

Power or Authority; Actions or Beliefs

Approximately as appears in *International Court Authority*. K. Alter, L. Helfer and M. R. Madsen, eds. New York, Oxford University Press (2018): 412-421

Institutional, political and social circumstances affect the impact of international courts ('ICs').¹ The valuable and intellectually intriguing aim of the project 'The Variable Authority of International Courts' is to develop and apply a metric to assess the effects of some of these contexts. The following comments do not seek to raise doubts about the important findings contained in the remainder of this volume. The reflections concern the theoretical framework Alter, Helfer and Madsen ('AHM') provide, and how it fits with the substantive chapters. What do they seek to measure with their metric – and are the findings actually about authority? Furthermore, AHM go to great lengths to proclaim methodological agnosticism about actors' beliefs and motives, and argue for the irrelevance of normative legitimacy for this research project. Yet the former claim seems incorrect and the second is both unnecessary and ill defended. These observations raise more general questions not addressed here, namely which premises or broader aspirations lead AHM to make these announcements.

Section 1 considers the concerns of AHM, in particular the metric of 'de facto authority'. If the authors maintain their position about motivational agnosticism, they should reconsider whether 'de facto authority' is the best label for the kind of impact of these ICs at various levels that concerns them, and which we agree is interesting. At times their claims seem to fit better with an – utterly respectable - aspiration to map the ICs' power more generally.

Section 2 urges AHM to retract their proclamation of methodological agnosticism about actors' motives. That attitude seems unnecessary, implausible given their intention to map causality, impossible to maintain given their definition of 'authority,' – and a commitment they and the other authors in the project violate repeatedly. Section 3 questions AHM's explicit bracketing of social legitimacy in the sense of actors' beliefs about normative legitimacy. Their reasons appear ill founded and confuse the relationship between 'authority' and social legitimacy. Some attention to social legitimacy would likely strengthen the project. Section 4 concerns the arguments AHM provide to leave aside questions of normative legitimacy. The low relevance of that research topic for the empirical project at hand would seem so obvious that it needs no justification. Yet they provide several arguments which on closer scrutiny seem not only unnecessary but implausible. I thus provide what may be thought of as a concurring opinion, agreeing with their conclusion but challenging

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their reasons. Section 5 provides a brief sketch of Raz' theory of legitimate authority to challenge their claims. Section 6 concludes by suggestion one area for future research where scholarship on social and normative legitimacy may in fact be relevant to understand the politics and legitimation strategies of international courts with variable authority.

1 On de facto authority

How do AHM distinguish their topic of interest – de facto authority – from related concepts such as de jure authority and power? The central claims of AHM are worth recalling *in extenso*. By the *de facto authority* of an IC the authors mean

whether one or more audiences recognize, by their words, actions, or both, that IC rulings are legally binding and engage in actions that push toward giving full effect to those rulings. ... our metric of authority, which measures observed practices, is agnostic as to why an audience recognizes a court's authority and to the subjective beliefs that underlie that recognition. Our approach thereby differs from what sometimes is labeled as sociological legitimacy, which focuses on how actors' perceptions may legitimize courts or how such perceptions allow courts to justify their practices and power. (p 6, my emphasis)

The authors want to distinguish the de facto authority of an IC from its exercise of power:

... a court may have de facto authority in some of the disputes that it adjudicates but still not be a politically powerful institution because many legal violations are never brought to court or are the subject of rulings that are ignored.

Powerful ICs, in contrast, have authority in fact that extends across a broad range of issues, states, and types of cases. (32)

But this distinction seems very similar to that between the authors' use of 'de jure' authority and 'de facto' authority. A court is said to have de jure legal authority but not de facto authority under very similar circumstances:

A formally constituted court may receive no cases even if violations of the law under its jurisdiction are widespread. Or it may issue decisions that the parties ignore or that have no legal or political impact. The core challenge that ICs face, therefore, is transforming formal legal authority into authority in fact, also known as de facto authority. (3)

It is thus unclear: If a court is not being asked to adjudicate violations, or its decisions are ignored, are these cases where the court has de facto authority but not power, or cases where the court has de jure authority but not de facto authority?

At times AHM also seem to equate expansion of de facto authority with increased power of the IC:

For any legal issue, a change from narrow to intermediate to extensive authority expands the court's power, defined as the ability to move governments and private actors in the direction indicated by the law. (32)

I submit that the relationship between de jure authority, de facto authority and power merit more attention in later developments of this project.

A related issue is what appears to be a mismatch between this metric and the five levels of de facto authority laid out by the authors. The authors provide several examples which are at best poor fits. The authors claim that filing of complaints is evidence of recognition of ICs as a forum to promote their legal rights (14). But this does not clearly indicate either part of the metric. As regards the fifth level, "popular authority" occurs "when recognition of IC rulings extends beyond the legal field to encompass the public in general" (11). The authors give as evidence such popular support as indicated by opinion polls as regards the US Supreme Court (p 11, fn 34). But such indicators do not seem aimed to capture either of the two parts of the metric.

In response to these concerns, the authors might be advised to adjust the metric depending on the level of de facto authority. The motives and the awareness among the audiences about why they act may shift across the levels of de facto authority. We might indeed reverse the indicators, and hold that an IC enjoys a high degree of general popular power or support – if not 'authority' - insofar as it seldom gives rise to reflections about whether its judgements create a legal obligation, and insofar as few actors see a need to 'push for' more effect of the rulings. An IC's judgements may for instance be accepted by the public according to a 'norm of appropriateness' (March and Simon 1993, 8) without much debate, possibly enjoying some kind of 'diffuse support' (Easton 1965).

Note that these proposals again raise the question of whether what the authors are interested in is best labelled 'authority' – or whether their concern is to measure the ICs' power (Bachrach and Baratz 1962, Lukes 1974; Barry 1989) more generally.

2 Motivational agnosticism in theory but not in practice – and why?

AHM give methodological reasons to bracket the study of audiences' preferences and beliefs which motivate acceptance of an IC's authority:

.. we seek a straightforward and measurable yardstick to evaluate how a range of contextual factors shapes de facto authority of ICs via an analysis of audiences' practices toward ICs. Although it is interesting to study subjective motivations and reasons why actors accept or reject IC rulings, observing practices does not necessarily shed light on this question. (6-7)

At least two issues merit attention. Firstly, this methodological commitment to motivational agnosticism appears fundamentally incompatible with their metric of de facto authority. That metric concerns a) whether audiences *recognize* an IC's ruling *as legally binding*, and b) whether audiences engage in 'actions that *push toward*.' Both of these two elements include claims about the intentional actions of actors, including claims about their beliefs and motives. AHM clearly ascribe motives: They will count as expressions of 'recognition' the "implied acceptance that accompanies a government's decision to implement or give effect to a court's judgment." (7). Furthermore, the value of 'intermediary authority' surely depends on actors' beliefs and motives: The role of ICs in stabilizing expectations about others' future actions depends in part on actors' mutual belief in others' future compliance with certain rules. The authors hold that "Evidence that multiple litigants are filing complaints suggests the beginnings of intermediate authority, because it indicates that a wider group of actors recognizes the IC as a forum to promote their legal rights." (14) However, filing complaints is only an indication of the actors' recognition of IC's rulings as legally binding if we ascribe to the actors a belief that others – such as government officials – will accept the IC as a de facto authority. But such ascription of beliefs is exactly what AHM rejects.

Secondly, without such claims about actors' beliefs we may ask why AHM chose to label this metric one of 'Authority.' Without ascription of beliefs and motives it seems difficult if not impossible to determine whether an IC exercises de facto authority or rather induces behavior due to actors' fears of sanctions by third parties, or is merely taken for granted by the other actors, or exercises other forms of power.

It would thus seem that AHM's study requires the researchers to ascribe to the actors some beliefs and values or preferences. The metric commits the authors to this. In general, such ascription of beliefs and motives is not impossible or methodologically worrisome. Indeed, many disciplines, and judicial decision making, engage in such. Consider, for instance, Easton's observation as regards the study of 'patterns' that

"to determine the probable future behavior, it becomes important to be able to make inferences, from observable actions or otherwise, about the state of mind of the members toward basic political objects." (Easton 1965, 163)

And a wide range of legal distinctions require judges to ascribe beliefs and motives – consider how to determine what is 'collateral' damage; the difference between first degree and second degree murder (whether the intentional killing is premeditated), or the determination of opinion juris:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." (*North Sea Continental Shelf Cases [Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands]* 1969, Para 77)

So we are faced with a separate, related and possibly interesting question: *why* do AHM claim that they want to avoid research about actors' motives or reasons for action – especially when they in fact engage in precisely this? What part of their overall research project entails or encourages such motivational agnosticism?

3 Why claim to avoid the study of social legitimacy?

The authors are very clear that they do not seek to explore whether an IC is socially legitimate – e.g., whether some actors believe that the IC is normatively legitimate. This is somewhat surprising, because the social legitimacy of ICs *may* play a causal role for de facto authority. Many scholars appear to hold that such beliefs among some actors affect their behavior: that compliance increases if the actor holds the authority to be normatively legitimate. This might occur because the actors are socialized to do so (Hurd 2007), or due to their “capacity to be moved for moral reasons” (Buchanan and Keohane 2006, 409). These empirical questions are under-researched (Bodansky 2013, 323), and would be appropriate given AHM's stated objectives.

I submit that parties' subjective beliefs about the normative legitimacy of ICs might be researched as possible contributing causes of de facto legitimacy. Thus one relevant research question which the authors appear to deliberately bracket concerns under which contextual conditions, if any, do some actors' belief in the IC's normative legitimacy – or lack thereof - affect its *de facto* authority at which levels? Such social legitimacy may be causally related to some of the contextual factors that affect the 'de facto authority' or power of the IC: The relevant beliefs of some actors may be constituted by some of these contextual factors, or some such factors may influence the court's social legitimacy among some actors. But AHM explicitly chose to not address these topics. So we may again ask why do AHM bracket the study of social legitimacy, for such weak reasons as motivational agnosticism?

4 Why argue for bracketing the study of normative legitimacy?

AHM spend some space (pp 6-7) explaining why they do not ask whether IC authority is normatively legitimate. This is not inconsistent, but the proclamation is rather surprising: Why, given the nature of such an empirical project about ICs, would anyone assume that the normative legitimacy of ICs should be directly causally relevant? My point is of course not that the normative legitimacy of IC cannot or should not be studied: Several issues of the normative legitimacy of ICs merit research, such as when is a de facto authority as defined by AHM normatively legitimate, and when not. But this is a different research project than that of AHM; not better or more important, but simply different.

So if the normative legitimacy of ICs is not relevant to begin with for the

research questions at hand, why do the authors lay out several reasons to defend their choice? This is even more puzzling because the arguments they offer are poor. So I concur with the conclusion, but challenge their reasons.

AHM appear to defend the bracketing of the study of normative legitimacy by several distinct arguments.

a) the authors note that ICs usually have legal competence based on express delegation from states, so that their legal right to rule is less contentious (6). But the issue of legal competence is at most one component of normative legitimacy. Many of the criticisms of normative legitimacy deficits of ICs concern not whether they originally were authorized appropriately, but rather about how they exercise and expand their mandate.

b) the authors appeal to the methodological challenges when studying subjective motivations and reasons – an argument that I argued above is ill founded, and does not match what they and the authors of the various articles actually do.

c) The authors claim that there is need to separate ‘authority’ from ‘normative legitimacy,’ suggesting that this is a new trend. They cite Peters and Schaffer (Peters and Karlsson 2013, 334) to this effect, that:

[m]any conceptions of authority link it so closely to legitimacy as to make “legitimate authority” tautological, and the two notions virtually indistinguishable. However, embedding legitimacy in the definition of authority may be both analytically and empirically problematic. ...First, if legitimacy and authority are two sides of a coin, then the more authority an institution has, the more legitimate it must be. This runs counter to experience: sometimes institutions acquire authority over new issues without necessarily being seen as more legitimate by all actors. Second, the [conflation of authority and legitimacy] seems to deny the existence of illegitimate authority – which might seem troubling for both normative and conceptual reasons . . .

In response, I grant that some authors deny any distinction between the two terms: "the phrase ‘legitimate authority’ is redundant"(Hurd 2007, 61, fn 116). However, the need to distinguish the two terms, and to do so with some care has been noted by several authors (e.g. Zürn, et al. 2012, 83). Joseph Raz' much used and criticized account of legitimate authority insists on the distinction between these two terms – apparently contrary to the claims of AHM, and by Peters and Schaffer. I lay out Raz' account below.

AHM go on to insist that the two concepts must be separated in a particular way:

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court can do everything normative theorists might expect of a legitimate international judicial body and still not have authority in fact. The converse scenario – authority in fact without legitimacy – is also possible. (7)

I submit that both of these last claims are correct, but not new. It is misleading if not disingenuous by the authors to claim that such distinctions are only made recently,

given Raz' and others' influential contributions.

Furthermore, that authority, sociological legitimacy and normative legitimacy can and should be conceptually distinguished is certainly important, but no reason to dismiss the study of the latter. To the contrary, these different research strands and traditions merit much closer collaboration.

So AHM's dismissal of normative legitimacy as a research topic again raises a puzzle: why do they spend time arguing the need to bracket such studies of the normative legitimacy of ICs? I suspect that few would disagree that the valuable research in this special issue does not stand to benefit from such research? If normative legitimacy of ICs is a dead dog for these research questions, why do the authors continue to beat it? AHM doth protest too much, methinks.

5 Raz' Service Conception of Authority applied to ICs

The following sketch shows one classical and useful way to distinguish the terms 'legitimacy' and 'authority.' Joseph Raz discusses this when addressing how, if at all, someone who commands us to do something, thereby give us a reason to act differently, even imposing on us a moral duty to do so (Raz 1986, Raz, 2006 #49378). This puzzle of legitimate authority arises most clearly in cases where the authority issues a directive or command that appears stupid, mistaken, unfair, unjust or otherwise irrational to those subject to it.

On Raz' account, legitimacy and authority are related in the following way:

What makes mere de facto authorities different from people or groups who exert naked power (e.g., through terrorizing a population or manipulating it) is that mere de facto authorities claim, and those who have naked power do not, to have a right to rule those subject to their power. They claim legitimacy. They act, as I say, under the guise of legitimacy. (Raz 2006, 1005)

It is thus a perfectly sensible question to ask when are such claims by de facto authorities correct. In our context such puzzles of legitimate authority arise when an ICs issues a judgment which some "compliance constituencies" (Dai 2007)– be it domestic courts or parliaments, or judges of other ICs - regard as stupid or unjust or otherwise contrary to their legitimate interests – but where some of these compliance constituencies still take the judgment as a rebuttable reason for action. The action at issue depends on who the actor is: – be it to decide a case of their own differently, or to favour one legislative proposal over another, or to follow one procedure rather than another. Why is it not irrational to take that command as a reason?

Raz' answer is the 'Service Conception of Authority.' He argues that an authority is legitimate for an agent insofar as it provides a service to the agent: When complying with the authority's command helps the agent act as she should – i.e. according to the reasons she has. Such reasons are objective or external, not subjective or internal. That is: The subject may be mistaken about which reasons she

has for acting. So whether an authority is normatively legitimate thus depends partly on whatever reasons correctly apply to the case, not necessarily reasons of which the agent is aware. These correct reasons may well be other-regarding. Thus a state may have reason to not contribute to and indeed act to prevent other states' violations of its citizens' human rights (cf Tasioulas 2010).

Raz offers a non-exhaustive list of five reasons or forms of service which an authority typically may provide, if the authority

1. is wiser than the subject
2. has a steadier, less biased will
3. avoids self-defeating direct individual action
4. helps the subject reduce decision processing costs such as anxiety or time
5. is better placed – if its legitimacy is acknowledged – than the individual, e.g. to address collective action problems

Arguably, International Courts might provide several of these services:

Some ICs may provide a less biased will, thus the ICs which provides assurance that states will remain committed to their treaty obligations – be it human rights, international criminal law or investment conditions - cf 'self-binding' ICs (Alter 2008). Other ICs also provide this service in dispute resolution among parties.

Some ICs may reduce states' decision processing costs. States often agree to treaties with central terms left drastically unspecified, either to save time or because the states think it better to delegate the interpretation to a sufficiently independent third party – the IC – rather than to negotiate all details. The IC then provides the service of filling in the 'incomplete contract' among the states (Pauwelyn and Elsig 2012, Stone Sweet and Brunell 2013). Finally, several ICs may help states reduce or even resolve various collective action problems, by reducing free rider problems by increased monitoring or sanctions to promote trade.

Note that these arguments about service are not conclusive as they stand. Rather, they will need to be substantiated in particular cases, for particular ICs vis-a-vis particular compliance constituencies. Thus Raz' service account of authority does not say anything about which and when such self proclaimed authorities as ICs are in fact normative legitimate – i.e. which commands of which authority actually create moral duties among compliance constituencies to obey. Indeed, Raz' account of authority (in)famously indicates that no actor may have a moral duty to obey all laws or other authorities. Thus on this account at least two conditions need to be met for ICs to not only be authorities, but for them to enjoy legitimate authority for various compliance constituencies. Firstly, the objective of the self binding or the collective action problem that the IC addresses has to be an objectively real problem – i.e. one that the actors have reason to resolve. So an IC set up to foster coordination among states pursuing a heinous objective will not be legitimate even if it carries out its mandate diligently and impartially. Consider, as an extreme hypothetical example, a Wannsee tribunal for solving the coordination problems among Axis powers during the Second World War to implement the Wannsee agreement about the 'final

solution' to the Jews in Europe. Such an IC would help the states divide the burdens and benefits fairly as regards transportation, personnel, etc. And it could be a *de facto* authority, but not be a legitimate authority on Raz' account. Less extreme and more relevant examples may include some of the objectives – and some of the unintended effects – of BITs and the WTO regime, e.g. insofar as the benefits and burdens are unfairly distributed among states or have massive detrimental impact within some of the states (Ruggie 1982).

Secondly, the IC will need to actually provide the service. If the service to be provided by an IC is coordination or assurance, and relevant compliance constituencies fail to comply, the coordination or assurance benefits of the IC are not forthcoming. In such cases the claims of the IC to authority are false, and it is an illegitimate authority. ICs must sometimes have 'de facto' legitimacy in order to enjoy normatively legitimate authority. Note that unless the IC actually provides the service the IC has authority, but it is not normatively legitimate by such arguments. For example, if the service to be provided by an IC is coordination or assurance, this requires relevant compliance constituencies to actually comply, otherwise the coordination or assurance benefits of the IC are not forthcoming. Its claims to authority are false, and it is an illegitimate authority.

6 Some ways forward

In closing, consider two fruitful ways to pursue AHM's research agenda further.

Do the findings in this volume book support or challenge general hypotheses about certain constellations of context factors in *shifts* from one level of *de facto* authority to another? What might be such hypotheses? The author team can clearly aspire to generate fruitful hypotheses (parallel to those proposed in Helfer 2006) about when states create more or less independent ICs. Such hypotheses might be developed with variables drawn from regime theory/game theory – such as variations across the problem structure the IC addresses - be they self-binding or other-binding (Alter 2008), whether the problems are benign or malign, or the problem solving capacity of ICs.

The second suggestion is to incorporate social legitimacy as a variable in the empirical research to explain the dynamics of the 'de facto authority' of ICs. Consider that AHM note that contestation and challenge against ICs often occurs (14). I propose that such contestation will increase and take on other forms when an IC increases its authority. This could be a shift from one level to another as defined by AHM, or from one plateau to another, defined in some other way. I suggest that resistance is more likely when an IC moves from one plateau 'upwards.' It will claim authority in jurisdictions where general acceptance of its judgments as 'appropriate' can no longer be taken for granted. And at this new plateau the presumption among some compliance constituencies is no longer one of compliance (11). These shifts of plateau may be described as where the borders of the regime shift, in Easton's sense:

The regime represents relatively stable expectations, depending on the system

and its state of change, with regard to the range of matters that can be handled politically, the rules or norms governing the way these matters are processed, and the position of those through whom binding action may be taken on these matters. Within this range, the politically relevant members are less likely to challenge the authority and validity of settlements arrived at, even though they may of course question the wisdom. (Easton 1965, 192)

I suggest that social legitimacy, and explicit discussions about the normative legitimacy of ICs, become more salient at such occasions. At that point, these topics thus merit attention also by empirical researchers. Note in passing that the participants to such debates about the normative legitimacy of ICs will typically not agree that the subject matter of their disagreement is best described as one of social legitimacy. The disagreeing parties are not just contesting whether others actually believe that an authority is legitimate. Rather, the parties will disagree about which of these beliefs are correct or well grounded – i.e. matters of normative legitimacy.

Such discussions about the normative legitimacy of ICs may in turn affect other actors' legitimation strategies. Thus some ICs may deliberately decide on particular legitimation strategies to convince certain compliance constituencies about their normative legitimacy.

I thus submit that Raz' account of authority –and the need to present arguments for why such authority is normatively legitimate – may be especially relevant in indicating courts' legitimation strategies when IC's increase their plateaus of authority. This may indeed be a context factor which in turn affects the transition and its speed from one level or plateau to another.

This is not to argue that such perspectives about social and normative legitimacy should be included in the present volume. Rather, the point is only that there are opportunities for understanding the growth and actions of ICs better by integrating research on normative and social legitimacy, rather than dismissing such research out of hand.

I have suggested that the research agenda of AHM has fostered interesting findings about the impact of ICs. That achievement stands, regardless of whether this impact is best described as authority or other modes of power, and regardless of discrepancies between how the metric is defined and the changes the researchers actually observe. I have argued that AHM have provided few good methodological reasons to favour motivational agnosticism, and that they have reason to include research on social legitimacy. Their hesitation in this regard thus remains somewhat of a puzzle.

To understand the changing authority and power of international courts we have good reasons to explore some motives of important compliance constituencies – including their beliefs about normative legitimacy. And such understanding is in turn important to assess whether the authority of ICs is normatively legitimate.

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