

Legitimacy in International Law and Institutions: Carrying Forward the Work of David D. Caron

Saira Mohamed*

David D. Caron's scholarship on the legitimacy of international law and international institutions was ground-breaking, expansive in its reach and its impact, and elegant in its analysis, form, and structure. The questions of legitimacy that he addressed in his writing represent some of the most urgent and important matters of international law, and some of the most difficult. They are questions about how power can be exercised fairly, how justice can be achieved in a diverse international community, and how institutions can be deployed to mitigate the world's greatest challenges.

Grappling carefully with these complex questions, Caron examined the meaning and function of legitimacy in international law across a range of contexts in international law, from the Security Council,¹ to arbitration,² to international dispute resolution more broadly,³ and beyond.⁴ One might be tempted to call him a generalist, except that such a label would belie his deep expertise in so many areas of international law. His ability to both dig deeply in individual contexts and look across specialized fields, across the expanses of

DOI: <https://doi.org/10.15779/Z38BV79W1Z>

Copyright © 2019 Regents of the University of California

* Professor of Law, University of California, Berkeley, School of Law. My thanks to the editors of the Berkeley Journal of International Law for their devotion to this symposium and to celebrating the work of David Caron.

1. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

2. See David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513 (2009); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

3. See David D. Caron, *Comparative Analysis of International Dispute Resolution*, 85 AM. SOC'Y INT'L L. PROC. 64, 65-70 (1991).

4. See, e.g., David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183 (2002); David D. Caron, *The International Whaling Commission And The North Atlantic Marine Mammal Commission: The Institutional Risks Of Coercion In Consensual Structures*, 89 AM. J. INT'L L. 154 (1995).

public and private law and all that lies at their intersections, and to assess international law more broadly, made his work in legitimacy especially powerful. Moreover, Caron's scholarship did not merely work from inside the concept of legitimacy to assess its meaning; it also took a step back and questioned the appropriateness and significance of the rise of attention to legitimacy in international law. "Is this discussion justified?" Caron asked, then still in the early years of the academy's attention to this concept. "Does the presence or absence of legitimacy really matter? Why do we care, and is our concern justified?"⁵

The contributions of David Caron to the field of international law are of course not confined to scholarly writing. David had a rich life in international law outside the academy, and his ideas on the concept of legitimacy of international law and international institutions were reflected in the work he did as an eminent practitioner of international law, including as a judge *ad hoc* in the International Court of Justice and a member of the Iran-United States Claims Tribunal, both esteemed positions he held at the end of his life. David understood and cared deeply about the power of institutions, whether law schools or arbitral tribunals or professional associations or international courts.⁶ He built and shaped and led institutions deftly. He thought carefully about constructing processes and making decisions that had "integrity, that may be trusted," to use his words from *The Legitimacy of the Collective Authority of the Security Council*,⁷ one of his most celebrated scholarly writings on legitimacy. He thought carefully about ensuring "that an institution is faithful to the promise of the organization, that is, that it acts with integrity."⁸

David's untimely passing is a massive blow to the development of international law and to the institutions of international law. But his contributions to the field are prolific and indelible. He has left us with a wealth of wisdom and insight, with the lasting gifts of his intelligence, his diligence, his energy, his curiosity, and his openness; and the scholars who continue to work in the fields David shaped carry forward his work in their own.

5. David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC'Y INT'L L. PROC. 303, 304 (1993).

6. One example of this devotion is in the following passage of Caron's piece on legitimacy and the Security Council, which in turn is quoted poignantly in David Kaye's essay in this volume:

Challenges to power framed in terms of the illegitimacy of that power cannot be dealt with merely on the level of general principles. Rather, the means of confronting the challenges to legitimacy must be institutionalized. This conclusion places a heavy emphasis on process, not because I believe justice is merely procedural, but because I believe our diverse global community is more likely to find its vision of substantive justice through a process involving debate.

David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 588 (1993).

7. *Id.* at 561.

8. *Id.*

This much is clear in the contributions of the four panelists who participated in the session on Legitimacy in International Law and Institutions, during the symposium entitled *The Elegance of International Law* that was held to honor David Caron. In her essay, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, Lori Damrosch offers her thoughts on the question of economic sanctions as countermeasures, in what she describes as “an installment of what would have been a continuing conversation with David D. Caron . . . on themes that engaged both of [them] across multiple phases of [their] intersecting careers.”⁹ In *International Courts and Democratic Backsliding*, Tom Ginsburg assesses the capacities of courts to do the work of democracy preservation, drawing on the distinction Caron articulated in the 2017 Charles N. Brower Lecture on International Dispute Resolution between the functions of courts and the tasks of adjudicators,¹⁰ the misalignment of which, Caron noted, harms “both the identity of a court and the legitimacy that is accorded to courts.”¹¹ In *Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron’s Study of the UN Security Council*, David Kaye uses Caron’s four principles that enable an institution, process, or decision to avoid illegitimacy¹² to assess why state-driven models of global internet governance are perceived as illegitimate, while non-state governance models have been more accepted by both states and civil society.¹³ Finally, Bernard Oxman writes in *Nonparticipation and Perceptions of Legitimacy* on the issue of the impact on legitimacy of nonparticipation of states in dispute resolution proceedings, which he uses to address the broader question of what is needed “to encourage behavior that is consistent with the kind of international order under which we would like to live.”¹⁴

While each essay addresses a distinct—and crucial—area of international law, the four are unified as well. Each contribution demonstrates traits of legal scholarship that Caron’s work exemplified: careful doctrinal analysis alongside idealism and hope about the prospects for the future of law; rigorous theoretical work informed by a realistic assessment of politics on the ground; facility with and appreciation of interdisciplinarity, from the social sciences to humanistic

9. Lori Fisler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 46 *ECOLOGY L.Q.* 95, 95, 37 *BERKELEY J. INT’L L.* 249, 249 (2019).

10. Tom Ginsburg, *International Courts and Democratic Backsliding*, 46 *ECOLOGY L.Q.* 111, 111–13, 116–32, 37 *BERKELEY J. INT’L L.* 265, 265–66, 268–86 (2019); See David D. Caron, *The Multiple Functions of International Courts and the Singular Function of the Adjudicator*, 111 *AM. SOC’Y INT’L L. PROC.* 231 (2017).

11. Caron, *supra* note 10, at 236–37.

12. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT’L L.* 552, 561 (1993).

13. See generally David Kaye, *Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron’s Study of the UN Security Council*, 46 *ECOLOGY L.Q.* 135, 140–47, 37 *BERKELEY J. INT’L L.* 289, 294–301 (2019).

14. Bernard H. Oxman, *Nonparticipation and Perceptions of Legitimacy*, 46 *ECOLOGY L.Q.* 81, 82–92, 37 *BERKELEY J. INT’L L.* 235, 236–46 (2019).

methods and beyond. Each of these scholars was not only a colleague and collaborator of David Caron, but also a friend. And each of these contributions demonstrates not only the creativity and analytical muscle of the authors, but also their devotion to sustaining the work of David D. Caron, to continuing the conversations to which he so vibrantly, powerfully, and beautifully gave his voice.