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REVIEW ESSAY

LEGITIMACY, AUTHORITY, AND PERFORMANCE: CONTEMPORARY ANXIETIES OF INTERNATIONAL COURTS AND TRIBUNALS

*By Cesare P.R. Romano**

Legitimacy and International Courts. Edited by Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal, and Geir Ulfstein. Cambridge, UK: Cambridge University Press, 2018. Pp. viii, 387. Index.

The Legitimacy of International Trade Courts and Tribunals. Edited by Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Q. Zang. Cambridge, UK: Cambridge University Press, 2018. Pp. xi, 533. Index.

The Performance of International Courts and Tribunals. Edited by Theresa Squatrito, Oran R. Young, Andreas Føllesdal, and Geir Ulfstein. Cambridge, UK: Cambridge University Press, 2018. Pp. xix, 450. Index.

International Court Authority. Edited by Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen. Oxford, UK: Oxford University Press, 2018. Pp. xix, 464. Index.

This review essay examines four edited volumes released in 2018 that address questions concerning the "legitimacy," "authority," and "performance" of international courts and tribunals (ICs). Each of the four volumes has a somewhat different focus.

Legitimacy and International Courts, co-edited by Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal, and Geir Ulfstein, focuses on the related, but more specific, issue of the legitimacy of ICs.[1] The book's various chapters discuss what seems to underpin or undermine

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[1] LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal & Geir Ulfstein eds., 2018) (hereinafter LEGITIMACY). Nienke Grossman is a professor of law and co-director of the Center for International and Comparative Law at the University of Baltimore School of Law. Harlan Grant Cohen is the Gabriel M. Wilner/UGA Foundation Professor in International Law and faculty co-director of the Dean Rusk International Law Center at the University of Georgia School of Law. Andreas Føllesdal is a professor of philosophy at the University of Oslo Faculty of Law and director of PluriCourts. Geir Ulfstein is a professor of law at the University of Oslo Faculty of Law and deputy director of PluriCourts.

legitimacy of ICs, and it proposes three broad categories—"democracy," "justice," and "effectiveness"—to classify some of the factors that may affect legitimacy of ICs.

The Legitimacy of International Trade Courts and Tribunals, co-edited by Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, and Michelle Q. Zang, also discusses legitimacy but in regard to a specific, and particularly prolific, branch of the overall "international judiciary."[2] It examines eleven international trade courts, but, unlike *Legitimacy and International Courts* and *International Court Authority*, it does not try to come up with a larger conceptualization of what "legitimacy" and "authority" are and what factors influence them. Instead, it looks at a narrower range of legitimacy issues and concerns that have emerged over time, trying to determine whether "legitimacy deficits" are attributable more to ICs' design features and practices than to the specific political context in which they operate.

The Performance of International Courts and Tribunals, co-edited by Theresa Squatrito, Oran R. Young, Andreas Føllesdal, and Geir Ulfstein, offers a novel conceptual framework to evaluate ICs.[3] "Authority" and "legitimacy" have been the focus of much attention during the past decade. Also, previous scholarship discussed the somewhat related concepts of "effectiveness" of ICs, "compliance with decisions" of ICs, and "impact" of their work.[4] However, this is the first attempt to adapt specifically for ICs the theoretical framework that was developed by Tamar Gutner and Alexander Thompson in 2010 to evaluate the "performance" of international organizations.[5] Of course, it turns out that "authority," "legitimacy," and "effectiveness" of ICs are relevant concepts for a discussion of the "performance" of ICs.

Lastly, *International Court Authority*, co-edited by Karen Alter, Laurence Helfer, and Mikael Rask Madsen, offers a carefully crafted framework to conceptualize and measure the authority of ICs and identifies a series of contextual factors potentially explaining why similarly designed ICs seem to command different levels of authority.[6]

This review essay does not aim to untangle the four books, or, more modestly, identify gaps and overlaps. That, in itself, is an article-length project. Instead, it will try to understand the extent to which they are related to each other, identify the context in which they were conceived and written and the perceived problems that pushed scholarship in this specific direction. The conclusions map the way forward for scholarship in this specific, and, by now,

[2] THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS (Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein & Michelle Q. Zang eds., 2018) (hereinafter LEGITIMACY OF ITCs). Robert Howse is the Lloyd C. Nelson Professor of International Law at NYU School of Law. Hélène Ruiz-Fabri is the director of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. Michelle Q. Zhang is a professor of law at the University of Oslo Faculty of Law.

[3] THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS (Theresa Squatrito, Oran R. Young, Andreas Føllesdal & Geir Ulfstein. eds., 2018) (hereinafter PERFORMANCE). Theresa Squatrito is an assistant professor at The London School of Economics and Political Science. Oran R. Young is a distinguished professor emeritus at the Bren School of Environmental Science & Management.

[4] *See, e.g.*, YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014); CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2005).

[5] Tamar Gutner & Alexander Thompson, *The Politics of IO Performance: A Framework*, 5 REV. INT'L ORG. 227 (2010).

[6] INTERNATIONAL COURT AUTHORITY (Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen eds., 2018) (hereinafter AUTHORITY). Karen J. Alter is professor political science at Northwestern University. Laurence R. Helfer is the Harry R. Chadwick, Sr. Professor of Law at Duke University School of Law. Mikael Rask Madsen is the director for iCourts, Center for Excellence for International Courts and a professor of law at the University of Copenhagen Faculty of Law.

mature area of international law and relations, arguing for a less-descriptive and more normative scholarly agenda

I. The Context in Which These Books Were Conceived

Legitimacy and International Courts, *The Legitimacy of International Trade Courts and Tribunals*, and *The Performance of International Courts and Tribunals* are all products of the same think tank, PluriCourts, a research center of the Faculty of Law of the University of Oslo (Norway) focused on the "study of the legitimate roles of the judiciary in the global order."[7] According to its mission description, PluriCourts "studies the legitimacy of international courts and tribunals (ICs) from legal, political science and philosophical perspectives."[8] It explores "the normative, legal and empirical soundness of charges of illegitimacy, to understand and assess how ICs do, could and should respond"[9] and "the multidimensional legitimacy standards which include multilevel separation of authority, independence and accountability, performance and comparative advantages."[10] Pragmatically and neutrally, it "also aims to identify best practices and models to establish, improve or abolish ICs."[11] Andreas Føllesdal, a professor of philosophy, is the director, and Geir Ulfstein, a professor of law, is the deputy director.[12] PluriCourts includes amongst its researchers legal scholars and political scientists.[13]

International Court Authority is a project of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts. iCourts is dedicated to the study of international courts, their role in a globalizing legal order, and their impact on politics and society.[14] It is directed by Mikael Rask Madsen, a sociologist and professor at the Faculty of Law of the University of Copenhagen (Denmark). Karen Alter, a professor of political science at Northwestern University, and Laurence Helfer, a legal scholar and professor of law at Duke University School of Law, the two co-editors with Madsen of *Authority*, are permanent visiting professors at iCourts.[15]

PluriCourts and iCourts are distinct endeavors but they have much in common and close ties.[16] They were both established around 2012, with grants from the respective national research foundations. To avoid overlap and play on the strengths of the respective faculties,

[7] PluriCourts – Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, *at* https://www.jus.uio.no/pluricourts/english [hereinafter PluriCourts].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] PluriCourts, *People*, *at* https://www.jus.uio.no/pluricourts/english/people.

[13] iCourts – The Danish National Research Foundation's Centre of Excellence for International Courts, *at* https://jura.ku.dk/icourts [hereinafter iCourts].

[14] iCourts, *About iCourts*, *at* https://jura.ku.dk/icourts/about.

[15] iCourts, *Staff*, *at* https://jura.ku.dk/icourts/staff.

[16] I need to disclose that I have close ties with both centers and series. I am senior research fellow at iCourts and teach every summer at the joint PluriCourts/iCourts Summer School. I am editor of the Oxford University Press series on international courts and I am often requested by Cambridge University Press to review submissions of manuscripts for publication in their dedicated international courts series. That being said, I played no role in the making of the books here reviewed nor in their publication process other than green lighting *International Court Authority* for publication in the Oxford University Press series.

PluriCourts decided to place "legitimacy" and its many offshoots as the core question concerning ICs and their work. iCourts decided to take a broader view, not limiting itself to an issue or an area, privileging cross-court comparative analysis. However, with such broad remits, right from the outset the two centers realized that, because they had the same object of study, cooperation was warranted. Over the years, they have jointly organized several conferences and events. PluriCourts disseminates its scientific work in a Cambridge University Press dedicated series called "Studies on International Courts and Tribunals." iCourts does the same in the Oxford University Press series "International Courts and Tribunals."

All of this helps to explain why this review essay discusses this cluster of books and their relation to each other. *Legitimacy and International Courts*, *The Legitimacy of International Trade Courts and Tribunals*, and *The Performance of International Courts and Tribunals*, products of PluriCourts, are closely related to each other, the two *Legitimacy* books obviously more so than *Performance*. Some of the contributors have written pieces for at least two of them, if not all of them. *Authority* is the product of a different context and intellectual mix, with no overlap with the PluriCourts books. Therefore, it is expedient to discuss first the three PluriCourts books and then *Authority*, highlighting differences between the two.

II. *Legitimacy and International Courts*, *The Legitimacy of International Trade Courts and Tribunals*, and *The Performance of International Courts and Tribunals*

A. Legitimacy and International Courts

The key word at the heart of PluriCourts is "legitimacy," and it is the object of study of the first two books. As the editors of *Legitimacy and International Courts* recognize, "legitimacy is often criticized as a notoriously slippery concept" (Grossmann, et al., p. 4). The term has been used "in a myriad of ways by many different authors" (*id.*), but, according to the editors, in the end a legitimate power is broadly understood to mean one that has "the right to rule" (*id.*). "A legitimate court possesses a justifiable right to issue judgments, decisions, or opinions, which those normatively addressed must obey, or at least consider with due care" (*id.*). This "right to rule" can be grounded in predefined standards, the four corners within legitimate power can be yielded, something which formally trained international legal scholars would call "competence" and "jurisdiction." This is called "normative legitimacy," or "objective legitimacy." Alternatively, it can be in the eye of the beholder, deriving from perceptions or beliefs. This is the so-called "sociological legitimacy" or "subjective legitimacy." Crucially, the two can be disharmonious. A court that scores high on normative legitimacy might still score low on sociological legitimacy (think of the Court of Justice of the European Union and the British public, particularly those bent on Brexit; or the International Court of Justice in the aftermath of the South-West Africa decision[17]).

While it is undeniable that the concept of legitimacy is slippery, one would have expected the editors of this book to at least attempt to provide a working definition of it, one that the book, and perhaps even the whole of PluriCourts, relies on. Instead, they proceed straight to slicing and dicing it, probably to highlight its multifaceted nature. For instance, we learn that one could distinguish between "internal legitimacy" (i.e., the perception of regime insiders

[17] South-West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 ICJ Rep. 6 (July 18).

and those working with the regime) and "external legitimacy" (i.e., the perception of outsiders), and that considerations and concerns about legitimacy can be split into "source-," "process-," and "results-oriented" factors. Source-oriented factors relate to the "who": who should give or has given consent to be bound by the given court, for instance. Process-oriented factors regard how courts do what they do (i.e., fairness, impartiality, adherence to rules, etc.). Results-oriented factors are those concerned with the outcomes, with how well the court performs its function.

Overall, the book seems to pay more attention to "normative legitimacy" than to "sociological legitimacy." Sociological legitimacy is discussed in the chapters by Mark Pollack,[18] Andrea Bjorklund,[19] Alexandra Huneeus,[20] Nienke Grossman,[21] and Geir Ulfstein,[22] but more as a counterpoint to "normative legitimacy" than on its own merits. However, one needs not to bemoan this since, as we will see, "sociological legitimacy" features strongly in *Authority*.[23]

The editors group proposes to assess "normative legitimacy" by three broad standards: "justice," "democracy," and "effectiveness." This is where things get tangled. To explain what the "justice" standard is, the editors make reference to three different ideas: First, Joseph Raz's concept of authority, according to which an institution's legitimacy is directly correlated to whether it helps a state to better act in accordance with rules that bind it independently.[24] Second, Allan Buchanan and Robert Keohane's notion that the legitimacy of global governance institutions depends on respecting standards of "minimum moral acceptability."[25] And, finally, the idea of Nienke Grossman, one of the co-editors, that a court's legitimacy, and, in her case, international human rights courts specifically, depends on whether it helps states comply with international law better than they would have done on their own.[26] The problem is that these three notions of legitimacy seem to be neither well-related to each other, nor, taken together, amount to a "justice" standard—whatever "justice," a slippery concept, means.

The second standard, "democracy," is better but also not devoid of problems. The editors use it to group together factors such as "accountability," "transparency," "participation," and "representativeness." Some of these are more precise tools to assess courts than others. One can easily count how many women sit on the bench of any given international court at any given time and measure the gap between that number and an ideal fifty percent. Measuring accountability is far more challenging. More crucially, as Mortimer Sellers explains in his chapter, democracy is a concept that should not be evoked when discussing international

[18] Mark A. Pollack, *The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence*, *in* LEGITIMACY, *supra* note 1, at 143.

[19] Andrea K. Bjorklund, *The Legitimacy of the International Centre for Investment Disputes*, *in* LEGITIMACY, *supra* note 1, at 234.

[20] Alexandra Huneeus, *Legitimacy and Jurisdictional Overlap: The ICC and the Inter-American Court in Colombia*, *in* LEGITIMACY, *supra* note 1, at 114.

[21] Nienke Grossman, *Solomonic Judgments and the Legitimacy of the International Court of Justice*, *in* LEGITIMACY, *supra* note 1, at 43.

[22] Geir Ulfstein, *The Human Rights Treaty Bodies and Legitimacy Challenges*, *in* LEGITIMACY, *supra* note 1, at 284.

[23] *See* Part IV *infra*.

[24] JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

[25] Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

[26] Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61 (2013).

judicial institutions because "any contribution that democracy makes toward the legitimacy of international law will be oblique and instrumental. Democratic practices and procedures make international courts more legitimate only to the extent that they advance the purposes that justify international courts in the first place" (Grossman, et al., p. 342).[27]

The third standard, "effectiveness," should be the least problematic, since there is already established literature assessing that, but it seems to me that the editors managed to blur it by adding the related, but distinct, question of compliance with decisions of ICs.

The rest of the book is divided into two broad sections. One is dedicated to studying how variations in the three factors (justice, democracy, and effectiveness) affect legitimacy of a number of ICs (i.e., International Court of Justice, International Criminal Court, European Court of Human Rights, Court of Justice of the European Union; International Tribunal for the Law of the Sea; dispute settlement under the World Trade Organization and the International Centre for the Settlement of Investment Disputes; and human rights bodies). The other explores crosscutting issues, eschewing an analysis of any particular court. Føllesdal raises doubts about the connection made between democracy and legitimacy, suggesting that calls for "democratization" of ICs are better understood as calls for the "constitutionalization of the international legal order," meaning, in essence, the integration of international and domestic law (Grossman, et al., p. 307).[28] Sellers doubles down with his critique of the usefulness of the concept of democracy when talking about ICs.[29] Shany closes with a revised summary of his well-known study of the effectiveness of ICs.[30]

B. The Legitimacy of International Trade Courts and Tribunals

The Legitimacy of International Trade Courts and Tribunals largely treads on ground that has already been covered by *Legitimacy and International Courts* but, by focusing on a specific family of international judicial bodies, it makes it easier to contextualize some of the points made in the latter. *Legitimacy and International Courts* dedicated only two chapters to international trade courts, while *The Legitimacy of International Trade Courts and Tribunals* is entirely focused on them. *The Legitimacy of International Trade Courts and Tribunals* studies eleven trade courts and tribunals, some of which are known only to the ICs *cognoscenti*,[31] and not all of which are, strictly speaking, international. Indeed, it includes, perplexingly, the Federal Court of Canada and the U.S. Court of International Trade,[32] which are domestic courts, not international courts.[33]

[27] Mortimer N.S. Sellers, *Democracy, Justice, and the Legitimacy of International Courts*, *in* LEGITIMACY, *supra* note 1, at 342.

[28] Andreas Føllesdal, *Constitutionalization, Not Democratization: How to Assess the Legitimacy of International Courts*, *in* LEGITIMACY, *supra* note 1, at 307.

[29] Sellers, *supra* note 27.

[30] Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, *in* LEGITIMACY, *supra* note 1, at 354.

[31] *See, e.g.*, Rilka Dragneva, *The Case of the Economic Court of the Commonwealth of Independent States*, *in* LEGITIMACY OF ITCS, *supra* note 2, at 286; Ousseni Illy, *The WAEMU (Western Africa Economic and Monetary Union) Court of Justice*, *in* LEGITIMACY OF ITCS, *supra* note 2, at 349.

[32] Donald C. Pogue, *The United States Court of International Trade*, *in* LEGITIMACY OF ITCS, *supra* note 2, at 182; Maureen Irish, *The Federal Courts of Canada*, *in* LEGITIMACY OF ITCS, *supra* note 2, at 202.

[33] The standard definition of an international court or tribunal (also known as "international adjudicative bodies" is: (1) international governmental organizations, or bodies and procedures of international governmental

As compared to *Legitimacy and International Courts,* the theoretical apparatus is thin. The editors dedicate only a couple of pages to the "legitimacy debate" (Howse, et al., pp. 4–7). They asked the contributors writing on each court to systematically address seven issues: independence; procedural legitimacy, fact-finding, burden of proof, rules of evidence, and standards of review; styles of interpretation; interaction between international trade courts; interaction between international trade courts and the "domestic level"; and the question of the underuse, or use for non-trade disputes, of international trade adjudicatory bodies. Clearly, these questions probe more the normative legitimacy of the work of the chosen ICs than their sociological normativity.

Considering that *Legitimacy and International Courts* and *the Legitimacy of International Trade Courts and Tribunals* are the product of the same think tank, share some core co-editors, and were published within the same period, it is understandable that they decided not to restate the theoretical apparatus of *Legitimacy and International Courts*. However, it would have been better to make at least explicit reference to it.

Overall, the *Legitimacy of International Trade Courts and Tribunals* will be of great interest to those scholars focusing on international trade. However, it should be read in conjunction with at least the Introduction and Part II of *Legitimacy and International Courts* to truly benefit from its insights.

C. The Performance of International Courts and Tribunals

I find *The Performance of International Courts and Tribunals* to be the most interesting of the tryptic of PluriCourts books here reviewed. While the vein of the legitimacy of ICs had already been tapped and, by now, has been exhausted, "performance" is a term that so far has been absent in discussions of ICs. Much like the "legitimacy" books, the reader is not offered a straightforward definition of the book's key term. Instead, we are given a quote from the Gutner and Thompson seminal study of the performance of international organizations, the chosen theoretical framework of the book:

> Performance as an explanandum is a multifaceted concept. In everyday usage, it has two distinct but related meanings. First, as a verb, to perform is simply to fulfill an obligation or complete a task. Second, as a noun, performance refers to the manner in which the task is completed. Thus, to address the issue of performance, as applied to the social world, is to address both the outcomes produced and the process—the effort, efficiency and skill—by which goals are pursued by an individual or organization. (Squatrito, et al., pp. 8–9)[34]

Accordingly, the book distinguishes between "outcome performance" and "process performance." "Process performance" captures questions regarding procedural fairness and procedural justice, efficiency of procedures, including length of proceedings and the cost of operating the given IC, transparency, reasoning and interpretation, fact-finding, and other

organizations, that (2) hear cases where one of the parties is, or could be, a state or an international organization, and that (3) are composed of independent adjudicators, who (4) decide the question(s) brought before them on the basis of international law (5) following pre-determined rules of procedure, and (6) issue binding decisions. Cesare Romano, Karen Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and the Players*, *in* Oxford Handbook of International Adjudication, at 6 (Cesare Romano, Karen Alter & Yuval Shany eds., 2014).

[34] *Citing* Gutner and Thompson, *supra* note 5, at 231.

indicators of judicial decision making (Squatrito, et al., pp. 13–14). "Outcome performance" assesses the activities of ICs and evaluates the extent to which the actions of courts contribute to the attainment of substantive goals (*id.*). To this end, the contributors were asked to answer: to what extent their assigned IC is able to "settle the disputes" brought before it? To what extent does it contribute to the "clarification of the law"? To what extent does it facilitate "compliance with international law"? Assuming all of these are actually goals assigned, implicitly or explicitly, to ICs, then one might wonder how this is different from studies assessing the effectiveness of ICs, which compare actual impacts with desired outcomes, or, in other words, outcomes with expectations. The editors candidly admit that performance analysis is similar to effectiveness analysis. However, they claim that their chosen framework captures a broader "set of goals identified by analysts as well as relevant constituencies" (Squatrito, et al., p. 8) and in that it differs from Shany's study of effectiveness,[35] which, they say, "treats judicial procedures primarily as determinant of goal attainment" (Squatrito, et al., p. 13)

Although I am not completely persuaded by the editors' distinction, the novel theoretical framework reveals its potential in the level of analysis. The editors distinguish between micro-, meso-, and macro-levels, corresponding roughly to the level of the single case, the issue area or regime to which the case belongs, and the overarching legal system in which the case arises.[36] A micro-level output performance analysis asks, for instance, whether the judgment rendered in a given case has led to the settlement of the dispute that gave rise to the case. At the meso-level one might ask whether the activities of a court have contributed to the prevention of disputes or behavioral changes across the relevant regime. For instance, does the International Criminal Court deter war crimes? At the macro-level, one might ask whether a given court, or all courts, are changing the nature of international relations, helping to move the international community toward the rule of law. All of this produces a complex matrix, with two dimensions (process and outcome performance), three levels (micro, meso, and macro), applied to the study of four issue areas that have been "judicialized" (trade, investment, human rights, and international criminal law).

Obviously, such a fine-grained analysis necessitates finding the "determinants of performance," the independent variables that account for variance in performance, the dependent variable (Squatrito, et al., p. 13). Legitimacy, for instance, is one such variable, the hypothesis being the greater the legitimacy of a court, the more performing it will be.[37] Naturally, this entails untangling chains of causality and making correct inferences, which can be very difficult. Thus, wisely, the editors refrained from spelling out a set of precise hypotheses to be given to the authors of the various chapters to test systematically in their contributions. Instead, they sought to identify the main types of explanations that are usually invoked in this kind of analysis. Somewhat disappointingly, they then discuss the classical, mainstream categories of contemporary international relations scholarship: realist, liberalism, institutionalism, and constructivism. Of course, a realist will assess the work of international courts differently than someone who views the world through the lens of institutionalism. Also, political scientists see courts and ask questions about them that are different from those

[35] SHANY, *supra* note 4.
[36] PERFORMANCE, *supra* note 3, at 15–18.
[37] *Id.* at 6.

asked by legal scholars. As long as these intellectual premises and backgrounds are made explicit, the analysis will still be plausible. The problem is the *method*.

Method is discussed in a distinct chapter, by Theresa Squatrito, which I find to be the most useful chapter of this good book.[38] There, Squatrito discusses some of the tools, quantitative and qualitative, that could be used to observe, measure, and analyze the performance of international courts, and test the roles of each determinant. It is a good *vademecum*, one that contains useful insight for novices and expert hands.

The last chapter, entitled "What We Know So Far," attempts to synthetize the insights contained in the various dedicated chapters.[39] Unsurprisingly, the first conclusion is that context matters. Each IC is idiosyncratic, in structure and the environment in which it operates, making generalization possible only at the highest level of abstraction. For instance, the editors believe to have found, at the micro-level of analysis, enough evidence to suggest that "open refusal to comply with the decisions of international courts is relatively uncommon" (Squatrito, et al., p. 413), or, at the meso-level, that "the judgments of international courts do make a difference beyond the level of the individual cases that appear on their dockets" (Squatrito, et al., p. 417). Everyone who has studied ICs for some time probably had the intuition that that was the case. Now, however, we have some evidence to point to in support.

The editors are more cautious in arriving at conclusions at the macro-level. They report not seeing "any convincing evidence that international society has evolved to the point where the rule of law determines political behavior" (Squatrito, et al., p. 425). I find the argument to be undermined by a strawman fallacy. Even the most die-hard supporter of the idea of the rule of law would not go as far as wishing it to *determine* political behavior. That would amount to the abdication of politics and its enslavement to the rule of a law. Rather, they would like to see the rule of law play a greater role, domestically and internationally, have *greater influence* on political behavior, but in a dialectic relationship with politics, not against it. If that is the case, then, had the editors asked themselves whether there is any convincing evidence that that international society has evolved to the point where the (international) rule of law *influences* (international) political behavior, they would have found plenty.[40] Also, they did not find sufficient evidence to support a conclusion that the rule of law, or at least legalization, is spreading in interactions between and among states, and that ICs have become relevant players in international relations.[41] That is surprising. Perhaps not uniformly across the globe and in every aspect of international relations, but legalization[42] and judicialization[43] have been a feature of international relations since the end of the Cold War.

I have no problem embracing the editors' conclusion that "political power, rational calculations, and normative pressures will continue to be leading determinants of outcomes in

[38] Theresa Squatrito, *Measurements and Methods: Opportunities for Future Research*, *in* PERFORMANCE, *supra* note 3, 373.

[39] Oran R. Young, Theresa Squatrito, Andreas Føllesdal & Geir Ulfstein, *What We Know So Far*, *in* PERFORMANCE, *supra* note 3, at 406.

[40] *See, e.g.*, KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW, COURTS, POLITICS, RIGHTS (2014).

[41] Young, Squatrito, Føllesdal & Ulfstein, *supra* note 39, at 417.

[42] *See, e.g.*, Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[43] *See, e.g.*, THE JUDICIALIZATION OF INTERNATIONAL LAW (Andreas Føllesdal & Geir Ulfstein eds., 2018); Karen J. Alter, Emilie Marie Hafner-Burton & Laurence Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449 (2019).

most issue areas during the foreseeable future, and cultural diversity will continue to spark conflicts that judicial mechanisms are unable to settle" (*id.*). Yes, ICs have, and will always have, limits. However, I have to reject categorically assertions such as:

> The emergence of human rights courts at the regional level, by contrast, is likely attributable to social, economic, and cultural differences that rule out the prospect of any overarching global consensus regarding normative standards applicable to matters involving human rights. What seems like a violation of human rights in one cultural settings may seem perfectly acceptable in another. (*Id.*)

That misunderstands the architecture of the international system of protection of human rights. It flat out ignores the existence of a very developed global system of protection of human rights, within the United Nations, that hinges on an "overarching global consensus regarding normative standards applicable to matters involving human rights" (*id.*), from the Universal Declaration of Human Rights[44] onward. It also ignores the fact that the legal instruments regional courts are called to apply contain, with minimal variations, the same rights, worded in the same way, of global instruments, and that the jurisprudence of global human rights bodies and regional courts is remarkably synchronized. Human rights are universal by definition and in fact.

In closing, the editors point out "certain developments that lead to significant changes in the role of law at the international and transnational level" that "deserve to be monitored closely by all those who share an interest in the evolving roles of international courts and tribunals" (Squatrito, et al., p. 417). According to them, the broader context within which ICs will operate in the foreseeable future are, first, a less predictable political environment, one that will ask decision makers to be alert of the impact of seemingly unrelated events and need them to be ready to adjust to changing circumstances in an agile fashion.[45] And, second, the fact that a comprehensive system of global governance, based either on a reformed UN or some wholly new arrangement replacing the UN, is not on the horizon.[46] Thus, according to the editors, the challenges ICs face and those who support them are, first, strengthening and creating courts that have both the authority and the capacity to deal with issues that take the form of classic, interstate disputes.[47] Second, ICs need to move faster and "find ways to operate on a timescale that matches the pace of world affairs" (Squatrito, et al., p. 428). And, third, in turbulent times like this, "featuring nonlinear and often surprising changes, the need for normative leadership becomes central" (*id.*).

I am not sure these are the right questions, or the most pressing ones, and I am even more skeptical about the answers provided by the editors. On the first question, we have already made much progress. The fact that the overwhelming majority of courts created since the end of the Cold War can hear cases that have been brought by entities that are not sovereign states is a step in that direction. More can be done, but, technically, it might not be possible to enlarge the jurisdiction *ratione personae* of existing ICs. The answer might be the creation of more ICs, which raises issues of fragmentation, competition, and overlap.

[44] GA Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948).
[45] PERFORMANCE, *supra* note 3, at 426.
[46] *Id.*
[47] *Id.* at 427.

On the question of moving faster, I tend to concur. ICs move frustratingly slow. However, that impression is true mostly if one conceptualizes ICs as firetrucks putting out fires—you want them to arrive on the scene before all is burned down. Framed like that, the fact that it took the Yugoslav and Rwanda tribunals (ICTY and ICTR) more than twenty years to prosecute those most responsible of international crimes committed in the early 1990s in those regions is a failure. However, that is not the only function of ICs. Sometimes they even need to move slowly, to allow the parties find a solution on their own.

Lastly, on the question of "normative leadership," according to the editors, "many issues that appear on courts' dockets will take the form of what are often referred to as cases of first impression," and "decisions rendered in such cases can serve as important precedents, even in systems that formally reject or deemphasize the role of precedent" (*id.*). To me that sounds like a reason to move deliberately and go slow, not to hasten.

The book concludes with a call to action on the part of scholars. Over the past twenty years, we learned much but much more needs to be done. As compared to the pioneering years of international court and tribunals scholarships—those of the Project on International Courts and Tribunals (PiCT)[48]—nowadays there is much more data available, often organized and already systematized. Many theoretical frameworks have been advanced, but many more could be conceived. As the editors concluded, "we are only beginning to understand the roles that judicial institutions play in international society and the roles they are likely to play going forward in a highly dynamic social setting" (Squatrito, et al., p. 433). PluriCourts and iCourts are likely to continue to be the main generators of much research in this domain.

III. *International Court Authority*

While *Legitimacy and International Courts*, *The Legitimacy of International Trade Courts and Tribunals*, and *The Performance of International Courts and Tribunals* are products of PluriCourts, *International Court Authority* is a fruit of a different tree—iCourts—and it shows in many ways. The co-editors of *Authority* are a political scientist, a legal scholar, and a sociologist, who have worked for years, through iCourts, together, in various combinations, often exploring the edges of international judicialization, giving them a grasp of the intricacies of the structure and functioning of ICs that is unparalleled.[49] The experience they have in working together allowed them to conceive a tight theoretical framework, which results in a book that reads less like an edited book and more as a multi-author volume.

While the PluriCourts books investigate the normative aspect of legitimacy (objective legitimacy) deeper than sociological legitimacy (subjective legitimacy), *Authority* puts a premium on context and maps variations in "how audiences that interact with ICs embrace or reject [their] rulings" (Alter, et al., p. 3). To this end, the contributors were asked to measure

[48] Cesare Romano, Karen Alter & Yuval Shany, *Editors' Preface*, *in* Oxford Handbook of International Adjudication, *supra* note 33, at vii.

[49] *See, e.g.*, Karen Alter & Lawrence Helfer, Transplanting International Courts: Law and Politics of the Andean Tribunal of Justice (2017); Karen Alter, Lawrence Helfer & James Gathii, *Backlash Against International Courts in West, East and Southern Africa*, 27 Eur. J. of Int'l L. 293 (2016); Karen Alter, Lawrence Helfer & Jacqueline McAllister, *A New International Human Rights Court for West Africa: The Court of Justice for the Economic Community of West African States*, 107 AJIL 737 (2017).

authority by the "practices of key audiences, which include the statements, conduct, and other observable activities of different actors that interact with the court or respond to its rulings" (Alter, et al., p. 13). In other words, theirs is a bottom-up approach to the study of authority, as opposed to the top-down approach followed by most literature.

The editors distinguish authority from both "legitimacy" and "power." They reject the idea that authority and legitimacy are linked by a direct variation, whereby if legitimacy increases so does authority. They are neither two sides of the same coin nor the elements of the tautological expression "legitimate authority." They are rather variables independent of each other. In approaching them this way, the editors follow recent scholarship on international institutions that has become increasingly weary of conflating the two notions.[50] They also distinguish authority from power, in the sense that authority is a "form of power" but one sufficiently different from power to justify a distinction (Alter, et al., p. 25).

Unsurprisingly, Andreas Føllesdal, the director of PluriCourts and the co-editor of *Legitimacy and International Courts*, resists the separation of legitimacy and authority, arguing that *Authority*'s framework is asking essentially normative questions.[51] Ian Hurd, a political scientist, also takes exception with the separation of legitimacy and authority, being uneasy with the departure from the tradition of international relations scholarship, which typically views authority linked to legitimacy.[52]

Lamentably, *Authority*'s co-editors do not offer a straightforward definition of "authority." As with the books on legitimacy, they let us infer the meaning positively from a series of indicia and negatively by telling us what the object of their study is not. Thus, we are told that there are two forms of authority: *de jure* and *de facto*. *De jure* authority, favored by legal formalistic approaches, derives from the mandate given to ICs, as codified in their constitutive legal instruments (treaty, statute, etc.). Conversely, *de facto* authority is the "real world" authority, or "authority in fact," which, crucially, can be greater or smaller than *de jure* authority. "[*D*]*e facto* authority is generated when IC rulings are reflected in the practices of audiences. The capacity of an IC to exercise authority is, therefore, its ability to influence practices in law, politics, and society" (Alter, et al., p. 13). A simple mind would conclude that the definition of authority is "the ability to influence behaviors," but it is obviously much more complicated with that, even though it is not exactly clear how. Later on in the book, in Section III, entitled "International Court Authority in Question," several contributors push back and further distinguish authority from "influence," "leadership," "persuasion," and the various ways in which behavior can also be changed without coercion.[53]

The stated goal of *Authority* is to "explore the theoretical and practical challenges involved in transforming an IC's formal *de jure* authority into *de facto* legal authority or authority in fact" (Alter, et al., p. 15). Variations in *de facto* authority are measured on a five-level scale: "no authority"; "narrow authority"; "intermediate authority"; "extensive authority"; and "popular

[50] *See, e.g.*, Birgit Peters & Johan Karlsson Schaffer, *The Turn to Authority Beyond States*, 4 TRANSNAT'L LEGAL THEORY 315 (2011); Andrei Marmor, *An Institutional Conception of Authority*, 39 PHIL. & PUB. AFF. 238 (2011); Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and its Politicization*, 4 INT'L THEORY 69 (2012).

[51] Andreas Føllesdal, *Power or Authority; Actions or Beliefs*, *in* AUTHORITY, *supra* note 6, at 412.

[52] Ian Hurd, *Authority and International Courts: A Comment on "Content-Independent" Social Science*, *in* AUTHORITY, *supra* note 6, at 422.

[53] AUTHORITY, *supra* note 6, at 365–460.

authority." Each level corresponds to an increasingly wider circle of audiences influenced, and each is independent of each other, in the sense that the same court can have at the same time different level of authority in the eyes of different audiences.

Again, the editors chose to emphasize context, which is often overlooked in normative approaches. They identified three broad institutional, social, and political contexts that can hinder or aid an IC in establishing its authority: (1) institution-specific factors; (2) factors related to IC constituencies and their interests; and (3) global, regional, and domestic contexts.[54] Accordingly, they asked the contributors to measure IC authority by studying the behavior of key constituencies. They left the contributors free to decide which contextual factors to examine, and required them only to use the authority metric, as defined by the editors, and to compare at least two dimensions of IC authority.[55]

The contributors delivered. The editors kept them on the tight and narrow. These chapters are full of detail and novel information, often reflecting on-the-ground, original research. Moreover, one of the many positive features of this book is that it includes a full treatment of the lesser-known regional courts. Over the years, the editors and the various researchers associated with iCourts have turned their telescopes from the well-known bodies in the international adjudicative universe (e.g., International Court of Justice, World Trade Organization, International Criminal Court, European Court of Human Rights, etc.) to less visible ones. Thus, alongside the usual objects of study, the book features chapters on: the East African Court of Justice;[56] the Economic Community of West African States (ECOWAS) Community Court of Justice;[57] the Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (OHADA);[58] the Southern Africa Development Community (SADC) Tribunal;[59] the Caribbean Court of Justice;[60] and the Andean Tribunal of Justice.[61] It also looks at how authority of the global courts, such as the International Court of Justice, is perceived among less-studied audiences, such as Islamic states.[62]

Finally, in Part III of the book, the co-editors opened their theoretical framework to debate and contestation by a diverse group of scholars in law, political science, philosophy, and anthropology who have previously written, sometimes extensively, on institutions of global

[54] Karen Alter, Laurence Helfer and Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, *in* AUTHORITY, *supra* note 6, at 24, 36 –58.

[55] AUTHORITY, *supra* note 6, at 15.

[56] James T. Gathii, *The East African Court of Justice: Human Rights and Business Actors Compared*, *in* AUTHORITY, *supra* note 6, at 59.

[57] Solomon Ebobrah, *The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority*, *in* AUTHORITY, *supra* note 6, at 82.

[58] Claire Moore Dickerson, *The OHADA Common Court of Justice and Arbitration: Its Authority in the Formal and Informal Economy*, *in* AUTHORITY, *supra* note 6, at 103.

[59] E. Tendayi Achiume, *The SADC Tribunal: Sociopolitical Dissonance and the Authority of International Courts*, *in* AUTHORITY, *supra* note 6, at 124.

[60] Salvatore Caserta & Mikael Rask Madsen, *The Caribbean Court of Justice: A Regional Integration and Postcolonial Court*, *in* AUTHORITY, *supra* note 6, at 149.

[61] Karen Alter & Laurence Helfer, *The Andean Tribunal of Justice: From Washington Consensus to Regional Crisis*, *in* AUTHORITY, *supra* note 6, at 173.

[62] Emilia J. Powell, *The International Court of Justice and Islamic Law States: Territory and Diplomatic Immunity*, *in* AUTHORITY, *supra* note 6, at 277.

governance and/or authority and power and how they work. The resulting kaleidoscope of perspectives is humbling, as it opens countless avenues of inquiry.

The editors should be praised not only for having the courage of welcoming in the book voices that openly question their theoretical framework, but also, in the closing chapter, for having the honesty to admit that some aspects of the framework they laid down at the outset were not validated by the empirical findings in the various chapters. For instance, they admit that some of the categories posited were neither necessary nor sufficient to explain variations in authority, and that, overall, it is not as easy as they thought to take into account contextual factors because they are not discrete forces that can be discussed separately but rather interact with each other in never-ending feedback loops.[63]

IV. Conclusions

The past two years yielded a bumper crop of books on closely related aspects of the life of international courts: legitimacy, authority, and performance. More are looming on the horizon, for instance the upcoming volume edited by Freya Baetens, *Legitimacy of Unseen Actors in International Adjudication*.[64] This new wave has moved beyond the questions that commanded scholarly attention during the 2000s and early 2010s, such as the independence of ICs and their accountability, composition of ICs, the fragmentation of the international judiciary and law, and the relationship between ICs and between ICs and national courts. In a way, investigations on legitimacy, authority, and performance of ICs is the logical next step of an intellectual evolution. However, there is another more context-laden way of looking at this new trend: it may be the result of a fundamental anxiety caused by a radically changed context, one that has become considerably more hostile to the ICs enterprise.[65]

Over the past three years, pushback against ICs has gone from being sporadic and uncoordinated, to a full-frontal assault on the very idea that underpins ICs: that international relations can and should be governed by the rule of law (with ICs being its trustees) instead of the rule of might. At the time of this writing, the leaders of the five permanent members of the UN Security Council are Donald Trump, Vladimir Putin, Boris Johnson, Xi Jinping, and Emmanuel Macron. At least four of them have shown remarkable reluctance to have their actions constrained by law, domestically or internationally, and have taken steps to narrow or thwart the authority and legitimacy of many ICs. Outside of this circle, in Asia, Europe, Latin America, and Africa, leaders of a similar bent abound these days. That ICs' legitimacy and authority always rested on thinner ground than their domestic counterparts is undeniable. However, that thin ground is now cracking. In this sense, a wave of books discussing authority and legitimacy is an expression of a deep-seated anxiety. Yet, what is needed now is a less-descriptive and more normative, clear-eyed scholarly agenda, one that can help find ways to entrench ICs in the international landscape.

[63] Karen Alter, Laurence Helfer & Mikael Rask Madsen, *Conclusion: Context, Authority, Power*, *in* Authority, *supra* note 6, at 435

[64] Legitimacy of Unseen Actors in International Adjudication (Freya Baetens ed., 2019).

[65] Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int'l J. L. in Context 90 (2018).

We have been writing about ICs for twenty years now, not as separate entities with little in common but as a unified field of study.[66] The amount of knowledge that has been generated fills entire shelves. The question is: *cui bono*? Has all of this translated into better ICs design, better judicial practices, reformed rules of procedure, greater care and attention by states of the international judiciary? And if it has not, why? One can argue that it is not the role of scholars to generate actionable ideas but it is rather to describe and understand, lest they lose the neutrality needed to be able to carry out objectively their function. I belong to the school of thought that believes that scholars owe a debt to society and have a duty to try to help it progress. In that vein, I hope that the next generation of IC scholarship takes on the challenge of carrying out a self-assessment, linking scholarly debates to actual changes in the material world. We need to start taking stock of what has been done and what still needs to be done if we are to ensure that ICs will not go down in history as a temporary anomaly of the age between the end of the Cold War and the beginning of the Crisis of Democracies.

[66] See special issue of the *New York University Journal of International Law and Politics* on the proliferation of ICs. 31 N.Y.U. J. Int'l L. & Pol. 679 (1998–1999).