FOREWORD: SOCIOLOGICAL PERSPECTIVES ON INTERNATIONAL COURTS

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Recent years have witnessed a judicialization of international relations. In part, this development reflects a growing willingness of domestic courts to adjudicate cases with international dimensions.[1] More dramatically, it reflects a dramatic increase in the number of international courts, an expansion of their jurisdiction, and an upsurge in the number of cases filed and decided.[2] Perhaps inevitably, the increased prominence of international courts and tribunals provoked a backlash. The international community seems to have entered a period marked by rising populism, accompanied by a retrenchment from multilateralism in general and resistance to international courts in particular.[3] States increasingly threaten to or in fact exit from international courts;[4] states use reappointment and other procedures to stymie international tribunals;[5] and high profile instances of nonappearance and noncompliance are a growing concern.[6] In response to these developments, scholars have begun to typologize different patterns of backlash to international courts and to develop analytic frameworks to explain variation across

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1. *See, e.g.*, Gonzalez Carreno v. Ministry of Justice, S.T.S., July 17, 2018 (R.O.J., STS 2747/2018) (Spain) (recognizing binding character of Views of the Committee on the Elimination of Discrimination against Women); President of the Republic v. Ayyoub, al Mahkamah al-Idārīyah al-'Ulyā [Supreme Administrative Court], case no. 74236/62, session of 16 Jan. 2017) (Egypt) (annulling act of ceding islands to Saudi Arabia pursuant to treaty between Egypt and Saudi Arabia); Prime Minister v. Parliament of Catalonia, S.T.C., July 20, 2017 (S.T.C. 102/2017) (Spain) (rejecting ability of regional government of autonomous community to validly conclude certain international treaties).

2. For an excellent overview, see KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

3. *See, e.g.*, Peter L. Lindseth, *Theorizing Backlash: Supranational Governance and International Investment Law and Arbitration in Comparative Perspective*, 21 J. WORLD INV. & TRADE 34 (2020); Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019); *Symposium: Populism and International Law*, 49 NETH. Y.B. INT'L L. 1 (2018). For a thoughtful analysis of the relationship between legality and authoritarian politics in general, see Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

4. *E.g.*, Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court*, N.Y. TIMES (Mar. 17, 2019), https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html.

5. *E.g.*, Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297 (2019).

6. Recent cases prominently involving nonappearance include: The Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits (Perm. Ct. Arb. 2015); In the Matter of the South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award on the Merits (Perm. Ct. Arb. 2016).

tribunals.[7]

These complex and contradictory tendencies call for sustained scholarly attention. Fortunately, a number of superb academic centers devote considerable energies and resources to the study of international courts and tribunals. One of the most prominent of these centers is the Max Planck Institute for International, European and Regulatory Procedural Law, based in Luxembourg. The Institute's Department of International Law and Dispute Resolution, led by Institute co-director Professor Hélène Ruiz Fabri, focuses on various techniques and mechanisms of international dispute settlement.

In November 2018, the Max Planck Institute hosted a two-day workshop on Sociological Perspectives on International Tribunals. In addition to Professor Ruiz Fabri, the workshop organizers included Professors Moshe Hirsch, Sungjoon Cho, Andrew Lang, Ron Levi, and Mikael Madsen, all of whom have played leading roles in bringing different traditions of sociological research to international legal inquiry. Many of the contributions to this special symposium issue of the *Temple International and Comparative Law Journal* were presented at that workshop.

Given his groundbreaking work in introducing sociological thought to international legal scholars,[8] it is appropriate that the Symposium opens with an article by Moshe Hirsch, who is the Maria Von Hofmannsthal Chair in International Law at the Faculty of Law of the Hebrew University of Jerusalem.[9] Hirsch's point of departure is that international courts operate in specific social environments, and his article usefully surveys a number of social functions that international tribunals play. Hirsch notes that, in addition to their dispute settlement functions, international courts can promote social integration in politically polarized communities by, for example, attributing social meaning to international acts. International tribunals also act as agents of state socialization by exerting pressure on states to comply with widely shared international norms. Hirsch's article also reminds us that international adjudication is a field in which different international actors compete for primacy; pursing this insight "unmask[s] perceptions of equality and underlines that international tribunals are not ideologically or culturally neutral."[10] By surveying various strands of sociological research, foregrounding the social roles the courts play, highlighting that courts are sites of conflict among different social groups, and problematizing the claims that courts are simply neutral arbiters, Hirsch's article usefully introduces many of the conceptual frameworks and thematic issues that are addressed in other

7. *See, e.g.*, Mikael R. Madsen et al., *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. CONTEXT 197 (2018) (examining the types of opposition to international courts); Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016) (considering efforts by African governments to limit the jurisdiction of sub-regional courts).

8. *See generally* MOSHE HIRSCH, INTRODUCTION: SOCIOLOGY OF INTERNATIONAL LAW (2015).

9. Moshe Hirsch, *Introduction: Sociological Perspectives on International Tribunals*, 34 TEMP. INT'L & COMP. L.J. 193 (2020).

10. *Id.* at 196.

contributions to the Symposium.

Hirsch's introduction is followed by two articles that illustrate how sociological approaches can be applied to international courts in general, and then by four articles that bring sociological theories to bear on particular phenomena at specific international courts and tribunals. In some respects, the article by André Nunes Chaib and Edoardo Stoppioni picks up where Hirsch's Introduction leaves off. In *Mapping Sociological Approaches to International Procedural Law*, Nunes Chaib, an Assistant Professor of Law at Maastricht University, and Stoppioni, a Senior Research Fellow at the Max Planck Institute Luxembourg, argue that sociological approaches were originally developed in response to shortcomings and inadequacies found in then-dominant positivist approaches to international law.[11] After providing historical context for the emergence of sociological approaches to international law, the authors turn to the application of particular strands of sociological theory and methodology. In particular, they highlight how "practice theory" can enrich understandings of the development of international procedural law, explore how "critical theory" can be used to analyze the legitimacy of international procedural law, and urge the use of ethnographic research strategies to illuminate the role of the adjudicator and the emergence of legal argument in judicial decision making.

Mapping Sociological Approaches argues that critical theory reveals the relationship of procedure to power, a relationship that is explored more fully in Sophie Schiettekatte's contribution, *The Faces of Procedure in International Adjudication: Servant, Justice, and Power*.[12] Schiettekatte, a PhD researcher on international courts and tribunals at the European University Institute in Florence, Italy, outlines three different ways to conceptualize procedure: as an instrument for advancing the underlying values of substantive law; as a form of justice marked by impartiality and neutrality that ensures the fair and evenhanded treatment of litigants; and as an instrument of power. Schiettekatte's focus is on this third conceptualization of procedure, an approach that problematizes conventional understandings of procedure as value-neutral and objective and yet an approach that to date has been understudied and undertheorized in the literature. Using decisions from several international tribunals, Schiettekatte argues that "for all its claims of neutrality . . . , procedure is also a medium that itself often reflects the language and the message of the powerful."[13] Both *Mapping Sociological Approaches* and *The Faces of Procedure* illustrate how conceptual frameworks drawn from sociological theory can generate productive lines of inquiry not likely to be as fruitfully pursued using conventional legal analysis.

The remaining contributions to the Symposium focus on specific international courts. Lucas Lima's article, *The Debate on the Use of Experts by the International Court of Justice: An Inquiry Through Sociological Lenses*, traces changes in the in

11. André Nunes Chaib & Edoardo Stoppioni, *Mapping Sociological Perspectives to International Procedural Law*, 34 TEMP. INT'L & COMP. L.J. 203 (2020).

12. Sophie Schiettekatte, *The Faces of Procedure in International Adjudication: Servant, Justice and Power*, 34 TEMP. INT'L & COMP. L.J. 225 (2020).

13. *Id.* at 245.

International Court of Justice's (ICJ) practices regarding the use of scientific and technical experts across a range of recent cases.[14] Lima, a Professor of International Law at the Universidade Federal de Minas Gerais in Belo Horizonte, Brazil, employs sociological theory to argue that the Court's evolving approach to the use of expert evidence should not be understood simply as addressing technical, evidentiary issues but raises larger questions of "control, power, authority, and effectiveness."[15] In particular, he examines the values and interests of four different socio-professional groups involved in the debate over experts, specifically judges at international courts, parties (understood to include state officials, counsels, and other professionals directly involved in the litigation process), the experts, and international legal scholars. Lima argues that by carefully identifying the competing values and interests advanced by each of these groups, it is possible to gain a deeper understanding of the Court's evolving approach to the controversial, and recurrent, question of how best to receive and evaluate expert evidence.

Geoff Gordon's article, *Contradiction & the Court: Heterodox Analysis of Economic Coercion In International Law*, also focuses on the ICJ.[16] But where Lima's article traces changes in the Court's treatment of expert evidence across a line of cases, Gordon highlights a single order in a single case before a singular court to illuminate both methodological and substantive issues. Gordon, a Senior Researcher at the T.M.C. Asser Instituut in The Hague, focuses on the ICJ's decision to grant provisional relief to Iran in an action it filed challenging U.S. sanctions. His article draws from actor-network theory and critical sociology within a critical realist framework to investigate certain structural conditions under which the Court operates and certain "contradictions" associated with those operations. For example, Gordon notes that the U.N. Charter's ban on the use of force has the result of legally privileging other forms of economic coercion, such as the use of economic sanctions—notwithstanding the fact that such sanctions may have devastating, and even lethal, consequences. Gordon also argues that the ICJ's order and the U.S. announcement that it does not intend to comply with the order, undermines neither the Court's "idealistic authority" nor the United States's "coercive authority."[17] Gordon's article attempts to disentangle, or perhaps synthesize, these and related contradictions; hence it argues that the Court's "ethical ideal is predicated in part on material distributions guaranteed by the United States," while the United States's material power is "facilitated by the . . . legal and political ideals guaranteed by the ICJ."[18] Questions regarding the ICJ's relative level of effectiveness have generated a large literature.[19] Gordon's

14. Lucas Lima, *The Debate on the Use of Experts by the International Court of Justice: An Inquiry Through Sociological Lenses*, 34 TEMP. INT'L & COMP. L.J. 251 (2020).

15. *Id.* at 253.

16. Geoff Gordon, *Contradiction & the Court: Heterodox Analysis of Economic Coercion In International Law*, 34 TEMP. INT'L & COMP. L.J. 281 (2020).

17. *Id.* at 299.

18. *Id.* at 300.

19. *E.g.*, PHILIPPE COUVREUR, THE INTERNATIONAL COURT OF JUSTICE AND THE EFFECTIVENESS OF INTERNATIONAL LAW (2017); YUVAL SHANY, ASSESSING THE

distinctive contribution is to use a heterodox mix of sociological methods to trace the underappreciated connections between particular well-intentioned individuals diligently performing their jobs, such as international judges, and larger structural conditions that authorize certain forms of potentially lethal coercion.

The final two contributions explore regional courts. Ezgi Yildiz's article, *Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights*, focuses on variation in the relative degrees of inclusivity found in public hearings at these two regional human rights courts.[20] Yildiz, a Postdoctoral Researcher at the Graduate Institute of International and Development Studies in Geneva, Switzerland, argues that judicial practices arise from, and reflect, a court's distinctive legal culture. Her article compares and contrasts public hearings at the Inter-American Court of Human Rights, which are highly inclusive and frequently include statements from victims and civil society actors, with public hearings at the European Court of Human Rights, which do not. Drawing on elite interviews and research visits to both courts, Yildiz argues that these divergent practices reflect the quite different historical experiences out of which these courts were created. The European Court was originally intended to prevent established democracies from backsliding into authoritarian regimes.[21] The Inter-American Court, in contrast, was formed in a region that had known military dictatorships, many massacres, and other human rights violations. The Inter-American system was intended to help states transition to democracy. Given this historical setting, the Court has always had a victim-centered approach. Yildiz then employs a particular strand of sociological theory, known as "practice theory," to explain why courts continue to employ these divergent practices, notwithstanding significant changes in the political context in which they decide cases. The article thus contributes to an emerging literature applying practice theory to international courts and tribunals.[22]

Mihreteab Tsighe Taye's article, *Human Rights, the Rule of Law, and the East African Court of Justice: Lawyers and the Emergence of a Weak Regional Field*, is concerned with origin stories.[23] Specifically, his article examines the origins of the rule of law and human rights provisions in the treaty establishing the East African Community Court. Tsighe, who is a Lecturer and Coordinator of the International Law Program at the School of Law and Federalism at the Ethiopian Civil Service University, draws upon Bourdieu's sociological thought and research on other

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EFFECTIVENESS OF INTERNATIONAL COURTS (2014).

20. Ezgi Yildiz, *Enduring Practices in Changing Circumstances: A Comparison of the European Court of Human Rights and the Inter-American Court of Human Rights*, 34 TEMP. INT'L & COMP. L. J. 307 (2020).

21. For one classic account, see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

22. *See, e.g.*, Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 MICH. J. INT'L L. 47 (2018) (using practice theory to analyze the decision-making practices of international court judges).

23. Mihreteab Tsighe Taye, *Human Rights, the Rule of Law, and the East African Court of Justice: Lawyers and the Emergence of a Weak Regional Field*, 34 TEMP. INT'L & COMP. L. J. 337 (2020).

international bodies that employs the concept of a weak field[24] to detail a complex story of civil society and human rights lawyers' contributions to the institutionalization of the East African Community Court. While much attention is paid to the efforts of lawyers to use litigation to prompt institutional change, the article appropriately highlights the efforts of court officials, namely judges and the registrar, to engage in "off the bench" diplomacy intended to attract users and supporters of the Court.[25] In highlighting the roles of human rights litigators, civil society activists, and international judges, *Human Rights, the Rule of Law, and the East African Court of Justice* provides a useful supplement to more traditional accounts of court formation and evolution that focus on state actors and state interests.

Both individually and in the aggregate, the contributions to this Symposium issue reveal subtle and previously unrecognized ways in which sociological approaches to international tribunals can provide us with more nuanced and enriched understandings of the many roles these courts play. To be sure, these articles do not profess to provide an exhaustive or comprehensive overview of sociological approaches to international tribunals. Our hope is that, through the power of example, the *Journal*'s publication of this special Symposium issue will stimulate additional scholarly inquiry into this important topic.

24. *E.g.*, Stephanie Lee Mudge & Antione Vauchez, *Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics*, 118 AM. J. SOC. 449 (2012); Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INSTIT. POLIT. SOC. 128 (2008).

25. Taye, *supra* note 23, at 346.