

INTRODUCTION TO THE SYMPOSIUM: POLITICAL AND LEGAL THEORY ON THE LEGITIMACY OF INTERNATIONAL COURTS

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Until recently, relatively few international courts and tribunals existed; they decided relatively few cases and were relatively marginal players in international affairs. The 1990s marked a sea change. Courts proliferated, and today, more than two dozen permanent international courts are operational, and over one hundred judicial bodies and mechanisms hear international disputes. These entities, moreover, are increasingly busy; over 90 percent of the more than 37,000 binding judgments rendered by international courts have been issued since the fall of the Berlin Wall,¹ International courts increasingly consider disputes involving contentious political, economic, and security issues.

Perhaps inevitably, the increased prominence of international courts and tribunals sparked a backlash. Instead of creating new adjudicatory fora—a process that has virtually ground to a halt—the international community seems to have entered a period of resistance and retrenchment. States increasingly threaten to, or in fact do, exit from international courts; states use reappointment and other procedures to stymie international tribunals; and high-profile instances of nonappearance and noncompliance are a growing concern. Scholars have begun to typologize the different patterns of backlash to international courts and to develop analytic frameworks to explain variability across tribunals.²

These complex and contradictory tendencies call for sustained scholarly attention. Fortunately, a number of academic centers have arisen to study international courts. One of the most prominent of these centers is PluriCourts-Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order

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1. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 4 (2014).

2. See, e.g., Mikael Madsen, Pola Cebulak, & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197 (2018); Joose Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 9 J. INT'L DIS. SETT. 679 (2018); Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016).

(PluriCourts), based at the University of Oslo. PluriCourts sponsors a wide range of interdisciplinary scholarship on international courts and tribunals, with a particular focus on the legitimacy of these bodies, including from legal, political science, and philosophical perspectives. As part of this mission, PluriCourts hosts a large number of workshops and seminars. The papers included in this Symposium are written by participants at a Political and Legal Theory Workshop hosted by PluriCourts at the University of Oslo in June 2018.

The Symposium opens with a paper by Allen Buchanan, for many years the James B. Duke Distinguished Professor of Philosophy at Duke University.³ Buchanan is a leading theorist of legitimacy in international law and institutions.⁴ In his symposium contribution, Buchanan examines the debate over the legitimacy of the International Criminal Court (ICC). This important paper breaks new ground in at least two respects. First, Buchanan provides a sophisticated analysis of existing theories of legitimacy. Specifically, he argues that any plausible theory of institutional legitimacy must include multiple criteria for legitimacy, but that no existing theory provides an adequate account for weighing and combining the various criteria to permit a well-grounded judgment of whether any particular institution should be considered legitimate. The paper then examines two of the central claims in debates over the ICC's legitimacy, namely that the Court has engaged in a "pattern of invidiously selective prosecution," and that the Court's jurisdiction is "arbitrarily circumscribed" as the planet's most powerful military powers—China, Russia, and the United States—are not party to the treaty creating the ICC and therefore not subject to the Court's jurisdiction the way that other states are. In this context, Buchanan usefully highlights the difficulties of drawing the boundaries of a complex institution such as the ICC. For example, if some states have failed to join the Court and therefore are not subject to jurisdiction in the same way that other states are, should this be considered a legitimacy deficit of the ICC, or a feature of the international legal system, which provides that states are free to join or not join treaties as they see fit? Finally, Buchanan raises the provocative question of whether, in light of the conceptual and normative uncertainties that infect debates over the ICC's legitimacy, advocates ought to employ a different normative vocabulary when urging ICC reform.

Given the importance of Buchanan's paper in light of his previous work on legitimacy in international law and institutions, the symposium includes two responses. The first, co-authored by Margaret deGuzman, a Professor at Temple University Beasley School of Law, and Timothy Kelly, a Temple Law student, challenges Buchanan's theoretical approach to the ICC's legitimacy, as well as his

3. Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court*, 33 *TEMPLE INT'L & COMP. L. J.* 323 (2019).

4. His groundbreaking works in this area include ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2003); Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT'L AFF.* 405 (2006).

account of the ICC's allegedly invidious prosecution record and institutional benefits.⁵

Perhaps the most interesting argument in this paper is the response to Buchanan's claim that the ICC engages in invidious selectivity when making charging decisions. They note that several cases were referred to the Court by the states on whose territories the alleged crimes occurred, that in such the cases the Court is highly dependent upon cooperation from the relevant government, and that this cooperation would certainly have vanished had the Court filed charges against government actors. deGuzman and Kelly argue that it is not "invidious" to pursue claims only against those for whom evidence is or will be available. As the authors note, the larger question raised by their argument is whether it is preferable to prosecute defendants from one side of a conflict, or no one at all. Given the ICC's broad anti-impunity mandate, and the general importance of the principle of equal application of the law to any system of legality, deGuzman and Kelly's defense of selective enforcement is certain to prove controversial.

Alain Zysset, a Lecturer in Public Law at the University of Glasgow School of Law, contributes the other response to Buchanan. Zysset asks whether Buchanan's claims are specific to the ICC or whether they can be applied more generally to other international courts or institutions.⁶ While some might see generality as a virtue, Zysset criticizes Buchanan for not paying sufficient attention to some of the ICC's specific institutional features. In particular, Zysset notes that Buchanan at times analogizes the ICC with human right bodies, yet this analogy elides the "categorical difference" that human rights obligations apply to states, and international criminal law applies to individuals. Zysset argues that since the ICC can apply the coercive features of criminal law, it carries a heavier justificatory burden than other international bodies. Thus, while deGuzman and Kelly claim that the ICC enjoys a greater level of legitimacy than Buchanan suggests, Zysset argues that its legitimacy deficit may be larger than Buchanan believes.

Several other Symposium contributions expand the focus beyond the ICC and address other aspects of legitimacy at international courts and tribunals. Theresa Squatrito, a Lecturer in International Relations at the University of Liverpool Department of Politics, and formerly a postdoctoral fellow at PluriCourts, focuses on the sociological legitimacy of international courts.⁷ Like others who write in this area, she is interested in the actions that states can take to delegitimize courts. One notable contribution of her paper is to highlight that state behavior is only one part of a larger dynamic, and that international courts can employ multiple strategies in response to states' delegitimation efforts. Her arguments foreground the political context within which international courts operate and open up an interdisciplinary

5. Margaret M. deGuzman & Timothy Kelly, *The International Criminal Court is Legitimate Enough to Deserve Support*, 33 TEMPLE INT'L & COMP. L. J. 397 (2019).

6. Alain Zysset, *Response to Allen Buchanan's "The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court"*, Manuscript, 2019, 33 TEMPLE INT'L & COMP. L. J. 392 (2019).

7. Theresa Squatrito, *International Courts and the Politics of Legitimation and De-legitimation*, 33 TEMPLE INT'L & COMP. L. J. 298 (2019).

research agenda for exploring which judicial strategies are most effective, and under what conditions.

Monika Polzin's contribution also explores the strategic interactions between states and international courts.⁸ Her specific focus is on the state practice of providing courts with "authoritative interpretations" of relevant treaty texts. These interpretations are intended to govern the interpretative practice of international courts and tribunals. Polzin accurately characterizes these interpretations as a battle for interpretive authority. Are these practices a useful tool for enhancing the legitimacy of international courts, or an unwarranted interference with judicial independence? To untangle these doctrinally and normatively complex questions, Polzin creates a typology of authentic interpretations, and offers pragmatic guidance as to how international courts should respond to each type.

Dafina Atanasova, a Research Fellow at the Centre for International Law at the University of Singapore, notes that while most inquiries into legitimacy focus on specific individual courts, interactions among different international courts remain relatively unexplored.⁹ Atanasova argues that international courts often face situations of "domain overlap," where multiple courts possess jurisdiction over the same actors, fact-patterns, or issues. These overlaps create the possibility of normative inconsistencies and conflict, which can have the effect of undermining the rule of law on the international plane. This result, in turn, would weaken the normative legitimacy of international courts. To avoid this outcome, Atanasova offers a model of international court interactions that includes a number of principles and approaches that courts can use to promote the rule of law on the international plane. These interactional norms are inspired by the philosophical public reason literature, and Brian Barry's theory of "justice as impartiality."

The final two papers examine different aspects of legitimacy debates that surround the European Court of Human Rights (ECtHR). Lisa Sonnleitner's paper focuses on the debate over the democratic legitimacy of the European Court of Human Rights, and in particular controversies over the ECtHR's use of evolutionary interpretation.¹⁰ Sonnleitner, a University Assistant at the University of Graz, highlights the negative reactions in the United Kingdom and other states to specific ECtHR decisions that apply an evolutionary method of interpretation to various provisions of the European Convention on Human Rights. This approach is said to cause an "inflation" of human rights, inappropriately close off areas of legitimacy moral disagreement, and improperly interfere with and constrain democratic political processes. Sonnleitner provides useful clarification of the concept of "legitimate" moral disagreement, noting that democratic, majoritarian politics can express historic biases concerning vulnerable groups or reflect interest group

8. Monika Polzin, *Authentic Interpretations and International Courts: Like Calvin and Hobbes or Tom and Jerry*, 33 *TEMPLE INT'L & COMP. L. J.* 247 (2019).

9. Dafina Atanasova, *A Rule of Law View on the Relations of International Courts and Tribunals*, 33 *TEMPLE INT'L. L. J.* 365 (2019).

10. Lisa Sonnleitner, *The Democratic Legitimacy of the European Court of Human Rights to Interpret Evolutively*, 33 *TEMPLE INT'L & COMP. L. J.* 279 (2019).

capture. Sonnleitner suggests that the question of whether courts inappropriately preempt legitimate disagreement is not unique to evolutionary interpretation, but rather an instantiation of larger debates over judicial review more generally. She also notes that judgments reached through evolutionary interpretation—like those reached through other means of interpretation—often prompt widespread political debate. In this sense, rather than foreclose debate, the Court can more accurately be seen as a “conversation initiator” that injects a set of principled arguments into contentious political debates.

The paper by Katja Achermann, of the University of Cambridge and University of St. Gallen, and Klaus Dingwerth, a Professor of Political Science at the University of St. Gallen, also examines controversies concerning the ECtHR.¹¹ They note that the level and intensity of criticism, and hence of politicalization, of the ECtHR varies across different states and—like Squatrito—are interested in processes of delegitimization. To understand what drives politicization, Achermann and Dingwerth turn to the domestic level; in particular, they examine the treatment of the ECtHR in the “quality press” of Austria and Switzerland. They review discussions of the ECtHR in two leading newspapers in each state for the period 1999 to 2016. Among other findings, they claim that the evaluation of the Court declines more sharply in Switzerland than in Austria, and that the Swiss press more frequently analyzes the ECtHR using a “sovereignty-related” frame while the Austrian press more commonly uses a “functionality-based” frame. The authors further argue that it is critical to examine different conceptions of political legitimacy in different states. They claim that the Austrian conception of political legitimacy is more instrumental and functional, which the Swiss conception rests more on notions of direct democratic legitimation. Hence, frequent Swiss newspaper accounts that suggest that the ECtHR is encroaching on popular sovereignty are politically salient.

Both individually and in the aggregate, the contributions to this Symposium issue of the *Temple International and Comparative Law Journal* use a variety of inter- and cross-disciplinary methodologies to develop a diverse set of novel thoughts and perspectives on international courts and tribunals. The papers provide doctrinal and conceptual explorations, as well as economic, political, and philosophical inquiries into some of the most difficult problems facing international courts today.

11. Katja Achermann & Klaus Dingwerth, *Helping v. Hindering Sovereignty: The Differential Politicization of the European Court of Human Rights in the Austrian and Swiss Press*, 33 TEMPLE INT'L & COMP. L. J. 340 (2019).