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# Introduction: Legitimacy and International Courts

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## INTRODUCTION: LEGITIMACY AND INTERNATIONAL COURTS<sup>1</sup>

### 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>2</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), 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. Instead, they shape and promote specific normative regimes like international investment, human rights, humanitarian 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>3</sup> Decisions are frequently used as focal points in driving domestic and international political debates.<sup>4</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 should a state 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 non-governmental 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

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<sup>1</sup> First drafts of the chapters in this volume were presented and discussed at a conference in September 2014, in a joint conference sponsored by the University of Baltimore School of Law and the University of Oslo's PluriCourts conference, in honor of the University of Baltimore School of Law's Center for International and Comparative Law's 20th anniversary. Drafts were then edited and revised in preparation for publication. This Introduction was co-authored by Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman, and Geir Ulfstein, co-editors of the volume.

<sup>2</sup> K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014), p. 3-4.

<sup>3</sup> See N. Grossman, 'The Normative Legitimacy of International Courts', *Temple Law Review* 86 (2013), 68-72.

<sup>4</sup> H. Cohen, 'Theorizing Precedent in International Law', in A. Bianchi et al. (eds.), *Interpretation in International Law* (Oxford University Press, 2015) p. 268-289; 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 University Press, 2015) p. 172-194.

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 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 volume examines what underpins and undermines legitimacy, or the justification of authority, of international courts and tribunals. 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 from 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 Introduction surveys some of the key contributions of this volume and distills some of the lessons of its varied chapters for the legitimacy of international courts. Parts II and III are largely conceptual in approach, exploring what legitimacy means for each and all of the courts. Part 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. Part III looks more closely at the chapters in this volume and explores their contributions to the discussions above, as well as their lessons regarding the relationship between sociological and normative legitimacy.

Part 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 volume's chapters to either support or undermine an international court's sociological or normative legitimacy. Part 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>5</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 pre-defined standards, sociological legitimacy derives from *perceptions or beliefs* that an institution has such a right to rule.<sup>6</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>7</sup>

‘Legitimacy capital’ may increase or decline over time.<sup>8</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>9</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>10</sup>

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<sup>5</sup> D. 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 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), 603-604; 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 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* (Palgrave Macmillan, 2007) pp. 211-228.

<sup>6</sup> See, e.g., Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’, *Ethics and International Affairs* 20 (2006), 405.

<sup>7</sup> Mark A. Pollack (in this volume), citing Ian Hurd, ‘Legitimacy and Authority in International Politics’, *Int’l Org.* 53 (1999), 379, 381; see also Nienke Grossman, ‘Legitimacy and International Adjudicative Bodies’, *George Washington International Law Review* 41 (2009), 117.

<sup>8</sup> See Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014), p. 145-47.

<sup>9</sup> See, e.g., Joost Pauwelyn, in this volume, citing Joseph 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>10</sup> Mark A. Pollack, in this volume, citing Yonatan Lupu, ‘International Judicial Legitimacy: Lessons from National Courts’, *Theoretical Inq. L.* 14 (2013), 440-42. The canonical origin of the terms is David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965).

Considerations and concerns about legitimacy can be usefully split up into source-, process- and result-oriented factors.<sup>11</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>12</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>13</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 non-state stakeholders, such as civil society in non-democratic states, or transnational groups, as well as that of states.

As regards 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>14</sup> In recent years, and as discussed below, questions have been raised about who those relevant parties may be and what kinds of procedural rights they should be afforded.<sup>15</sup>

Finally, result-oriented factors concern how well the international court performs its ‘functions,’ 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>16</sup> A second form of performance factors pertains to how well ICs contribute to the solving the problems 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

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<sup>11</sup> Rüdiger Wolfrum, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’, in *Legitimacy in International Law* (Rüdiger Wolfrum & Volker Röben eds., 2008), p. 6.

<sup>12</sup> Jan Klabbers, ‘Setting the Scene’, in J. Klabbers et al. (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009), p. 39; L. H. Meyer & P. Sanklecha, ‘Introduction’, in L.H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009), p. 3-4; D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *American Journal of International Law* 93 (1999), 596, 597, 605; Buchanan & Keohane, above note 6, 412–13.

<sup>13</sup> D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, *American Journal of International Law* 93 (1999), 605.

<sup>14</sup> See T. M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995), p. 7 (discussing both procedural and substantive fairness); Bodansky, above note 13, 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>15</sup> See, e.g., Grossman, ‘The Normative Legitimacy of International Courts’, *Temple Law Review* 86 (2013), 82.

<sup>16</sup> M. 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, Oxford University Press, 2014), pp. 464-482; A. v. Bogdandy & I. Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* (Oxford: Oxford University Press, 2014); Alter *The New Terrain of International Law: Courts Politics, Rights* (Princeton University Press 2014) p. 10-13.

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>17</sup>

## **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 better to act in accordance with rules that bind it independently.<sup>18</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>19</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>20</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>21</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>22</sup> To the extent 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>23</sup> Likewise, authors who address the legitimacy deficits of ICs propose their 'democratization,' by which the authors often mean to increase their transparency, accountability or participation by various parties.<sup>24</sup> At the same time, such calls for democratization should give pause, since 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

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<sup>17</sup> A. M. Burley & W. Mattli, 'Europe before the Court: A Political Theory of Legal Integration', *International Organization* 47 (1993), 41-76.

<sup>18</sup> J. Raz, *The Morality of Freedom* (Oxford University Press, 1986), p. 47, 53.

<sup>19</sup> A. Buchanan & R. O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics and International Affairs* 20 (2006) 405-437.

<sup>20</sup> N. Grossman, 'The Normative Legitimacy of International Courts', *Temple Law Review* 86 (2013), 100.

<sup>21</sup> *Ibid.*, 101.

<sup>22</sup> T. Pogge, 'The Role of International Law in Reproducing Massive Poverty', in S. Besson & J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), p. 417-435.

<sup>23</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 Issue 3 (2006), 533-62.

<sup>24</sup> A. v. Bogdandy & I. Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* (Oxford University Press, 2014).

secure more equitable representation of the population, such as calls for more women and minorities as judges of ICs.<sup>25</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>26</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>27</sup> A third set of recommendations call for more transparency, accountability and participation concerning ICs.<sup>28</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 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>29</sup> Goals might also, however, be articulated by non-mandate 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 wide spread non-compliance 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, non-compliance 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 upon 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.

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<sup>25</sup> Grossman, ‘Achieving Sex Representative International Court Benches’, *American Journal of International Law* 110 (2016), 82.

<sup>26</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>27</sup> Y. Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’, *American Journal of International Law* 106 (2012), 241.

<sup>28</sup> Grossman, ‘The Normative Legitimacy of International Courts’, 61-105; A. Buchanan & R. O. Keohane, ‘The Legitimacy of Global Governance Institutions’, *Ethics and International Affairs* 20 (2006), 405-437.

<sup>29</sup> Y. Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’, 241.

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

As the next sections of this Introduction show, this volume significantly deepens our understanding of (A) the factors driving sociological legitimacy, as well as interactions between normative and sociological legitimacy, and (B) 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 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 volume 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 Pollack's** chapter demonstrates, 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 Bjorklund** argues 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. ICSID proponents 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 from her case study of the involvement of the International Criminal Court and the Inter-American Court of Human Rights 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 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 heightens the sociological legitimacy of both courts, although it may also represent an expansion of its mandate, which would be inconsistent with its normative legitimacy.

**Nienke Grossman's** chapter suggests that when the International Court of Justice appears to 'split the baby' with little deference to the governing law, it may threaten its legitimacy by exceeding the scope of authority granted by states in its governing statute. She also proposes that

such judgments are inherently unfair, and therefore a threat to legitimacy, because they grant the more legally meritorious party less than the law provides. She invokes Joseph Raz's service conception of authority to argue that a subset of Solomonian judgments may result in a failure to assist states in better complying with the governing law than they would in the Court's absence. This constitutes another threat to its legitimacy.<sup>30</sup> She considers the impact of perceptions of Solomonism on the Court's sociological legitimacy as well.

**Geir Ulfstein** considers challenges to the normative legitimacy of the United Nations human rights treaty bodies with respect to their court-like function of ruling on the merits of individual petitions. He proposes that legitimacy for these bodies requires (1) independent, impartial and highly competent treaty body members, (2) application of procedures that allow both parties to be heard and ensure that relevant facts are taken into account, (3) respect for the legal mandate established in their constitutive instruments, (4) effectiveness, and (5) accountability to international and national organs. Treaty bodies possess unique features which complicate the legitimacy analysis, such as their emphasis on the protection of human rights, their ever-growing caseload, the non-binding nature of their decisions, and their ability to produce state reports and General Comments, in addition to responding to individual complaints.

## **B. Legitimacy and Substantive Outcomes**

As discussed in Part II, normative legitimacy has been linked to justice, democracy, and effectiveness. Perceptions of justice, democracy, and effectiveness may also affect sociological legitimacy. While relationships between these concepts and legitimacy are found in existing literature, this volume adds new insights by considering these topics in relation to international courts as a whole and with reference to specific international courts.

### **1. Legitimacy and Justice**

In this volume, **Molly Land** examines the relationship and tensions between doing justice and legitimacy on the European Court of Human Rights, through the lens of prisoner voting rights cases. She proposes that justice is an aspect of normative legitimacy, like legality, and considers the extent to which just decision-making affects perceptions of legitimacy. Land defines 'just outcomes' as those that 'expand human rights protection,' especially for society's most vulnerable people. She argues that the prisoner voting cases show two ways in which the pursuit of justice can enhance the legitimacy of a court: (1) legitimacy can increase when compliance constituencies consider its decisions just, and (2) even when decisions may conflict with national policy preferences, a robust domestic human rights culture raises the costs of non-compliance. So long as the Court appears to be a moral actor, dissonance between domestic policy and the court's decisions may ultimately promote compliance and bolster legitimacy. Also, pursuing just outcomes may be less risky and more legitimacy-enhancing for mature courts, like the European Court of Human Rights, because they already possess general legitimacy. Yet, courts that issue decisions with domestic political consequences must be conscious that they may meet with resistance if they are perceived to be overreaching by doing justice. While a court must be sensitive to domestic political concerns, however, the prisoner voting rights cases suggest that too much deference may undermine the compliance pull of a court's decisions.

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<sup>30</sup> J. Raz, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006), 1003-1044.

For **Mortimer Sellers**, justice is the linchpin of legitimacy. He defines legitimacy as ‘the status of being correct according to some external standard’ or in light of ‘the most *appropriate* standard for evaluating the practice in question.’ While a court that is ‘actually legitimate’ fulfills such standards, for ‘sociologically legitimate’ courts, subjects are persuaded to act as if a rule or institution is legitimate. The extent to which a law or legal institutions secure or advance justice provides the standard for measuring actual legitimacy. Thus, actually legitimate courts advance justice, while sociologically legitimate courts are believed to do so.

**Margaret de Guzman**, as discussed further below, examines the International Criminal Court’s failure to prioritize explicitly between global and local justice concerns as potentially affecting the Court’s legitimacy.

## **2. Legitimacy and Democracy**

**Andreas Follesdal’s** contribution raises doubts about the link that many scholars have made between democratic theory and the legitimacy of international courts. Follesdal suggests that scholars misuse the term ‘democracy’ because their proposals are seldom about standards or institutions unique to democratic governance. While reform proposals emanating from these critiques may enhance the legitimacy of international courts, they rarely recommend standards or institutions unique to democratic governance. While transparency, accountability and participation are often, but not always, beneficial, they can be valuable even when they do not advance democracy. To deepen our understanding about legitimacy and these ideals, legitimacy scholars should distinguish between democratic institutions of decision-making, the normative principles that justify those institutions, and important features of those institutions that contribute to their justification. Follesdal suggests that calls for democratization are better understood as suggestions for constitutionalization of the combination of international and domestic law constituting a ‘Global Basic Structure.’ A global constitutionalist perspective helps address contested issues concerning the functions of constitutions: to create, curb and channel the use of institutions, and specify rules for changing *de facto* constitutions. Further, it provides a normative justification that also provides reasons for valuing democracy: institutions deferred to must treat all people with the respect owed political equals.

**Sellers**, too, questions the utility and theoretical consistency of linking democracy and legitimacy. Democracy, in his view, has little to do with legitimacy, because it has little to do with justice. Instead, democracy has the potential to threaten judicial independence and impartiality, and thereby legitimacy. On the other hand, the ‘illusion’ of democracy may indirectly buoy legitimacy by securing broader public support for judicial decisions legitimate on other grounds. It is purely instrumental in its relationship to legitimacy. Democratic practices and procedures legitimate international courts only to the extent that they advance the purposes that justify international courts in the first instance.

## **3. Legitimacy and Effectiveness**

In this volume, **Yuval Shany** proposes that legitimacy and effectiveness tend to operate in a mutually reinforcing manner, but can be mutually undermining. Legitimacy can help a court to be more effective, and effective courts may be considered more legitimate. In addition, he argues that judicial illegitimacy can produce ineffectiveness and vice versa. Sociological legitimacy – or perceptions of justified authority – may be particularly important in sustaining judicial effectiveness by inviting support and cooperation by relevant constituencies. Put otherwise, when states believe courts are legitimate, they are more likely to implement their decisions and to

provide them with resources. At the same time, legitimacy and effectiveness are not always unidirectional. For example, sometimes protecting the legitimacy of an international court may require the adoption of ineffective judicial decisions, and occasionally, effective judicial bodies are not legitimate. Shany concludes by pointing out that gaps between judicial outcomes and the preferences of courts' constituencies can result in sociological legitimacy.

**Margaret de Guzman** identifies and analyzes the importance of clear missions for international courts, questions the International Criminal Court's failure to prioritize between local and global justice, and suggests this lacuna affects both the effectiveness and legitimacy for the ICC. She proposes that existing theories of ICC legitimacy do not properly take into account ambiguities in the Court's goals and priorities. Without clearly defined objectives, the Court cannot be effective, and a limited capacity for effectiveness translates into dubious capacity for legitimacy. Consequently, clarifying and prioritizing the Court's goals with respect to global justice – the building of global norms to prescribe and prevent international crimes – and local justice – providing justice to victims of international crimes, can translate into strengthened legitimacy.

**Andrea Bjorklund** adds to the conversation by pointing out that a tribunal that actually resolves issues effectively may thereby reduce its normative legitimacy in the eyes of some critics. This may appear to be the case for the investment regime, which is criticized for impermissible infringements of state sovereignty.

#### **IV. The Legitimacy of International Courts in Context**

This volume not only makes contributions to the literature on sociological and normative legitimacy and their interaction, but also it raises new insights about the context in which these courts operate and its link to legitimacy. Many discussions of the legitimacy of international courts take place in the abstract, focusing on general principles of normative or sociological legitimacy that might apply to international adjudication generally. The accounts of specific international courts in this volume, informed by their authors' expertise in those courts' histories and affairs highlight a range of contextual factors that influence courts' respective legitimacy. The different courts have different normative goals, reflect different design choices, speak to different audiences, and inhabit different environments. These chapters describe the complex ways that these contextual elements interact with one another to either sustain or diminish the legitimacy of these various courts.

The full range of contextual elements that might be taken into account is too long to list here, but a general survey is useful. Some of these elements are beyond a particular court's or its designers' control; others reflect choices each must make in both designing and managing a particular court.

##### **A. Types of Contextual Elements**

###### **1. Normative Goals**

Different international courts will operate with a focus on different normative goals such as dispute resolution, rule development, and substantive justice. A court might be charged with or see it itself as primarily concerned with *dispute settlement*—resolving discrete disputes between the parties, as opposed to development of a consistent and coherent normative regime. This might be an ad hoc exercise, an appeal to a neutral arbiter to divide some set of fought-over spoils in a manner acceptable to both parties, based on law or *ex aequo et bono*. For example,

Nienke Grossman suggests that the ICJ may, at times, be engaged in this model of dispute settlement when it issues Solomonic judgments seemingly detached from concrete norms.<sup>31</sup>

Sometimes though, courts or those appearing before them have broader aspirations than resolving a single case. They may be engaged instead in *rule development*, using discrete disputes to help clarify ambiguities in a legal regime, providing guidance and predictability to regime actors. For example, ITLOS is involved in more than just the settlement of a particular dispute; it is involved in developing law of the sea rules more broadly. The creation of a permanent WTO Appellate Body and the development of compulsory jurisdiction were arguably efforts at achieving similar goals for trade law.

A third possible goal for an international court might be substantive *justice*. This can take a variety of forms even for a particular tribunal. It might be justice as defined by the values of a particular regime. For Molly Land, a desire to achieve justice explains and underpins the ECtHR's adoption of expansive, rather than minimalist, readings of the rights it is tasked with protecting.<sup>32</sup> This form of justice is largely prospective, aimed at making each state under its supervision a little more just in the future. For the ICC, justice is retrospective or restorative, designed to remedy past wrongs. Still, as Margaret de Guzman describes, the ICC faces choices between local and global justice.<sup>33</sup>

Of course, the lines between these different goals are fuzzy; specific courts may embrace multiple or all of these goals simultaneously or over time, depending on the specifics of the case before them. Resolving disputes by applying the law may provide justice to the party in the right. It may also help develop the rules, providing certainty, predictability and guidance. Various actors—members of a court, litigants, stakeholders—may also disagree on the normative goals for particular courts. But as will be discussed below, matching up expectations about those goals with other features of a particular court may be important in determining whether it will possess normative or sociological legitimacy.

## **2. Design Choices**

Myriad choices face those designing or seeking to reform a particular international court or tribunal. These choices include structure, personnel, case initiation, procedures, and effect, among others. For example, will the court be embedded within a particular international regime<sup>34</sup> as the WTO-DSB is within the trade regime, ITLOS is within the law of the sea convention, or human rights courts and bodies are within particular human rights treaties or will it be independent of any particular regime as in the case of the ICJ? Embeddedness itself can take a range of forms—a court's jurisdiction could be limited to a specific treaty or treaties or limited in the sources or rules it can apply. Additionally or alternatively, a court could be embedded within particular institutional structures, establishing relationships between the court and other bodies that may support it, monitor it, or hold it accountable.<sup>35</sup> As Joost Pauwelyn suggests, it may be

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<sup>31</sup> Grossman (in this volume).

<sup>32</sup> Land (in this volume).

<sup>33</sup> DeGuzman (in this volume).

<sup>34</sup> A regime is defined here as a set of “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.” S. D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in S. Krasner (ed.), *International Regimes* (Cornell University Press, 1983), p. 1, 185.

<sup>35</sup> For example, the ECtHR and WTO-DSB are both limited in their jurisdiction and embedded within an institutional structure that supports and oversees it. The ICJ is open to disputes arising under a range of treaties and regimes, limited only by the agreements of the parties, and except where otherwise agreed, applies the general sources of

the panels' deep embeddedness within a broader set of institutional structures at the WTO that allows it to use largely non-lawyer panelists.<sup>36</sup> Will an adjudicative body be a permanent body with a set group of judges like the ICJ or WTO AB or a system for setting up ad hoc tribunals like ICSID or WTO panels? Who will make the decisions—will the court have professional judges or other types of experts? What credentials will be required?

How will cases come to the court? Will jurisdiction be compulsory, optional, or something in between? As Anastasia Telesetsky explains, ITLOS has compulsory jurisdiction over prompt release cases, but only optional jurisdiction over maritime delimitation cases.<sup>37</sup> Prompt release cases may function like free samples designed to convince states to opt for ITLOS in other cases.<sup>38</sup> ITLOS may on the flipside have some discretion whether to issue advisory opinions.<sup>39</sup> Who can initiate cases—state parties as in the WTO, ITLOS, or ICJ, national courts as with the ECJ, private parties as in ICSID or human rights courts and bodies, or a prosecutor, as in the case of the ICC?

When it comes to procedural choices, will there be oral arguments or will the case be solely on the written record as with most human rights treaty bodies? What role will non-parties play in the proceedings, whether victims of crimes, amicus curiae state, amicus curiae NGOs? These are questions that the various bodies—the ICC, the WTO dispute settlement system, ICSID arbitrations continue to struggle with.

Court designers must consider the effects of a body's decisions. For example, will the decisions of a particular court or tribunal be binding or non-binding? How much precedential effect will decisions in one case have for future similar ones? The ICJ Statute gives prior decisions little more than persuasive authority; in practice, the court itself may give its own decision greater weight.<sup>40</sup> The WTO AB has interpreted the Dispute Settlement Understanding to create at least vertical *stare decisis*—in the AB's view, WTO panels must follow AB decisions.<sup>41</sup> ICSID arbitrators and advocates have appealed to a loose *jurisprudence constante*.<sup>42</sup> And the Rome Statute specifies that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions.'<sup>43</sup> What methods of enforcement will be available to a particular court or tribunal—the power to order particular interim or final measures, questions that have arisen for the ICJ, ITLOS, and the Human Rights Committee; enforcement by a Council of Ministers like the ECJ and the Committee of Ministers for the EtCHR; appeal to the UN Security Council like the ICJ?

These are, of course, only a small sampling of the design choices that international courts might exhibit. As will be discussed below, the legitimacy of specific international courts and tribunals will often depend on how well these choices are aligned with other aspects of a court's context.

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international law. The ICJ is nonetheless embedded within the institutional structure of the United Nations, issuing advisory opinions at the request of UN bodies and looking to the Security Council for enforcement of its decisions.

<sup>36</sup> Pauwelyn (in this volume).

<sup>37</sup> Telesetsky (in this volume).

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> M. Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996).

<sup>41</sup> See H. Cohen, 'Theorizing Precedent in International Law'; M. Crowley and R. Howse, 'US–Stainless Steel (Mexico),' *World Trade Review* 9 (2010), 122-4.

<sup>42</sup> Bjorklund (in this volume).

<sup>43</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998), 2187 UNTS 90, Art. 21.2.

### **3. Audiences**

The courts in this study also highlight the various audiences to which any particular court or tribunal will speak. These audiences might be the litigants in a particular case or the other participants in a particular legal regime more generally. The ICJ, argues Nienke Grossman, by both its title and statute, speaks to the broader community subject to international law.<sup>44</sup> Its legitimacy, she argues, is at least partly derived from its ability to help other actors beyond the litigants in a specific case discern lawful from unlawful actions.<sup>45</sup> Solomonic judgments trade legitimacy with that audience for what the court perceives (wrongly in Grossman's view) will be viewed as legitimate by the specific litigants before it.<sup>46</sup> Concerns about ICSID's legitimacy, Andrea Bjorklund suggests, have tracked shifts in the practical audiences for ICSID decisions.<sup>47</sup> ICSID's designers made choices designed to legitimate decisions with discrete litigants who had directly agreed to arbitration in contracts or concession agreements.<sup>48</sup> The rapid multiplication of Bilateral Investment Treaties, the consequent widening of access to arbitration, and the range of public policies now challengeable before ICSID panels, however, has broadened interest in ICSID panel decision and required ICSID and ICSID arbitrators to legitimate their decisions to a much broader audience.<sup>49</sup> The design features chosen to guarantee equality of arms and fair proceeding may be insufficient to do so.

This hints at another distinction between audiences. The audiences may be technical, professional audiences or they may be much broader, including the public at large. Audience may include trade diplomats, the elite investment law bar, foreign ministries, national court judges, transnational advocacy networks, or domestic publics at large. The court may be speaking primarily to regime insiders—Joost Pauwelyn suggests that this had long been the case within the trade law.<sup>50</sup> To the extent the issues they decide remain of low salience to those outside the regime, legitimacy with those insiders may be sufficient. If, on the other hand, those issues become salient to broader populations, as in the case of felon disenfranchisement laws described in Molly Land's chapter on the ECtHR,<sup>51</sup> a court may need to legitimate its decisions in different ways. Sometimes a court may choose to legitimate its decisions with a broader audience at the expense of a narrower one. This might be the strategy employed by human rights courts and bodies when they choose broader evolutive interpretations fought by state parties. Or as Margaret de Guzman explains, an international criminal court like the ICC may choose global justice goals over local ones.<sup>52</sup> As a result, it may choose cases and procedures that legitimate its actions in global eyes, rather than local ones. It might, for example, choose to emphasize independence from local politics rather sensitivity to it.<sup>53</sup> As de Guzman suggests, achieving maximum legitimacy with both global and local audiences may be impossible.<sup>54</sup>

### **4. Institutional environment**

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<sup>44</sup> Grossman (in this volume).

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Bjorklund (in this volume)

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Pauwelyn (in this volume).

<sup>51</sup> Land (in this volume).

<sup>52</sup> DeGuzman (in this volume).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

Finally, international courts and tribunals do not operate in a vacuum. Instead, they exist within an ecosystem of courts, tribunals, and other international and domestic institutions, and their normative and sociological legitimacy may depend on finding the proper role to play within it. Some courts will be first movers, like the ICJ, providing the first real fora for particular disputes. Such courts may have a lot of room (and time) to establish their legitimacy. They will face a range of decisions about the scope of their jurisdiction, their procedures, and their methods of interpretation. As Yuval Shany explains, the right decisions can produce virtuous cycles where initial investments of ‘legitimacy capital’ translate into effectiveness; initial effectiveness bolsters legitimacy, and so on.<sup>55</sup> An older, successful court will, in turn, have legitimacy capital to expend. It may be able to take riskier decisions, perhaps ones that bolster legitimacy with some audience members at the expense of some others, without threatening its overall legitimacy.<sup>56</sup> The European Court of Rights, with its increasingly aggressive scrutiny of the states under its jurisdiction, may demonstrate that point.<sup>57</sup>

Other courts or tribunals may be latecomers, like ITLOS. As Anastasia Telesetsky explains, ITLOS has had to compete with the ICJ for jurisdiction in maritime boundary delimitation cases.<sup>58</sup> As the latecomer, ITLOS must give states reasons to choose it over the predictability that comes from the ICJ’s longer track record. As Telesetsky explains, ITLOS thus uses prompt release cases, over which it has exclusive jurisdiction, to make the argument to states that its decisions are particularly attentive to state consent.<sup>59</sup> Those cases thus become proving grounds for the tribunal’s legitimacy relative to other courts.

Overlapping jurisdiction may also create substantive regulatory competition between courts and tribunals. The divergent logics of international criminal law and the traditional rules of state responsibility may pit the ICTY against the ICJ.<sup>60</sup> The competing logics of liberalized trade and human rights may pit the WTO against UN human rights bodies. In these cases, overlapping jurisdiction risks disorder, highlights the limits of specific tribunals’ logics and mandates, and demonstrates the limits of their effectiveness, all of which in turn may threaten their perceived legitimacy with both outsiders and insiders. Disagreement over the content of international law may undermine any and all tribunals’ claim to legitimate authority to interpret it.

In other situations, overlapping jurisdiction may be mutually reinforcing. Alexandra Huneeus tells the story of the ICC and Inter-American Court of Human Rights’ interaction in Columbia.<sup>61</sup> In that case, overlapping jurisdiction has allowed each to borrow, reference, and appeal to the complementary work of the other, strengthening the authority and sociological legitimacy of each, so much so, that their normative legitimacy may now be in question.<sup>62</sup>

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<sup>55</sup> Shany (in this volume).

<sup>56</sup> *Ibid.*

<sup>57</sup> *See* Land (in this volume).

<sup>58</sup> Telesetsky (in this volume).

<sup>59</sup> *Ibid.*

<sup>60</sup> Compare *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment in the Appeals Chamber, ¶¶ 115-45 (July 15, 1999) (rejecting the ICJ’s “effective control” test) *with* Application of the Convention on the Prevention and Punishment of the Crime of Genocide ¶ 223 (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf>, ¶ 406 (reasserting the “effective control” test after *Tadic*).

<sup>61</sup> Huneeus (in this volume).

<sup>62</sup> *Ibid.*

**Table 1. Factors Relevant to IC Legitimacy**

<b>Normative Goals</b>	<b>Design Choices</b>	<b>Audience</b>	<b>Environment</b>
<ul style="list-style-type: none"> <li>• Dispute Settlement               <ul style="list-style-type: none"> <li>○ Ad Hoc</li> <li>○ Rule-based</li> </ul> </li> <li>• Rule/Regime               <ul style="list-style-type: none"> <li>○ Development</li> <li>○ Justice                   <ul style="list-style-type: none"> <li>▪ Global</li> <li>▪ Local</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Structure               <ul style="list-style-type: none"> <li>○ Regime Dependent or Independent?</li> </ul> </li> <li>• Personnel               <ul style="list-style-type: none"> <li>○ Permanent or Ad Hoc?</li> </ul> </li> <li>• Adjudicators               <ul style="list-style-type: none"> <li>○ Method of Appointment</li> <li>○ Credentials</li> </ul> </li> <li>• Case Initiation               <ul style="list-style-type: none"> <li>○ Compulsory or Ad Hoc Jurisdiction?</li> <li>○ States</li> <li>○ Supervisory Body (Commission, Security Council, etc.)</li> <li>○ Prosecutor</li> <li>○ Investors</li> <li>○ Individuals</li> </ul> </li> <li>• Procedures               <ul style="list-style-type: none"> <li>○ Public or Closed?</li> <li>○ Written submissions</li> <li>○ Oral arguments</li> <li>○ Participation by:                   <ul style="list-style-type: none"> <li>▪ Interested third parties</li> <li>▪ Amici</li> <li>▪ Victims</li> </ul> </li> </ul> </li> <li>• Effect               <ul style="list-style-type: none"> <li>○ Binding?</li> <li>○ Precedential?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• State Parties</li> <li>• Bureaucrats               <ul style="list-style-type: none"> <li>○ Trade Diplomats</li> <li>○ Foreign Ministries</li> <li>○ National Judges</li> </ul> </li> <li>• Professional Bar</li> <li>• Investors</li> <li>• Transnational Advocacy Networks</li> <li>• General Public               <ul style="list-style-type: none"> <li>○ Global</li> <li>○ Local</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Age of Tribunal</li> <li>• Availability of Other Fora</li> </ul>

## **B. Models of Interaction**

These numerous and varied contextual elements, summarized at Table 1 interact in complex ways to affect the legitimacy of international courts. For example, specific audiences at specific times are more or less likely to be interested in achieving particular normative goals or to view attempts at achieving those goals as desirable and legitimate. Achieving particular normative goals in a legitimate manner may require specific design choices—methods of

initiating disputes, types of adjudicators, processes of adjudication, or even substantive rules. A court's specific environment—whether it is a new or old court, whether it faces competition or not—may affect the relative legitimacy of its options, priorities, and opportunities. The chapters in this book help to illuminate a few of these different interactions and suggest avenues for further research.

The importance of these interactions becomes most obvious when these factors—normative goals, design features, audiences, and environments—end up misaligned, whether at the outset or as a result of changes to each over time. When that happens, the legitimacy of a particular international court may be brought into doubt. ICSID, as Andrea Bjorklund explains, was designed to provide dispute settlement services for discrete investment disputes between consenting parties, yet various treaties have thrust it into a different role, in which arbitrators are seemingly asked to sit in judgment over state public policy.<sup>63</sup> Whereas arbitrators once spoke only to states and investors, they now find themselves speaking to national publics as well. Procedures designed primarily to protect investors and to guarantee procedural fairness in discrete disputes may no longer seem legitimate for what may be seen by this new audience as a public law dispute.<sup>64</sup>

As Joost Pauwelyn recounts, the appointment of non-lawyer, insider, trade diplomats to the former GATT and now WTO dispute settlement panels may have been adequate when disputes were technical, and the audience was trade ministries. But when disputes pit trade against other concerns, for example, the environment or animal welfare, other stakeholders, suddenly interested in WTO dispute settlement, may deem the same arbitrators inadequate and illegitimate.<sup>65</sup> Nienke Grossman describes a different type of misalignment, one between a court's perceived and actual role.<sup>66</sup> Solomonic judgments divorced from relevant law may reflect the ICJ's judgment that its role is to divide entitlements such that both parties are equally pleased and displeased.<sup>67</sup> But as Grossman explains, Solomonic judgments conflict with ICJ's role as a court of justice, expected to apply and develop law.<sup>68</sup> The ICJ might be buying itself some limited sociological legitimacy (states continue to choose it over ITLOS, as Anastasia Telesetsky explains,<sup>69</sup> no doubt because states prefer the expected outcome), but in so doing, the ICJ undercuts its broader normative legitimacy.<sup>70</sup> In a sense, it may be argued, the ICJ's chosen audience conflicts with its broader structure, design, and mandate.

To protect both normative and sociological legitimacy, courts and their supporters must be cognizant of these relationships between contextual factors and work to keep these various elements aligned. Courts may have to make choices. They may not be able to be or do all things for all audiences. As Margaret de Guzman explains, legitimately providing global justice or local justice may require the ICC to choose to different procedures and strategies.<sup>71</sup>

### **1. Regime-embedded v. Regime-independent tribunals**

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<sup>63</sup> Bjorklund (in this volume).

<sup>64</sup> Ibid.

<sup>65</sup> Pauwelyn (in this volume).

<sup>66</sup> Grossman (in this volume).

<sup>67</sup> Cf. E. A. Posner and J. C. Yoo, 'Judicial Independence in International Tribunals', *California Law Review* 93 (2005), 1, 17-18.

<sup>68</sup> Ibid.

<sup>69</sup> Telesetsky (in this volume).

<sup>70</sup> Grossman (in this volume).

<sup>71</sup> DeGuzman (in this volume).

One set of interactions with importance for questions of legitimacy revolves around the choice whether to embed a court or tribunal within a particular regime or whether set it up as independent of any particular regime.<sup>72</sup> Examples of the former (regime-specific courts) in the book include the WTO DSU, ITLOS, European Court of Justice, European and Inter-American Courts of Human Rights, and UN Human Rights Committee, established pursuant to and as part of the WTO, United Nations Convention on the Law of the Sea (UNCLOS), the European Union, ECHR and American Convention on Human Rights, and International Covenant on Civil and Political Rights, respectively. Examples of the latter (regime-neutral courts) include the ICJ and ICSID, neither of which is tied to a specific set of substantive laws. Instead, each is available to help decide disputes arising under a range of treaties or laws when relevant parties so choose. The chapters suggest that the choice between these two models has significant implications for these courts' respective legitimacy. The choice acts as a key organizing principle dictating how other contextual elements are or will need to be aligned.

At the most basic level, the chapters in the book help illuminate why IC designers might tie an IC more or less closely to a particular regime. Regime-specific courts cater most effectively to repeat-players who operate regularly under the shadow of the regime and court, and who seek, above all, predictable rules. The WTO-DSB might be an archetype of such a regime-specific court. GATT members explicitly moved to a model of compulsory jurisdiction and a permanent Appellate Body in the hopes that WTO-DSB would help develop clearer, more predictable rules for international trade. The ECtHR's move towards compulsory jurisdiction can be described in much the same way, as an attempt to develop clear, generally applicable rules of European human rights that can provide state parties, their legislatures, and their courts, all of whom are repeat players with regards to human rights, with forward-looking guidance. Regime-specific courts help achieve these goals through relative insulation from other areas of international law. Designed to develop the laws of a particular regime, their mandates often limit them to considering its rules, their meaning, and their objectives. The DSU limits on the jurisdiction of the WTO dispute settlement are a perfect example.<sup>73</sup>

Regime-neutral courts, on the other hand, make most sense when their primary consumers are not repeat players and the issues are ones that do not come up as often, particularly for that state. Fair dispute resolution, rather than rule development, is the primary goal sought by its consumers. Maritime boundary delimitation might be a typical example. Most states will have few of those disputes and may be less interested in the development of clear rules on the subject. Future cases may not be that relevant to them. Where states or other consumers are interested in prospective rule development, regime-neutral courts are more likely to put those rules in a broader context embedding them within the larger corpus of international law. Neither of these points should be overstated. When states delegate disputes under a particular treaty to the ICJ, for example, the Vienna Convention on Consular Relations, they undoubtedly hope that over time, the treaty's provisions may be clarified by a corpus of cases. That goal though seems secondary.

The choice between regime-specific and regime-neutral courts may also turn, to some extent, on the traditional rules-standards divide.<sup>74</sup> Regime-specific courts are useful where states

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<sup>72</sup> For the definition of regime, see above note 34.

<sup>73</sup> WTO Dispute Settlement Understanding, Article 3.2 provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

<sup>74</sup> P. J. Schlag, 'Rules and Standards', *UCLA Law Review* 33, (1985), 379.

or other actors can only agree on vague standards and hope to delegate rule development to other institutions. Human rights and trade, again, fit the bill. Where states or other actors choose more determinate rules designed to govern discrete interactions, ad hoc dispute resolution may be the more apt choice.

These insights have a number of implications for legitimacy. For one thing, these choices suggest specific chains of contextual factors that need to be aligned to support these courts' legitimacy. It suggests the connection of normative goals, for example, rule development, with specific structures like an embedded court and compulsory jurisdiction (to avoid fragmentation and conflicting interpretations), and a specific audience, usually regime insiders (though regime insiders may be a broad and numerous group in the case of a regime like human rights). It also suggests certain types of process and decision-making. To legitimately develop rules from specific cases for the broader regime, the courts' processes must allow for sufficient involvement or intervention by other regime participants, whether other states or amici. It may also suggest the need for proper accountability mechanisms, like democratic control or legislative overrides.

These legitimacy chains can also help explain conflicts over certain courts' legitimacy. As Andrea Bjorklund explains, ICSID was designed to legitimate resolutions of discrete disputes between parties in privity who had agreed on both the specific substantive rules governing their relationship—the contract—and the jurisdiction of a tribunal to resolve it.<sup>75</sup> Ad hoc, secretive, but procedurally fair dispute resolution may have been normatively and sociologically legitimate. But as the type and scope of disputes before ICSID tribunals has expanded through BITs and other agreements, this chain has broken.<sup>76</sup> To many, investment law looks like a de facto regime, and secretive, ad hoc dispute resolution no longer looks appropriate. Both arbitrators and advocates have sought greater consistency, predictability, transparency, and participation. But these moves only break the chain further. Based not on a single set of substantive rules, but a vast array of similar treaties and agreement, consistency, through forms of *stare decisis*, for example, may be illegitimate from the standpoint of legality or consent. They also may be illegitimate in the absence of effective review and accountability mechanisms. Annulment proceedings, sufficient accountability for ad hoc arbitration, may be too weak and too narrow to guarantee that rules develop in directions acceptable to investment law's swelling stakeholder ranks. It is those sorts of concerns that undergird the powers of NAFTA's Foreign Trade Commission and calls for a permanent investment law appellate body.

A different sort of challenge to this chain can be seen in the history and development of the WTO-DSB. A regime-specific tribunal may be a legitimate means of developing trade law within the WTO and among trade insiders. But as the WTO has moved from regulating tariffs and quotas to other regulatory trade barriers, trade law has come into potential conflict with other concerns like health or the environment and become salient to a much broader audience that cares about those issues. A closed regime that considered only trade law may have been legitimate to and for an audience of trade insiders. But as reaction to the Tuna-Dolphin dispute<sup>77</sup> and the 1999 protests in Seattle demonstrated, a regime that failed to consider other external concerns was illegitimate in the eyes of many regime outsiders. The WTO AB's response, visible in its

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<sup>75</sup> Bjorklund (in this volume).

<sup>76</sup> Ibid.

<sup>77</sup> Report of the Panel, United States-Restrictions on Imports of Tuna, DS21/R (Sept. 3, 1991), GAIE B.I.S.D. (39th Supp.), 155 (1993).

resolution of the Shrimp-Turtle dispute,<sup>78</sup> was to open the regime up, at least partly, to other concerns. Opening WTO dispute settlement proceedings to the public, allowing amici, and considering outside areas of international law have all been on the table as well. The alternative to changing these design features, as the conflict over affordable medicines demonstrated, would have been for regime outsiders to seek out other more friendly fora for their disputes, threatening the DSB's control over the development of trade law.<sup>79</sup>

Regime-specific courts' legitimacy may also be inextricably intertwined with the legitimacy of the broader regime. As Yuval Shany<sup>80</sup> and Mark Pollack<sup>81</sup> suggest in their respective chapters, a regime-specific court may both gain and lose legitimacy along with the regime in which it is embedded. And Andrea Bjorklund describes the legitimacy debates around ICSID in similar terms.<sup>82</sup> As the number of BITs and BIT arbitrations has multiplied, investment law has become a de facto regime. ICSID, she argues, is no longer judged on the basis of its own legitimacy alone, but on the legitimacy of the investment regime it supports.<sup>83</sup> ICSID's procedures could be nothing but fair, but so long as they are used to support normative ends viewed by many as unjust, like putting the interests of investors ahead of democratically enacted state public policy, ICSID's legitimacy will suffer.

## **2. Bindingness, Stakes, Exit, and Voice**

Another key relationship illuminated by the chapters is between legitimacy, exit, and voice. Geir Ulfstein's chapter on the UN treaty bodies adds a factor that goes undiscussed in most of the others—bindingness.<sup>84</sup> As Ulfstein explains, the UN treaty bodies diverge from the other courts and tribunals described here in a number of ways. Communications are considered by experts rather than judges, who serve on the treaty bodies on a near-volunteer basis. In some cases, legal expertise among the group may be limited. The experts consider the communications before them on an extraordinarily truncated timeline, there are no oral arguments, and decisions are made solely on the written record. Separation-of-powers concerns abound; the same experts issue general comments expounding the treaties they supervise and decide discrete disputes over the treaties' application. The UN General Assembly, to which the bodies technically report, does little to hold the bodies accountable for their interpretations and decisions.<sup>85</sup> And yet, the treaty body claims broad powers to declare state parties in violation of their human rights obligations and to require them to take remedial actions. The lack of process, the low levels of participation, and the absence of accountability for its decisions seem incongruous with the vast powers of review the treaty bodies claim. While many have questioned the legitimacy of the treaty bodies' work, those bodies have not crumbled in the face of a perceived legitimacy deficit. If anything,

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<sup>78</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 8, 1998).

<sup>79</sup> See, e.g., L. R. Helfer, 'Regime Shifting: The Trips Agreement and New Dynamics of International Intellectual Property Lawmaking', *Yale Journal of International Law* 29, (2004), 49-51, 65-69 (describing how developing states used brought their demands for access to affordable medicine to human rights bodies rather than to WTO dispute settlement).

<sup>80</sup> Shany (in this volume).

<sup>81</sup> Pollack (in this volume).

<sup>82</sup> Bjorklund (in this volume).

<sup>83</sup> Ibid.

<sup>84</sup> Ulfstein (in this volume).

<sup>85</sup> Ibid.

the opposite has happened: state parties to the treaties have sought to strengthen the bodies and provide them more tools to do their work. How can this seeming paradox be explained?

Part of the answer, as Ulfstein suggests, is the fact that the decisions of the treaty bodies are generally accepted to be non-binding.<sup>86</sup> As Ulfstein suggests, if the bodies' decisions were to be binding, major reforms would be needed to their structure and processes.<sup>87</sup> The Human Rights Committee and the other human rights treaty bodies would have to look more like traditional courts—the ECtHR, for example.

The broader insight is that the legitimacy of a particular court or tribunal may not be dependent solely on structural factors like who decides cases, under what processes, or even in service of which goals. The legitimacy of any particular tribunal may depend as much on what, or how much, it asks of its audiences. A body issuing non-binding decisions asks less of participants. Compliance may not be 'voluntary,' but it is also not obligatory. Such a body may need to do less to legitimate its decisions. We have described legitimacy as 'justified authority.' Most of the chapters in the book focus on the 'justification' prong of that equation. Bindingness focuses us on the other variable, 'authority.' The less authority a body claims or asserts, the less justification it needs to do so legitimately.

Although bindingness in a legal sense is binary, this focus on the authority exercised by a tribunal or court highlights how authority might be increased or decreased in a variety of ways. It might be calibrated through control of jurisdiction: The court or tribunal will claim much more authority when jurisdiction is compulsory than where states or other actors can opt-in or out of jurisdiction. So too where a court or tribunal's jurisdiction is exclusive—leaving open the possibility to forum shop may soften a court or tribunal's claims to authority. Relative authority might be calibrated through precedent: the more precedential the decisions of the tribunal the broader its claim of authority. Or it might be calibrated through substantive scope: the narrower the court or tribunal's substantive mandate, the less authority it needs to justify. In fact, the level of authority might be thought of a function of stakes. The more that is asked of participants, both in terms of substance and obligation, the more justification participants will expect and require. As Molly Land describes, the ECtHR's progressive narrowing of the margin of appreciation and more aggressive review of national legislation has been met with increasing demands from member states for justification.<sup>88</sup>

The effect of varying the stakes or authority can be conceptualized as a form of the well-known relationship between exit and voice.<sup>89</sup> Decreasing the level of authority claimed by a court or tribunal—making decisions non-binding, making jurisdiction optional, narrowing the scope of its mandate—essentially increases the opportunity for participants to exit the regime. They can refuse to follow the decision (at least technically). They can refuse jurisdiction or shop for more favorable fora. They can choose to comply in narrower or easier ways. Less work will need to be done to justify their acceptance of the court or tribunal's authority. Arguably, the possibility of exit acts as an ongoing form of specific consent that can always be rescinded or limited.

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

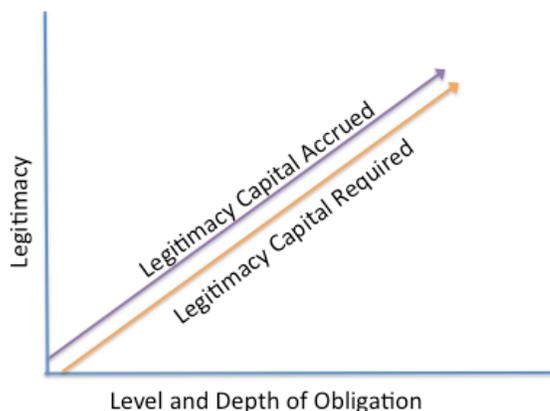
<sup>88</sup> Land (in this volume).

<sup>89</sup> A. O. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations, and States*, (Harvard University Press, 1970); see also E. Benvenisti, 'Exit and Voice in the Age of Globalization', *Michigan Law Review*, 98 (1999), 167; J.H.H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991), 2403.

As opportunities to exit decrease, however, demands for voice, participation, or control grow. This can be seen in the stories of the courts and tribunals described in this book. As the authority of each increases, so too do demands for greater participation in decision-making. Thus compulsory, exclusive jurisdiction in the WTO DSU has been met by calls for (depending on who is calling) greater openness and transparency, more opportunities to be heard, and more room for legislative correction by WTO members. Some like Joost Pauwelyn have argued that exit too might need to be recalibrated to establish the DSU's legitimacy, perhaps through broader readings of exceptions or safe harbors within trade agreements or something like a margin of appreciation.<sup>90</sup> BITs have made exit from ICSID more difficult and the rapidly increasing number of cases has increased the power of de facto precedent. While some have used the exit options they have left—explicit carve outs from ISDS have been included in newer agreements and Venezuela, Ecuador, Bolivia, and Argentina have all withdrawn from ICSID jurisdiction—others have called for greater transparency, more participation through amici, or more opportunities for meaningful review.<sup>91</sup>

In this sense, higher stakes may require more legitimacy and lower stakes less. But as Yuval Shany suggests, the relationship may run in the opposite direction as well.<sup>92</sup> While weak, narrow, or timid courts or tribunals may need less legitimacy capital to support their work and their authority, that same weakness, narrowness, or timidity will make them less effective and, in turn, less legitimate. As Shany suggests, the timidity of the ICJ's *Southwest Africa* decision damaged the ICJ's perceived legitimacy for decades. By contrast, the boldness of the ICJ's later approach to Nicaragua's case against the United States suggested that the ICJ could handle high stakes cases effectively, kicking off a virtuous legitimacy cycle for the court.<sup>93</sup> A court may choose a lower legitimacy burden by asking less of stakeholders. When it does so, however, it risks limiting its legitimacy more broadly. If and when that court wants to take bolder action in the future, it may have insufficient legitimacy capital to support it.

The figure below illustrates this relationship between the level and depth of obligation and legitimacy.



<sup>90</sup> J.H.B. Pauwelyn, 'The Transformation of World Trade', *Michigan Law Review*, 104 (2005), 1-66.

<sup>91</sup> See also S. Williams, 'Aggression, Affected States, and a Right to Participate: A Response to Koh and Buchwald', *AJIL Unbound*, 109 (2016), 246 (arguing for third-party intervention in future ICC aggression cases).

<sup>92</sup> Shany (in this volume) .

<sup>93</sup> *Ibid.*

As the level and depth of obligations increase, more legitimacy capital is required to support them. At the same time, stronger and deeper obligations will also increase the court's legitimacy capital for the future. Choosing where to be on one of the two vectors dictates where a court will be on the other.

For the UN treaty bodies, this suggests an uncomfortable tradeoff. Justifying binding decisions might require changes to the treaty bodies' structure, personnel, and processes that seem politically and logistically implausible. Among other things, such reforms would require massive infusions of additional resources. Binding decisions might require full-time judges, longer and/or more frequent meetings, oral arguments and opportunities to respond, among other things. So long as their pronouncements remain non-binding, however, their existing arrangements—part-time experts, short meetings, written submissions alone—may largely suffice. The treaty bodies may not need to work as hard to legitimate their work. The treaty bodies' inability to bind states, however, cripples their effectiveness, guaranteeing that many of their boldest pronouncements will be ignored. Its legitimacy capital will essentially be capped. Given its resources, is limited effectiveness and limited legitimacy enough? Maybe.

### **3. Raising Legitimacy Capital**

A final way to imagine the interaction between the contextual elements described in these chapters is in relation to each court's or tribunal's quest for 'legitimacy capital.'<sup>94</sup> Yuval Shany develops the idea of 'legitimacy capital' as a way to capture the functional role a court's normative or sociological legitimacy might play. It treats a court's normative or sociological legitimacy as an asset that the court needs in order to accomplish its goals. One might imagine international courts or tribunals as startups seeking infusions of capital from interested investors. In this case though, the key investment is not ordinary capital (though they need that too), but legitimacy capital. The court or tribunal will only be able to operate if someone will fund it, someone will send it cases, and someone will be influenced by its decisions. None of those things will happen, however, if no one is interested or willing to see that court, its cases, or its overall project as legitimate.

This startup model suggests that a court or tribunal interested in legitimacy capital must consider three sets of contextual factors: (1) audience, (2) product, and (3) packaging. Proponents of the startup court must decide from whom to seek legitimacy capital. Are their potential investors—those who the court will rely on to support its jurisdiction and decisions<sup>95</sup>—states, bureaucrats, national court judges, investors, transnational or local advocacy groups, or the general public either in specific countries or globally? They will need to decide what they are selling to those potential investors—dispute settlement, monitoring, predictability, rule development, or some form of justice, whether remedial or restorative, local or global. Proponents of the court will also need to consider packaging. Will the court be permanent or ad hoc? Will it have professional judges, experts, or other types of arbitrators? How will they be appointed and for how long? Will the court be embedded within a regime or independent of any? What processes will it follow for case initiation, case management, deliberation, and decision-making?

A court, its designers, or its proponents can look at these factors in whatever order they chooses. Once they make decisions though about one of these categories, those decisions will

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<sup>94</sup> See Shany (in this volume).

<sup>95</sup> This group overlaps with but is distinct from the court's audience.

affect the options available to it in the others. If one starts with a group of investors, say states, the next question has to be what states want. For Margaret de Guzman, the ICC's initial choice is whether to seek legitimacy capital from local or global constituencies.<sup>96</sup> Each will want different types of justice and will expect different types of procedures. And choosing the wrong procedures may alienate the chosen audience. An ICC that ignores local concerns and local norms in an effort to project independence, neutrality, and universality may cost itself the support of the communities affected by the crimes it prosecutes. Alternatively, one could start with a product, for example, substantive human rights justice. The challenge for a court or its proponents then becomes finding audiences interested in supporting that goal and willing to invest legitimacy capital in a court willing to provide it. It may be that states' interest in that product is limited. A human rights court or body might thus seek to augment its legitimacy capital by shopping its product to others, whether transnational advocates or national judges and lawyers. This strategy appears to have been embraced by the ECtHR<sup>97</sup> and the Inter-American Court of Human Rights,<sup>98</sup> among others. Courts may even start with the packaging. The WTO DSU and ITLOS are limited in what they can offer and to whom by their origin within the trade and law of the sea regimes, respectively. The key is that building a court's legitimacy capital requires that the choices in the three categories be properly aligned.

Courts face these choices throughout their lifetimes. Maintaining legitimacy capital requires constantly reassessing whether choices are aligned to guarantee sufficient investment. Initial assumptions about the market in legitimacy capital can turn out to be wrong. The ICJ's decision to reject Ethiopia's and Liberia's standing in the *Southwest Africa* decision<sup>99</sup> may have reflected a belief among ICJ judges that states, the court's primary audience, wanted it to be cautious before stepping into politically sensitive disputes. While some state parties may have wanted or preferred that, the court's track-record after that case suggests that the interest in such a conservative court was limited. The ICJ's decision cost the court considerable credibility and led many developing states to turn away from it.<sup>100</sup> The ICJ took a different approach in its *Nicaragua* decision, however. A court willing to decide politically difficult cases and confront politically powerful states turned out to be much more popular with states than the opposite. The *Nicaragua* decision arguably reopened the flow of legitimacy capital.<sup>101</sup>

Anastasia Telesetsky describes ITLOS as a court focused on states and offering dispute settlement.<sup>102</sup> Perhaps judging that such an audience would be attuned to issues of state consent, it has sought to emphasize legality in its decisions.<sup>103</sup> And yet, its docket of cases remains small. As Telesetsky lays out in her chapter, ITLOS has decided only one maritime boundary delimitation case since its founding. One other case is pending. During that same period, the ICJ has decided ten cases on maritime delimitation or maritime rights.<sup>104</sup> Perhaps states are less

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<sup>96</sup> DeGuzman (in this volume).

<sup>97</sup> E. Voeten, 'Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights' (2012), Georgetown University, 4-6 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2029786](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029786)> accessed March 22, 2014.

<sup>98</sup> See A. Huneus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority', *Law and Contemporary Problems* 79 (2016), 179.

<sup>99</sup> *South West Africa* (Liberia v SA; Ethiopia v SA), 1966 ICJ 6.

<sup>100</sup> Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014), p. 104-05.

<sup>101</sup> See Shany (in this volume).

<sup>102</sup> Telesetsky (in this volume).

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

willing to invest much legitimacy capital for such cases in ITLOS in the face of the ICJ's more established jurisprudence. The challenge for ITLOS thus becomes finding a new audience, product, or both. Telesetsky mentions the Sub-Regional Fisheries Commission request for an advisory opinion.<sup>105</sup> In defiance of state parties who argued that the tribunal could not exercise advisory jurisdiction, ITLOS accepted the request. Could advisory opinions on issues like environmental protection provide ITLOS with a new audience interested in investing legitimacy capital in the tribunal? The interactions described here suggest it might be worth exploring.

## **V. Chapter Summaries:**

This volume deepens and broadens prevailing understandings of international courts and legitimacy by comparing legitimacy across courts and seeking to probe the relationship between cross cutting concepts such as democracy, effective and justice to legitimacy. This Introduction has already referred to the volume's authors in discussing their individual and collective contributions to the legitimacy and international courts literature. Below is a brief summary of each chapter for easy reference.

**Nienke Grossman** examines the impact of Solomonic judgments on the legitimacy of the International Court of Justice. Solomonic judgments 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. Alternatively, Solomonic judgments may prioritize pleasing and displeasing the litigating parties in relatively equal amounts over deciding disputes in strict accordance with the law. Grossman 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 biased against parties with significantly stronger legal cases. Also, Solomonic judgments that 'split the baby' may result in unsound legal reasoning, and they do not assist those normatively addressed to better comply with the law. The perception that the Court is acting in a Solomonic fashion, even when it may not be, may harm its sociological legitimacy, when detracting from the Court's adjudicatory function. On the other hand, perceptions that the Court is making decisions that are rooted in law and also Solomonic may enhance the Court's effectiveness, and thereby, its sociological legitimacy.

**Margaret de Guzman** identifies and analyzes the importance of clear missions for international courts, questions the International Criminal Court's failure to prioritize between local and global justice, and suggests this lacuna affects both the effectiveness and legitimacy for the ICC. She proposes that existing theories of ICC legitimacy do not properly take into account ambiguities in the Court's goals and priorities. Without clearly defined objectives, the Court cannot be effective, and a limited capacity for effectiveness translates into dubious capacity for legitimacy. Consequently, clarifying and prioritizing the Court's goals can translate into strengthened legitimacy. The Court's objectives can be grouped into two categories, which may at times overlap: a pursuit of 'global justice,' or the building of global norms to prescribe and prevent international crimes, or 'local justice,' to provide justice to the victims of international crimes. These two different objectives may shape the way one understands and analyzes the Court's legitimacy of origin, decision-maker legitimacy, legitimacy of exercise, and output legitimacy. While legitimacy of origin refers to whether the ICC is legitimate based on the manner in which it was created, 'personal legitimacy' is concerned with the major actors at the ICC: judges and prosecutors. 'Legitimacy of exercise' deals with the operational practices and

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<sup>105</sup> Ibid.

procedures of the court, while ‘output legitimacy’ looks to the results or outputs created by the Court. For example, democratic representativeness among the creators of the ICC may be less important for ‘legitimacy of origin’ if the Court’s goal is global justice, since human rights are universal norms not grounded in state consent. If the goal is to engender local justice, perhaps decision-makers should take into account to a greater degree the desires of the state where atrocities took place. In the same vein, the selection of cases and situations may sometimes be legitimate when a global – but not local – justice approach is utilized.

**Molly Land** examines the relationship and tensions between doing justice and legitimacy on the European Court of Human Rights, through the lens of prisoner voting rights cases. She proposes that justice is an aspect of normative legitimacy, like legality, and considers the extent to which just decision-making affects perceptions of legitimacy. Land defines ‘just outcomes’ as those that ‘expand human rights protection,’ especially for society’s most vulnerable people. She argues that the prisoner voting cases show two ways in which the pursuit of justice can enhance the legitimacy of a court: (1) legitimacy can increase when compliance constituencies consider its decisions just, and (2) even when decisions may conflict with national policy preferences, a robust domestic human rights culture raises the costs of non-compliance. So long as the Court appears to be a moral actor, dissonance between domestic policy and the court’s decisions may ultimately promote compliance and bolster legitimacy. Also, pursuing just outcomes may be less risky and more legitimacy-enhancing for mature courts, like the European Court of Human Rights, because they already possess general legitimacy. Yet, courts that issue decisions with domestic political consequences must be conscious that they may meet with resistance if they are perceived to be overreaching by doing justice. While a court must be sensitive to domestic political concerns, however, the prisoner voting rights cases suggest that too much deference may undermine the compliance pull of a court’s decisions.

**Alexandra Huneeus’s** chapter examines the International Criminal Court and the Inter-American Court of Human Rights’ engagement with the Colombian peace process, and its impact on the legitimacy of both courts. Professor Huneeus proposes that complementary work, such as influencing the state’s response to atrocity crimes through different bodies of law and different national actors, yielding different kinds of changes in state behavior, does not appear to heighten or lessen legitimacy. When both courts are working toward the same goal, however, such as accountability for crimes of the paramilitary, the legitimacy of one appears boosted by the work of the other, through a dynamic of constructive interference. Both courts support the same underlying goal, making it and the institutions advocating for it appear more legitimate. Normative legitimacy questions may arise when one court relies on or incorporates the work of the other to justify its own actions, such as when ICC Prosecutor Fatou Bensouda threatened to open a case in Colombia if it did not comply with the Inter-American Court’s jurisprudence. While perceptions of both courts’ legitimacy might be enhanced by promotion of consistent legal rules, the ICC may be acting beyond the scope of authority delegated to it by invoking another Court’s case law. Also, it may undermine its legitimacy if it is perceived as derailing a fragile peace process by taking away options from the Colombian government. Understanding the relationship between multiple international courts operating in the same factual context and its impact on legitimacy promises to be an increasingly fertile field of inquiry.

**Mark Pollack** examines both normative debates and empirical evidence about the legitimacy of the European Court of Justice. The first part provides a basic theoretical framework, defining legitimacy as ‘the right to rule,’ consistent with Dan Bodansky’s

understanding of the term, and distinguishing between normative and sociological conceptions of the term. Next, it examines the normative legitimacy of the ECJ, considering three possible criteria. The third part of the chapter surveys empirical evidence about the sociological legitimacy of the ECJ. Finally, the fourth part proposes that the Court is subject to greater normative criticism and lower levels of public support than previously. Pollack finds that both the normative and sociological legitimacy of the court are ‘more fragile and contested than they first appear.’ While the Court is one of the most trusted legal or political institutions in Europe, ‘the apparent public legitimacy of the court rests on a very thin base of public knowledge about the court,’ which seems to borrow legitimacy from attitudes towards Europe and the rule of law. Consequently, impacts on the legitimacy of the EU may ultimately impact perceptions of the legitimacy of the ECJ.

**Anastasia Telesetsky’s** contribution considers the challenges of generating legitimacy for one of the youngest courts discussed in this volume: the International Tribunal for the Law of the Sea (ITLOS). She suggests that the legitimacy, or justified or justifiable authority, of ITLOS will depend largely on whether States actively support it by referring cases and providing financial assistance, and whether the court is trusted to protect both core sovereign interests and the international rule of law. Through an analysis of their decisions thus far, Telesetsky argues that ITLOS judges have already taken steps to attempt to institutionalize legitimacy, for example, by providing detailed jurisdictional analysis, detailing the legal questions to be addressed, citing directly to specific provisions of the United Nations Convention on the Law of the Sea, employing a cautious incrementalist approach by carefully building on pre-existing case law, and citing and relying on decisions of other international courts. To bolster legitimacy within the tribunal, as opposed to for external stakeholders alone, Telesetsky points to the importance of a rule of law culture, the introduction and justification of new legal standards for itself, respect for sovereigns, abstaining from deciding issues unnecessary to resolve the dispute, and creating an ethical environment. Finally, she suggests that the court revise some of its current practices to address possible perceptions of partiality and overreaching, and the lack of enforcement options.

**Joost Pauwelyn** examines differences between the pools of individuals deciding World Trade Organization disputes, as opposed to investor-state disputes within the framework of the International Centre for the Settlement of Investment Disputes, and suggests the differences in the pools may affect the sources and limits of legitimacy for the tribunals and the broader legal system within which the tribunals operate. He finds striking differences among adjudicators, including nationality, professional background, diversity, status and ideology. For example, WTO panel and Appellate Body members tend to be technocrats from developing countries, while ICSID arbitrators are likely to be high powered, elite private lawyers or academics from Western Europe or the United States. While the ICSID pool is relatively closed, with a small number of ideologically polarized individuals serving multiple times as arbitrators, WTO panelists have relatively low reappointment rates and are more ideologically homogeneous. These differences suggest that ‘legitimacy capital’ comes from different sources for ICSID, as compared to the WTO. For Pauwelyn, sociological legitimacy for the WTO comes from inside its diplomatic, governmental surroundings. The WTO Appellate Body and panels are embedded in a thick bureaucratic regime, where the quality of the broader WTO system and internal communication between adjudicators and WTO member countries is essential to maintaining its legitimacy. ICSID’s legitimacy, on the other hand, relies more heavily on the individual quality and impartiality of its arbitrators, as it is situated within a thin institutional platform, no diplomatic

community surrounds or interacts with it and no appellate body exists. On the other hand, concerns arise about ICSID arbitrators' representativeness and impartiality.

**Andrea Bjorklund** explores the legitimacy of the International Centre for the Settlement of Investment Disputes. She proposes that many of ICSID's legitimacy problems arise from a mismatch between its design and current expectations from relevant publics. While ICSID was designed to resolve specific and discrete disputes, it is now a symbol of investment law and policy and is the recipient of critiques which should be leveled against states rather than ICSID. Bjorklund notes that defenses of ICSID rely on formalistic criteria linked to normative legitimacy, while criticisms focus on criteria linked to both normative and sociological legitimacy. Bjorklund relies on Yuval Shany's insights about the relationship between effectiveness and normative legitimacy, and on factors related to normative sociological legitimacy drawn from Thomas Franck for international law generally, and then modified and expanded upon by Nienke Grossman in the framework of international courts and tribunals. She then reviews the legitimacy criticism of investment treaty arbitration generally and of ICSID arbitrations in particular to probe the dissonance between sociological and normative legitimacy. Her analysis concludes by showing a shift in expectations and standards over time.

**Geir Ulfstein** considers challenges to the normative legitimacy of the United Nations Human Rights Treaty Bodies with respect to their court-like function of ruling on the merits of individual petitions. Drawing, in part, on prior scholarship on legitimacy and international courts, he proposes that legitimacy for these bodies requires (1) independent, impartial and highly competent treaty body members, (2) application of procedures that allow both parties to be heard and ensure that relevant facts are taken into account, (3) respect for the legal mandate established in their constitutive instruments, (4) effectiveness, and (5) accountability to international and national organs. Ulfstein considers the treaty bodies' legitimacy through the lens of each of these legitimacy prerequisites, explaining in detail how they may apply differently in the treaty body context, as compared to traditional international adjudication. Treaty bodies possess unique features which complicate the legitimacy analysis, such as their emphasis on the protection of human rights, their ever-growing caseload, the non-binding nature of their decisions, and their ability to produce state reports and General Comments, in addition to responding to individual complaints. He makes specific recommendations for enhancing the legitimacy of these institutions.

**Andreas Follesdal** questions the utility of linking 'democratization' or 'democratic values' with the legitimacy of international courts. He suggests that scholars misuse the term because their proposals are seldom about standards or institutions unique to democratic governance. While reform proposals coming out of these critiques may enhance the legitimacy of international courts, they rarely recommend standards or institutions unique to democratic governance. While transparency, accountability and participation are often, but not always, beneficial, they can be valuable even when they do not advance democracy. To deepen our understanding about legitimacy and these ideals, legitimacy scholars should distinguish between democratic institutions of decision-making, the normative principles that justify those institutions, and important features of those institutions that contribute to their justification. Follesdal suggests that calls for democratization are better understood as suggestions for constitutionalization of the combination of international and domestic law constituting a 'Global Basic Structure.' A global constitutionalist perspective helps address contested issues concerning the functions of constitutions: to create, curb and channel the use of institutions, and specify rules

for changing de facto constitutions. Further, it provides a normative justification that also provides reasons for valuing democracy: institutions deferred to must treat all people with the respect owed political equals.

**Mortimer Sellers** probes the relationship between democracy, justice and legitimacy. He defines legitimacy as ‘the status of being correct according to some external standard’ or in light of ‘the most *appropriate* standard for evaluating the practice in question.’ While a court that is ‘actually legitimate’ fulfills such standards, for ‘sociologically legitimate’ courts, subjects are persuaded to act as if a rule or institution is legitimate. The extent to which a law or legal institutions secure or advance justice provides the standard for measuring actual legitimacy. Thus, actually legitimate courts advance justice, while sociologically legitimate courts are believed to do so. Democracy, however, has little to do with legitimacy because it has little to do with justice. Instead, democracy has the potential to threaten judicial independence and impartiality, and thereby legitimacy. On the other hand, the ‘illusion’ of democracy may indirectly buoy legitimacy by securing broader public support for judicial decisions legitimate on other grounds. It is purely instrumental in its relationship to legitimacy. Democratic practices and procedures legitimate international courts only to the extent that they advance the purposes that justify international courts in the first instance.

**Yuval Shany**’s chapter explores the relationship between effectiveness and legitimacy. In his view, the two can either mutually reinforce or undermine each other. Effective courts may be viewed as more legitimate, and legitimacy can assist a court in improving its effectiveness. Judicial illegitimacy may undermine effectiveness, and ineffectiveness can undermine judicial legitimacy. Perceptions of justified authority from relevant constituencies may assist in sustaining judicial effectiveness by resulting in increased support and cooperation. In other words, when states believe courts are legitimate, they are more likely to implement their decisions and to provide them with resources. At the same time, legitimacy and effectiveness are not always unidirectional. For example, sometimes protecting the legitimacy of an international court may require the adoption of ineffective judicial decisions, and occasionally, effective judicial bodies are not legitimate. Shany concludes by pointing out that gaps between judicial outcomes and the preferences of courts’ constituencies can result in sociological legitimacy.