What Is It We Disagree about When We Disagree about the Legitimacy of an Institution? A Framework for Analyzing Legitimacy's Institutional-Context Sensitivity

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Over the last few decades, "legitimacy" has become a key concept in both academic and political discourse about institutions.[1] However, the proliferation of academic legitimacy scholarship has been accompanied by concerns that scholars are "talking past each other."[2] Prominent legal scholars, including James Crawford[3] and Martti Koskenniemi,[4] have argued that such miscommunication is pervasive and caused by the term legitimacy's semantic ambiguity. Other legal scholars have characterized legitimacy as protean, mercurial, impossible to pin down,[5] and as infinitely malleable and possible to invoke as one pleases.[6] Several international relations scholars and political scientists have characterized legitimacy as an "essentially contested concept."[7] And the philosopher Arthur Applbaum has argued that while all key concepts in political theory are contested, it is widely thought that disagreement about legitimacy is different, and that "in arguments about legitimacy there is less agreement about what we are disagreeing about."[8]

How can this be? Are some scholars—or even whole disciplines—confused about the proper meaning and use of the term legitimacy? Are they using the same

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term while assuming different underlying concepts? Is there no coherent under-lying concept of legitimacy? Or could it be that legitimacy, as argued by Kosken-niemi, is in essence a strategic concept that evokes the semblance of normative substance but, in reality, has none?[9]

This article aims to show that legitimacy is indeed a "protean," or highly changeable, concept, and that it is so in large part because it denotes a quality or achievement of institutions and other rule-following practices that is "institutional-context sensitive"—meaning that it is a quality or achievement that is sensitive to—or changeable across—different types of institutions, different levels and parts of institutions, and different contexts these institutions operate in. Yet, while legitimacy's various institutional-context sensitivities make it a particularly complex concept and cause us to talk past one another, these same institutional-context sensitivities also center the meaning and use of the concept. This article shows that it is possible to discern certain patterns in legitimacy's various institutional-context sensitivities and thereby get a better grasp of the many different uses of the concept of legitimacy.

The first part of this article focuses on understanding what type of concept legitimacy is. I argue that legitimacy is an example of what philosophers have called a "thick normative concept"[10]—a concept that is *evaluative* in the sense that it accredits a valued quality or achievement while also having *substantive descriptive content.* Thick normative concepts are complex. Legitimacy, however, is more complex and confusing than most other thick normative concepts because it accredits a type of normative quality or achievement that is also "internally complex," and this internal complexity is furthermore "institutional-context sensitive." Much of the conceptual and philosophical literature on legitimacy has focused on identifying a core criterion or essence of legitimacy,[11] without looking at the relevance of contexts, practices, and institutions. The recent phil-osophical literature on "institutional legitimacy" has taken important steps to correct this.[12] What remains undertheorized in this literature, however, is what I will call legitimacy's "institutional-level sensitivity," or how the quality or achieve-ment of legitimacy changes at higher and lower institutional levels. Building on a distinction from the philosopher John Rawls's early article "Two Concepts of Rules,"[13] this article seeks to show that there is an important—but often overlooked —difference between the legitimacy of a rule-enforcing practice or institution, and the legitimacy of an act, policy, or subunit within a practice or institution. Also missing are explanations of how legitimacy's various types of institutional-context

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sensitivities are interconnected, and analytical tools that can help us grasp the complex interconnections between them.

The second part of the article presents a structured framework for analyzing how scholars use the concept of legitimacy when making specific legitimacy judgments or legitimacy arguments about an institution, and poses the following questions:

1. Which *institutional level(s)* of the institution is the legitimacy argument focused on?
2. Which *institutional dimension(s)* of the targeted institutional level(s) is the focus on?
3. Which *evaluative criterion (or criteria)* is used? And which *type* of normative criteria is it?
4. What is assumed to be the primary *purpose(s)* of the institution?

This sequence is accompanied by two figures that aid the mapping of these four aspects. The questions and the figures together amount to a framework of analysis that foregrounds distinctly institutional aspects of legitimacy and helps us grasp the complex ways in which different institutional-context sensitivities shape a legitimacy judgment or legitimacy argument about an institution.

Throughout, the steps of analysis are illustrated with examples of legitimacy arguments about the International Criminal Court (ICC) presented by political philosophers, political scientists, and legal scholars. The main purpose of the framework is to help bring out the internal complexity and institutional-context sensitivity of the concept of legitimacy. Additionally, it can help make sense of specific legitimacy arguments about an institution, and whether scholars *Y* and *Z* are engaging directly in a discussion and disagreeing substantively, or are in fact talking past each other. The framework is particularly useful when trying to understand legitimacy debates about supranational institutions like the ICC where additional institutional levels, and rapidly evolving institutions and institutional contexts, make legitimacy judgments particularly complex and contested.

Legitimacy: a Particularly Protean and Confusing Type of Concept

In ordinary parlance, the term "legitimacy" can be used to ascribe a vague notion of being proper or justified.[14] In both political and scholarly discourse, "having legitimacy" or "being legitimate" ascribes a more specific quality or achievement that is distinctive of social and political institutions, and is standardly defined as having "the right to rule."[15] For the purpose of this article, I avoid using these standard definitions because they explain legitimacy with concepts that are

themselves highly contested and in need of further analysis and explanation.[16] Instead, I will define the quality or achievement of being legitimate as "being worthy of support, cooperation, and obedience";[17] or, for short, "being respectworthy" or "acceptance-worthy."[18] When an institution or practice is respectworthy or acceptance-worthy, it has several different types of qualities and achievements that give participants good reason to think that it is worthy of their support, cooperation, and obedience. Moreover, this set of qualities and achievements gives them reasons to obey a specific policy or decision within the practice even if they think that the specific policy or decision is unjust and not worthy of moral respect on its own merits.[19] Such *normative* legitimacy is a quality that is distinct from *perceived* legitimacy or the mere *belief* among some audiences that an institution, or some part thereof, is normatively legitimate or worthy of support, cooperation, and obedience.

In my view, the particularly protean or mercurial nature of the concept of legitimacy can best be explained by noticing the following features:

1. Legitimacy is a *thick normative concept*—an *evaluative* concept (a concept that is normatively or evaluatively loaded) that also has considerable *substantive descriptive content.*[20] To say that an institution, such as the ICC, is legitimate, is to evaluate it positively and make a normative claim about how we should relate to it; namely, that we ought to respect it—or support it, cooperate with it, and in general obey its rules and decisions even when we disagree with them.[21] Or as a philosopher might put it, legitimacy ascriptions make an evaluative "action-guiding" claim. Simultaneously, however, it is to attribute to the ICC distinct qualities or achievements, or to imply that it has features and achievements that are sufficient to make it respectworthy in the context. For example, that its system of rules is sufficiently coherent, that it is achieving its stated purposes to a sufficient degree, and so forth. To say that the ICC is legitimate is thus also to make (or at least to imply) a descriptive claim about facts in the world that may be true or false depending on how the ICC actually is. Reflecting on this duality helps us understand that these evaluative and descriptive aspects of the concept may come apart; and also that the term legitimate can be used strategically and rhetorically to declare that the institution is respectworthy, without the speaker being able or willing to defend the descriptive claim that is implied by the term.

2. Legitimacy is a particularly confusing thick normative concept because it ascribes and denotes a quality or achievement that is "internally complex" or has an "internally complex character."[22] In order for an institution to be legitimate, it must have several different types of qualities and achievements. This becomes evident when we see that any argument about how or why an institution or policy is legitimate, or worthy of respect, must refer to the institution's further respect-making qualities or achievements; for instance, that it is just or that it is legal. But for an institution or a policy to be legitimate or respectworthy, it is not enough for it to have just *one* quality, or one type of quality, such as being legal or just. *Several* different types of qualities and achievements are needed. Yet, the achievement of being legitimate is attributed to institutions and parts

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thereof "as a whole" or as one overall achievement—and this can cause confusion. Some conflate the meaning of the term legitimacy with a particular further quality or achievement that typically needs to be in place to a sufficient degree for something to be legitimate: Thus, some use the term legitimate to denote that an institution or policy is respectworthy because it is in accordance with the law. Others use the term to denote respect-worthiness in the sense of being sufficiently just, or in the sense of having sufficient acceptance and empirical support.

3. Legitimacy ascribes and denotes a quality or achievement of institutions that is internally complex and furthermore "institutional-context sensitive." This means that the exact set of qualities, and the threshold levels of each of these sub-qualities, that are necessary and sufficient for making an institution respectworthy, is dependent on various features of the institution or institutional entity in question, as well as features of the wider institutional context in which it operates. A particularly important institutional-context sensitivity is legitimacy's sensitivity to institutional levels. The set of qualities—and the necessary threshold levels—that are required for an *overall institution or rule-following practice* to be respectworthy is not the same set of qualities that is required for the legitimacy of a particular subinstitution or a particular policy *within* the institution. When we assess the legitimacy of a rule-following practice or institution, we focus primarily on its general moral and rational qualities and comparative advantages. When we assess the legitimacy of a policy *within* an institution that is itself thought to be legitimate overall, the focus shifts and other types of qualities become relevant; namely, the policy's *fit and justification within this practice or institution.* That is, it becomes relevant whether the policy coheres with and is justifiable in light of the *rules of the practice*, and also whether the policy coheres with or undermines the *basic purpose(s) of the institution.*

The variability, changeability, or "open character"[23] of the qualities and achievements needed for something to be legitimate can be confusing. It is especially confusing for theorists who try to define the essence or core meaning of the concept of legitimacy or define a general principle of political or institutional legitimacy.[24] If we focus solely or primarily on finding the essence or core quality of legitimacy, it may seem that there is no coherent underlying concept of legitimacy at all.

Legitimacy's internally complex character and context sensitivity make it impossible to define a set of the conditions or qualities that are sufficient or necessary to achieve legitimacy in general. However, the concept of legitimacy is not *fully* "open in character": there are certain patterns, or a certain logic, in how the set of necessary respect-making qualities and achievements changes across, and within, institutions. To identify these sensitivities and patterns, I suggest that it is useful to analyze how we reason when we make (informed) legitimacy judgments about an institution. In the next section, I do so while drawing on examples of legitimacy arguments about the International Criminal Court. The ICC legitimacy

scholarship provides a good example for analyzing legitimacy arguments, not only because the ICC's legitimacy is highly contested but also because it is a relatively new institution without coercive enforcement mechanisms that can only function with the willing cooperation of its member states. It is thus an institution that is particularly dependent on its legitimacy to function.[25] Moreover, scholars from different disciplines have written about its legitimacy, making it a good case for understanding whether scholars from different disciplines use the concept of legitimacy in different ways.

A FRAMEWORK FOR ANALYZING AND COMPARING LEGITIMACY ARGUMENTS ABOUT AN INSTITUTION WITH A FOCUS ON THE INSTITUTIONAL-CONTEXT SENSITIVITY OF THE ARGUMENTS

In this section, I present a four-pronged sequence of questions and two figures. Together, these amount to a framework that can help us understand and map some of the most important ways in which legitimacy arguments are institutional-context sensitive. They can also be a help in disentangling the multiple ways in which this institutional-context sensitivity may cause us to talk past each other in legitimacy discussions about institutions.

Step 1: Which institutional level is the legitimacy argument directed at?

When trying to understand how various institutional-context sensitivities may shape a legitimacy judgment—and ultimately what it takes for an institution, or a policy within an institution, to be legitimate—it is helpful to start by identifying the "institutional level(s)" at which the different scholars in a discussion direct their arguments. This will be easier if we start by ordering the institutional levels of the institution from the highest to the lowest and include any higher or overarching regime of which the disputed institution may be seen as being a part. Setting up such an overview will also remind us of the complexity of the institution and how its different subparts and offices have their own systems of rules and their own basic purposes. An extensive overview of the ICC's institutional levels may, for example, look like figure 1.[26]

When we try to analyze and map which institutional level(s) two different scholars direct their legitimacy arguments at, we may find that scholars *A* and *B* direct their praise or criticism at the same institutional entities at the same level. Or we may find that *A* only focuses on problems relating to the qualities of specific decisions made by the court, whereas *B* consistently focuses on the quality of the

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OVERARCHING INSTITUTION/ REGIME				
International political order System of rules: UN Charter, public and private international law Basic purpose: To uphold an international political and legal order				

INSTITUTION				
The International Criminal Court System of rules: The Rome Statute of the ICC + Rules of Procedure and Evidence Basic purpose: To, e.g., prosecute the most serious international crimes				

SUBUNITS				
Assembly of the state parties	**Presidency**	**Registry**	**Chambers** • **Pretrial** • **Trial** • **Appeal**	**Office of the Prosecutor**
System of rules: Rome Statute art. 112 + The Rules of Procedure of the Assembly of State parties	System of rules: Rome Statute art. 38 + The Rules of Procedure and Evidence	System of rules: Rome Statute art. 43 + Regulations of the Registry	System of rules: Rome Statute + The Rules of Procedure and Evidence	System of rules: Rome Statute, art. 42 + Regulations of the Office of the Prosecutor
Basic purpose: legislation, oversight	Basic purpose: administration, legal oversight, and external relations	Basic purpose: administration and outreach	Basic purpose: adjudication	Basic purpose: investigation and prosecution

POLICY				
Example	*Example*	*Example*	*Example*	*Example*
Policies related to amending the Rome Statute	Reviewing decisions by other ICC bodies	Outreach to affected communities	Interpreting and setting standards of evidence	Formulating a policy for opening cases

ACT / DECISION				
Example	*Example*	*Example*	*Example*	*Example*
Changing the rules of procedure and evidence	Excluding persons from ICC's list of experts	Outreach meeting in refugee camp in Uganda	2018 acquittal on appeal in Bemba case	2018 opening of investigation into the *Situation in the State of Palestine*

Figure 1.   Overview of institutional levels of the ICC.
Note: This figure maps the institutional levels and subunits of the ICC, placing the highest institutional level on top of the figure. The figure also includes (incomplete) information about the most relevant rules and procedures, and it provides an interpretation of the basic purpose(s) of the higher institutional levels and the subunits. For reasons of space, interpretations of basic purposes at the lower institutional levels have been omitted.

ICC's process rules. These differences in institutional focus may be a source of conflicting judgments about the ICC's legitimacy and can also become a source of confusion.

Yet, more importantly for our purposes here, mapping which institutional levels the legitimacy arguments are directed at also helps us notice one of the ways in which legitimacy is "institutional-level sensitive," or how the qualities that need to be in place for something to be legitimate or respectworthy change across institutional levels. As argued above, there is an important difference between the *legitimacy of a system of rules to be applied and enforced* and the *legitimacy of a particular act* that falls under this rule-following practice.[27] When we assess the legitimacy of the ICC *as* a system of rules to be applied and enforced, we discuss questions such as: Is the purpose of having this rule-following practice morally and rationally acceptable? Is the system of rules suited to achieve these purposes? Is the system of rules morally acceptable? Can it be applied and enforced in a coherent way? Do the participants willingly assent to the rules? Does applying and enforcing such a rule-following practice benefit the participants in the long run?[28] What makes this "highest institutional level," or the overarching institution, worthy of support, cooperation, and obedience will be informed by general arguments about the rationality and morality of having such a rule-following practice, and by comparisons to institutional and noninstitutional alternatives.

The legitimacy of a specific ICC subunit, policy, or decision, on the other hand, has a different kind of normative complexity. For a policy to be legitimate or worthy of respect is not primarily a matter of the general moral and rational merits and comparative advantage of the policy itself. For a specific policy to be legitimate, it must emerge from, or be made by, an *institution and a system of rules that is itself legitimate* or worthy of support, cooperation, and obedience.[29] The legitimacy of subunits, offices, policies, and acts that fall under the rules of the institution or practice is furthermore a matter of being recognizable, proper, justifiable, and respectworthy *within* the institution or practice. As James Crawford has put it: To say that a policy is legitimate is "to make a *systemic* point."[30] An ICC policy is incompatible with, or lacks respect-worthiness within the ICC practice, if the policy is not permitted by the ICC's system of rules and procedures. Nonetheless, a policy can be in accordance with the rules and still be illegitimate if the policy somehow undermines the basic purposes and values of this institution, or the point of having it.[31]

We have seen here that the legitimacy of an institution *itself* and the legitimacy of a policy *within* an institution seem to ascribe and denote different types of qualities or achievements. So, are these completely different concepts and phenomena such that it would be better to have used different terms to refer to them? Not quite,

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because the legitimacy of and within an institution will also be deeply interconnected. It is often said that when an overall system of rules is legitimate it confers a presumptive or pro tanto legitimacy onto the lower levels and ultimately onto the specific policies and decisions that are made in accordance with its rules and procedures. A familiar example is the way a legitimate constitution confers legitimacy onto ordinary laws, and the specific policies and decisions made in accordance with it.[32] Noticing that legitimacy can be conferred from higher institutional levels helps us make sense of the widely held view that a particular policy, or decision, can be mistaken or even unjust but still be legitimate or respectworthy. If a policy is justified within an institution that is itself legitimate, then the policy is legitimate and respectworthy (in the complex institutional normative sense) no matter how immoral and irrational it is when seen in isolation from the institution.

However, if a gravely immoral or irrational policy is justified within a justifiable institution, this raises questions about the moral and rational respect-worthiness and justifiability of the *institution itself*:[33] When a legitimate institution produces gravely immoral policies and decisions over time, or if it fails to produce any moral or rational goods, this will typically weaken the legitimacy of the overall institution and may eventually undermine it. But before that happens, the institution's policies and decisions are legitimate insofar as they are justified or respectworthy within the practice. Thus, an institution's legitimacy is not fully determined by the qualities of its higher institutional levels. Decisions and policies with a stellar moral and rational quality at lower institutional levels may also over time enhance the legitimacy of the overall institution, and according to some, even bootstrap an institution into legitimacy in the first place.[34]

As we have seen, an ICC policy can be unjust but still legitimate. An unjust ICC policy is not legitimate simply because it is legal, nor because its legal qualities "outweigh" its rational and moral flaws. Rather, it is legitimate insofar as we have reasons for respecting the ICC policy despite its irrationality and injustice, because (a) we have good reasons to think that having the overall ICC institution practice is morally and rationally valuable and that it is worthy of our support, cooperation, and obedience despite having certain moral and rational flaws; and (b) we have good reasons to obey the unjust ICC policy because general adherence to the rules and decisions made in accordance with them is a necessary precondition for upholding the ICC as an institution. If all or most participants have the discretion to decide for themselves on the respect-worthiness of actions that fall under the institution's rules, the point of having the institution or rule-following practice will

be lost.[35] Yet, if the ICC's policies and decisions are morally and rationally flawed, and some of them gravely so, participants have good reasons for trying to change the rules and procedures that produced these results. Moreover, if the ICC's unjust policies are grave and persistent over time, and the responsible bodies of the ICC are not able or willing to address these injustices, participants may no longer have sufficient reasons to think that the ICC is, overall, a morally and rationally justifiable institution worth supporting and cooperating with. However, as we shall see, the calculus of whether such unjust policies undermine the legitimacy of the institution will be influenced by several additional institutional and contextual factors.

Step 2: Which institutional dimension(s) does the argument focus on?
Now that we have identified the institutional level at which a legitimacy argument is directed, this step asks: Does the legitimacy argument target the origin dimension, the process dimension, or the outcome dimension of the institutional level or entity?

"Origin," or "pedigree," refers to how a given institution, subunit, or decision came into being. When the term "legitimate" first came into use in midfifteenth-century English, it was used to denote a certain official achievement—that of having a proper legal origin or being in accordance with the established traditions of the regime; for instance, being a "legitimate king" or a "legitimate child."[36] The ICC's origin is widely thought to be one of its legitimacy assets and something that gave the ICC a start-up capital, or reservoir, of both normative and perceived legitimacy. The ICC came into being through the mechanism of a voluntary treaty, a way of setting up a court that is in accordance with the *recognized rules of international law.* This is also thought to be a *morally justifiable* way of setting up an international court because it secures the *willing consent* of its member states. The now closed International Criminal Tribunal for the Former Yugoslavia (ICTY), by contrast, was set up by a UN Security Council resolution without the consent of the parties subject to its jurisdiction. While this, too, is in accordance with international law,[37] many have argued that the ICTY's origin was unjust: that it was an unjustifiably coercive way of setting up a tribunal, which weakened or even undermined its overall legitimacy.[38]

The "process dimension," on the other hand, refers to the quality of the process and procedures by which an institution or one of its subparts operates. It has, for example, been argued that the ICC has a legitimacy problem due to weaknesses in

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how the Office of the Prosecutor is gathering and vetting evidence, resulting in several acquittals and dismissed cases.[39]

The "outcome dimension" can be further differentiated into effectiveness, efficacy, and effects. "Effectiveness" refers to the extent to which an institution or some subpart of the institution succeeds in achieving its stated or basic purposes, such as whether the ICC succeeds in prosecuting international crimes by making state parties cooperate in extraditing defendants. "Efficacy" refers to how efficiently an entity utilizes its resources, such as whether it operates time- and cost-effectively. The high cost and slow speed of the ICC's trials, together with the low number of cases it succeeds in investigating, is a very common legitimacy criticism of the ICC. And finally, "effects" refer to the desirable and undesirable effects an institution or a policy has on participants, outsiders, or an overarching institution. Some argue, for example, that the ICC derives much of its legitimacy from the long-term positive effects it has—or may have over time—on both member states and nonmember states by being able to project and set a minimal standard of international criminal justice globally.[40]

When participants in a discussion focus on different institutional dimensions, this alone may lead them to assess the legitimacy of the institution somewhat differently and to emphasize different types of qualities that are necessary for respecting and accepting this institution.

Step 3: Which evaluative criterion is applied? And what type of criterion is it?

The next step in the analysis seeks to identify the evaluative criterion (or criteria) that respective scholars use when they evaluate one or more institutional dimension(s) across one or more different institutional level(s). Or put differently: this step focuses on identifying the type(s) of normative qualities a scholar focuses on or gives weight to in the legitimacy assessment.

Here we may encounter a bewildering plethora of criteria or qualities. Attempts at formulating legitimacy criteria for international courts, for example, include criteria such as state consent, the consent of democratic states, legality, minimal moral acceptability, nonviolation of core human rights, transparency, comparative benefit, procedural fairness, public justifiability, institutional integrity, judicial independence, impartiality, and accountability.[41] Some of these criteria have been formulated as attempts to grasp the core quality or essence of what makes any kind of rule-regulated coercive practice justifiable.[42] Other criteria are part of "mixed conceptions of legitimacy" that combine various normative criteria.[43] These

conceptions may, in turn, be general or be made for a particular (type of) institution or regime. Other criteria again may be attempts at reconstructing criteria for when we can expect or predict perceived legitimacy.[44]

However, I submit that the evaluative criteria or qualities that we are likely to encounter in the analysis of scholars' legitimacy arguments can helpfully be subsumed under one of the following three general types, or be seen as a combination of two or more of these types:

1. *Legal*: Possessing a sufficient conformity to the recognized laws, rules, or traditions of the practice
2. *Rational/moral*: Having a sufficient conformity to general rational and/or moral standards
3. *Social acceptance*: Producing sufficient levels of willing acceptance or assent among the participants.

Going forward, I will refer to these as the "legal," "moral," and "social" types of evaluative criteria, corresponding to different types of qualities or achievements that are necessary for an institution or institutional entity to be legitimate.[45] Categorizing the evaluative criteria we encounter in a legitimacy argument as being of one of these types can help us get a better understanding of the argument itself, because an evaluative criterion may not be of the type it seems to be at first glance. Indeed, misunderstanding the nature or type of the evaluative criteria that another scholar uses is itself a source of confusion and miscommunication in scholarly legitimacy discussions. In the next subsections, I take a closer look at these three types of qualities or evaluative criteria.

Sufficient conformity to the recognized laws, rules, or traditions

Many charges of illegitimacy or legitimacy problems focus on the failure to conform to positive law or to the recognized rules and traditions of the practice. I argued above that the legitimacy of a particular act or policy is intimately linked to its conformity with the rules of the practice, whereas the legitimacy of an overall institution depends on its general moral and rational qualities and comparative advantage. However, institutions, too, can be assessed in terms of their legal qualities, albeit in a different way. The ICC's system of rules, for example, can be evaluated in terms of its consistency and coherence. These, too, are legal qualities, but "legal" in a different sense than simply being in accordance with positive law. When scholars point to the legal qualities of the ICC's origin as an important source of its legitimacy, moreover, they refer not to this origin's conformity to ICC's

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system of rules, but its conformity to *public international law*—a higher or *overarching* legal practice.

In one of his late writings, Rawls points to how the quality or achievement of legitimacy has a logic of "sufficiency" or "thresholds":[46] For an overall institution or regime to be respectworthy, it need not operate in a perfectly legal way. Yet, it must be sufficiently legal in the sense that the system of rules and the practice of applying and enforcing that system of rules cannot be too incoherent, inconsistent, or unjust.[47] Similarly, we find that an institutional subunit, for example, does not have to operate in a perfectly legal way. Yet, it cannot flout the laws or rules of its overarching institution tout court without ceasing to be justifiable or respectworthy within the practice.[48]

Sufficient conformity to moral or rational standards, including "sufficient justice"
Legitimacy allows for considerable "leeway"[49] or "slack" in how just something must be to be legitimate.[50] Some philosophers define legitimacy as having sufficient or minimal justice.[51] Many more think that an institution cannot be legitimate unless it is at least minimally just or moral,[52] or more just or moral than the feasible alternatives. As I argued above, this is not true across all institutional levels: A particular policy within a legitimate practice can be unjust and irrational and still be legitimate. An overall institution or regime, on the other hand, does also have leeway or slack, but must be rationally and morally justifiable on its own merits. Or, more precisely, it must be morally and rationally justifiable given the *feasible* institutional and noninstitutional alternatives and given the importance of the problems it solves or goods it produces. In some contexts, that means that institutions that are quite unjust are still legitimate, insofar as they provide functions or goods that are rationally and morally necessary in the context, such as basic political order and stability.[53] Lacking moral and rational respectworthiness can also take the form of failing to treat persons with any care or respect, producing grave environmental harms, or failing to produce any significant goods or useful functions at all. Our expectation is typically not that an institution must be *fully* or *perfectly* moral or rational to be legitimate, too. And a common source of disagreement and miscommunication is conflicting implicit assumptions about *how* rationally and morally justifiable an institution must be to qualify as legitimate.

Sufficient levels of de facto acceptance, or social belief in respect-worthiness

The ICTY was sometimes said to lack legitimacy because the local populations did not accept the tribunal's rightful authority or did not believe that it was respect-worthy. Did this lack of assent and support merely matter for the ICTY's perceived legitimacy, or did it also impact the ICTY's normative legitimacy? That is, can people's belief in an institution's respect-worthiness, or their willing assent to being subject to its rules—or lack thereof—impact an institution's normative legitimacy? Scholars from different disciplines tend to disagree about this, at least when they conceptualize and theorize legitimacy.

When philosophers conceptualize and theorize normative legitimacy, they typically focus on the substantive moral and rational criteria that must be satisfied for an institution to deserve acceptance or belief in its respect-worthiness. On this view, the mere fact that persons accept or recognize the institution as respectworthy is not in itself a benchmark or normative criterion of acceptance. Philosophers often emphasize that persons can be, and indeed often are, mistaken in their beliefs about how an institution operates, and thus also mistaken in their beliefs that the institution really deserves to be accepted as legitimate or respectworthy.[54] Others in the critical theory tradition emphasize that ideology and indoctrination may lead us to falsely accept the legitimacy of a regime.

Social scientists, on the other hand, measure the levels of obedience, deference, or acceptance of an institution to make claims about the institution's overall legitimacy.[55] We also find Max Weber–inspired scholars who define the legitimacy of a regime in terms of the participants' belief that the regime is worthy of respect and obedience ("Legitimitätsglauben").[56] Other social scientists have conceptualized an institution's legitimacy in terms of its capacity to engender and maintain the belief that it is normatively respectworthy, or that it is the most appropriate institution.[57]

Few social scientists today think that a high level of obedience or belief in an institution's respect-worthiness as such amounts to a *sufficient* criterion for that institution's legitimacy. Such views are now widely seen as unacceptably reductionist, and as conflating normative and perceived legitimacy.[58] Yet, many social scientists and several philosophers—myself included—see a certain level of de facto social acceptance, or sufficient level of legitimacy belief, among the participants as a *necessary precondition* for the legitimacy of an institution.[59] On this view, an overall institution cannot be legitimate if *no one* believes that it is worthy of

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support and cooperation, and if nobody assents to being subject to its rules and demands.[60] On a practice-oriented understanding of institutions, this seems rather obvious. Without sufficient support, cooperation, and obedience among both officeholders and subjects, there would be no practice at all. Without minimal normative respect and acceptance among the subjects, an overall institution or practice will depend on threats and coercion to function. In addition to causing moral harm, this makes it costly—or even impossible—to achieve the stated purposes that makes the institution respect-worthy.[61]

That said, social acceptance and legitimacy belief do not play the same role at all institutional levels. A specific policy or decision may be legitimate and legitimately enforced even when its addressees do not think that it is morally and rationally respectworthy (think, for example, of a political compromise in a coalition government), and even when they do not willingly respect it. Yet, if the addressees fail to assent to *most* or to *all* of the institution's rules and policies, this becomes a serious legitimacy problem also for the institution itself.[62]

The evaluative criterion is not always what it seems to be
In ICC debates, we find that legal scholars tend to focus on conformity to recognized laws or rules in their legitimacy assessments. Philosophers, on the other hand, tend to focus primarily on the moral and rational aspects of institutions in their legitimacy arguments, such as whether they are just, or produce societal goods. Political scientists and sociologists focus primarily on the degree to which the institutions are believed to be worthy of respect, and sometimes they simply measure levels of obedience and acceptance.

Based on this, we may think that legal scholars, philosophers, and social scientists in general have different concepts of legitimacy and that they routinely speak past each other in legitimacy debates. However, upon a closer look, we find several social scientists and philosophers who agree that conformity to established rules is a criterion of normative legitimacy.[63] Rawls says for example that kings and queens being legitimate, unlike being just, "says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules and traditions of, for example the English or the French crown."[64] Rawls also argues that legitimate law (in a constitutional democracy) cannot depart too much from a (sufficiently just) constitution.[65] Moreover, when we analyze the legitimacy conceptions, and especially the legitimacy arguments, that scholars from these disciplines make about a

specific institution, we often find that most apply both legal and moral types of evaluative criteria, or both social and legal types, or a mix of all three types.

Further, it can be difficult to determine whether a specific evaluative criterion is of the legal, moral, or social type. Take, for example, the legal scholar Nienke Grossman's mixed conception of legitimacy for international courts. Grossman lists "upholding a minimum core set of human rights" as a necessary but not sufficient criterion and applies this criterion to legitimacy arguments.[66] Because Grossman is a legal scholar, we may automatically think that she takes the criterion of upholding a minimum core set of human rights to be a legal type of legitimacy criterion; that is, as a requirement of sufficient conformity to the existing recognized legal treaties and jurisprudence. This interpretation is strengthened when we see that she justifies the inclusion of this criterion in her mixed legitimacy conception by demonstrating its centrality in public international law, and its inclusion in many global and regional treaties.[67] However, Grossman also justifies the criterion by saying that "the international community *agrees* that some core set of human rights exists that should not be violated in any circumstance," and by saying that this criterion is "*demanded by morality.*"[68] This suggests that the criterion, as Grossman uses it, is best understood as a mix of the moral, legal, and even social acceptance type of evaluative criteria.

"Legality" seems unequivocally to be a legal type of legitimacy criterion, and a scholar who argues that legality is necessary for a policy's legitimacy can simply mean that the institution must conform sufficiently to positive law to be respect-worthy. Yet, scholars who conceptualize legitimacy primarily or solely in terms of legality rarely rely on a positivist or black-letter idea of legality and law. Typically, they rely on a much more expansive and normative idea of legality.[69] One example is Jutta Brunnée and Stephen J. Toope's interactional account of the legitimacy of international law, which explicitly builds on Lon Fuller's understanding of legality.[70] For a rule to be legal, according to Fuller, it must respect the "inner morality of the law" and satisfy eight principles of legality that, in practice, guarantee that the law embodies basic moral and rational standards.[71] For these theorists, "sufficient legality" is thus both a legal and a moral/rational criterion of legitimacy.

"Consent" is another often used criterion of legitimacy. This can be a legal type of legitimacy criterion, for instance, when someone argues that state consent is a necessary criterion of the legitimacy of an international court's jurisdiction as based on the rules of international law. At other times, the criterion of consent is embedded in moral arguments about the importance of the autonomy or the

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self-legislation of persons and groups. Consent in this sense can be a *voluntaristic* criterion of legitimacy, meaning that it is the will or the very act of giving the consent that is seen as transferring authority or legitimacy. Others who take consent to be a legitimacy criterion, however, focus primarily on the importance of the *reasons* for giving the consent. As we move further in the direction of *ideal* or *hypothetical consent*, the criterion of consent in effect becomes a requirement of conformity to certain general moral and rational principles.[72]

Mapping and Comparing the Three First Aspects: The Legitimacy Table

Which type of evaluative criterion (criteria) does a scholar apply to which institutional dimension(s) and at which institutional level(s)? These three aspects alone yield a wide range of possible combinations and ways in which two scholars may come to disagree or talk past one another. This section includes a figure (*figure 2*) that can assist in the mapping of these three aspects of legitimacy judgments about an institution.

When using this figure to assist in the analysis and mapping of legitimacy arguments, one can start at the top and tick off which institutional level the legitimacy argument is directed at. Then, one can go down to the three-by-five-column table and check off which dimension of the institutional level the argument is directed at, and which type of criterion (criteria) is applied in the argument. Drawing a line from the overview of institutional levels on top of the figure to the proper box in the table below will help visualize different lines of legitimacy arguments and facilitate comparisons.

This figure prompts us to identify not only the evaluative criterion applied in the legitimacy arguments but also which institutional level and institutional dimension it is applied to. This can help us get a better understanding of the legitimacy argument. It is particularly useful for comparisons between different scholars' legitimacy arguments, and for determining whether two scholars are engaging in the same issues and aspects or talking past each other because their focus is on different types of normative qualities, institutional levels, or institutional dimensions. Or—as is often the case—all of these at once.

This heightened precision in the analysis, together with the figure's visualization of which type of normative criterion (or criteria) is applied to which institutional level(s) and dimension(s), is furthermore helpful when trying to identify patterns in legitimacy's institutional-context sensitivities—and patterns in how legitimacy changes across institutional levels in particular. Figure 1's overview of the institution's levels and subunits, including their basic purposes and system of rules, in

Institutional levels

| OVERARCHING INSTITUTION |
| INSTITUTION |
| SUBUNIT |
| POLICY |
| ACT / DECISION |

Institutional dimensions

Evaluative criteria	**ORIGIN** The way it came into being – how it was made and by whom	**PROCESS** The processes or procedures through which it operates	**OUTCOMES**		
			Efficiency Degree to which it attains its goals	**Efficacy** Performance given resources	**Effects** on e.g. subjects, third parties, overall regime
LEGAL Sufficiently in accordance with recognized laws or rules	X (+) ICC was made in accordance with the rules of international law				
MORAL Sufficiently in accordance with moral/rational standards		Y(-) States which are members of the UN Security Council can refer cases to the ICC even when not members of the ICC			
SOCIAL ACCEPTANCE Sufficient levels of belief in its respect-worthiness among participants					Z (-) The ICC Office of the Prosecutor has initiated too many investigations on the African continent

Figure 2. The legitimacy table: Which institutional level is the argument directed at? Which dimension of this institutional level is it directed at? Which type of evaluative criterion is used?

Note. The top section of the figure, highlighted in grey, lists the levels of the institution that a legitimacy argument may be targeted at, with the highest institutional level on top. The bottom section lists three important institutional dimensions that the legitimacy argument may be directed at. The far-left stub column lists different types of evaluative criteria that may be used in a legitimacy argument. The table is illustrated with three different legitimacy arguments about the ICC: *X, Y,* and *Z.* The symbols + and – signify appraisal and criticism, respectively.

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combination with a mapping of the elements in figure 2 can also make it easier to grasp different ways in which legitimacy is "purpose sensitive."

Step 4: What is seen as the basic purpose(s) of the institution?

At this final step, the focus is on identifying the basic purpose(s) that the scholar attributes to the institution. When scholars tacitly understand the nature and purpose of an institution differently than one another, this can be a source of disagreement and confusion in their legitimacy discussions. Such confusion is particularly difficult to disentangle because the scholar's assumptions about basic purposes shape his or her legitimacy assessment of the institution in several different ways.

In the institutional legitimacy literature, it is now widely acknowledged that legitimacy is "purpose sensitive."[73] An institution's "basic purpose(s)" refers to the basic function(s), good(s), or value(s) that comprise the official and publicly known purpose—or the public justification—for having the institution. The basic purpose(s) of an institution or practice helps orient the participants' application and enforcement of the institution's system of rules. The institution's basic purpose(s) in tandem with its system(s) of rules also inform what is a proper or justifiable move or action within the institution, and what can be a justifiable exception or excuse for not following a rule in a certain context.

Some institutions have basic purposes that are widely accepted and seen as rationally and morally permissible, or even as morally obligatory,[74] and these give participants a weighty reason to accept or respect the institution.[75] Indeed, an institution's basic purpose may be considered so important and valuable that it can outweigh rather serious rational, moral, and legal flaws in the institution's origin, procedures, or outcomes.[76] An institution's purposes may also be seen as morally neutral and permissible, or as unjust and morally impermissible, and will then provide a weighty reason against accepting and respecting the institution.[77] However, a morally impermissible purpose does not necessarily undermine an institution's legitimacy or respect-worthiness. As Nate Adams puts it, a morally mandatory basic purpose will significantly "lower the justificatory bar"[78] for being accepted as respectworthy—that is, the moral quality of the institutions' basic purpose may compensate for rather serious flaws in the way it functions, which institutions with a less important and morally admirable purpose may not get away with.

But several other institutional aspects and sensitivities also raise or lower the justificatory bar and help determine whether the institution is legitimate. One such institutional sensitivity is the powers and competencies wielded by the institution: If the institution is based on voluntary participation, lacks coercive enforcement mechanisms, regulates a narrow domain, and does not significantly impact the lives and freedoms of others than those who choose to take part, then this significantly lowers the justificatory bar for respecting it, or the bar for allowing it to operate unhindered.[79] Second, although an institution has a morally impermissible basic purpose it may de facto perform subsidiary functions or yield outcomes[80] that are morally and rationally valuable and even morally mandatory. A third important institutional-context sensitivity relates to institutional alternatives and comparative benefits: If the institution performs some rationally and morally important function, and there are no *feasible institutional or noninstitutional alternatives available*,[81] then this lowers the justificatory bar for respecting the institution, while the presence of morally and rationally superior institutional or noninstitutional alternatives may render the institution illegitimate altogether.[82]

When we turn to the legitimacy of a subunit, policy, or decision *within* an institution, its basic purpose(s) shapes the set of necessary and sufficient respect-making qualities in even more complex ways. These dynamics seem to be less well understood and conceptualized in the current institutional legitimacy literature, because this literature pays little attention to the distinction between justifying an institution and justifying an entity that is part of an institution.

We have seen that the legitimacy or respect-worthiness of a subunit, such as the ICC's Office of the Prosecutor (OTP), is first and foremost a question of its respect-worthiness within the overall ICC practice. Its respect-worthiness is not primarily a question of the OTP's own general moral and rational merits as seen in abstraction from this practice. What is worth noticing at this stage of the analysis is that subunits, policies, and decisions within an institution each have their own basic purpose(s).[83] Thus, an important part of the OTP's respect-worthiness is the justifiability of its basic purpose(s) in light of the ICC's system of rules *and* in light of the ICC's overall basic purposes, functions, and values. This speaks to institutions' need for institutional coherence or consistency, including what Allen Buchanan calls "institutional integrity."[84] Such institutional coherence is a precondition for an institution's ability to function well and achieve its basic purposes —an important aspect of what makes an institution worthy of our support, cooperation, and obedience.[85]

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The legitimacy of a specific *policy* of the OTP, moreover, is partly dependent on the extent to which it is justifiable in light of the OTP's basic purpose(s) but also justifiable in light of the basic purposes of the ICC overall. Noticing these types of complex interdependencies helps explain why conflicting assumptions about an institution's basic purposes may lead scholars to focus on different types of qualities in their legitimacy assessments, or thus to identify salient legitimacy strengths and deficits at different institutional levels and across different institutional dimensions.

Why do Scholars Focus on Different Evaluative Criteria, Levels, and Dimensions?

Why do scholars often misconstrue what it is they disagree about when they disagree about the legitimacy of an institution? This article has shown that a common and undertheorized source of confusion and talking past each other in scholarly legitimacy discussions involves scholars focusing not only on different (types of) evaluative criteria but also on different institutional levels and different institutional dimensions in their legitimacy assessments—and sometimes focusing on all of this at once. Such differences in focus may be said to be a way of talking past each other, but do not necessarily amount to a full communication breakdown,[86] or make legitimacy discussions irrational and futile. In my view, scholars are often too quick to conclude that conflicting moral and political commitments, or conflicting conceptions of legitimacy itself, are at play.[87] The result can be an unwillingness to engage with the legitimacy arguments and findings of other scholars, and those made by scholars from different disciplines in particular.

Our moral and political values play an important role in our legitimacy assessments, and especially in determining what we take to be morally and rationally respectworthy purpose(s), rules, procedures, and outcomes of an institution. But a scholar's focus when assessing the legitimacy of an institution is also determined by how the scholar understands the institution's basic purpose(s), its powers and competencies, its de facto functions, its institutional boundaries, and the institutional and noninstitutional alternatives to the institution.

On the face of it, questions about an institution's basic purpose(s) are factual questions that should be easy to answer. For highly specialized institutions such as the International Organization for Standardization, whose purpose is to develop and publish international standards for goods, technologies, and services, the basic

purpose may seem clear to all.[88] Most institutions, however, have more than one basic purpose and pursue multiple subsidiary goals and values, meaning that it is not always obvious which are basic and which are subsidiary. Some purposes may potentially conflict. Moreover, an institution's basic purposes can also evolve over time. For example, several regional trade courts have expanded their jurisdiction to include human rights issues and thereby expanded their basic purposes, de facto functions, and competences. Additionally, there will often be contestation and power struggles about which of an institution's multiple purposes *should* be prioritized going forward.

Some of those who dismiss the ICC as illegitimate are clearly mistaken about its basic purposes. Yet, the ICC's founding treaty and its subsequent evolution do allow for somewhat diverging understandings of what its basic purpose(s) are. There is wide agreement on the ICC as a *court*, and the basic purposes of courts are thought to be that of resolving disputes and adjudicating cases that are brought before them in an impartial manner and according to the law. Scholars who view the ICC primarily as a court thus have a particular focus on whether the ICC has a coherent system of rules, and whether it applies and enforces this system of rules in an impartial and consistent manner. Some emphasize that the ICC is a *criminal* court, and that it therefore has a special duty to uphold legal principles that are fundamental in criminal law. These scholars tend to focus more on the procedural legal aspects and on the rights of the defendants in their legitimacy assessments, and they hold the ICC to higher standards than they would if they had been assessing the legal procedures of an international trade court.[89] Others emphasize that the ICC is an *international* criminal court that functions in a different way, and in a different institutional context, than domestic criminal courts.[90] For these scholars, the ICC is a court of last resort, having both limited jurisdiction and limited access to enforcement mechanisms; therefore, it cannot be expected to ensure "equality before the law" in the same way domestic courts are expected to. Others, again, see the ICC as an institution whose primary purpose is to *create international criminal justice* or *end impunity* for the most serious international crimes. These scholars often focus on the OTP and the Pre-Trial Chamber's case selection, criticizing their failures to hold powerful states that are not ICC members to account.[91] Others, again, emphasize the ICC's long-term potential for projecting and setting a global standard of criminal justice and make nation-states adhere to these standards.[92] We see here how different perceptions of purposes can lead scholars to focus on different qualities or normative criteria—which in turn can

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lead them to focus on different levels, parts, and dimensions of the institution, in their legitimacy assessments.[93]

Different understandings of where to draw institutional boundaries when assessing an institution is another example of how scholars may arrive at different conclusions on an institution's legitimacy. Some scholars think that the ICC has a serious legitimacy deficit because it does not have jurisdiction over permanent UN Security Council members such as the United States, although the Rome Statute allows the Security Council to refer cases to the ICC under the Chapter 7 powers of the UN Charter. These scholars view the ICC as an integral part, or subunit, of the international political order, and argue that the power asymmetries and injustices of this practice create serious legitimacy deficits for the ICC. [94] Yet, other scholars take the ICC to be a self-standing treaty-based institution or regime, and on their view, the ICC's legitimacy is not seriously weakened by these power-asymmetries and injustices because they are effectively beyond the control of the ICC.[95] The injustices are here viewed as injustices of the international political order, not of the ICC. Again, it is not entirely clear where the ICC's institutional boundary lies, and there seem to be good arguments for both ways of drawing the boundary.[96]

In my view, it makes sense to think of many complex institutions as "variously describable."[97] By that, I mean that informed persons and groups can reasonably describe an institution in somewhat different ways, because they understand its basic purpose(s), the relative importance of its different subparts, or its institutional boundaries, in somewhat different ways. Or because they emphasize differently its past performance, current functioning, and its future potential. Yet, if we accept that an institution can reasonably be interpreted in somewhat different ways, we should also accept that there is some scope for reasonable disagreement over this institution's legitimacy (even if we deny that there can be any reasonable disagreement on moral, rational, and political values and principles more generally). Granting some leeway for reasonable disagreement about an institution's legitimacy, however, is not incompatible with saying that persons and groups are sometimes flatly mistaken in their legitimacy judgments about an institution.

This brings us to another puzzle for which an institutional-context-sensitivity–oriented analysis can give a more charitable interpretation: Why do scholars from philosophy, law, and political science tend to focus on different types of normative qualities in their legitimacy assessments? Are these differences in focus a

reflection of their disciplinary biases? Are they conflating or distorting the concept and the quality of legitimacy, each in their own way? As I see it, there are indeed examples of conflation in these various disciplines' attempts to formulate general definitions, conceptualizations, and theories of legitimacy. However, when we turn to how philosophers, political scientists, and legal scholars reason and argue about the legitimacy of specific institutions such as the ICC, I would say that they are more nuanced and that their differences in focus are often comparable to the differences in focus and reasoning that we associate with different roles or "offices" *within* institutions.[98] As we have seen, complex institutions pursue their basic purpose(s) through institutional subunits with their own specialized systems of rules and basic purpose(s)—a specialization that ideally helps the overall institution function well and achieve its basic purposes.[99] Participants in complex institutions are thus assigned to different roles or "offices"[100] that come with special responsibilities and duties, with varying room for discretion, and with different sorts of evidence, reasoning, and arguments that are considered proper.[101]

Not surprisingly, the way legal scholars focus and reason when assessing the legitimacy of an institution often resembles that of a judge—with a special focus and emphasis on the institution's legal qualities, or the qualities of the system of rules, and the extent to which subunits, policies, and decisions are in accordance with the rules (as well as the basic or constitutive ideas and values of the practice's system of rules). The orientation of a political scientist, on the other hand, bears more resemblance to that of an administrator who needs to take into consideration whether the rules and directives of the institution are actually accepted, and what it takes for the institution to be acceptable so as to function well and achieve its basic purposes. Philosophers, on the other hand, tend to focus more on the respect-worthiness of the institution overall, and to focus primarily or exclusively on its rational and moral qualities. A philosopher will thus often reason in a way that bears resemblance to how a (supreme) legislator would reason when setting up a new institution. Or how a legislator would reason if authorized to evaluate and change not only the basic rules of the practice but also its basic purposes or the principles that the institution should aim at or be constrained by. These different disciplinary focuses in legitimacy assessments can on a charitable reading be seen as complementary and as highlighting different important aspects of a complex institution's legitimacy. By becoming more aware of the specific focus of their own discipline, scholars can perhaps better understand and

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be more open to legitimacy arguments that come from scholars of other disciplines—or at least be less likely to dismiss them outright as confused or strategic, or conclude that they emerge from different conceptions or concepts of legitimacy altogether.

Concluding Thoughts

Now, some may object that this article has not said anything substantive about legitimacy because it has not said anything about which specific moral and rational qualities or achievements need to be in place—and at which threshold levels—for an institution to be legitimate. Nor has it said anything about which type(s) of moral and rational qualities or achievements are most essential or define a minimal normative standard of legitimacy. The findings of the article, however, suggest that a fully general and substantive conception of normative legitimacy cannot be formulated, because the normative quality or achievement of legitimacy is intrinsically connected to institutions or practices of applying and enforcing a system of rules. Thus, in order to formulate substantive and more specific legitimacy standards or requirements, we need some prior knowledge about the institution in question, concerning its basic purpose(s), its powers, and the feasible institutional and noninstitutional alternatives available in the context in which it operates.

What we can do without specific knowledge about the institution, I submit, is to say something more general about the types of normative qualities that typically come into play when assessing whether an institution or some part thereof is worthy of our respect, and about how different types of institutional-context sensitivities typically interact and help shape the set of necessary and sufficient qualities that must be present for an institution to be worthy of support, cooperation, and obedience. This is what I have tried to do in this article, while also providing some analytical tools and figures that can facilitate the inquiry and help us better understand what it is we disagree about when we disagree about the legitimacy of an institution.

[3] James Crawford, "The Problems of Legitimacy-Speak," *Proceedings of the 114th Annual Meeting* 98 (March 31–April 3, 2004), pp. 271–73.

[4] Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European Journal of International Relations* 15, no. 3 (August 2009), pp. 395–442, at p. 409.

[5] Christopher A. Thomas, "The Uses and Abuses of Legitimacy in International Law," *Oxford Journal of Legal Studies* 34, no. 3 (Winter 2014), pp. 729–58, at p. 729.

[6] Jan Klabbers and Touko Piiparinen, "Normative Pluralism: An Exploration," in Jan Klabbers and Touko Piiparinen, eds., *Normative Pluralism and International Law: Exploring Global Governance* (London: Cambridge University Press, 2013), pp. 13–35, at p. 32. C.f. Koskenniemi, "Miserable Comforters."

[7] Achim Hurrelmann, Steffen Schneider, and Jens Steffek, "Conclusion: Legitimacy–Making Sense of an Essentially Contested Concept," in Achim Hurrelmann, Steffen Schneider, and Jens Steffek, eds., *Legitimacy in an Age of Global Politics* (London: Palgrave Macmillan, 2016), pp. 229–37, at p. 229.

[8] Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs* 38, no. 3 (Summer 2010), pp. 215–36, at p. 216.

[9] Koskenniemi, "Miserable Comforters."

[10] Thick normative concepts are also referred to as "thick ethical concepts" and "thick concepts." I assume a fairly inclusive understanding of "thick normative concepts," and include also so-called "respect-relative" evaluative concepts and "dual character concepts." See Pekka Väyrynen, "Thick Ethical Concepts," *Stanford Encyclopedia of Philosophy* online, ed. Edward N. Zalta, last updated Spring 2021, plato.stanford.edu/archives/spr2021/entries/thick-ethical-concepts/.

[11] See Matthias Brinkmann and Johan Vorland Wibye, "Towards Non-Essentialism: Tracking Rival Views of Legitimacy as a Right to Rule," *Oxford Journal of Legal Studies* 43, no. 3 (Autumn 2023), pp. 497–519. Brinkmann and Wibye take a nonessentialist approach to the concept of legitimacy. See also Thomas Fossen, *Facing Authority: A Theory of Political Legitimacy* (New York: Oxford University Press, 2023), which takes a pragmatist approach to legitimacy thus similarly resisting attempts to define legitimacy in terms of essence or a core criterion.

[12] See, for example, Allen Buchanan, "Institutional Legitimacy," in David Sobel, Peter Vallentyne, and Steven Wall, eds., *Oxford Studies in Political Philosophy*, vol. 4 (Oxford: Oxford University Press, 2018), pp. 53–79; Nate P. Adams, "Institutional Legitimacy," *Journal of Political Philosophy* 26, no. 1 (2018), pp. 84–102; Nate P. Adams, "Legitimacy and Institutional Purpose," *Critical Review of Social and Political Philosophy* 23, no. 3 (2020), pp. 292–310; N. P. Adams, "The Concept of Legitimacy," *Canadian Journal of Philosophy* 52, no. 4 (May 2022), pp. 381–95; Eva Erman, "A Function-Sensitive Approach to the Political Legitimacy of Global Governance," *British Journal of Political Science* 50, no. 3 (July 2020), pp. 1001–24; and N. P. Adams, Antoinette Scherz, and Cord Schmelzle, "Legitimacy beyond the State: Institutional Purposes and Contextual Constraints," *Critical Review of International Social and Political Philosophy* 23, no. 3 (2020), pp. 281–91.

[13] John Rawls, "Two Concepts of Rules," *The Philosophical Review* 64, no. 1 (1955), pp. 3–32.

[14] Confusingly, "legitimate" is also used as a synonym for having social acceptance or support; being morally justifiable; "being in accordance with law"; and being "fair and reasonable." For the two last uses of the term, see *Merriam-Webster* online, s.v. "legitimate," www.merriam-webster.com/dictionary/legitimate.

[15] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 23–37.

[16] See Brinkmann and Wibye, "Towards Non-Essentialism" on how complex the analysis of rights can become and how it can "explode" accounts of what other philosophical terms, like legitimacy, mean.

[17] Not all social and political practices and institutions "rule" and demand obedience in the way nation-states do. However, all social and political rule-constituted practices necessitate a certain deference to the system of rules—or that the participants for the most part refrain from deciding on matters regulated by the rules on the basis of what they think is best in the situation. However, the specific duties, disabilities, and the like that follow from an institution or act being legitimate will differ across offices or roles within an institution and be quite different for those who are nonparticipants or outsiders, for example, limited to a duty of nonintervention.

[18] See Frank I. Michelman, "IDA's Way: Constructing the Respect-Worthy Governmental System," *Fordham Law Review* 72, no. 2 (2003), pp. 345–65 and Buchanan, "Institutional Legitimacy." See also Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* [Legitimation crisis] (Frankfurt am Main: Suhrkamp, 1976), p. 39. Habermas defined *legitimacy* as the "Annerkennungswürdigkeit" (recognition-worthiness) of a political order.

[19] Having normative reasons to obey an unjust-but-legitimate policy as a participant of a legitimate practice is not the same as having an all-things-considered (or an all-one's-roles-and-offices-considered) duty to obey the policy. One may, for example, think that the special moral duties of the "office of

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motherhood" must take precedence over one's duties as a citizen in a legitimate regime in certain situations.

20 Väyrynen, "Thick Ethical Concepts." Note that what W. B. Gallie calls "essentially contested concepts" have the same characteristics as thick normative concepts. Essentially contested concepts are furthermore "internally complex" and "context sensitive," characteristics I borrow here from Gallie. See W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society*, New Series 56 (1955–1956), pp. 167–98. While I could have used Gallie's framework when analyzing the concept of legitimacy, it includes other characteristics that are less clear and would need extensive discussion.

21 The scope of this article does not allow for an extensive discussion for participants and outsiders of the nature of the duties and rights, claims, liberties, powers, immunities, and so on that come with an institution's legitimacy. Suffice it to say that several institutional factors come into play, such as an institution's powers, basic purposes, de facto functions, and more. However, in the third section, I briefly discuss how the duties and "proper practical reason" and "room for discretion" that legitimacy confers on a "ruling" agent depends on the specific role or "office" that the agent holds within the practice.

22 Gallie, "Essentially Contested Concepts," pp. 171-73.

23 Ibid., p. 172.

24 See Fossen, *Facing Authority*, which makes a similar point.

25 These features give international courts what Thomas M. Franck calls a "peculiar strength as a laboratory for those seeking to isolate and study the legitimacy factor." Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990), p. 20.

26 Some view the ICC as a self-standing legal regime, whereas others see it as part of the international legal order more generally, and these different ways of drawing the ICC's institutional boundary—or different ways of framing the political and institutional context it operates in—can make a big difference in a legitimacy assessment. I will return to this in the third section.

27 Rawls, "Two Concepts of Rules."

28 Ibid.

29 I am not denying that an institution can bootstrap itself into legitimacy through its performance over time. An institution that came about in a flawed way and with unfair rules may improve its rules, change its purposes, and take on new functions. Over time, this can make an illegitimate institution morally and rationally worthy of respect. For an argument to this effect in connection with international courts, see, for example, David Luban, "Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law," in Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 569–88, at p. 577.

30 "To say that conduct is illegitimate is to make a systemic point; the law may allow you to do that, but your conduct tends to undermine the foundations of the system as a whole." Crawford, "The Problems of Legitimacy-Speak," p. 271; my italics.

31 Ibid. See also Rawls, "Two Concepts of Rules," which makes the same point.

32 John Rawls, "Political Liberalism: Reply to Habermas," *Journal of Philosophy* 92, no. 3 (March 1995), pp. 132–80, at p. 175.

33 Ibid., p. 176.

34 "Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness." Luban, "Fairness to Rightness," p. 577.

35 Rawls, "Two Concepts of Rules."

36 *Merriam-Webster* online, s.v. "legitimate," www.merriam-webster.com/dictionary/legitimate.

37 This is provided for in chapter 7 of the UN Charter.

38 The question of whether an institutional entity has a sufficiently high-quality origin to merit respect within the practice involves both the question of *who* (was the entity made by the appropriate agents?) and the question of *how* (was the entity made in the right way?). In the case of the ICTY, both these aspects of its origin are seen as problematic.

39 Patryk I. Labuda, "The ICC's 'Evidence Problem': The Future of International Criminal Investigations after the Gbagbo Acquittal," *Völkerrechtsblog* blog, January 18, 2019, voelkerrechtsblog.org/the-iccs-evidence-problem/.

40 Margaret M. deGuzman and Timothy Lockwood Kelly, "The International Criminal Court Is Legitimate Enough to Deserve Support," *Temple International & Comparative Law Journal* 33, no. 2 (2019), pp. 397–404, at p. 402.

41 See, for example, Daniel Bodansky, "The Concept of Legitimacy in International Law," in Rüdiger Wolfrum and Volker Röben, eds., *Legitimacy in International Law* (Berlin: Springer, 2008), pp. 309–18; Andreas Follesdal, "Survey Article: The Legitimacy of International Courts," *Journal of Political Philosophy* 28, no. 4 (January 2020), pp. 476–499, at p. 478; Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20, no. 4

(December 2006), pp. 405–37; Nienke Grossman, "The Normative Legitimacy of International Courts," *Temple Law Review* 86, no. 1 (2013), pp. 61–106; and Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge, U.K.: Cambridge University Press, 2010).

42 For example, Joseph Raz's "service conception" of legitimacy says that a political authority is justified if it enables those who are subject to it to better comply with the reasons that apply to them. See Raz, *The Morality of Freedom*, p. 53.

43 See, for example, Buchanan and Keohane, "The Legitimacy of Global Governance Institutions."

44 David Beetham, *The Legitimation of Power* (Basingstoke, U.K.: Palgrave Macmillan, 1991); and Tom R. Tyler, *Why People Obey the Law* (New Haven, Conn.: Yale University Press, 1990).

45 These are simplifying labels, but we need some simplification to get the analysis off the ground. These types of criteria for evaluating legitimacy connect with the familiar distinction between what is often called "legal legitimacy," "moral legitimacy," and "social legitimacy," which I think are better described as legal, moral-rational, and social aspects of a complex type of normativity that we commonly refer to as "normative" or "political" legitimacy.

46 Rawls, "Political Liberalism," pp. 173, 175.

47 See Step 4 on "institutional integrity."

48 See Rawls, "Political Liberalism," p. 175.

49 Ibid.

50 "Any given rule or institution . . . may have a high level of legitimacy and yet be quite unjust. Or it may be very just and yet be distinctly illegitimate." Franck, *Power of Legitimacy*, p. 209.

51 Jean Hampton, *Political Philosophy* (Boulder, Colo.: Westview, 1988).

52 Buchanan, "Institutional Legitimacy."

53 This is a point that is often made by "realists" inspired by Bernard Williams in political philosophy. See, for example, Enzo Rossi and Matt Sleat, "Realism in Normative Political Theory," *Philosophy Compass* 9, no. 10 (October 2014), pp. 689–701.

54 See, for example, Amanda R. Greene, "Is Political Legitimacy Worth Promoting?," *American Society for Political and Legal Philosophy* 61 (2019), pp. 65–101.

55 Some political scientists seem to think that measuring acceptance and compliance levels is a proxy for measuring legitimacy. As argued by Bodansky, many of them seem to assume that normative and perceived legitimacy are closely correlated. See Daniel Bodansky, "Legitimacy in International Law and International Relations," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, U.K.: Cambridge University Press, 2013), pp. 321–41.

56 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978). For an overview of more recent uses of Weber's work on the state and legitimacy, see Phillipp Lottholz and Nicolas Lemay-Hébert, "Re-Reading Weber, Re-Conceptualizing State-Building: From Neo-Weberian to Post-Weberian Approaches to State, Legitimacy and State-Building," *Cambridge Review of International Affairs* 29, no. 4 (2016), pp. 1467–85.

57 Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *American Political Science Review* 53, no. 1 (March 1959), pp. 609–105, at p. 86.

58 See Beetham, *Legitimation of Power*, p. 10; and David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965), pp. 285–310.

59 Buchanan "Institutional Legitimacy," p. 56.

60 Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?," *American Journal of International Law* 93, no. 3 (July 1999), pp. 596–624. Andrew Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?," *Review of International Studies* 31 (December 2005), pp. 15–32; John Horton, "Political Legitimacy, Justice and Consent," *Critical Review of International Social and Political Philosophy* 15, no. 2 (2012), pp. 129–48; and Grossman, "The Normative Legitimacy of International Courts," p. 63.

61 Buchanan presents a "functional" version of this type of view. According to the author, the distinctive practical function of a legitimate institution is to provide "meta-coordination," and this function, he says, cannot be achieved unless there is "sufficient moral reason-based support" for the institution (Buchanan, "Institutional Legitimacy," p. 56). Rawls, too, recognizes the relevance of the participants' de facto acceptance or assent, at least in the context of conceptualizing legitimacy for liberal democracies. Like Jürgen Habermas, Rawls criticizes Weber and says that acceptance is not enough for something to be legitimate. See Rawls, "Political Liberalism," p. 177, fn. 77.

62 This can be a serious legitimacy problem, not only because voluntary assent is itself a morally and rationally desirable quality of institutions but also because lack of assent can make the institution cease

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63 to function well and to produce the goods, functions, and values that make up the basic purpose of having the institution.

63 The social scientist David Beetham, for example, says that the first general criteria of political legitimacy is that "power should be acquired and exercised according to established rules." See Beetham, *Legitimation of Power*, p. 121.

64 Rawls, "Political Liberalism," p. 173.

65 Ibid., p. 175.

66 Grossman, "The Normative Legitimacy of International Courts," p. 97.

67 Ibid.

68 Ibid., p. 101; my emphasis.

69 Bodansky, "The Concept of Legitimacy in International Law," p. 311.

70 Brunnée and Toope, *Legitimacy and Legality in International Law*.

71 Lon L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964). The legal positivist Hans Kelsen also has a more normative conception of legitimacy. Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007).

72 See Horton, "Political Legitimacy, Justice and Consent."

73 Adams, "Legitimacy and Institutional Purpose." Others like Eva Erman use terms like "function-sensitive." See Erman, "A Function-Sensitive Approach to the Political Legitimacy of Global Governance." See also legal scholar Yuval Shany's article "Assessing the Effectiveness of International Courts: A Goal-Based Approach" (*American Journal of International Law* 106, no. 2 [April 2012], pp. 225–70).

74 See Adams, "Legitimacy and Institutional Purpose."

75 In table 2, I could have included "purpose" as an additional institutional dimension. However, as we shall see, the basic purpose of an institution also functions in other ways—namely, as an evaluative standard that subunits, policies, and decisions must cohere with. Including this dimension would make the table confusing. Purpose is therefore the focus of the next step in the framework's analysis.

76 The relative importance attributed to the moral/rational quality of the purpose of the institution, on the one hand, and the moral/rational flaws of the institution's origin, procedures, or outcomes, on the other, can also depend on the *time frame* used in the legitimacy assessment. That is, it depends on the extent to which the focus is on the institution's *likely future potential*, or on its *past and current* functioning and outcomes. Some scholars also speak of "fact-based" (focus on past and present) and "faith-based" (that is, prospective) approaches to legitimacy. See, for example, Carsten Stahn, "EDITORIAL: Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?," *Leiden Journal of International Law* 25, no. 2 (June 2012), pp. 251–82. For an argument about the ICC's legitimacy that attributes a lot of weight to the court's future potential, see, for example, deGuzman and Kelly, "The International Criminal Court Is Legitimate Enough to Deserve Support," pp. 398-9.

77 See. Adams, "Legitimacy and Institutional Purpose," p. 297.

78 Ibid, 297.

79 See, for example, Antoinette Scherz, "Tying Legitimacy to Political Power: Graded Legitimacy Standards for International Institutions," *European Journal of Political Theory* 20, no. 4 (2021), pp. 631–53.

80 See Buchanan and Keohane, "The Legitimacy of Global Governance Institutions"; and Buchanan, "Institutional Legitimacy," on "institutional integrity."

81 See ibid., on "comparative benefit."

82 There are probably several other types of institutional-context sensitivities than the ones I have mentioned here, but the ones noted seem to be particularly important.

83 See the overview of ICC's institutional levels in figure 1.

84 See Buchanan, "Institutional Legitimacy." Buchanan observes that a legitimate institution can normally not have too much of a discrepancy between its stated purpose and its de facto functioning (unless this discrepancy is beyond the control of the institution itself). What Buchanan refers to as "institutional integrity" can be seen as an aspect of a more general "institutional coherence," or more precisely, the need for an institution's subunits, policies, and decisions to be sufficiently coherent with—or justified in the light of—the rules *and* the basic purposes of the higher institutional levels.

85 The basic purpose of the ICC's Office of the Prosecutor is to investigate and prosecute the most responsible perpetrators of international crimes under the court's jurisdiction.

86 Jeffrey Goodman, "A Critical Discussion of Talking Past One Another," *Philosophy & Rhetoric* 40, no. 3 (2007), pp. 311–25.

87 Allen Buchanan, "The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court," *Temple International & Comparative Law Journal* 33, no. 2 (2019), pp. 323–39.

88 Adams, "Legitimacy and Institutional Purpose."

[89] See, for example, Hague Institute for the Internationalisation of Law, *General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework* (Hague: Hague Institute for the Internationalisation of Law, October 2011), www.legal-tools.org/doc/ee4de3/pdf/.

[90] See deGuzman and Kelly, "The International Criminal Court Is Legitimate Enough to Deserve Support."

[91] See, for example, "Making Justice Work: Civil Society Unites in the Global Fight against Impunity," Coalition for the International Criminal Court, June 4, 2024, coalitionfortheicc.org/global-initiative-against-impunity.

[92] See Silje Aambø Langvatn and Theresa Squatrito, "Conceptualising and Measuring the Legitimacy of International Criminal Tribunals," in Nobou Hayashi and Cecilia Bailliet, eds., *The Legitimacy of International Criminal Tribunals* (Cambridge, U.K.: Cambridge University Press, 2017), pp. 41–64, at pp. 56-7.

[93] Some, like Margaret deGuzman, have also argued that one of the ICC's major legitimacy problems is that it lacks a clear basic purpose, or a clear priority among the many purposes it is made to achieve. See Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court," *Michigan Journal of International Law* 33, no. 2 (2012), pp. 265–320, at p. 265.

[94] Thomas Christiano, "The Problem of Selective Prosecution and the Legitimacy of the International Criminal Court," in "New Perspectives on the Legitimacy of International Institutions and Power," special issue, *Journal of Social Philosophy* 54, no. 4 (Winter 2023), pp. 471–89.

[95] See deGuzman and Kelly, "The International Criminal Court Is Legitimate Enough to Deserve Support."

[96] See Buchanan, "The Complex Epistemology of Institutional Legitimacy Assessments."

[97] I borrow this concept from Gallie, "Essentially Contested Concepts," p. 172.

[98] Compare Rawls, Two Concepts of Rules, p. 6.

[99] Ibid.

[100] Rawls, "Two Concepts of Rules," p. 3.

[101] Ibid p. 3, fn. 5.

Abstract: This article aims to explain the protean nature of the concept of "legitimacy," arguing that its variability largely stems from denoting a quality of institutions that is both internally complex and sensitive to variations in institutional context. While this institutional-context sensitivity often leads to confusion and miscommunication, it is also what centers the concept's meaning and use. To better understand legitimacy's different forms of institutional-context sensitivity, and how they are interconnected, the article shifts from analysis and comparisons of concepts and theories of legitimacy to analysis and comparison of specific legitimacy arguments regarding specific institutions. It introduces a structured framework for analyzing legitimacy claims, beginning with the identification of the institutional level that the argument is directed at. This approach highlights how legitimacy assessments vary across higher and lower institutional levels—a crucial aspect of institutional-context sensitivity that has been underexplored in recent institutional legitimacy literature. The framework, comprising four steps of analysis and two supporting figures, advances our understanding of the complex nature of institutions' legitimacy and underscores the importance of distinguishing between the legitimacy *of* an institution and the legitimacy *within* an institution. Throughout, the article illustrates the framework with examples drawn from scholarly debates on the legitimacy of the International Criminal Court.

Keywords: legitimacy, institutional legitimacy, institutional-context sensitive, institutional-level sensitive, purpose sensitive, thick normative concept, ICC, International Criminal Court

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