judgment amongst its addressees, which illustrates the closely intertwined nature of normative and sociological legitimacy.¹⁶ A normative conception of legitimacy, on the other hand, is concerned with the rightfulness of an entity's authority; that is to say, 'whether it is justified in some objective sense'.¹⁷

Departing from the sociological perspective of legitimacy, in the broadest sense, a legitimate court or tribunal is thus one whose authority is perceived as being justified.¹⁸ In the case of international courts, beliefs about the authority of a court are sometimes linked to views about the organisation of which the court is a part.¹⁹ In the context of international courts and tribunals, one of the grounds upon which this authority is constructed relates to its legality, arising from the consent of the parties involved in the adjudicatory process, also known as constitutive or legal legitimacy.²⁰ Some authors have expressed concerns that State consent in particular is a 'morally anaemic' perspective from which to depart in an analysis of international legal legitimacy, in light of the increasing

¹⁴ Keohane and Buchanan, 'The Legitimacy of Global Governance Institutions', 410; Erik Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14 *Theoretical Inquiries in Law* 411, 415.

¹⁵ Erik Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14 *Theoretical Inquiries in Law* 411, 414.

¹⁶ Ibid.; Bodansky, 'Legitimacy in International Law', p. 317.

¹⁷ Bodansky, 'The Legitimacy of International Governance', 601.

¹⁸ Grossman, 'Legitimacy and International Adjudicative Bodies'. This definition builds upon earlier literature on legitimacy, including the work of Daniel Bodansky, as well as later literature, such as Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 *Leiden Journal of International Law* 491, 492.

¹⁹ Voeten, 'Public Opinion and the Legitimacy of International Courts', 416. To give an example: the perceived legitimacy of the WTO Dispute Settlement Body might thus be influenced by broader conceptions of the WTO.

²⁰ Yvonne McDermott and Wedad Elmaalul, 'Legitimacy', in William A. Schabas and Shannonbrooke Murphy (eds.), *Research Handbook on International Courts and Tribunals* (Cheltenham, UK: Edward Elgar, 2017), pp. 229–231; Kumm, 'The Legitimacy of International Law', 918; Thomas, 'The Uses and Abuses', 735. However, some authors caution that legitimacy should not be conflated with legality, as the notion of legitimacy is broader than that of legality: see Keohane and Buchanan, 'The Legitimacy of Global Governance Institutions', 406; Cassese, 'The Legitimacy of International Criminal Tribunals', 492.

importance of non-State actors within international law.²¹ In addition, some may consider that non-democratic States do not enjoy normative legitimacy at the domestic level – and as such, their consent could not ‘transfer’ legitimacy to, say, an international institution such as the United Nations.²²

Courts might be perceived as enjoying a greater or lesser degree of legitimacy with regard to the manner in which consent was given and the method through which the court was created.²³ Contemporary international adjudicatory practice often involves many different stakeholders other than States, such as individuals or corporations. As a result, some authors argue that legitimacy might also require, if not the consent of those not party to proceedings, at least consultation and some form of involvement of relevant stakeholders in the court’s decision-making process.²⁴

The scope of constitutive legitimacy might change in accordance with the purpose and function of the international court in question: thus, for example, international criminal courts derive their legitimacy from the fact that every accused person has the right to be tried by a tribunal ‘established by law’.²⁵ A further facet of legitimacy in this regard is procedural legitimacy, which emphasises not only the outcome of the work of international courts, but the method by which this is achieved.²⁶ Elements of procedural legitimacy can relate to the existence of fair procedures and transparency; the degree to which the court has to answer to a higher or founding body; the participation of all parties in proceedings; and a balance of means between parties.²⁷ Equally, procedural legitimacy can be

²¹ McDermott and Elmaalul, ‘Legitimacy’, pp. 231–232; Nienke Grossman, ‘The Normative Legitimacy of International Courts’ (2013) 86 *Temple Law Review* 61.

²² Keohane and Buchanan, ‘The Legitimacy of Global Governance Institutions’, 413.

²³ Tullio Treves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’, in Rüdiger Wolfrum and Volker Röben, *Legitimacy in International Law* (Berlin/Heidelberg/New York: Springer, 2008), pp. 171–173.

²⁴ Cohen et al., ‘Legitimacy and International Courts’.

²⁵ McDermott and Elmaalul, ‘Legitimacy’, p. 232.

²⁶ Bodansky, ‘The Legitimacy of International Governance’, 612; Kumm, ‘The Legitimacy of International Law’, 924; Jean d’Aspremont and Eric de Brabandere, ‘The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Expertise’ (2011) 34 *Fordham International Law Journal* 190; Grossman, ‘The Normative Legitimacy of International Courts’; Thomas, ‘The Uses and Abuses’, 750; McDermott and Elmaalul, ‘Legitimacy’, p. 235.

²⁷ Wolfrum, ‘Legitimacy in International Law’, pp. 6–7; Treves, ‘Aspects of Legitimacy’, pp. 171–173; Cassese, ‘The Legitimacy of International Criminal Tribunals’, 493; Cohen et al., ‘Legitimacy and International Courts’.

derived from the method of appointment of the organs of the court and its judges; the degree to which politics plays a role in these appointments; the type of expertise required of judges; guarantees of impartiality and independence; and the perceived quality of previous judgments of the court.²⁸

A further understanding of sociological legitimacy in relation to international courts and tribunals relates to the outcomes of a court's decisions. One element of these outcomes is whether the institution in question is able to meet the goals for which it was created.²⁹ However, some authors have noted the often expansive and ambitious goals that international courts are expected to meet – goals which can often not be met without sincere cooperation from the States involved in the dispute.³⁰ Furthermore, '[p]rinciples related to outcomes only play a limited role because disagreement about substantive policy are exactly the kind of thing that legal decision-making is supposed to resolve authoritatively'.³¹ As such, effectiveness should not overpower other understandings of legitimacy.

Compliance is a further method through which it is possible to determine the outcome legitimacy of international courts.³² Other elements to take into account can include the voting record in relation to decisions rendered, whether judges issue separate or dissenting opinions, the degree to which the court's judgments are perceived to be clear and well reasoned, and whether the court addresses all arguments raised by the parties or whether it raises arguments *proprio motu*.³³ It is also possible to take into account whether a court's judgment is considered to be consistent with earlier case law or with the case law of other international courts.³⁴ In this regard, it is important to observe that perceptions of legitimacy in relation to these factors will likely differ across jurisdictions and between legal systems: as such, common lawyers might consider it more legitimate if a court addresses issues which were not raised by the parties, whereas an individual educated according to the civil tradition might argue the opposite.

²⁸ Treves, 'Aspects of Legitimacy', pp. 171–173.

²⁹ Wolfrum, 'Legitimacy in International Law', pp. 6–7; Grossman, 'The Normative Legitimacy of International Courts'; Cohen et al., 'Legitimacy and International Courts'.

³⁰ McDermott and Elmaalul, 'Legitimacy', p. 233.

³¹ Kumm, 'The Legitimacy of International Law', 927.

³² McDermott and Elmaalul, 'Legitimacy', p. 234.

³³ Treves, 'Aspects of Legitimacy', pp. 171–173.

³⁴ Ibid.

Even in the context of sociological legitimacy, it is impossible to ignore the importance of normative standards. Thus, as Antonio Cassese writes, legitimacy also encompasses the ‘moral and psychological acceptance of a body’; the legitimacy of an adjudicative body is often constructed in light of whether it reflects the values of the majority.³⁵ This statement refers to a sociological understanding of normativity: that is to say, beliefs by the addressees of a court or tribunal with regard to the normative value of the court.

However, one can also examine the legitimacy of courts from a purely normative standpoint – in other words, from the perspective of normative legitimacy described above. Normative conceptions are concerned with whether an entity is authoritative,³⁶ decoupled from the views of States, the international community, or the court’s addressees. Similar to descriptive legitimacy, some authors argue that consent lies at the heart of normative legitimacy, but a range of normative theories hold that actual compliance may matter for normative legitimacy also.³⁷ For example, numerous authors have argued that the normative legitimacy of an international court can flow from adherence to democratic standards,³⁸ although such claims are complicated by the movement of court activities from the domestic to the international level.³⁹ In addition, legitimacy can also be derived from the court’s adherence to values shared by the international community as a whole, such as compliance with peremptory norms or fundamental human rights.⁴⁰ More broadly, normative legitimacy can be determined with reference to whether a court helps to achieve justice – a concept which evidently can be construed in various ways.⁴¹

³⁵ Cassese, ‘The Legitimacy of International Criminal Tribunals’, 492.

³⁶ Thomas, ‘The Uses and Abuses’, 738.

³⁷ Meyer and Sanklecha, ‘Introduction: Legitimacy, Justice and Public International Law’, p. 3.

³⁸ Bodansky, ‘The Legitimacy of International Governance’, 599; Armin von Bogdandy, ‘Globalization and Europe: How to Square Democracy, Globalization, and International Law’ (2004) 15 *EJIL* 885; J.H.H. Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 *ZaöRV* 547; Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart, 2010).

³⁹ Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *AJIL* 510, 535.

⁴⁰ Cassese, ‘The Legitimacy of International Criminal Tribunals’, 492.

⁴¹ Cohen et al., ‘Legitimacy and International Courts’.

1.1.2 *A Multidimensional Conceptualization of Legitimacy as Applied to Unseen Actors*

In the present book, different facets of this multidimensional conceptualisation of legitimacy are addressed from a range of disciplinary perspectives, incorporating both sociological as well as normative understandings of legitimacy. The ‘orthodox’ approach based on the concept of legal legitimacy has its merits, given that it mirrors the discourse that international courts seek to project to the outside world, as well as the discourse into which most international lawyers have been socialised. Applying it to the exclusion of other approaches, however, runs the risk that the results will be too general, abstract and reductionist to produce an analysis which is sufficiently sophisticated and nuanced to capture the reality of the issue of unseen actors within international adjudication.

As such, a multidimensional conception of legitimacy can produce more fruitful results,⁴² as it can acknowledge that these unseen actors are often explicitly or implicitly obscured within the language of the law. With regard to international courts and tribunals, an assessment of legitimacy should include an examination of their origins, function (including their day-to-day procedure), and performance (that is, the outcome and effects of its function). In this sense, legitimacy can be examined with reference to three factors: an international court’s genesis; its daily execution of procedure; and the results it produces. It is these elements that the various contributions to this volume seek to address, producing a multidisciplinary view on the issue of unseen actors.

The participation of unseen actors in the adjudication process may be assessed with reference to this multidimensional conceptualisation of legitimacy. A number of contributions in this volume highlight challenges that are intrinsically tied to one of the elements of legitimacy outlined above: the genesis of international courts. In this understanding, legitimacy requires that courts function according to their mandate, whereby the actions of a court (including those of its unseen actors) are justified with reference to its role as envisaged by its founders. In other words, in the consent-based international legal order, legitimacy with reference to an international court’s origins rests on whether the founders have consented to the international court’s actions. Legitimacy concerns may arise when a legal assistant or tribunal secretary fully or partially drafts

⁴² Langvatn and Squatrito, pp. 51–52.