

Introduction

International courts have been operating for many decades, and they have stood at the center of many research projects and study programs in various disciplines: law, social science, political science, international relations and politics, etc. Special attention has been afforded, in this connection, to the notion of judicial legitimacy: its sources and nature, the factors that influence it, and the different strategies embraced by courts in order to enhance it. During the last few decades (and since the end of the Cold War, in particular), international courts have grown in number and strength, and many of them have expanded their jurisdictions. This has further underscored the importance of addressing questions regarding their legitimacy, turning such questions into a hotly debated issue both in academia and in the international political arena.

Many of the legitimacy challenges of international courts stem from their duality: being both courts and international institutions, they confront many of the challenges that attend both groups of bodies. First, although the rulings of international courts are binding, in the absence of a global government, they typically lack the ability to enforce their judgments. Therefore, like other international institutions, courts often depend on voluntary compliance of the parties to adjudication, be they states or individuals. Moreover, their audiences are diverse and have a wide array of preferences. This makes it extremely difficult for international courts to issue decisions that meet universal approbation, and increases the chances of at least some constituencies opposing their judgments. This is mostly apparent in cases dealing with sensitive issues that implicate national interests, such as human rights violations by states and leaders. These issues are highly controversial and often trigger public disapproval, which might compromise the legitimacy of international courts. It should also be mentioned that most of the judges of these courts are government nominees and many of them do not enjoy the same guarantees of judicial independence that judges in democracies enjoy. Thus, contrary to national courts, international courts may find it difficult to be considered representative in nature, or to rely on political representation as a source of their legitimacy.

What also affects international courts' legitimacy — quite like national courts — is the scope of their jurisdictional powers. This question concerns not only the subject matter under the courts' jurisdiction, but also the parties eligible to sue or file a petition, and the parties that can be sued or filed against. For example, when courts extend their judgments to new issues, and grant

access to more and more parties (such as individuals and nongovernmental organizations), their powers may increase, but their legitimacy in the eyes of key actors might decline. Expanding jurisdiction also concerns courts' interpretation of existing law: when judges apply creative interpretations, some see it as illegitimate lawmaking, which exceeds the authority granted to the courts by states. In other words, if courts stretch their jurisdiction too far, by expanding the issues they rule on, the parties that can participate in the judicial process, and the interpretation of the law they apply, it might compromise their legitimacy. What is considered "too far" and to what extent it actually affects courts' legitimacy are complex questions with no clear-cut answers.

The articles in this issue tackle questions and challenges concerning international courts' legitimacy by conducting two kinds of analyses. The first three articles explore and develop theoretical aspects of international courts' legitimacy by relating to their democratic, discursive and communicative features. In doing so, they offer a conceptual framework of legitimacy in general, of international courts' legitimacy in particular. The next five articles take an institutional approach. Focusing on the strategic considerations of courts, they explore the various ways in which international courts can obtain, maintain and enhance their legitimacy. Together, the articles in this issue comprise a multifold discussion of the legitimacy of international courts, shedding some new and important insights on it.

Opening the issue, Andreas Follesdal focuses on the challenges facing the international human rights judiciary. These challenges often arise due to a common perception that there is no obvious collective action problem that justifies the operation of the human rights judiciary (contrary to other kinds of international courts and institutions). In addition, the human rights judiciary is often accused of being undemocratic, since these courts dictate the way of action for democratically elected domestic bodies. Nonetheless, Follesdal shows that in the "global basic structure" in which international courts — and specifically the human rights judiciary — act, there are collective action problems; he further shows that the human rights judiciary plays an important role in solving these problems. This justifies the courts' jurisdiction and legitimacy. Moreover, Follesdal explores the ways in which the international human rights judiciary enhances domestic governments' democratic nature, thereby strengthening democracy rather than contradicting it. Follesdal's article provides the necessary basis for discussing further justifications and legitimacy of international human rights judiciary in particular, and of international courts in general.

Armin von Bogdandy develops the connection between democracy and international courts' legitimacy. Contrary to national courts, international courts' autonomy and legitimacy cannot be based on the classical theory

that understands democracy as “the rule of the people.” Thus, the author turns to other elements of democracy, namely: representation, participation, and deliberation. These elements characterize international courts and are embedded in Articles 9-12 of the Treaty of the European Union (TEU). They are based on a transnational-cosmopolitan conception of citizenship, which puts inclusion at its center and does not substitute for national citizenship, but rather supplements it. Von Bogdandy shows, for example, that although courts — specifically international courts — are not elected bodies, they can be considered to represent the citizens of their communities. In addition, participation and deliberation are achieved by the transparency of the legal procedures and by the participation of the affected and interested parties. Thus, according to von Bogdandy, the legitimacy of international courts can be conceptualized — and justified — in terms of democracy.

Ingo Venzke relates the question of legitimacy to the concept of authority. In his article, he analyzes the sources of international tribunals’ authority and the factors that influence it. Venzke lays the foundations for a comprehensive theory of authority by placing authority between coercion by force and persuasion through argument (though the boundaries are thin and sometimes elusive). Within these boundaries, he analyzes the issues of recognition, constraints, and delegation, as the contours of authority. He then turns to the concrete features that influence courts’ authority, namely: judges’ personality, the judicial process, and the judicial outcomes. According to Venzke, however, the most influential factor is the communicative dynamic of the courts. By thoroughly analyzing how courts gain authority through legal reasoning, discursive construction, and leaning on precedents, the author concludes that authority is best understood and achieved by means of communication. Going back to the connection between authority and legitimacy, this implies that international courts’ legitimacy should also be achieved and understood by the same means.

Turning to the second part of this issue, Erik Voeten in his article characterizes the factors that influence public opinion on international courts and hence their legitimacy. By analyzing Google data searches on various international courts, and by referring to past surveys on international courts and institutions, Voeten examines the diffuse support granted by the public to international courts, and the connection between their publicity and their legitimacy. He deduces from the data that the trust in international courts is strongly correlated to the public knowledge about those courts and to public trust in other international institutions and in domestic courts. These correlations indicate mainly that international courts are viewed by the public not as a possible substitute for a poorly performing domestic justice system, but rather as an extension of the domestic courts. This insight may help international courts in their efforts to

enhance their legitimacy. Voeten concludes his article by calling for further and more thorough empirical studies, which would explore and analyze the more nuanced factors influencing public legitimacy of international courts and institutions.

As regards obtaining and enhancing their legitimacy, Yonatan Lupu encourages international courts to learn an important lesson on legitimacy from their national counterparts. Lupu shows that even though there are some major differences between national and international courts, since some of the challenges facing them are the same, contemporary knowledge about national courts, which has been gathered during many years of extensive research on them, may help international courts gain legitimacy. Among the differences between national and international courts, Lupu points to the fact that the preferences of international courts' audiences are much more diverse than those of national courts. There is also an information deficiency, which makes it quite difficult for international judges to assess their audiences' preferences. Nonetheless, one of the lessons that international courts can learn is how to use curbing, i.e., incidents in which a court's ruling arouses a public outcry, to collect information about audience preferences. This can help courts avoid similar curbing in the future, thereby enhancing their legitimacy in the long run.

Other strategies are stressed by Shai Dothan, who analyzes the means used by international courts in order to improve the compliance with their judgments. He shows that international courts behave strategically in order to rally support for their judgments in the international community. Among the various strategies, Dothan explores the way international courts take into account the actors they interact with (such as states, national courts, and domestic and international organizations). Specifically, he analyzes how they also consider strategically which norms to apply and how to justify their selection and interpretation. Should international courts succeed in enhancing their legitimacy by these strategic considerations, they would enjoy, Dothan concludes, satisfactory compliance even in cases of controversial rulings.

Going deeper into the interaction between international courts and states, Laurence R. Helfer and Karen J. Alter challenge the common assertion that expansive lawmaking compromises international courts' legitimacy. They do so by leaning on empirical findings on the Court of Justice of the European Union (CJEU), the Andean Tribunal of Justice (ATJ), and the ECOWAS Community Court of Justice (ECCJ). The authors show that contrary to the common assertion, there is no distinct correlation between a court's legitimacy and the extent to which its rulings constitute expansive lawmaking. Rather, backlash and criticism of international courts seem to depend mainly on the effect their rulings have on domestic politics. In other words, if a court issues a technical and narrow judgment, which directly undermines a decision or an

act of a domestic government, its legitimacy would be more compromised than in a case of expansive lawmaking that is consistent with the domestic government's preferences.

Another common presumption is challenged by Clifford James Carrubba and Matthew Joseph Gabel in this issue's last article. The authors deal with the assumed correlation between international courts' legitimacy and states' compliance with adverse decisions. First, they show why high rates of compliance do not necessarily indicate a high level of legitimacy. Rather, all actors — states defecting from an international agreement, plaintiffs who file complaints, and third-party states — act strategically. Consequently, only few cases of states that defect from an international agreement reach international courts; and of those, in only a few cases do courts rule against the defecting state — this happens mainly when the court is certain the state will comply with an adverse ruling. The authors then develop a comprehensive model, which begins with rationalizing why governments create international regulatory regimes and courts in the first place, and traces the span of the entire judicial process. Through this model the authors show that international courts are imbued with legitimacy simply by existing as fire alarm and information clearinghouse mechanisms, i.e., as a means of maintaining the coordination between member states. Thus, compliance with courts' rulings is predicted when it is consistent with the governments' *ex ante* goals when they created the regime. Nonetheless, the authors also suggest that compliance may also enhance international courts' legitimacy.

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