



ASIL STUDIES IN INTERNATIONAL LEGAL THEORY

The Authority of International Criminal Law

A Controversial Concept

Clare Frances Moran

CAMBRIDGE

THE AUTHORITY OF INTERNATIONAL CRIMINAL LAW

Despite a wealth of literature exploring the issues surrounding it, the legitimacy and authority of international criminal law remain in question. Adopting a perspective informed by legal and political philosophy, Clare Frances Moran considers the authority of international criminal law, why it can be conceived of as more than simply an exercise of power and how that power may be exercised legitimately. Advancing existing scholarship on the subject, Moran explores the roots of the authority of law at the domestic level and tests these ideas in an international context. She examines sovereignty, complementarity, and postcolonial issues, and how each impacts international criminal law. By developing a theory on the authority of international law, Moran considers how it might be possible to adjudicate more effectively at the international level.

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Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

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www.cambridge.org

Information on this title: www.cambridge.org/9781108483650

DOI: [10.1017/9781108678629](https://doi.org/10.1017/9781108678629)

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First published 2023

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-108-48365-0 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

For J.F.L. and E.S.L.

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Preface

The creation of courts and tribunals, and the undertaking of trials at the international level, has often been argued to lack legitimacy. The charges levelled range from claims of victors' justice and postcolonial bias to arguments that individual courts lack jurisdiction or have been created to further the interests of certain powerful States. Whatever foundation these claims may (or may not) have, the creation of a system of international criminal justice remains an act of power. Its legitimacy should be of concern to all, yet the question of how legitimacy might be assessed has not been fully explored. As a term, legitimacy is frequently mentioned in the literature concerning international criminal law, and specifically that which focuses on the International Criminal Court, as well as being a common theme in other areas of international law. The debate, however, remains limited in nature: for international criminal law, the focus has been squarely on the question of whether the International Criminal Court possesses legitimacy, without considering how this may be defined or elaborated. Legitimacy in international criminal law remains critically understudied. A closer look at the concept of legitimacy in general reveals its connections to the idea of authority which, as will be demonstrated in this work, precipitates legitimacy. Authority, unlike legitimacy, is rarely mentioned and only recently has attracted more attention in international law scholarship. The contents of these concepts and their connection to power require further investigation.

Accordingly, this book attempts to reframe the debate by looking at the concept of legitimacy through the lens of authority. Specifically, it examines what authority constitutes and how this affects legitimacy. This argument focuses on asking a certain set of questions: what sort of authority does the International Criminal Court have? What is meant by authority? How does this concept link to power and legitimacy?

The three concepts – legitimacy, authority, and power – are intrinsically connected, and in no area more closely than international criminal law. This book centres on the question of whether international criminal law, as an area of law, constitutes a legitimate exercise of power. There has been repeated questioning of the legitimacy of international criminal tribunals,¹ the hybrid war crimes tribunals during the Second World War,² and, more recently, the International Criminal Court.³ Legitimacy arises as a question because of the lack of a central State authority in international criminal law, and public international law generally. The agreement on which the international system is predicated is not necessarily the only requirement for the creation of mechanisms of international criminal justice and, indeed, sometimes it is not required at all. The question of legitimacy, however, rarely goes beyond the mention of the word: there are few discussions of what legitimacy means in international law and fewer yet of how the system of international criminal justice might secure legitimacy. The focus on whether the system has legitimacy also ignores a deeper look at the links between legitimacy, authority, and power. This book is an attempt to remedy that deficit and to refocus the problems faced by international criminal justice on the issue of its authority.

¹ See, among others, Nobuo Hayashi and Cecilia Baillet, *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017); Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 AJIL 295; Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 LJIL 491.

² Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press 2008); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Press 2009); Alexander Sukharev, 'The Nuremberg Tribunal and the Problems of International Rule of Law' (2006) 77 RIDP 711.

³ Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34 TWQ 800; Mandiaye Niang, 'Africa and the Legitimacy of the ICC in Question' (2017) 17 ICLR 615.

Acknowledgements

I am immensely grateful for the support I have received from many individuals and organisations, without whom this work would never have reached completion. The funding from the Carnegie Foundation for the Universities of Scotland and the Society of Legal Scholars allowed me to take up a visiting scholarship at Columbia University, New York. Columbia provided generous resources and an excellent environment in which to develop and write the manuscript. The editorial staff at Cambridge encouraged and supported the work from an early stage and throughout the review process. My thanks and gratitude go to Tom Randall for his unwavering support and consideration during the submission process. The reviews he sought made the work far better than it could have been with my input alone. I am very grateful to the critical efforts of the reviewers, who have generously given their time and consideration of my ideas. My thanks also go to Joao de Sousa Assis and Thomas Moran for reading through the manuscript at various stages, and my mother, Frances Moran, for her skill as my informal editor and her presence as dedicated grandmother.

My thanks go to my parents and my brother for their endless encouragement and kindness. I am so grateful to my husband, Joe, for all his support throughout my academic career. It would be a very different experience without him.

Any errors in the work remain mine alone.

Introduction

When the International Criminal Court (the ICC/the Court) released a warrant for the arrest of Sudanese President Omar al-Bashir in 2009, the response from political world leaders and their advisers was mixed. The responses from States¹ ranged from enthusiastic support for the ICC, and thus acknowledgement of its authority and jurisdiction as a court, to tacit rejections of its independence and its ability to effect justice for the victims of the crimes, to complete disregard for it as an institution. The French and British Foreign Offices welcomed the decision, while the Russian Special Envoy to Sudan and the Senegalese President expressed their displeasure with the Court. al-Bashir's own response was that the ICC could 'eat' the warrant.²

The response of al-Bashir is not uncommon from those who are accused of international crimes: the defendants indicted before the tribunals at Nuremberg submitted a motion arguing that their prosecution was against the established principle of no crime without law.³ The defence counsel on behalf of Tadic's⁴ case before the International Criminal Tribunal for the former Yugoslavia (ICTY) submitted a motion questioning the authoritative jurisdiction of the Tribunal.⁵ Although both motions were rejected by the respective courts, the intention to query the jurisdiction of such a court indicates that the courts are

¹ 'Sudan: Reaction to Warrant for Bashir's Arrest' *Thomson Reuters*, 4 March 2009, <https://reliefweb.int/report/sudan/sudan-reaction-warrant-bashirs-arrest>.

² 'Sudanese President Tells International Criminal Court to "Eat the Arrest Warrant"' *The Guardian*, 4 March 2009, www.theguardian.com/world/2009/mar/04/sudan-al-bashir-war-crimes.

³ Nullum crimen, nulla poena sine lege; Motion adopted by Defense Counsel, 19 November 1945, Nuremberg Tribunal 1945, see <http://avalon.law.yale.edu/imt/v1-30.asp#1>. See Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *EJIL* 1085–1102; Stanley Paulson, 'Classical Legal Positivism at Nuremberg' (1975) 4 *Phil & PA* 132–158.

⁴ *Prosecutor v Tadic* IT-91-1.

⁵ Decision on the defence motion on jurisdiction 10 August 1995, *Prosecutor v Tadic* IT-91-1.