

What is it we disagree about, when we disagree about the legitimacy of an institution?

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1 Introduction

Problems and challenges of institutions such as international courts and tribunals (ICs) are often framed as a question of their legitimacy. The International Criminal Tribunal for the Former Yugoslavia's (ICTY) legitimacy has for instance been questioned on the grounds that it was set up by the UN Security Council acting on chapter VII powers, and not as part of a voluntary treaty system, and also on the grounds that it lacked of support in the local population. The International Criminal Court's (ICC) legitimacy has been questioned on the basis of how the Office of the Prosecutor has chosen to exercise its discretion in certain cases, and the perception that the court selectively prosecutes of African state leaders, while others have impunity. But the ICC has also been questioned because some of the crimes the court prosecutes are formulated too vaguely, such as the crime of "joint criminal responsibility". Several groups see the World Trade Organisation's Appellate Body (WTO AB) as illegitimate, because it is believed to pursue the narrow trade interest of the WTO and fail to take wider public interests and equity considerations into account in their rulings. Other's, such as the current US administration, argue that the AB is illegitimate because its jurisprudence is too dynamic and unpredictable. These debates over ICs' legitimacy follow a general trend over the last couple of decades of focusing on legitimacy as a key normative concept in public political debates, but also among legal scholars, political scientists and political philosophers.

"Legitimacy" denotes the quality of being "legitimate", which in turn signifies something that is somehow warranted, allowable, permissible or proper.¹ In the context of political authority and institutions legitimacy is typically connected to the question of whether a system of rule or institution - and its specific subparts, actors, and decisions - are worthy of respect, support, deference or obedience.² Furthermore, legitimacy is also

¹ C.f. The definition of legitimate in the Merriam-Webster dictionary:

1a: lawfully *begotten*; *specifically*: born in wedlock **b:** having full *filial* rights and obligations by birth a *legitimate* child **2:** being exactly as purposed: neither spurious nor false - a *legitimate* grievance - a *legitimate* practitioner. **3a:** accordant with law or with established legal forms and requirements - a *legitimate* government **b:** ruling by or based on the strict principle of hereditary right- a *legitimate* king. **4:** conforming to recognized principles or accepted rules and standards - a *legitimate* advertising expenditure - a *legitimate* inference. **5:** relating to plays acted by professional actors but not including revues, *burlesque*, or some forms of musical comedy - the *legitimate* theater."

² E.g. Buchanan, Allan (2018) "Institutional Legitimacy", in Oxford Studies in Political Philosophy, Volume 4 (eds. D. Sobel, P. Vallentyne, and Stephen Wall), Oxford University Press, Oxford.

connected to the idea of a political authority and the “rightfulness of a power holder or system of rule”,³ or “the right to rule”. Still, the concepts “legitimate” and “legitimacy” have no generally accepted standard use; there is no general agreement on the criteria for being legitimate, nor agreement on the rights, duties and obligations that follow from having this quality. Different people and groups mean different things by legitimacy, and there seems to be no hope of uniting these meanings in a general conception or achieving consensus on any of the current attempts to formulate a theory or a full conceptualization of legitimacy. While all normative concepts in politics are disputed, it has been suggested that disagreements about legitimacy goes deeper, and that when we disagree about legitimacy we don’t even agree on what it is that we disagree about.⁴ It is therefore tempting to conclude that legitimacy discussions are rationally irresolvable, and ultimately futile.

This paper argues that it is not possible to provide a full conceptualization of the concept legitimacy that is both general and substantive, and which all reasonable discussants can affirm as the correct one. This, however, does not mean that one has to succumb to relativism or skepticism about legitimacy or the usefulness of the concept and legitimacy discussions. Instead the paper suggests that it can be fruitful to approach the concept legitimacy as an example of what W.B. Gallie called an “essentially contested concept”.⁵ In the scholarly literature on legitimacy it is fairly common to characterize legitimacy as an essentially contested concept, but “essentially contested” is often taken to signifying a hotly and deeply disputed concept, one that different competent language users use in different ways, and where there is no hope of bringing the meanings closer because different users discuss different things. Yet, when Gallie originally coined the phrase he had in mind a set of distinctly complex concepts with specific characteristics, concepts that competent language users can reasonably disagree on, and for which conceptual disputes can also yield progressive clarification. No doubt there are many open interpretative questions with regard to Gallie’s use of the term “essentially contested concepts”, and on any of these interpretation one may reasonably ask whether “legitimacy” fits the bill of an essentially contested concept perfectly. The paper does not weigh in on the many debates surrounding essentially contested concepts,⁶ but in the first part of the paper I hope to demonstrate that that legitimacy is sufficiently similar to

³ Beetham, David (2005) “Legitimacy” in *The Shorter Routledge Encyclopedia of Philosophy*, Routledge, London, p. 551.

⁴ Cf. Arthur I. Applebaum (2010) “Legitimacy without the Duty to Obey”, *Philosophy & Public Affairs* Vol. 38(3), pp. 215–39, at p. 2016.

⁵ Gallie, W.B. (1956), “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society*, Vol. 56, pp. 167–198; and in a slightly altered version Gallie, W.B., “Essentially Contested Concepts”, pp. 157–191 in Gallie, W.B., *Philosophy and the Historical Understanding*, Chatto & Windus, (London), 1964. C.f. Hurrelmann et al. who includes a brief discussion of legitimacy as an essentially contested concept in the conclusion of their book on legitimacy and global politics. Hurrelmann et al. (2007) *Legitimacy in the Age of Global Politics*. See also Waldron, J., “Is the Rule of Law an Essentially Contested Concept (in Florida)?”, *Law and Philosophy*, Vol. 21, No. 2, (March 2002), pp. 137–164

⁶ For a useful overview of these debates see Collier, D. Hidalgo, F.D. and Maciuceanu, A.O. (2006) “Essentially contested concepts: Debates and applications”, *Journal of Political Ideologies*, Vol.11 (3), pp. 211-246.

what Gallie referred to as an essentially contested concept, and that analyzing legitimacy as such a type of concept help provide useful insights into the concept.

The second part of the paper then proceeds on the assumption that progressive clarification of the concept legitimacy is possible, and develops an analytical framework that aims to include the most important criteria and elements that recur in legitimacy assessments of institutions across three scholarly disciplines - law, political philosophy and political science – in discussions about institutions such as international courts. This part of the paper presents what can be characterized as a “semi-formal” framework of analysis for the concept legitimacy as used in these disciplines; a framework that includes semi-formal elements and normative criteria which recur in the scholarly debates about the legitimacy of institutions, and which in different combinations, and with different emphasizes, result in different more specific conceptualizations of institutional legitimacy. The proposed analytical framework makes it easier to identify exactly what it is one disagrees on, when one disagrees about the legitimacy of some part of an institution, or an institution as a whole. Hence, the framework can also help contribute to a progressive clarification of the concept legitimacy in these scholarly disciplines. Both by making participants more reflexively aware of the way they themselves use the concept, or more aware of the criteria and elements that go into their legitimacy judgments, but also by helping them understand how others use the concept in a somewhat different way, and finally by identifying typical common concerns and conceptual dynamics, and make more visible why differences and variations of the use of the concept occur. This, the paper assumes, can help avoid certain common forms of cross-talk in current legitimacy debates, but also help forge a certain convergence in the use of the concept, while falling short of an agreement on a general and substantive conception of conception.

Throughout, the paper exemplifies the use of the proposed analytical framework with reference to legitimacy debates surrounding international courts and tribunals. Most debates about legitimacy in political philosophy have been tied to, or extrapolate from, debates about the legitimacy in the context of the nation state.⁷ These traditional legitimacy debates tend to be focused on the justifiability of political authority as such, or on the question of whether it is justifiable to have a state. Legitimacy, however, is a quality or achievement that is intrinsically connected to systems of rules, laws and institutions, and the particular dynamic of the concept is arguably best understood from an internal institutional perspective. This perspective is easily lost in debates where the focus is solely on the more external and overarching question of what can justify a political authority or system of rules in the first place. The debate about IC legitimacy, on the other hand, provide a fertile ground for getting an overview of different approaches to legitimacy across a wider range of approaches and institutional levels and dimensions.

⁷ N.P. Adams (2018) *Journal of Political Philosophy*, 2018

2 “Legitimacy” – conceptual confusion and conceptual conflation

International courts and tribunals (ICs) have been confronted with a dizzying array of accusations about being illegitimate or having legitimacy deficits and legitimacy problems. Some of these accusations were mentioned in the opening paragraph of this paper. In short we can say that legitimacy issues for these courts have been raised in relation to their origins, institutional designs, operation and procedures, as well as with regard to their results. Moreover, different actors use different criteria or standards for what counts as a legitimacy problem. There is some systematicity in what normative criteria different groups in these debates have focused on. It is for example clear that legitimacy of ICs for lawyers and legal scholars is primarily a matter of the *legality* of these courts and their processes. Political and moral philosophers, on the other hand, focus almost exclusively on the courts’ *moral justifiability* or *justice*, while political scientists assesses these courts legitimacy primarily in terms of their *acceptance levels*, or *levels of support*, *rate of implementation of judgments and deference*. Not surprisingly these different focuses may result in philosophers, political scientists and lawyers assessing the legitimacy, and the legitimacy problems, of a specific IC in different, and sometimes conflicting, ways. Now, is it possible to incorporate all these meanings into a coherent and useful conception of legitimacy? How do we work out the meaning of a concept that incorporates so many different levels, aspects, and dimensions? How should we understand these disagreements about various ICs’ legitimacy? Who is right, or are they all wrong?

2.1 Conceptual confusion

I shall argue that some of the disagreements in IC legitimacy debates stem from what we can call *conceptual confusion*. Scholars who use the concept legitimacy are sometimes inconsistent in their own usage of the concept; sometimes they have often not given the meaning of the concept legitimate sufficient thought, and sometimes the concept is a mere buzzword and used to signal approval or dismissal without clear criteria for doing so.

The most common source of confusion in legitimacy debates in general is between what is often called *normative legitimacy*, on the one hand, and *sociological, empirical or descriptive legitimacy*, on the other hand. Legitimacy is a particularly confusing concept because it is one of few concepts that can refer to both to the quality of an object, as well as to a subject’s beliefs about that object. Thus, when two persons say that the ICC is illegitimate, the first can mean that that the ICC is illegitimate because it fails to live up to a certain set of normative criteria, while the other mean that key stakeholders like states does not *believe* that the ICC is legitimate or that it deserves respect or support. Such conceptual confusions are common in the literature on ICs and can be resolved if discussants are aware of the duality of the concept, and willing to be more explicit about whether they speak of legitimacy from the normative or empirical perspective.

Descriptive and normative legitimacy clearly present two distinct perspectives, and it is important to be clear about which perspective one takes. Nevertheless, the two cannot be completely detached from each other either: As Daniel Bodansky puts it, descriptive legitimacy is to some degree parasitic on normative legitimacy, since beliefs about an institution’s legitimacy involve beliefs about the extent to which the institution

deserves respect and support.⁸ On the other hand, many also think that normative legitimacy depends on descriptive legitimacy, or on people's belief. Legitimacy on this view is an intrinsically normative but also intrinsically a *social* quality. While legitimacy is not the same as people's belief in an institution's legitimacy, and while it is possible to be mistaken in one's belief in an institution's legitimacy, it is also the case that an institution would not be legitimate if no one believed that it is legitimate, or believed that it is worthy of respect and support.⁹ Hence a certain measure of what Max Weber called "Legitimitätsglaube" or "legitimacy belief" among stakeholders seems itself to be a normative criterion of legitimacy.¹⁰ Obedience or deference to an institution or system of rules can be caused not only by belief in an institution's respect-worthiness, but also by coercion and fear of sanction, hence we cannot infer that an institution is in fact legitimate merely from observing obedience to the institution. So, we have seen that normative and descriptive legitimacy may overlap or interact in various ways, yet they nonetheless remain distinctive perspectives, and much confusion can be resolved if speakers are clear about which perspective they take.

Another common source of confusion relates to different *time horizons* of those who use the concept legitimacy: If one person judge an IC's legitimacy solely on the grounds of how this IC was created and how it has performed in the past, he or she may very well see the IC's legitimacy differently from a person who focuses on long-term potential of the court. We can call the former a "status quo" and the latter a "prospective" form of legitimacy judgment or legitimacy assessment¹¹. Now, one may of course argue that the past is often predictive of the future performance of an institution, and also that both past, present, and likely future results should play into a full legitimacy assessment of an institution. Still, focusing exclusively on the past or future yields two clearly distinct perspectives on legitimacy. Some of the confusion in legitimacy discussions about ICs could be avoided if speakers were more explicit about which of these perspectives they take.

2.2. Conceptual conflation

⁸ D. Bodansky, "The Concept of Legitimacy in International Law" in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer 2008), pp. 321–41, at p. 327.

⁹ Some explain this feature of legitimacy by saying that if no one believes in an institution's legitimacy it cannot perform the essential function of legitimacy – namely to provide "meta-coordination". Buchanan 2018.

¹⁰ BY using this term I do not mean to buy into all the aspects that Weber attributed to such belief. Note that Weber seems to think that legitimacy belief is also a sufficient criterion of legitimacy, a view that is now mostly discredited. M. Weber, "Die drei reinen Typen der legitimen Herrschaft", *Basic Concepts in Sociology, The Theory of Social and Economic Organization*. Others seem unaware of the distinction or fail to make it explicit. Thomas Frank, one of the first legal scholars to work out a conception of legitimacy, for example, does not distinguish between descriptive and normative legitimacy in his extensive discussion. T.M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990)

¹¹ Stahn has referred to this as taking a "fact based" approach and a "faith based approach" in the assessment of international criminal courts. See C. Stahn, (2012) "Editorial: Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?" *Leiden Journal of International Law*, Vol. 25(2), p. 251–82.

The types of confusion discussed so far do not amount to inherently irresolvable disagreements, and they do not necessarily signal that the discussants have different underlying understandings or conceptions of legitimacy. When we now turn to what I shall call certain *reductivist* or *conflationary tendencies* in the scholarly debates about IC it is more uncertain whether we deal with conceptual confusion, different conceptualisations, or with different senses of the concept legitimacy itself. As mentioned above, legal scholars typically focus exclusively on the *legal* aspects of ICs when they diagnose ICs as having legitimacy problems: They argue for instance that the court has not been set up in accordance with accepted tenets of international law, that the legal rules are not sufficiently clearly formulated, that the jurisprudence is too dynamic resulting in inconsistent application of rules, lack of predictability, and retroactivity, and so forth. But do these legal scholars see legitimacy *as the same* as sufficient legality, in the sense that when they conclude that the court is not sufficiently legal, they also conclude that it is illegitimate? Or do they discuss a particular *type* of legitimacy (“legal legitimacy”)? Or do they only see legality as *one of several elements* of the value or quality of legitimacy, i.e. as one of the elements that must be taken into account in a full or general legitimacy assessment? In discussions about ICs we seem to find examples of all of this, but often it is hard to tell whether it is the one or the other because the authors seldom make their views on the connection between legality and legitimacy explicit.

I shall argue, however, there is a tendency among legal scholars and practitioners to conflate legality, or legal aspects of an institution, with its legitimacy. Similarly there is a tendency in political science to (more or less unreflectively) conflate normative and empirical legitimacy. Philosophers, on the other hand, tend to conflate legitimacy with sufficient moral justifiability, and they have often started from some pre-given moral theory or standard of justice and use this as the sole yardstick for assessing the court’s legitimacy.¹² I shall suggest that when the word legitimacy can be replaced by other concepts in a context without loss of meaning, it is redundant and better avoided. So, if by “legitimacy” or “legal legitimacy” one simply means “sufficient conformity to legal rules”, it might be better to say that outright rather than to speak of legitimacy or legal legitimacy. Similarly, if by “legitimacy” or “moral legitimacy” one only means sufficient moral justifiability on the basis of a specific type of moral theory, it might be better to explain this rather than using “legitimacy” or “moral legitimacy”.¹³

While it is a fact that some use the concept legitimacy merely to refer to legality or moral justifiability, I argue that “legitimacy” is best reserved to denote a complex achievement or quality, and a more complex or multilevel assessment of institutions. And, I argue, this complex quality involves both a consideration of legality, or conformity to recognized rules and traditions, as well as considerations of moral justifiability,

¹² C.f. Peters, F. “Political Legitimacy” (2010) *Stanford Encyclopedia of Philosophy* (Summer 2017 edition), (ed. Zalta, E.N.), available at <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>

¹³ C.f. Langvatn, S.A. & Squatrito, T. (2016), “Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals”, *The Legitimacy of International Criminal Tribunals*, (eds. Hayashi, N. and Bailliet, C.) Cambridge University Press, Cambridge.

institutional integrity and Legitimitätsglaube among participants and affected of the institutional practice. Am I here proposing a new use of the concept legitimacy, or claim that I have discovered its real meaning in a way that can eliminate disagreement and contestation about its correct use? I claim to do neither, but I do suggest that that the concept legitimacy has become a buzzword, a concept that is over-used and over-extended in so many directions that it has “fallen from conceptual grace”¹⁴. I also suggest that it is both necessary and possible to try to bring it back to its “core”, or say something about the “core elements” and “logics” that go into legitimacy judgments. But before I proceed to present these elements and the framework for analysis I shall briefly discuss how legitimacy can be said to be an essentially contested concept.

2.3 Legitimacy as an essentially contested concept

While some disagreement about legitimacy can be attributed to conceptual confusion and conceptual conflation, there is also reason to believe that legitimacy is kind of concept that competent users of the concept can, and sometimes do, reasonably disagree on.¹⁵ Or put differently, disagreements about legitimacy do not necessarily signal that the disputing parties do not share the same concept, or that they attribute radically different and incommensurable meanings of the concept legitimacy. Nor does such disagreements necessarily signal conceptual confusion or conflation, or head-on conflicts of interests among the disputing parties. I submit that there can be different reasonable more specific conceptualisations of the concept legitimacy, where none of them are likely to win out over the others, but where there is bound to be continuous competition for acceptance of the proper criteria of legitimacy.

Legitimacy thus seems to share most of the traits that Gallie sees as characteristic of essentially contested concepts:¹⁶ Legitimacy is a concept that is 1) *appraisive*, meaning that it signifies or accredits some kind of valued achievement or quality; 2) the valued quality or achievement of being legitimate is furthermore of an *internally complex character*, meaning that it includes multiple possible components, elements or features, although the worth or quality is *attributed to the whole*. This means that when one says that something is legitimate the concept signifies a multitude of elements and components that are in place, and any explanation of why something is legitimate must refer to the contributions of these various parts and elements.¹⁷ This in turn makes legitimacy 3) *initially variously describable*, meaning that different persons different users of the concept can reasonably come to describe its meaning in somewhat different

¹⁴ C.f. Melvin J. Dubinck’s discussion of the concept “accountability” which he argues has suffered a similar fate.

¹⁵ Gallie 1956, p. 169.

¹⁶ Gallie 1956, p. 171ff. For discussion of these criteria see Collier et al. 2006, p. 216f.

¹⁷ Collier et al. 2007 makes an important point when they say that it only makes sense to say that a concept is internally complex if the different components are indeed part of the *same* concept. So an explication or clarification of the concept must try to show how the different elements and components hang together. If the concept is over aggregated or over-extended with meanings, it is more appropriate to disaggregate it or diagnose conceptual confusion conflation and conceptual misunderstandings, as I attempted to do in part 1. Collier et al. 2006, p. 217ff.

ways, or emphasize some elements more than others without referring to different concepts of legitimacy or being mistaken about what legitimacy is altogether. A different way to phrase this is to say that the concept legitimacy allows for different conceptualizations of legitimacy.¹⁸ Legitimacy is also what Gallie calls 4) *open in character* in the sense that it denotes a quality or achievement that admits of considerable modification in light of changing circumstances. Or put in a different way, the exact constellation of elements that need to be in place for something to be legitimate depends on a range of circumstantial factors that can change over time, and these cannot be determined in advance or *in abstracto*. Gallie also defines essentially contested concepts as 5) *contestable* or *contested* in the sense that different persons or parties adhere to different conceptions or views of the right use of the concept, and use them both aggressively and defensively, with a certain awareness that others use the concept differently. According to Gallie an essentially contested concept can also be anchored in 6) an *original exemplar* or in a *series of paradigmatic exemplars* that are sufficiently similar to make it clear to the users of the concept that they are trying to conceptualize the same quality or achievement. And finally, an essentially contested concept allows for 7) *progressive clarification*, in the sense that on-going contestation about its meaning is likely to bring us closer to capturing the relevant criteria and features that characterizes the exemplars of the concept.

The meaning of the concept “legitimacy” is no doubt contested, and as other political concepts, it is often used defensively or even aggressively. It is less clear that different users of the concept are usually aware that others use the concept differently, and what others’ criteria of legitimacy are. Nor is it obvious that “legitimacy” can be anchored in an original exemplar, or in a series of paradigmatic exemplars.¹⁹ Yet, if is Gallie is right, the progressive clarification of the concept legitimacy depends crucially on the existence of exemplars or a group of paradigmatic examples which are recognized as such by competent users of the concept and can anchor the use of the concept.

It is difficult to find examples of institutions, or acts that all agree on, as exemplars of legitimacy. I conjecture that one reason for this is that “legitimacy” refers to a quality or achievement that was originally, and arguably is still primarily, *internal to a specific institutional practice or system of laws or rules*:²⁰ An exemplary legitimate law must to some extent be relative to the legal system which the law is part of, a (positive) law is not a law if it is not part of a particular system of laws. It is thus hard to find a concrete exemplar that is exemplary for all legal, political and institutional systems. What counts as an exemplary legitimate government in a theocratic monarchy will no doubt be different from what counts as an exemplary legitimate government in a constitutional liberal and democratic regime. Now, we can of course also raise the more abstract and general question of which of these regimes are legitimate in the first place,

¹⁸ C.f. Rawls on the difference between a concept and a conception. Rawls 1994, 1995, 1997.

¹⁹ Note that Gallie acknowledged that his own real-world examples of essentially contested concepts, that “social justice” and “a Christian life”, did not perfectly fit his criteria either. Gallie 1956.

²⁰ As Rawls puts it, legitimacy is “institutional and connected to law”. Rawls 1995, p.

and argue that only the latter is legitimate. But if we focus solely on which type of system or regime is legitimate we fail to understand much of the specific logic and dynamics of legitimacy judgments, and that the term can meaningfully be used within different types of political and legal practices. However, I shall argue that what counts as legitimate in different types of systems and regimes is only *partly* relative to the specific aims and purposes of that particular practice, but also *share* a range of features or elements. More specifically, I shall argue that across different types of political practices, institutions and legal regimes legitimacy judgments have some common “semi-formal” elements and logics. In the next section I try to reconstruct and schematically present these as they emerge in current debates about ICs.

To sum up this section: Analysing legitimacy as an essentially contested concept helps us see why the concept spurs a type of contestation that is different from mere conceptual confusion. Contestation is likely to arise because of a combination of the concept’s normative valence; the internal complexity of the quality it denotes; the different ways the quality can be interpreted and described; the open nature of its meaning and revisability in new situations; and the open nature of the exemplars that anchor the concept. Yet, analysing legitimacy as an essentially contested concept also means assuming that progressive clarification of the concept is possible. It is towards such clarification I aim to contribute with the framework presented in the next section.

3 A framework for locating disagreements about legitimacy and analysing legitimacy

As I said above, there is seldom agreement on exemplars of a perfectly legitimate act or institution, and seldom agreement the exact criteria of legitimacy. Yet, there seems to be more agreement on institutions and acts that are clearly *illegitimate*, and also more agreement on types of elements and aspects that can potentially create *legitimacy problems*.²¹ I believe that identifying and getting an overview of elements and components at different institutional levels where charges of illegitimacy frequently occur, and combining this with well-worn insights from the more theoretical legitimacy literature, help us see how legitimacy has the characteristics of an essentially contested concept, one that is internally complex and variously describable. Such a mapping exercise also helps yield an analytical framework that may help us locating the source of disagreements and contestation about legitimacy more accurately, and be a step towards grasping the elements that go into a legitimacy assessment or legitimacy judgment, or the elements that combines in the internally complex value, quality or achievement which we refer to as legitimacy. If such a framework succeeds in bringing together elements that those who disagree about legitimacy can recognize as relevant,

²¹ Legitimacy is not necessarily special in this regard. c.f. Theodor Adorno who similarly takes a negative hermeneutical approach: “Wir mögen nicht wissen, was das absolut Guten was die absolute Norm, ja auch nur, was der Mensch, oder das Menschliche und die Humanität sei, aber was das Unmenschliche ist, das wissen wir sehr genau”. T. Adorno (1996) *Probleme der Moralphilosophie*, Frankfurt am Main, p. 261.

and if the framework can help them understand each other better, this shows that progressive clarification of the concept legitimacy is possible, at least in a limited context such as interdisciplinary scholarly discussions about ICs.

The list of legitimacy problems discussed in the literature on ICs is long and diverse. But already the few examples provided in this paper show that IC legitimacy problems are seen as occurring in relation to *different institutional aspects*, at *different institutional levels*, and also in relation to *different normative criteria*. I shall argue that an ICs' legitimacy problems can stem from problems at institutional levels above the court itself, and that the legitimacy of each institutional level within a system influences the other levels. Secondly, I shall argue that legitimacy problems can occur in relation to at least *three institutional dimensions*: in relation to the origin, the on-going processes, and the outcomes of each institutional level of the system. Moreover, I shall argue that what is seen as a legitimacy problem for any of these institutional levels or dimensions is typically informed by one or more of *four normative criteria or standards*: sufficient adherence to established rules and conventions, sufficient moral justifiability, sufficient institutional integrity, and sufficient Legitimitätsglaube among relevant stakeholders.

An ICs' overall legitimacy may thus be seen as a joint function of the weaknesses or strengths of the institutional dimensions at different institutional levels of a system, as judged by these four normative criteria. This already draws a picture of "legitimacy" a quality or achievement that is internally complex. However, in the next section I shall go on to argue that what it means to satisfy each of these normative criteria to a sufficient degree, and what the relative importance between these criteria is, depends crucially on what one takes to be the nature of the agents involved, and the purpose of the court or institution in question. Courts, like most other institutions, are what Gallie calls "variously describable" and "open". It is not clear that an IC only has one purpose or even a main purpose, and the purposes, aims and values of institutions like ICs may also change over time. Finally, I shall submit that the appropriate threshold levels of the various normative criteria will be influenced by a range of additional contextual factors, such as the scope and nature of the institution's powers and whether there are non-institutional and institutional alternatives.

I start with the elements which I take to be most fundamental for understanding the nature of legitimacy assessments of ICs, and I tentatively try to fit them into an analytical framework or schema that I suggest may be useful as a tool for locating and diagnosing disagreements in legitimacy assessments of institutions. I then turn to the additional contextual aspects of legitimacy.

3.1 Legitimacy across three institutional dimensions: Origin, process, and outcomes

In the legitimacy literature it is common to distinguish between input-legitimacy and output-legitimacy.²² Some take the quality and nature of the input to a system to be the primary determinant of its legitimacy - i.e. who gets to shape the rules and make the

²² The distinction is often said to originate with Fritz Scharpf, Scharpf, F. (1999) *Governing in Europe. Effective and Democratic?*, Oxford University Press, Oxford.

decisions, and the way they do so. Others argue that legitimacy is primarily about outputs,²³ while many argue that we should understand input and output as complementary aspects of a political or legal system's legitimacy, rather than as competing understandings of what legitimacy ultimately amounts to. I side with those in the literature who think that the dichotomy between input and output legitimacy is unfortunate. We are likely to get a more nuanced legitimacy conception, and a better understanding of where disagreements about legitimacy lie, when we see that legitimacy problems of an institution can have to do with either its *origin*, *process* or *outcomes*, and that its legitimacy must ultimately be understood in relation to all of these institutional dimensions.²⁴

- *Origin* here refers to how an institution came into being in the first place, or its genealogy. It is not obvious to all, and to philosophers in particular, that origin is a relevant aspect for legitimacy in general. But when we look at the discourses surrounding ICs we find that questions relating to origin or pedigree often lie at the heart of charges of illegitimacy. As mentioned in the introduction, the legitimacy of the ICTY has often been questioned on the grounds that it was set up by the UN Security Council acting on chapter VII powers, and not as part of an independent treaty system where member states sign up voluntarily, as was the case for the ICC. The origin aspect of legitimacy was particularly prominent in the earliest historical uses of the concept legitimate, i.e. in mid 15th century English “a legitimate child”, and in the notion of a “legitimate heir” which refer primarily to correct heritage and pedigree. I take the origin aspect of legitimacy to stem from legitimacy's intimate connection to institutions and systems of law: Being a proper authority, or succeeding in performing an act within a legal or institutional system, means enactment in accordance with the recognized rules and procedures of the system, and such correct origin is often marked by what Thomas M. Franck calls “symbolic validation”.²⁵ The question of an IC's origin or pedigree involves both the question of *who* and *how*: was it made by the right agents, were they properly authorized according to recognized rules and principles, and was it created in the right way?
- *Process* refers to the nature and quality of the process and procedures by which an institution operates. Examples from IC legitimacy debates include questions

²³ E.g. Joseph Raz' “service conception” of legitimacy, and conceptions inspired by the service conception, such as that of D. Luban.

²⁴ Three part analyses of legitimacy have been presented, in different varieties, by several theorists: See V.A. Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput’, *Political Studies* 61, no. 1 (2013), pp. 2–22. The three-part distinction adopted here bears more resemblance to Wolfrum's, which analyses legitimacy in terms of ‘source, procedure and result’, a distinction also adopted also by Y. Shany. Rüdiger R.V. Wolfrum, *Legitimacy in International Law* (Berlin: Springer, 2008); Y. Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014). We prefer, however, to use the term origin or ‘pedigree’ rather than ‘source’, since ‘source legitimacy’ is often exclusively associated with the issue of *who* gets to decide or provide inputs in a system or institution.

²⁵ Franck 1990.

about the quality of an IC's legal process rules, but also its recruitment procedures, procedures for making rulings publicly available, the rights of defendants, equality of arms in court proceedings, etc.

- The third dimension is the *outcome or results* of an institution. I follow the trend in the legitimacy literature of differentiating outcomes into *effectiveness* and *effects*. Effectiveness refers to the extent to which the institution succeeds in achieving its stated aims and objectives, e.g. whether an international criminal court actually succeeds in prosecuting international crimes, by making state parties cooperate in extraditing defendants, and whether they manage to do so in a timely and cost-effective way, etc. The effects dimension refers to the institution's desirable and undesirable effects on others, e.g. an ICs' effect on its member parties, effects on the international organization it is part of, and/or effects on third parties.

3.2 Legitimacy at different institutional levels

Legitimacy problems not only occur with respect to different institutional dimensions, but also at what we can call *different institutional levels*, or at different levels of an institutional system or system of rules. The legitimacy of a particular ruling of a court is not the same as the legitimacy of the court case, or the legitimacy of the court itself: A court can be legitimate, while a particular case or ruling of the court is not. Yet, the legitimacy of various institutional and legal levels within a system are also somehow connected, and the legitimacy of a specific institutional level will typically be influenced by the legitimacy and qualities of the other levels. The legitimacy of the Court of Justice of the European Union (CJEU), for example, is not only determined by its own processes and rulings, but also influenced by the legitimacy of the regional supranational organization which it is part of.

A distinctive feature of legitimacy is that it can be *conferred* from a higher institutional or legal level to a lower level. The paradigmatic case is that of a legitimate constitution which confers legitimacy onto laws that are correctly enacted in accordance with it.²⁶ Since the law here emanates from, or is made in accordance with, a legitimate institutional authority it is itself presumptively or *prima facie* legitimate. The fact that the law has been made by a legitimate authority, or by the right agent in the right way in accordance with a legitimate institution or system, *itself* confers a certain measure of legitimacy onto the law, *independently of the content of the law*. Or as H.L.H. Hart puts it, it provides a reason for action "independently of the nature or character of the actions to be done".²⁷ This feature of legitimacy is often referred to as the *content-independence of legitimacy*.²⁸ The phrase "content-independent" can be somewhat misleading since it

²⁶ Rawls 1995.

²⁷ Hart, H.L.H.(1982), *Essays on Bentham*, Oxford University Press, Oxford, pp. 245-255. C.f. Joseph Raz' discussion of legitimate authority yielding content-independent reasons., and Simmons 1981

²⁸ The notion of content independence traces back to H.L.H. Hart's discussion of commands and authority in Hart, H.L.H. (1958), "Legal and Moral Obligation", in A. Melden (ed.) *Essays in Moral Philosophy*, Seattle, University of Washington University Press, p. 102.

may suggest that legitimacy is *completely* content-independent, or that the content of the law in question plays *no* role in the assessment of the laws' legitimacy whatsoever,²⁹ however egregiously immoral and disastrous its content is.³⁰ But conferral of legitimacy from a legitimate authority only yields a *prima facie* legitimacy; the presumption of legitimacy can be defeated. If it turns out that the law has disastrous moral effects, for example, its legitimacy may be defeated or at least weakened.

The origin and institutional pedigree of an institution can give it a strong initial legitimacy, a start-up capital of goodwill, or respect and willingness to defer, so to speak. But this legitimacy can be weakened over time if the institution's procedures or outcomes turn out to be weak. Moreover, certain agencies of the European Union (EU) are seen as having a strong legitimacy, even by persons and groups who think that the EU as a whole is illegitimate. The legitimacy of higher institutional levels, and other aspects of the origin of an entity, is thus not always determinate for how we assess the legitimacy of lower institutional levels, or how we judge the entity over time. An IC for example, may start out with a weak origin or pedigree, but over time *bootstrap itself into legitimacy*,³¹ or into more legitimacy, through stellar legal processes and outcomes, and through high levels of support and respect from various stakeholders and affected parties.

3.3 The normative standards or criteria of legitimacy assessment

We have seen that legitimacy problems may occur at different institutional levels and across different institutional aspects. But what are the criteria for saying that there is a legitimacy problem? Or put differently, what kinds of normative standards or criteria are these levels and dimensions assessed by in a legitimacy assessment? What standards do they have to satisfy to be legitimate? Several of these standards have already been mentioned in the examples discussed above. I submit that at least four normative standards are involved in legitimacy assessments of these institutional levels and dimensions: They are assessed by the extent to which they have 1) sufficient conformity to recognized laws or rules; 2) sufficient moral justifiability; 3) sufficient respect or support based on belief in respect-worthiness; and 4) sufficient institutional integrity. I shall look at these criteria in turn.

²⁹ N. P. Adams. (2017) *In Defense of Content-Independence*, *Legal Theory*, Vol. 23 (3), pp. 143-167.

³⁰ One can assume that if a constitution really is legitimate, or a political authority really is legitimate, they will only produce laws and decisions that are sufficiently just and good. However, unexpected effects and changing circumstances may occur, and defining a legitimate authority or institution in this way makes the whole notion of legitimacy more circular and opaque and of little practical use.

³¹ May, L. and Fyfe, S. (2017) *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, p. 15 ff. C.f. Luban, D. (2010) "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law, in *The Philosophy of International Law*, Besson, S. and Tasioulas, J. (eds.), Oxford University Press, Oxford, pp. Luban's procedural bootstrapping conception of legitimacy for international criminal courts has been criticized by, amongst others, Anthony Duff: A. Duff, "Authority and Responsibility in International Criminal Law" in S. Besson and J. Tasioulas (eds.) (2010) *The Philosophy of International Law*, Oxford University Press, Oxford, pp. 589-604.

3.3.1. *Sufficient conformity to recognized rules, standards or laws*

Legitimacy is first and foremost a quality or achievement that we attribute to systems of rules and law or institutions, and to acts and roles within these. Legitimacy is not a quality that we normally attribute to personal relations, i.e. relations between persons that interact not in some institutional role or capacity, but purely in their own personal capacity, e.g. as friends.³² When we assess the legitimacy of an act we assess it, amongst other, *as* an act within its particular institution or system of rules, and we assess whether it conforms sufficiently to, or is made in the right way according to, this system.

The connection between legitimacy and law, or systems of rules, was especially clear in the earliest uses of the terms such as “legitimate child”, meaning children who are “lawfully begotten, born of parents lawfully married”.³³ In many English dictionaries “legally permitted” and “in accordance with law” is still listed as one of the main meanings of the concept legitimate. Yet, as Bodansky³⁴ and many others have pointed out, questions of legitimacy can also arise in relations and institutional settings that are not regulated by law, but regulated by somewhat weaker or less formalized set of rules, standards and norms. Ruling through the medium of law with the possibility of coercion and sanctions make questions of legitimate authority become more acute. But questions of legitimacy may also arise in relation to non-legal and nonbinding institutional arrangements and systems of rules, such as voluntary codes of conduct within an organization, and in relation to international courts without biding jurisdiction.

However, legality, or being correctly made in accordance with positive law or recognized rules and standards in an institution or rule-following practice, cannot be the sole criterion of normative legitimacy. As moral and political philosophers often point out; Nazi Germany was ruled through law, but that does not mean that its legal acts were legitimate or that the regime as such was legitimate. There is wide agreement that the deep immorality and injustice of certain Nazi laws, and their effects, rendered these laws, as well as the overall Nazi regime illegitimate.³⁵

3.3.2. *“Sufficient moral justifiability” or “sufficiently just”*

Originally, sufficient legality, or conformity to recognized traditions and systems of rules, may have been the sole, or at least dominant, aspect of the meaning of the concept legitimate. But in modern times the requirement of sufficient justice or sufficient moral justifiability has become more prominent. As mentioned earlier, in moral and political

³² C.f. Rawls, J. (1995), “Reply to Habermas”, *Journal of Philosophy*,

³³ “Legitimate (adj.) Mid-15c., lawfully begotten, born of parents legally married,” from Middle French *legitimer* and directly from Medieval Latin *legitimatus*, past participle of *legitimare* “make lawful, declare to be lawful,” from Latin *legitimus* “lawful,” originally “fixed by law, in line with the law,” from *lex* (genitive *legis*) “law” (see legal). Transferred sense of “genuine, real” is attested from 1550s. Related: Legitimately; legitimeness. The older adjective in English was legitime “lawful, of legitimate birth” (late 14c.), from Old French *legitime*, from Latin *legitimus*.” Online Etymology Dictionary, available at <https://www.etymonline.com/word/legitimate>

³⁴ Bodansky 2011.

³⁵ While there has been some discussion in the literature on whether there could be morally acceptable and desirable parts of the German legal code during the Nazi regime – such as a prohibition on drunk driving – that could be said to have legitimacy even though the regime as a whole was illegitimate.

philosophy there is a tendency to focus only this criterion of legitimacy, or to frame all normative considerations as a question of moral justifiability or justice.

Framed as a criterion of justice, both formal, procedural and outcome justice seem to be relevant criteria for the legitimacy of an institution, or of an act made within it. We see examples of this in the legitimacy debates of ICs. A frequently voiced legitimacy problem for the ICC, is for example the perception that it does not treat like cases alike when deciding which cases to prosecute, but instead targets poor African countries, whereas state officials in richer countries have impunity.³⁶ The ICC is also accused of not being able to sufficiently secure procedural justice in its proceedings, amongst other because it lacks funding for witness protections, and have insufficient funding for gathering evidence. The legitimacy of international investment tribunals, on the other hand have been questioned because they in their rulings are believed to favour investors' interests over that of domestic public interests, leading to injustices in outcomes or distribution of goods.³⁷

3.3.3. Sufficient respect or support based on belief in respect-worthiness

I also side with those in the literature who see legitimacy as a distinct *social* normative quality or achievement, and not as a mere abstract category of moral or political philosophy. However, from merely observing deference towards an IC, for example, we cannot infer that the IC is legitimate, since deference and obedience can also stem from coercion or fear of sanctions. Rather, acceptance must also satisfy a benchmark of appropriate or justified acceptance, or put differently, it requires a certain measure of "Legitimitätsglaube", or respect and support based on the belief that the decision or institution is worthy of support, respect or even obedience and deference, among certain participants and stakeholders.

The European Court of Human Rights (ECtHR), for example, would not be legitimate if no states or citizens in Europe believed it to be so, or at least not if no one even believed that it was likely to become respect-worthy in the foreseeable future.³⁸ I shall furthermore suggest that Legitimitätsglaube, or belief in an institution' respect-worthiness, may be conceptualized as belief that the institution satisfies the four normative criterion discussed here to a sufficient degree across the intuitional levels and dimensions, or on a balancing of the weaknesses and strengths of the institutions across these levels and dimension with these normative criteria as the yardstick.

3.3.4. Sufficient institutional integrity

³⁶ This illegitimacy charge is not necessarily well founded, since most of the African cases have been self-conferrals, and many of the rich powerful states are not members of the court. But the perception of this as a legitimacy problem tells us something about formal justice as a normative criterion of legitimacy.

³⁷ I am not claiming that this is a well-founded charge of illegitimacy.

³⁸ C.f. what I above referred to as the "prospective perspective on legitimacy".

More hesitatingly³⁹ I also add “sufficient institutional integrity”, or being “sufficiently in accordance with the stated aims and purposes of the institution” as a normative criterion of legitimacy.⁴⁰ Institutional integrity means that there are no big gaps between aims and means of the organization, or that the origin, and especially the processes, acts and outcomes, do not radically conflict with the stated aims and purposes of the institution or system of rules in question. A human rights court which fails to uphold its own human rights standards, either in the process of setting up and creating the court, or in its process of operating - e.g. in the way it secures defendants or witnesses- is likely to be assessed as less legitimate than a trade court with the same type of human rights weaknesses. Why? Acts or decisions that fail to be in accordance with the institution’s aims and purposes can fail to be institutional “correct”, or in accordance with the rules and principles of the institution or legal system, even when they are correctly enacted in accordance with the purely formal rules and procedures. Think for instance of an act or decision being against the “spirit of the constitution”. Lack of institutional integrity can also be seen as a failure of rule of law norms, or as a failure of formal justice, or failing to apply rules and norms consistently and generally, and not make exceptions for oneself. Moreover, institutions that fail to live up to their stated aims and values do in a sense exert authority on false premises, or as Hanna Arendt said about hypocrisy, they try to “shine with something that is not”.⁴¹

3.3.4. The logic of “sufficiency” or “thresholds”

In order for an institution to be legitimate on the view presented here, the institution will have to satisfy multiple normative criteria across different institutional dimensions and at multiple institutional levels. This may seem to yield an overly demanding requirement for something to be legitimate, a legitimacy requirement that no real world institution will ever satisfy in practice.

Note, however, that each of the normative criteria in the list above includes the modifier “sufficiently”. This is a very important feature of legitimacy and legitimacy assessments that is widely recognized in the literature.⁴² As described above, the fact that a law has been made by a legitimate authority, in the right way confers a certain measure of legitimacy onto the law, *independently of the content of the law*. But this legitimacy is only *prima facie*, and can be defeated. An institution, law or decision cannot

³⁹ I am somewhat hesitant, however, because it is not entirely clear to me whether this criterion can be seen as a combination of the other criteria, and also whether it is more closely connected to empirical legitimacy than normative legitimacy.

⁴⁰ C.f. Buchanan who explains the criterion of institutional integrity as the condition where: “there is not a large disparity between the institution’s most important professed goals and procedures, on the one hand, and its actual performance, on the other; or if there is such a disparity there is an explanation of it that shows it to be beyond the institutional agents’ control and allows for a significant prospect that the disparity will be reduced over time”, Buchanan 2018, p. 59-60.

⁴¹ Arendt, H. (1963/1977) *On Revolution*, Penguin Books, New York, p. 100.

⁴² Buchanan, A. 2004. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, p. 432; Rawls, J. 1993, *Political Liberalism*, Columbia University Press, New York, p. 225; Rawls, J. 1995, “Reply to Habermas”, *Journal of Philosophy*, p. 175ff.

fall below a certain benchmark or threshold of the normative criteria without losing its legitimacy: It cannot be *too* egregiously immoral, be a *complete break* with recognized rules and standards, and it cannot be dismissed as illegitimate by *all* involved agents.

Legitimacy is a *weaker* criterion than full justice, and a weaker criterion than perfect legality, in the sense that legitimacy allows for a certain level of injustice and departure from the law to go unexamined, or without undermining the institution's overall legitimacy. This seems to be particularly true for acts and decisions at lower institutional levels, where legitimacy is partly conferred from higher levels. A particular law or decision can thus be legitimate, but unjust (although not too unjust).⁴³ It can also be perfectly just, but lack legitimacy in the sense of not being sufficiently in accordance with recognized laws and rules or not accepted as legitimate by anyone. It can be legal, but illegitimate, and it can be legitimate but not (perfectly) legal. It can also be recognized by everyone as legitimate, but still fail to be legitimate because everyone's belief in its legitimacy is based on false and misleading information and in reality the law is far from fulfilling the other normative criteria at one or more of the institutional levels and dimensions.

3.4. Legitimacy – an internally complex quality that is variously describable

The picture of legitimacy that emerges from my analysis of where legitimacy problems can be located, is a picture of legitimacy as a mixed, composite and multidimensional quality. Or with Gallie we can say that legitimacy is an internally complex quality. On this picture the quality of being legitimate is a joint function of several different institutional levels and dimensions being sufficiently in accordance with all of the four normative criteria; That is, each institutional level and dimension needs to be sufficiently in accordance with established rules and procedures, sufficiently morally justifiable, have sufficient institutional integrity and also have a sufficient level of respect or support in order to be legitimate.

In the literature on legitimacy, however, so-called *monistic* conceptions of legitimacy seem to be more common. By monistic conceptions of legitimacy I mean conceptions of legitimacy that explain legitimacy in terms of one key quality or criterion. Yet, a closer look at these monistic conceptions of legitimacy reveal that they often “pack different criteria together” in their main criterion. Take for instance legal scholars who focus on legality as the sole criterion of legitimacy. Typically, their notion of law and legality is not a narrow and purely positivist notion of law, instead they have a rich normative notion of what law and legality means. And, as Bodansky says, if we take a sufficiently expansive view of law, “much of the conceptual work that legitimacy does might be incorporated into the concept of law itself”.⁴⁴ An expansive view of law and legality can for example include what Lon Fuller calls the “inner morality of the law”. For a rule to be legal according to Fuller, it must respect the inner morality of law, or satisfy eight

⁴³ C.f. Langvatn, S. 2016.

⁴⁴ C.f. Bodansky, D. “The Concept Legitimacy in International Law”, p. 3f.

principles of legality: It must be (a) sufficiently general, (b) publicly promulgated or made publicly known, (c) prospective – that is, applicable only to future behavior, and not past, (d) at least minimally clear and intelligible, (e) free of contradictions, (f) relatively constant, so that its content do not change from day to day, (g) possible to obey, and finally be (h) administered in a way that does not wildly diverge from its obvious or apparent meaning. Law and legality, on this view is guaranteed to embody certain moral standards of respect, fairness, and predictability, and this makes it a more plausible criterion of, or conceptualization of legitimacy. But packing all of these criteria into the single criterion of “legality”, without making the sub-criteria explicit, makes it much harder to understand what it takes for an institution to be legitimate, or how disagreements and contestation about different aspects of legitimacy come about.

I believe that we can find the same tendency also among philosophers who promote monistic conceptions of moral justifiability. Joseph Raz’s influential “service conception of legitimacy”, for example, explains a genuinely legitimate authority in terms of a single outcome-related quality, namely the criterion that “the alleged subject is likely to better comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.”⁴⁵ Yet, as pointed out by Allan Buchanan, this criterion is in itself fairly “unilluminating” and “yields little insight about the features that make institutions legitimate”. For it to be illuminating we need either a comprehensive account of what kinds of reasons that objectively apply to all, or we must rely on our prior intuitions about what features and elements it is that yields legitimacy for an institution or authority independently of Raz’ criterion.⁴⁶

Now, if we accept that institutional legitimacy is a complex multilevel quality, and if we accept that the elements and dynamics I have discussed here make up a kind of conceptual core for “legitimacy” in this sense, then it is not hard to see why legitimacy is contested, or hard to see how different users of this concept may reasonably end up with somewhat different conceptualizations of its various elements and components. This is because legitimacy can be “variously described”, or because the various elements that goes into the combined complex quality or achievement of being legitimate can be interpreted and emphasized somewhat differently, without dismissing the relevance of the other elements entirely.

There is indeed conceptual confusion and conceptual conflation in most legitimacy debates, including in the debates about ICs’ legitimacy. I believe, however, that in the latter debates many participants over time come to acknowledge that many of the elements discussed here may in some instances and contexts be relevant, and accept that they are not elements that one can completely ignore in a full legitimacy assessment. Yet, the internal complexity of the concept legitimacy and the fact that it can be variously described, remain sources contestability which seem impossible to

⁴⁵ Raz, J. (1988). *The Morality of Freedom*, Oxford: Oxford University Press, p. 53

⁴⁶ Buchanan 2018, p. 70-1.

eradicate once and for all. Instead of trying to eradicate such contestability, it may be more fruitful to focus on locating where the disagreements in legitimacy debates lie, and try to get a better grasp of our own, and of others', often implicit and unreflective conceptualizations and criteria of legitimacy. For this purpose a schematic representation of the elements discussed above may be of some help.

REGIME/ SYSTEM		COURT	CASE X	DECISION X	
		PEDIGREE How it came into being	PROCESS The process or procedures through which it operates	OUTCOME	
				Efficiency: degree to which it attains its goals	Effects: on the regime, parties, and third parties
SUFFICIENT LEGALITY – in accordance with recognized traditions, laws and procedures			X		
SUFFICIENT JUSTICE or moral justifiability	Substantive justice				
	Procedural justice				
SUFFICIENTLY in accordance with the AIMS of the institution (institutional integrity)					
SUFFICIENT PERCEIVED LEGITIMACY –or respect/support based on belief in sufficient legality and sufficient moral justifiability &					

Figure 1. Components and levels of legitimacy assessment for an IC

The first row of the schema depicts different institutional levels. The second row depicts the different institutional dimensions of each institutional level, and the left side boxes depict the four normative criteria that each institutional level and dimension can be assessed by in a legitimacy assessment. The red crosses exemplify the emphasis of a given discussant, or the focus of a particular legitimacy conception. By comparing such schemas for different discussants or groups one gets an idea of where disagreements lie and why different persons and groups end up with different legitimacy assessments of an IC and. The schema may also help discussants become more explicit about their own emphasizes and focuses when using the concept legitimacy, and be a reminder of legitimacy aspects that unwittingly have fallen out of view. In addition to the elements depicted in the schema, it can also be useful to be explicit about whether one speak of

legitimacy primarily in a normative or empirical sense, and what the temporal horizon of one's legitimacy assessment is - as discussed in the beginning of this paper.

However, it is important to see that the conception of legitimacy that I have presented so far only includes *semi-formal* conditions and elements of legitimacy. As such it is insufficient for assessing and reaching a conclusion about the legitimacy of an actual institution. In order to assess the legitimacy of an actual institution one needs a *full substantive conception of legitimacy*, and in order to get to that we need more information both about the context of the institution, but also about the exact content of the various normative criteria: Which laws and rules do the institution have to sufficiently conform to? How do we specify the idea of moral justifiability, or of formal, substantive and procedural justice? And exactly who need to have a belief in the institution's respect-worthiness? Furthermore, we also need to know exactly what counts as an appropriate "threshold level", or a sufficiency level, of each of the normative criteria. Exactly how many agents need to believe that the institution is respect-worthy? When is it sufficiently procedurally just? We also need to know more about the relative importance between these criteria as they apply to the various institutional dimensions on different institutional levels. Can for example a stellar legal process of an IC in terms of legality and substantive and procedural justice for example outweigh injustices in how the IC affects certain third parties?

3.4. Assumptions about the nature of the relevant agents, and the aims and purposes of the institution

I submit that in order to formulate a more detailed and substantive conceptualization of legitimacy, one has to take a *stance on what the aims and purposes of the system or institution in question is*, as well as a *stance on who the main agents or stakeholder groups are*. Yet, this, I shall argue, is a deep and often unacknowledged source of the concept legitimacy's contentedness because assumptions about these deep matters are often not made explicit. And more fundamentally, it is not obvious that there is a single right way to determine who the relevant agents are, what their nature is, and what the right understanding of the aims and purposes of a practice or institution are. Most institutional and legal practices are themselves "variously describable", and also "open", in the sense that their aims and purposes, and who the central agents are, and may to some extent change with new circumstances.

Take the regime we call liberal democracy, or more precisely, constitutional liberal democracy. Most participants in this type of regime agree that this is a legitimate form of regime. Still, there is a wide range of views of exactly what the main aims and purposes of the regime are, e.g. whether popular sovereignty and democratic procedures, on the one hand, or liberal constitutionalism, on the other hand, is the more fundamental. Yet, how we define who the main agents are, and what the main aims and purposes of an institutional or legal practice are, has a *deep impact on all the elements and components that goes into the legitimacy assessment*. The way we define or

conceptualize the nature of the agents and the purposes of the practice helps specify the content of each of the normative criteria, as well as their relative importance, and it can also influence the relative importance between different institutional dimensions and levels.

The IC legitimacy debates illustrates both the importance of how one conceptualizes the agents and the aims and purposes, and how this is a source of legitimacy contestation. Consider the ICC. The ICC is a *court*, and part of its aim and purpose is no doubt to uphold the law. As *criminal* court the ICC also has a special obligations to uphold certain legal principles that are seen as especially fundamental in criminal law such as *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). It may therefore seem that the ICC's legitimacy depends more on legality and conformity to existing rules than many other institutions, and perhaps even more so than many other international courts. On the other hand, it is also widely thought that since the ICC, and international criminal law more generally, is still a relatively new phenomenon in need of adjustments, this allows for a dynamic jurisprudence that may go beyond black letter law. But beyond seeing the ICC as a criminal court, there are many divergent views on what the main agents and purposes of the ICC are. If we understand the ICC's main aims and purposes in terms of the concerns primarily in terms of classical criminal law, then the procedural legal aspects of the court will feature very prominently in a substantive conception of ICC's legitimacy. If, on the contrary, the primary aim is seen as rectifying injustice and giving victims a voice, then the pedigree and process is likely to be downplayed in favour of the qualities of the results and effects produced by the court. If one sees the main aim as giving victims a voice, this will also influence how one identifies the content of the various values or qualities sought at each level; one is, for example, more likely to interpret "sufficient procedural justice" as including some kind of access for, or representation of, victims in the proceedings.⁴⁷

⁴⁷ This section draws on a discussion in Langvatn, S.A. and Squatrito, T. (2016), pp...

REGIME / SYSTEM		COURT	CASE	DECISION	
THE MAIN AGENTS THE AIM AND PURPOSE OF THE PRACTICE		PEDIGREE How it came into being	PROCESS The process or procedures through which it operates	OUTCOME	
				Efficiency: degree to which it attains its goals	Effects: on the regime, parties, and third parties
SUFFICIENT LEGALITY – in accordance with recognized traditions, rules laws and procedures			X		
SUFFICIENT JUSTICE or moral justifiability	Substantive justice				
	Procedural justice				
SUFFICIENT INSTITUTIONAL INTEGRITY sufficiently in accordance with the aims and purposes of the institution			X		
SUFFICIENT LEGITIMITÄTSGLAUBE –or respect/ support based on belief in sufficient legality and sufficient moral justifiability &					

Figure 2. How we conceive of the aims and purposes of the practice in question, and who (and how) we view the main agents or stakeholders, colors every aspect of the semi-formal elements that go into a legitimacy assessment.

3.5. Factors that influence the strength of the duty created by legitimacy, and factors that raise or lower the threshold of the normative standards

Lastly, I tentatively add certain additional contextual factors that help shape legitimacy assessments. First, I follow Buchanan in thinking that the duties that follows from an institution having legitimacy depend on *the roles of different agents*: If an IC is legitimate this creates a different set of duties for the *direct participants and addressees* of the court, than it does for *third parties*. Direct addressees have a prima facie duty to oblige or even to actively support and promote a legitimate IC, whereas third-parties have a weaker duty, e.g. that of non-interference.⁴⁸ Secondly, if obliging or supporting a legitimate institution involves extreme costs and significant self-sacrifice for an agent,

⁴⁸ C.f. Buchanan 2018.

this may weaken, and in some cases even obliterate, the duties that follow from its legitimacy for that agent.⁴⁹

I also take there to be at least four factors that raises or lowers the threshold of the four normative legitimacy standards for an institution; 1) the nature of the domain it operates in; 2) the scope of the domain it regulates, 3) the powers it wields in that domain; and 4) the comparative benefits and alternatives. If an IC regulates a domain with severe influence in person's lives this raises the threshold of the normative legitimacy standards or criteria it has to satisfy. Similarly if it regulates a wide domain, or multiple domains, and when it wields hard powers such as having binding jurisdiction and coercive effective sanctions. If the IC regulates a domain that is important to regulate, and there are no institutional or non-institutional alternatives then this lowers the threshold of the normative criteria. If there are viable alternatives, this heightens them.⁵⁰

The factors listed here seem to influence legitimacy assessments, but do not seem to impact the core meaning of the concept legitimacy itself. Contestation and disagreements can ensue, however, over the importance of each of these factors, their relative importance, and whether the factors are actually in place or not in a given case to be assessed.

4 Concluding comments

In this paper I have analyzed legitimacy as an essentially contested concept, and provided an analytical framework that can help us see why different persons and groups arrive at somewhat different conceptualizations of legitimacy, even when they can be said to use the concept competently and with some kind of shared core meaning. This leaves little hope that it is possible to come to an agreement on a single shared substantive and general conceptualization, or standard of, legitimacy for an IC, and much less for institutions in general. Yet, it provides a path for locating the source of disagreements in legitimacy discussions, and also a path towards more agreement on what it is we disagree about when we disagree about legitimacy.

⁴⁹ Ibid.

⁵⁰ Ibid.