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BOOK REVIEW

Legitimacy and International Courts

Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, Geir Ulfstein. *Legitimacy and International Courts*. Cambridge University Press, 2018. Pp. 387, ISBN: 978-1-108-42385-4

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International courts and tribunals hear and decide hundreds of cases per year, brought by supranational actors, member governments, national courts, and individual litigants. Their decisions are often complied with, and its powers and jurisdictions have grown these last decades. As international courts' numbers and influence grow so too do challenges to their legitimacy. As such, it is interesting to raise the question of the legitimacy of international courts.

Keywords: legitimacy; international courts; tribunals; challenges

International courts and tribunals hear and decide hundreds of cases per year, brought by supranational actors, member governments, national courts, and individual litigants. Their decisions are often complied with, and their powers and jurisdictions have grown these last decades. As international courts' numbers and influence grow so too do challenges to their legitimacy.

Thirteen authors contributed to this volume; it emerged from an exchange continued over a workshop on the legitimacy of international courts and tribunals. This book, divided into 13 chapters of remarkable scope and depth of treatment, opens with an exploration of what legitimacy means for international courts. The function of the first section of the initial chapter is to make the distinction between sociological and normative legitimacy, a distinction that is important to understanding the content of the book. "Assessments of normative legitimacy may apply legal, political, philosophical, or other standards while sociological legitimacy is subject to empirical analysis, such as by measuring the degree or type of support that an institution enjoys" (p. 4). The concept of legitimacy and the relationship between different aspects of legitimacy and cross-cutting themes like justice, democracy and effectiveness are then examined. Finally, in the last section, the author reviews and analyzes how the court's normative and sociological legitimacy have been influenced by the variety of factors internal or external to the courts. In this section, not only the context of the courts is taken into consideration, but also the link between the particular objectives, choices, audiences, and its legitimacy.

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In Chapter II, Nienke Grossmann evaluates the link between the legitimacy and Solomonic judgments. Before assessing this link, the author defines a Solomonic judgment as a sort of compromise judgment that rejects the winner-take-all approach that characterizes most modern common law adjudication. Nienke Grossmann examines how the legitimacy of the International Court of Justice (ICJ) can be affected by Solomonic judgments. The author draws our attention to the fact that this kind of judgment can give rise to erroneous legal reasoning. Indeed, it can undermine its normative and sociological legitimacy by undermining its jurisdictional function. The author suggests that, "Solomonic decision making is a potential danger to the normative legitimacy of the ICJ when it exceeds the scope of states' delegated authority and because it is inherently biased against parties with significantly stronger legal cases." On the other hand, the fact that decisions are based on law and Solomonic judgments can reinforce the Court's effectiveness and thus its sociological legitimacy. In other words, this is a double-edge sword in the sense that, on the one hand, a Solomonic judgment may represent a point within a set of reasonable legal outcomes whereby the Court has awarded each of the litigating parties some, but not all, of what they seek. On the other hand, it also happens that Solomonic judgments prioritize pleasing and displeasing the litigating parties in equal amounts over deciding disputes in accordance with the relevant law.

In Chapter III, Margaret Deguzman explores how the effectiveness and legitimacy of the International Criminal Court (ICC) are affected by the fact that the ICC can't prioritize between local and global justice. The author notes that legitimacy cannot be thought of without goals and priorities. According to her, a court cannot be effective without clearly defining its objectives. Margaret Deguzman focuses on the unresolved tension between the ICJ's global and local agendas, which is according to her an obstacle to the legitimacy of international courts (p. 63). Contrary to what might appear to be the case, the ICC should not only serve both global and local constituencies. The author assesses that "this global-local dilemma is an important impediment to the ICC's effort to develop greater legitimacy" (p. 64). That is where the important issue of distinguishing between sociological legitimacy and normative legitimacy comes into the picture (p. 64). In this third chapter, Margaret Deguzman starts by explaining what the global-local dilemma is and then demonstrates that this dilemma has been underestimated when it comes to the ICC's legitimacy. As the author asserts, goals ascribed to the ICC are many and diverse (p. 66). From that, "where the interest of the communities conflict, or where they compete for scarce resources, the ICC must choose which to privilege" (p. 67). Finally, the author concludes that whatever method the ICC employs to resolving the global-local dilemma, "it will alienate some audience, and in the end, its sociological legitimacy will be affected in the short term".

Chapter IV brings us a step closer to the links and conflicts between legitimacy and doing justice. Molly K. Land demonstrates that the role of justice is a component of the normative and sociological legitimacy of international human rights courts. The author considers "justice as a factor that by itself can foster a tribunal's normative and sociological legitimacy" and consequently "achieving just outcomes can in the right circumstances also bolster their general legitimacy". The author shows that doing justice is a necessary condition of legitimacy because it can promote the "the extent to which a human rights court is perceived as legitimate". The author uses both conceptions of legitimacy (normative and sociological) to evaluate the role of justice in the legitimacy of the European Court of Human Rights (ECtHR) by referring to the prisoners' voting case. In the UK prisoners are disenfranchised upon incarceration in accordance with section 3 of the Representation of the People Act 1983. In Hirst the Grand Chamber held that the UK's 'general, automatic and indiscriminate' ban on prisoners' voting, violated Article 3 of Protocol 1 (A3P1) to the European Convention on Human Rights (ECHR). Therefore, despite the UK's obligation under Article 46(1) of the ECHR to

abide by judgments of the ECtHR, a constitutional clash between the UK and Strasbourg ensued.

The ECtHR's approach to prisoners' voting rights was reaffirmed in subsequent cases. In Greens and MT v United Kingdom (2011) the ECtHR held the UK's non-compliance sustained the violation of A3P1. The ECtHR applied the pilot judgment procedure, suspending pending applications and the UK was given six months to introduce legislation. In Scoppola v Italy (2013), as the third-party intervener, the UK Government challenged the Grand Chamber's judgment in Hirst. However, the Grand Chamber resolutely reaffirmed the principles established in Hirst. In addition to that, in 2015 the Committee of Ministers adopted an interim resolution (CM/ResDH (2015)) and expressed concern that the UK had failed to comply with Hirst. The Committee of Ministers called upon the UK to continue to engage in a high-level dialogue to facilitate compliance with the judgment.

The prisoners' voting case is interesting in the sense that it demonstrates for a human rights court, that justice and effectiveness are related. Indeed, as the author says, "the experience of the European Court in these cases indicates that pragmatic but unprincipled stands in response to political pressure pose the risk of undermining the compliance pull of a human rights court's decisions" (p. 113).

In Chapter V, Alexandra Huneeus raises the issue of coincidence or collision when the work of two or more international courts interacts with the same domestic actors over the same policy matters. The legitimacy and jurisdictional overlap of the International criminal court and the Inter-American Court in Colombia is the focus of chapter V. The author takes the examples of the Inter-American Court of human rights (IACHR) and the ICC in order to show that their works are not separated but tend on the contrary to converge (referring to the Colombian peace process as an example p. 118). The Colombian Peace process show us an example of an important phenomenon: "one or more international courts interacting with the same state over the same policy area" (p. 141). Indeed, this example demonstrates "how international courts with distinct mandates can converge on similar goals and work as complements in similar policy areas, enhancing their mutual influence and legitimacy." By referring to this example, the author also suggests that "the coupling of court power holds risks in the sense that their interaction can lead to judicial effects beyond what the state committed to in submitting to the jurisdiction of each" (p. 141).

In Chapter VI, Marck A. Pollack provides a very useful analysis of the legitimacy of the European Court of Justice (ECJ). In this chapter, the author analyzes "both normative debates and empirical evidence" about the legitimacy of the ECJ. In this very detailed chapter divided in four parts, the author gives the reader a basic theoretical framework, by defining legitimacy and distinguishing its two variants: normative and sociological variants (part I). In the second part, the normative legitimacy of the ECJ is examined and the author does that by identifying and applying three criteria for international court legitimacy: "that courts should be fair and unbiased, that their rulings should be politically acceptable and legally sound, and that they should operate openly and transparently" (p. 147). In the third part of the chapter, the author focuses on the sociological legitimacy of the ECJ among its audience. Here the author argues that the public support "has decreased in the past decade, as the Court has been caught up in a broader crisis of EU legitimacy". In the fourth section, the author argues the Court, faces "normative criticism and lower levels of public support than in the past".

Chapter VII completes the volume with a discussion on the International Tribunal for the Law of the Sea (ITLOS). Here, Anastasia Telesetsky examines why the International Tribunal for the Law of the Sea has not been chosen by many states as the judicial forum of choice for disputes relating to marine matters. By referring to this particular tribunal, the author starts by exploring the legitimacy challenges associated with the limited number of states actively

supporting ITLOS's operations and the lack of compliance with orders which explains why ITLOS is "frequently positioned to be the bridesmaid but not the bride when it comes to settling marine disputes". Indeed, the author assesses that "without ongoing support from state parties who indicate willingness to submit a matter to the tribunal and in light of competition with the ICJ for the same cases and institutional financing challenges, the sustainability of ITLOS as an international judicial institution is jeopardized" (p. 184). In addition to the lack of general consent, there is the problem of the willful disregard of ITLOS decisions which is potentially delegitimizing for the Court. The author goes on to explaining how ITLOS judges are working through their provisional orders and judgments in order to improve perceptions of ITLOS as a legitimate judicial body even though it is a young judicial institution (p. 187). She foreshadows future challenges regarding ITLOS's authority in interpreting the Law of the Sea due to its competition with the ICJ's cases (p. 206).

In chapter VIII, Joost Pauwelyn focuses on the choice of individuals who decide disputes, taking as a case study two particular courts: the World Trade Organization (WTO) and the Investor-state dispute settlement (ISDS). Indeed, the author shows that these two particular international tribunals not only decide matters, but "play a role also more broadly as evidence of the sources and limits of the legitimacy of the tribunal and the broader legal system within which the tribunal operates". The two courts taken as examples allow us to understand where WTO and ISDS source their legitimacy. The author does that "by striking differences between the pool of individuals deciding WTO as compared to ISDS disputes including their nationality, professional background, diversity, status, and ideology". What is interesting in this chapter is that the author points out why WTO adjudicators are different from ISDS arbitrators. As the author says, differences between WTO panelists and ISDS arbitrators "can be rationally explained and are key determinant of the legitimacy capital of the respective dispute settlement regimes" (p. 233).

Chapter IX gives us an interesting example of the misunderstanding of what an international court can possibly deliver. Andrea K. Bjorklund takes the example of the International Centre for Settlement of Investment Disputes (ICSID) to lighten the criticism that affects investment law generally. In order to do that, the author explores two approaches to legitimacy, first factors related to normative legitimacy and second factors related to sociological legitimacy. The author goes on with legitimacy critiques that have been raised at investment arbitration to insulate both their normative and sociological elements. These legitimacy critiques will be then revisited by the author in light of ICSID's features and limitations such as the fact, on the one hand, that for ICSID Convention tribunals, there is no standing or even quasi-standing tribunal of individuals who will sit on arbitral tribunals. On the other hand, no single treaty is being interpreted (p. 271). In another section the author concentrates on ICSID to analyze key decisions in its design on which its internal operations are built. In a final part, the author concludes by assessing whether and how ICSID can be separated from the criticisms raised at investment law more broadly. She concludes by trying to demonstrate that there is a shift in expectations and standards over time, a shift that can be explained by the fact that "as investment treaty arbitration is maturing, both normative and sociological legitimacy concerns are increasing" (p. 281).

In Chapter X, Geir Ulfstein discusses the legitimacy of the human rights treaty bodies' court-like function of deciding cases on individual complaints. The author starts by discussing legitimacy standards proposed for international courts as adapted to the human rights treaty bodies in their function of resolving claims for individuals. The author, in this chapter, examines the legitimacy of the human rights treaty bodies in relation to their composition (p. 287), then discusses their procedures (p. 289), their substantive decision making (p. 290), the effectiveness of human rights treaty bodies (p. 293) and accountability (p. 300). According

to him, "human rights treaty bodies serve the same functions as formal international courts and tribunals in interpreting and applying international law in complaints against states parties but four particular features of the treaty bodies stand out in a legitimacy context: the scope of their function, which is the protection of human rights, the overload of cases that represent a serious problem that may only be alleviated by administrative improvements and increased resources" (p. 303), the nonbinding character of the treaty bodies' findings that has "negative effects on the possibility to obtain compliance and is thereby threatening effectiveness as an aspect of legitimacy" (p. 303) and finally the combination of the dispute settlement function of the treaty bodies with their other functions which may raise additional legitimacy issues (p. 304).

In Chapter XI, Andreas Follesdal brings into question the link made by scholars between democratic theory and the legitimacy of international courts. According to him, there is a misuse of the term "democracy" by scholars. This can be explained by the fact that their proposals rarely raised the issue of standards or institutions unique to democratic governance. Even though reforms coming from those critiques are susceptible to value the legitimacy of international courts, they scarcely recommend standards or institutions unique to democratic governance. The author goes on to say that while transparency, accountability and participation are often, but not always, advantageous, they can be worthy to champion democracy. The author states that scholars, in order to enhance our understanding, should make a distinction between democratic institutions of decision-making, the normative principles that justify those institutions, and important features of those institutions that contribute to their justification. He argues that calls for democratization are better interpreted as suggestions for the constitutionalisation of the combination of international and domestic laws constituting a 'Global Basic Structure.' The particularity of this chapter is that the author considers only the claims concerning democratization made within recent insightful contributions by von Bogdandy and Venzke, Buchanan and Keohane, Grainne de Burca and Nienke Grossman. The authors considered "do not call for democratic legitimation of ICs according to the first sense of democracy-increasing direct or indirect electoral majoritarian control on the basis of prior deliberation" (p. 337). On the basis of their claims, the focus of this chapter is to evaluate and ameliorate some suggestions aimed at applying normative standards concerning democracy, standards, initially formulated to assess domestic institutions.

In Chapter XII, Mortimer N. S. Sellers considers whether democracy plays a role in measuring or advancing the legitimacy of international courts. The author makes ten primary points from which he questions the utility of linking democracy and legitimacy. According to him, democracy has little to do with legitimacy because it has little to do with justice. He assesses that "democracy plays at best an indirect and supporting role in measuring or advancing the legitimacy of international courts and tribunals" (p. 352). Concerning democracy, the author adds that it has the potential to threaten judicial independence and impartiality and thereby their legitimacy. On the other hand, "Democratic practices and procedures legitimate international courts only to the extent that they advance the purposes that justify international courts in the first instance".

Chapter XIII focuses on the link between judicial legitimacy and judicial effectiveness of international courts and examines their "undermining attributes". In part II of this chapter, Yuval Shany discusses the notion of judicial legitimacy and judicial effectiveness and explores "their common constitutive elements". According to Yuval Shany, concepts of judicial legitimacy and judicial effectiveness are not unrelated. Indeed, "legitimacy is one of the strategic assets that courts may deploy to increase their effectiveness, and effectiveness can be a legitimacy-enhancing factor" (p. 370). In addition to that, a difference between judicial outcomes and litigants' preferences would lead to a sociological delegitimization of the court. Finally,

the author assesses that an international court that is not perceived as effective might not obtain the support resources it needs and its judgments may not be complied with.

With the growth of international courts and tribunals, the perceived legitimacy of international courts and tribunals has become paramount. However, the link between an international court's authority and the concept of legitimacy still needs to be addressed comprehensively. The authors discuss these issues but leave us wanting a more thorough examination. By and large, issues of justified authority require a high degree of certainty. More work is needed in the field of comparative international courts. What can international court reformers learn from each other's experience? In addition to that, in several chapters (IX–XI), authors position themselves from other scholars' claims, but if authors are comfortable with it, readers might benefit from a more thorough positioning of the authors' arguments within the wider relevant literature. These points are however minor in an impressive and useful work.

The case studies are entertaining as well as enlightening, and virtually any reader is likely to learn something new about the international court's legitimacy and more particularly about the whys and wherefores of legitimacy. This thoroughly researched and well-written book guides the reader through the complexities of the legitimacy of international courts and tribunals. Indeed, one of the key strengths of this book is the depth of analysis of a wide range of issues relating to the legitimacy of particular courts, which can be of an immense utility for those studying international courts. The cases are thoroughly analyzed and their relevance across different issues is highlighted.

'Legitimacy and international courts' provides a unique examination of the risks of a misinterpretation of the notion of legitimacy and the impact that this may have on international courts and tribunals and the law they interpret and apply. It allows us to understand that greater legitimacy allows international courts and tribunals to assert their authority.

The book tells us more about the different types of legitimacy, depending on the particular characteristics of international courts. Experts improve our understanding of what legitimacy is and how it applies to international courts. This book gives the reader the opportunity to consider the legitimacy of international courts from a comparative perspective.

In order to give the reader a solid understanding of what reinforces and what weakens the legitimacy of international courts and tribunals, a set of scholars that have studied courts and tribunals and that are academics, practitioners, government officials and judges from several countries and institutions, bring a range of different methodologies as well as a range of perspectives.

This book will benefit both scholars and practitioners alike, especially those who practice at or study international courts and tribunals.

Competing Interests

The author has no competing interests to declare.

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